



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Law Library
Univ. of Calif.
Berkeley

ALL MATERIAL NONCIRCULATING

CALL NUMBER

VOLUME

COPY

79

COPY 3

AUTHOR

TITLE

SOUTH EASTERN REPORTER

NAME AND ADDRESS

COPY 3

READING
ROOM

This is a Key-Numbered Volume



Each syllabus paragraph in this volume is marked with the topic and section number under which the point will eventually appear in the American Digest System. The lawyer is led from that syllabus to the exact place in the Digest where we, as digest makers, have placed the other cases on the same point — ***This is the Key-Number Annotation***

National Reporter System—State Series

THE SOUTHEASTERN REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 79

PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA
THE SUPREME COURTS OF NORTH CAROLINA AND SOUTH
CAROLINA, AND THE SUPREME COURT AND
COURT OF APPEALS OF GEORGIA

WITH TABLE OF SOUTHEASTERN CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

AND

TABLE OF STATUTES CONSTRUED

SEPTEMBER 13 — DECEMBER 13, 1913

ST. PAUL
WEST PUBLISHING CO.

1914

Law Library

**COPYRIGHT, 1918
BY
WEST PUBLISHING COMPANY**

**COPYRIGHT, 1914
BY
WEST PUBLISHING COMPANY
(79 S.E.)**

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

GEORGIA—Supreme Court.

WILLIAM H. FISH, CHIEF JUSTICE.
BEVERLY D. EVANS, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

J. H. LUMPKIN. SAMUEL C. ATKINSON.
MARCUS W. BECK. H. W. HILL.

Court of Appeals.

BENJAMIN H. HILL, CHIEF JUDGE.¹
RICHARD B. RUSSELL, CHIEF JUDGE.²

JUDGES.

RICHARD B. RUSSELL.² J. R. POTTLE.
L. S. ROAN.³

NORTH CAROLINA—Supreme Court.

WALTER CLARK, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

PLATT D. WALKER. WILLIAM A. HOKE
GEORGE H. BROWN. WM. R. ALLEN.

SOUTH CAROLINA—Supreme Court.

EUGENE B. GARY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

C. A. WOODS.⁴ R. C. WATTS.
DANIEL E. HYDRICK. T. B. FRASER.

VIRGINIA—Supreme Court of Appeals.

JAMES KEITH, PRESIDENT.

JUDGES.

RICHARD H. CARDWELL. GEORGE M. HARRISON.
JOHN A. BUCHANAN. STAFFORD G. WHITTLE.

WEST VIRGINIA—Supreme Court of Appeals.

GEORGE POFFENBARGER, PRESIDENT.

JUDGES.

WILLIAM N. MILLER. L. JUDSON WILLIAMS.
IRA E. ROBINSON. CHARLES W. LYNCH.

¹ Resigned November 1, 1913.

² Became Chief Judge November 1, 1913.

³ Became Judge November 1, 1913.

⁴ Resigned June 7, 1913.

COURT RULES

SUPREME COURT OF APPEALS OF VIRGINIA

The following order was entered by the Supreme Court of Appeals of Virginia, at Wytheville, Va., on June 10, 1912:

Ordered, that from and after this date the Virginia Reports preceding 75 Virginia shall be numbered in the following sequence, but shall be cited in this court by the name of the Reporter as well as by number:

1 Washington	1 Virginia.	5 Leigh	32 Virginia.
2 "	2 "	6 "	33 "
1 Virginia Cases	3 "	7 "	34 "
2 "	4 "	8 "	35 "
1 Call	5 "	9 "	36 "
2 "	6 "	10 "	37 "
3 "	7 "	11 "	38 "
4 "	8 "	12 "	39 "
5 "	9 "	1 Robinson	40 "
6 "	10 "	2 "	41 "
1 Hening & Munford	11 "	1 Grattan	42 "
2 "	12 "	2 "	43 "
3 "	13 "	3 "	44 "
4 "	14 "	4 "	45 "
1 Munford	15 "	5 "	46 "
2 "	16 "	6 "	47 "
3 "	17 "	7 "	48 "
4 "	18 "	8 "	49 "
5 "	19 "	9 "	50 "
6 "	20 "	10 "	51 "
Gilmer	21 "	11 "	52 "
1 Randolph	22 "	12 "	53 "
2 "	23 "	13 "	54 "
3 "	24 "	14 "	55 "
4 "	25 "	15 "	56 "
5 "	26 "	16 "	57 "
6 "	27 "	17 "	58 "
1 Leigh	28 "	18 "	59 "
2 "	29 "	19 "	60 "
3 "	30 "	20 "	61 "
4 "	31 "	21 "	62 "
	32 "	22 "	63 "
	33 "	23 "	64 "
		24 "	65 "
		25 "	66 "
		26 "	67 "
		27 "	68 "
		28 "	69 "
		29 "	70 "
		30 "	71 "
		31 "	72 "
		32 "	73 "
		33 "	74 "

SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Force January 1, 1914

PRELIMINARY.

Bills of Exceptions.

1. Office and Contents. It is the office of a bill of exceptions to point out errors committed by the court during the progress of the trial. The bill or bills should contain only a concise statement of the facts necessary to present the points intended to be relied on as grounds of error, or only so much of the evidence as may appear necessary to present fairly the rulings of the court to which exception is taken. No bill of exceptions should contain matter irrelevant or unnecessary to the presentation of the question intended to be raised.

2. Points must be Clearly Stated. It is the duty of the exceptor to see that the points and objection on which he relies are correctly and clearly stated, so as to show plainly that an erroneous ruling was made to his prejudice, and he should not leave that fact to appear merely by inference or conjecture.

3. Rulings on Evidence or Instructions. An exception to the admission or rejection of evidence or to the granting or refusal of instructions to the jury, should state only so much of the evidence or facts proven as may be necessary to show the relevancy or irrelevancy of such evidence or the pertinency or impertinency of such instruction. The judge of the trial court should require all unnecessary matter to be stricken out before signing a bill of exceptions.

RULE I.

Petitions.

1. Must Assign Errors—Not Argue the Case. A petition for an appeal or writ of error may briefly state the case and must assign errors, naming the particular decrees or judgments complained of and the date of their rendition, and in the prayer of the petition it should be stated whether or not a supersedeas is desired; but the case is not to be argued in the petition. A separate note of argument, setting forth the points and authorities relied on, shall be submitted with the petition, and will be considered by the court, but such note is not to be considered as a part of the petition or to be printed with it. A note of argument may be filed in opposition to such petition.

2. Certificate of Counsel. The petition

must be accompanied by the certificate of some attorney duly qualified to practice in this court that in his opinion the decree or judgment complained of ought to be reviewed.

3. Names of Parties to be Summoned. It is also recommended to counsel presenting petitions, that they furnish to the clerk a memorandum of the names of parties to be summoned to answer the appeal or writ of error.

RULE II.

Docketing and Process.

1. Notice to Court Below and Summons. When an appeal or writ of error has been awarded, it shall be the duty of the clerk to notify the clerk of the court below of the fact of such allowance and of the penalty of the bond necessary to give effect to such appeal or writ of error when such bond is required, and the clerk of this court shall thereupon docket the case and issue process in accordance with the order of the court, summoning all parties other than the petitioner or petitioners.

2. Nonresident Parties. Whenever it is necessary that a nonresident party should be summoned to answer an appeal or writ of error, or have notice for any other purpose, order of publication may be had in the manner prescribed by law, which order shall be published once a week for four successive weeks in some newspaper published at the seat of government.

RULE III.

Printing the Record.

1. Dismissal for Failure to Print. If the appellant or plaintiff in error, except in cases of felony, shall fail to deposit with the clerk of this court within six months after the case has been docketed herein, a sum sufficient to pay for printing the transcript of the record, or shall fail to have the transcript of the record printed and fourteen copies thereof filed in the clerk's office within six months after the case has been docketed in this court, the appeal or supersedeas shall be dismissed.

2. How Procured. To procure such dismissal, the appellee or defendant in error must serve upon the opposite party, within reasonable time, a written notice that he

will, on a day specified, move the court to dismiss the case, and set forth in such notice the grounds of the said motion. The motion may be made on any day when the court is open, whether in regular or special term.

3. *Costs.* But if, when the motion is made, the record has been already printed or the cost of such printing deposited with the clerk and no actual delay in the hearing of the cause has resulted from the failure to print the record or make such deposit within the six months allowed by law, the dismissal will be without costs; otherwise costs will be awarded against the party in default.

4. *Renewal.* An appeal or writ of error dismissed in accordance with this rule may be renewed upon presenting a new petition reciting the fact of the former petition and allowance and dismissal and referring to the assignments of error contained in the former petition, if the same be presented within one year from the date of the decree or judgment appealed from, and new process will be ordered and a new bond must be given; but after two dismissals for failure to print, no new allowance can be had.

See *Perry v. Horn*, 21 W. Va. 732.

RULE IV.

Argument Docket.

1. *How Arranged.* Thirty days before the first day of each regular term, the clerk shall prepare a list of the cases then ready to be heard in the grand division in which the next regular term is to be held, and distribute the printed lists as provided in section 20 of chapter 157 of the Acts of 1882, and in arranging the argument docket he shall allow for each circuit not less than as many days as one-fifth of the number of open cases on the docket of such circuit, but when there are not more than three cases on the argument docket from any one circuit, cases from another circuit may be set for hearing on the same day.

2. *When Notice is Necessary.* In all cases (except those of felony) when the record has been printed since the last preceding regular term of court, the party desiring a hearing must give notice to the opposite party of his intention to insist upon a hearing at the next regular term, at least thirty days before the first day of such term, and no case will be placed on the argument list and deemed ready for hearing until the second term after the record has been printed unless the notice above mentioned has been given and returned to the clerk's office thirty days before the term.

3. *Cases Heard Out of Grand Division.* A like notice must be given and filed in the clerk's office at least thirty days before the first day of the term whenever it is desired that a case be heard out of its grand division; but the requirements of each clause of this rule as to the notice may, at the option

of the court, be waived by written consent of parties.

4. *Copy of Bond.* No case in which an appeal or supersedeas bond is required shall be placed upon the argument docket until the clerk shall have received a duly attested copy of such bond.

5. *Appellee may Expedite Hearing.* An appellee or defendant in error desiring to expedite the hearing of his case may have the record printed at his own expense and give the notice required by clause 2 of this rule, and the cost of such printing will, when the case is decided, be taxed among the costs incurred by such appellee or defendant in error, provided the appellant or plaintiff in error does not dismiss his appeal before hearing.

6. *Felony Cases.* When a writ of error has been allowed in the case of a party convicted of a felony, the clerk shall cause the record to be printed with all convenient dispatch, and the case will be called for hearing at the next regular term of court, wherever it may be held, without notice or consent being required, provided the record has been printed thirty days before the hearing.

RULE V.

Briefs.

1. In any case on appeal or writ of error, the counsel for the appellant or plaintiff in error at least thirty days, and counsel for the appellee or defendant in error at least ten days, before a case is called for hearing, shall file with the clerk of this court not less than ten copies of a printed brief, one of which copies shall, upon request, be furnished to each of the counsel engaged upon the opposite side. All reply and supplemental briefs shall be filed at least five days before a case is called for hearing, and no brief shall be filed later, unless by consent of counsel. It is also desired by the court that counsel upon each side will furnish promptly to counsel on the opposing side their respective briefs as soon as printed, but their doing so will not obviate the requirement of this rule as to filing copies in the office of the clerk, and it is recommended that the printed brief shall correspond in size of page with the printed record and bear the same docket number.

2. The brief of appellant shall contain a short and clear statement disclosing:

First. The kind of action or suit, and a closely condensed statement, without argument or quotation of evidence, of all facts necessary to determination of the points in controversy.

Second. What the issues were and how raised.

Third. How the issues were decided, and what the judgment or decree was.

Fourth. The errors relied upon for reversal.

Fifth. A concise statement of so much of

the record as fully presents every error and exception relied on, referring to the pages of the record. If the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely. The statement will be taken to be accurate and sufficient for a full understanding of the question presented for decision, unless the opposite party in his brief shall make the necessary corrections or additions.

Following this statement, the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. No alleged error or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing, but the court, at its option, may notice a plain error not assigned or specified.

3. The brief of appellee on the assignment of errors shall point out any omissions or inaccuracies in appellant's statement of the record, and shall contain a short and clear statement of the propositions by which counsel seek to meet the alleged errors and sustain the judgment or decree, or by which such errors are obviated. Following this statement, the brief shall contain the points and authorities relied on in like manner as required in the appellant's brief. The brief of appellee on cross-errors shall be prepared in the manner required in the case of appellant's brief. The brief of appellant, in answer to the cross-assignment of errors, shall be prepared in the manner required of appellees in answer to the assignment of errors. Reply briefs shall be prepared in manner like to answer briefs.

4. The briefs of any party may be followed by an argument in support of such briefs, which shall be distinct therefrom, but shall be bound with the same. The argument shall be confined to discussion and elaboration of the points contained in the briefs. The names of counsel shall be affixed to all briefs filed by them.

5. The court on its own motion may refuse to allow submissions of any case, until the briefs of the party demanding it, complying with this rule in respect to form and contents, shall have been filed, and may also strike out on submission briefs not complying therewith.

6. Either party whose brief has been filed in compliance with the rule may insist upon a hearing when the case is regularly called although no brief shall have been filed by the opposite party, and when one party has

complied with the rule and the other has not, the party complying with the rule may have the case either submitted or continued at his option. If one of the parties omits to file such brief at or before the hearing, he cannot be heard, but the case may be submitted or heard ex parte upon the argument of one counsel only for the party by whom the brief has been duly filed.

7. If no printed brief has been filed by either party within the time prescribed by this rule, the case will be continued when called, unless both parties are present in court, by counsel, with their respective briefs, and consent to submit the case with or without oral argument or file an agreement in writing to submit, but in no case can briefs be filed after the case is submitted.

8. It is not always necessary for counsel to appear in court in person in order to have a case submitted for judgment by the court; when the party desiring the submission of a case has filed his brief in compliance with the rule, he may by written request addressed to the court or to the clerk have his case submitted when called.

9. All former provisions of this rule, now omitted from it, are abrogated.

RULE VI.

Calling the Docket.

1. When Commenced. On the second day of each regular term the court will commence to call the cases then ready for hearing in the order in which they stand upon the printed list, and will proceed from day to day in the same order until all of the cases have been called.

2. How Many Cases to be Called. Not more than ten cases shall be considered liable to be called on any one day, including the one, if any, that may be under argument. No case shall be taken up out of the order of the docket except when briefs have been filed on both sides and the parties consent to submit the case without oral argument.

3. Set for Hearing. No case shall be set for hearing on any other days than those assigned to the circuit from which the case comes unless it be such as from its peculiar character or the mandate of the law may be regarded as a privileged case.

4. Exceptional Cases. Cases of general public interest or of peculiar hardship may be heard at a special term according to the provisions of section 13 of chapter 156, Acts of 1882, under such conditions and regulations as may be consented to by the parties or as the court may prescribe.

5. Agreement of Counsel. All agreements of counsel in regard to any case or matter pending in court shall be reduced to writing, signed by counsel and delivered to the clerk.

6. Reargument. Whenever the court desires further argument in any case which has been argued and submitted, it will fix a

day therefor, and cause notice of the time and place, as well as of the subject or branch of the case, on which argument is desired, to be given to counsel.

RULE VII.

Certiorari.

1. How Obtained. No certiorari for diminution of the record shall be awarded unless a motion therefor shall be made in writing, stating the facts on which the motion is founded, and all motions for such certiorari should be made at the earliest period possible after the diminution is discovered, either in regular or special term.

2. When to be Printed. If the necessity for such certiorari is caused by the failure of the appellant or plaintiff in error to have enough of the record brought up to present fairly both sides of all errors complained of by him, it shall be his duty to have the additional record printed, or in default thereof, his appeal or writ of error may be dismissed; otherwise such additional record shall be printed at the expense of the party asking for the certiorari, but when, in either case, the additional record brought up does not exceed ten pages of manuscript, it need not be printed unless so ordered by the court.

RULE VIII.

Motions and Affidavits.

1. Must be in Writing. All motions, except motions of course, made to the court, shall be reduced to writing and shall contain a brief statement of the facts and objects of the motion.

2. Notice to be Given. No affidavit shall be read in support of or in opposition to any motion hereafter made to the court unless reasonable notice be given to the opposite party or his attorney of the time and place of taking the same, or good cause be shown why such notice has not been given and every motion which is not a motion of course, shall be supported by affidavit.

RULE IX.

Oral Argument.

1. How many may be Heard. Only two counsel shall be heard on each side in the argument of any case unless by special leave of court, and the counsel for the appellant or the plaintiff in error shall be entitled to open and conclude the argument.

2. Time Allowed. Forty-five minutes only shall be allowed to the appellant or plaintiff in error for the opening and conclusion, and thirty minutes to the appellee or defendant in error for his reply, but by special leave of the court granted before the argument begins, a longer time may be allowed to each side. The time allowed may be apportioned between the counsel on the same side at their discretion. But in all cases a

fair opening of the case shall be made by the party entitled to the opening and concluding argument.

3. Who to be Deemed Counsel. The attorneys of the respective parties in the court below shall be deemed to be the attorneys of the same parties in this court until others have been retained and have notified the clerk of this court of that fact.

4. Record. In no case is it proper or necessary to consume the time allowed for argument by reading the record to the court, but counsel may refer thereto and state what they consider as proven by any exhibit or deposition on which they rely.

5. Commissioner's Report. No oral argument will be permitted upon exceptions to a commissioner's report except upon pure questions of law and without reference to details of evidence.

RULE X.

Cross-Assignment of Error.

1. When to be Considered. In any appeal or writ of error, if error is perceived against the appellee or defendant in error, the court will consider the whole record as being before it, and will reverse the proceedings, either in whole or in part, and in the same manner as it would were the appellee or defendant in error to assign errors and bring the case before the court, unless such error be waived by the party prejudiced thereby, which waiver shall be considered as a release of all error committed against him. It is, however, advisable for the appellee or defendant in error, if he is of opinion that there is error in the record to his prejudice, to call attention to the same by a formal counter-assignment of error, filed at the hearing of the case, or by pointing out and complaining of the same in his brief.

RULE XI.

Abandoned Cases.

1. When to be Dismissed. When a case has been called for argument at four successive regular terms held in the grand division to which the case belongs, and upon the call at the fourth term neither party is prepared to argue the same, the case shall be considered as abandoned and shall be dismissed at the costs of the appellant or plaintiff in error unless sufficient cause be shown for further continuance.

2. Reinstatement. No appeal or writ of error which shall have been dismissed or abated by the court, shall be reinstated or revived after the close of the next regular term held in the grand division in which the case belongs after such dismissal or abatement.

RULE XII.

Rehearing.

1. How Obtained. No petition for a rehearing will be entertained unless presented

within the term at which the decision is announced, nor in any case later than thirty days after the date of the decision of the case in which it is presented (unless as otherwise authorized by law), and no rehearing will be allowed unless one of the judges who concurred in the decision shall be dissatisfied with the conclusion reached, and no petition for a rehearing will be entertained by the court in any case unless the reasons therefor are printed and filed with the petition; but if the decision complained of is announced within fifteen days of the close of the term, the printing may be dispensed with. When a rehearing is allowed, the court may fix the time and place for reargument and resubmission, notice of which shall be given by the clerk to the attorneys of record, but, in case it fails to fix such time and place, the clerk shall enter the case upon the docket as if it had never been heard.

RULE XIII.

Index to Records.

1. **Must be Indexed.** In making transcripts of records for appeal and writs of error, the clerks of any court making such transcript shall annex thereto a complete index, giving pages of the record on which its chief component parts are to be found, including the pages where the deposition of each witness appears in such record.

RULE XIV.

Officers of Court.

1. **Accounts.** The officers attending this

court and receiving an allowance per diem therefor, shall, at the end of each term, furnish an account of the number of days so employed, verifying their accounts by affidavit, and orders of the allowance will then be made by the court and certified to the auditor of state, but such accounts will not be considered or allowed before the close of the term.

RULE XV.

Reports.

1. **Arguments to be Omitted.** In publishing the opinions of this court, the reporter shall not publish the arguments of counsel, but he shall report the names of counsel on each side, and when the counsel on the side adverse to the decision of the court shall furnish to him the points and authorities relied on, clearly and briefly stated, he may publish in the report such points and authorities; but in no case shall such points and authorities occupy more than one page of the printed report unless express authority therefor be given by the court.

RULE XVI.

Original Papers.

1. **Not to be Withdrawn.** No transcript of record, petition or other original paper or opinion of the court, shall be withdrawn from the custody of the clerk of this court unless upon motion made in court for this purpose and upon order of court permitting such withdrawal, except as provided in section 19, chapter 157, Acts of 1882.

CASES REPORTED

	Page		Page
Adair v. Spellman Seminary (Ga. App.)...	589	Atlantic & N. C. R. Co., State v. (N. C.)	447
Affleck's Adm'r, Powhatan Lime Co. v. (Va.)	1054	Augusta Land Co. v. Augusta Ry. & Electric Co. (Ga.).....	138
Alabama Great Southern R. Co. v. Brown (Ga.)	1118	Augusta Ry. & Electric Co., Augusta Land Co. v. (Ga.).....	138
Aldrich v. Southern R. Co. (S. C.).....	318	Avery & Co. v. Pope (Ga. App.).....	946
Alexander v. Atlanta (Ga. App.).....	177	Aycock Bros., J. G. & G. W. Durden v. (Ga. App.).....	213
Alexander, Milligan v. (W. Va.).....	665	Bacon Pecan Co., Gillespie v. (Ga. App.)...	212
Alexander v. Patterson (Ga. App.).....	482	Baggett, Chandler v. (Ga. App.).....	179
Allen, Berrien County v. (Ga. App.).....	1129	Baird, Bank of Union v. (W. Va.).....	738
Allen, Bethea v. (S. C.).....	639	Baker, Witt v. (Ga. App.).....	243
Allen, McLain v. (S. C.).....	1	Ball, Wiley v. (W. Va.).....	659
Allen v. State (Ga.).....	29	Ballard v. Daniel (Ga. App.).....	376
Allen v. State (Ga. App.).....	769	Ballard v. Lowery (N. C.).....	966
Allison v. Kenion (N. C.).....	1110	Baltimore & O. R. Co., State v. (W. Va.)...	834
Allison v. Morgan (Ga. App.).....	363	Bank of Cobbtown, Vaughan v. (Ga. App.)	1130
Alphin v. Lowman (Va.).....	1029	Bank of Columbia, Hiller v. (S. C.).....	899
Aman, Turlington v. (N. C.).....	1102	Bank of Haralson, Swygert Bros. v. (Ga. App.)	759
Ambrose v. Barber (Ga. App.).....	1135	Bank of Jonesboro, Corporation Commission v. (N. C.).....	808
American Mfg. Co. v. Champion Mfg. Co. (Ga. App.).....	485	Bank of Keystone, First Nat. Bank v. (W. Va.)	649
American Nat. Bank, Watson v. (Ga. App.)	586	Bank of Lavonia v. Bush (Ga.).....	459
American Soda Fountain Co., City Drug Co. v. (Ga. App.).....	376	Bank of Maysville, Turner v. (Ga. App.)...	180
Americus Grocery Co., Kerr Glass Mfg. Co. v. (Ga. App.).....	381	Bank of Plymouth, Spruill v. (N. C.).....	262
Anchors, Macon, D. & S. R. Co. v. (Ga.)...	153	Bank of Southwestern Georgia, Wright v. (Ga. App.).....	184
Anderson v. Anderson (Ga.).....	1124	Bank of Union v. Baird (W. Va.).....	738
Anderson v. Harrington (N. C.).....	426	Banks v. Bradwell (Ga.).....	572
Analely v. Davis (Ga.).....	454	Barber, Ambrose v. (Ga. App.).....	1135
A. N. Tumlin Co., Beck v. (Ga. App.).....	587	Barfield v. Hill (N. C.).....	677
Arey Distilling Co. v. Mutual Aid Banking Co. (N. C.).....	287	Barker v. Massachusetts Mut. Life Ins. Co. (N. C.)	424
Arlington Oil & Guano Co. v. Swann (Ga. App.)	476	Barlow v. State (Ga. App.).....	93
Armistead v. Weaver (Ga.).....	783	Barnes, Hurt v. (Ga.).....	775
Armour & Co. v. Commonwealth (Va.).....	828	Barnes v. North Carolina Public Service Co. (N. C.).....	881
Armstrong v. Boyd (Ga.).....	780	Barnwell Lumber Co., Silverthorne v. (S. C.)	519
Armstrong's Adm'r, Selvey's Ex'rs v. (W. Va.)	1019	Bashar v. Pittsburg, C., C. & St. L. R. Co. (W. Va.).....	1009
Arnett, Tyler & Tomlinson v. (Ga. App.)...	482	Basnight v. Small (N. C.).....	269
Arnold Grocery Co. v. Shackelford (Ga.)...	470	Battle, Mimbs v. (Ga. App.).....	922
Arrington, Greer v. (W. Va.).....	720	Battle Bros., McKinney v. (Ga. App.).....	92
Artrip, Branham v. (Va.).....	390	Baxter, Georgia Coast & P. R. Co. v. (Ga. App.)	187
Ashbaugh v. Chesapeake & O. R. Co. (W. Va.)	741	Baxter, Reidsville & S. E. R. Co. v. (Ga. App.)	187
Athens Sav. Bank, Caudell v. (Ga.).....	776	Beach, Hinson & Co., Fisher v. (Ga. App.)	84
Atkins, South Georgia R. Co. v. (Ga. App.)	226	Bearden v. State (Ga. App.).....	79
Atkinson v. Kennedy (Ga. App.).....	84	Beasley v. Byrum (N. C.)	270
Atkinson v. Virginia Oil & Gas Co. (W. Va.)	647	Beck v. A. N. Tumlin Co. (Ga. App.).....	587
Atlanta & C. R. Co. v. Carolina Portland Cement Co. (Ga.).....	555	Beddingfield v. State (Ga. App.).....	581
Atlantic Coast Line R. Co. v. Bunn (Ga. App.)	947	Bell v. Norfolk Southern R. Co. (N. C.)...	421
Atlantic Coast Line R. Co., Burnett v. (N. C.)	414	Bell v. Verdel (Ga.).....	849
Atlantic Coast Line R. Co. v. Collins (Ga. App.)	946	Bell, Virginian R. Co. v. (Va.).....	396
Atlantic Coast Line R. Co., Huggins v. (S. C.)	406	Bell v. W. H. Cooper & Sons (Ga. App.)...	380
Atlantic Coast Line R. Co., Hunter v. (N. C.)	610	Bell Lumber Co., Bird v. (N. C.).....	448
Atlantic Coast Line R. Co., Miller v. (S. C.)	645	Belle Isle, Jones v. (Ga. App.).....	357
Atlantic Coast Line R. Co., Mott v. (N. C.)	867	Benjamin-Ozburn Co. v. Morrow Transfer & Storage Co. (Ga. App.).....	753
Atlantic Coast Line R. Co., Smith v. (N. C.)	483	Bennett v. Southern Ry.—Carolina Division (S. C.)	710
Atlantic Coast Line R. Co., Thomasville Live Stock Co. v. (Ga. App.).....	162	Bennettsville & C. R. Co. v. Glens Falls Ins. Co. (S. C.).....	717
Atlantic Coast Line R. Co. v. Whitney (Ga. App.).....	181	Bennettsville & C. R. Co., Royal Exch. Assur. of London v. (S. C.).....	104
Atlantic Coast Lumber Corp., Gresham v. (S. C.).....	799	Bennettsville & C. R. Co., Syracuse Ins. Co. v. (S. C.).....	104
		Benton-Shingler Co. v. Mills (Ga. App.)...	755
		Bernard Gloekler Co. v. Carr (W. Va.)...	732

	Page		Page
Bernard v. McClanahan (Va.)	1059	Buckeye Cotton Oil Co., Willingham v. (Ga. App.)	496
Berrien County v. Allen (Ga. App.)	1129	Buffalo Collieries Co., Taylor v. (W. Va.)	27
Bethea v. Allen (S. C.)	639	Bugg v. State (Ga. App.)	748
Bettison, Salter v. (Ga. App.)	358	Bullock & Co., White Sewing Mach. Co. v. (N. C.)	1107
Biggs v. Silvey (Ga.)	857	Bunn v. Atlantic Coast Line R. Co. (Ga. App.)	947
Binder v. Georgia Ry. & Electric Co. (Ga. App.)	216	Burdett, Ohio Fuel Oil Co. v. (W. Va.)	667
Bird v. Bell Lumber Co. (N. C.)	448	Burner v. Burner (Va.)	1050
Birmingham Fertilizer Co. v. Dozier (Ga. App.)	927	Burnett v. Atlantic Coast Line R. Co. (N. C.)	414
Birmingham Fertilizer Co., Keaton v. (Ga. App.)	754	Burney v. Jones (Ga.)	840
Black v. State (Ga. App.)	173	Burriss v. Brock (S. O.)	193
Blackburn v. Morel (Ga. App.)	492	Bush, Bank of Lavonia v. (Ga.)	459
Blackshear, Supreme Ruling of Fraternal Mystic Circle v. (Ga. App.)	210	Butler, Louisville & N. R. Co. v. (Ga.)	776
Blackshear Mfg. Co., Ford v. (Ga.)	576	Butler v. Tattall Bank (Ga.)	456
Blackstad Mercantile Co. v. Parker & Glover (N. C.)	606	Butts v. State (Ga. App.)	87
Blades, Pate v. (N. C.)	608	Byrom Cotton Co., Moultrie Compress Co. v. (Ga. App.)	589
Blake v. Smith (N. C.)	596	Byrum, Beasley v. (N. C.)	270
Blakely Artesian Ice Co. v. Clarke (Ga. App.)	526	Cable Co. v. Mathers (W. Va.)	1079
Blalock v. Empire Life Ins. Co. (Ga. App.)	374	Cable Piano Co. v. Strickland (N. C.)	506
Bland v. Rigby (W. Va.)	1013	Caldwell v. Caldwell (Ga.)	853
Blease, State v. (S. C.)	247	Calhoun, Western Union Tel. Co. v. (Ga. App.)	370
Blount v. Royal Fraternal Ass'n (N. C.)	299	Calhoun, Western Union Tel. Co. v. (Ga. App.)	371
Board of Com'rs of Columbus County, Withers v. (N. C.)	615	Callaway, Evans v. (Ga.)	116
Board of Com'rs of Scotland County, Gibson v. (N. C.)	976	Cameron v. State (Ga. App.)	745
Board of Com'rs of Vance County v. Henderson (N. C.)	442	Canal-Louisiana Bank & Trust Co. v. Savannah Ice Co. (Ga. App.)	45
Board of Drainage Com'rs of Bear Swamp Drainage Dist., Newby & White v. (N. C.)	266	Cannon-Torrence Co. v. Marlott (N. C.)	1109
Board of Education of Forsyth County, Board of Graded School Com'rs of City of Winston v. (N. C.)	886	Carbon Black Mfg. Co., Reserve Gas Co. v. (W. Va.)	1002
Board of Graded School Com'rs of City of Winston v. Board of Education of Forsyth County (N. C.)	886	Carnegie Natural Gas Co. v. Swiger (W. Va.)	3
Board of Trustees of Davis and Elkins College, Collins v. (W. Va.)	10	Carolina Portland Cement Co., Atlanta & C. R. Co. v. (Ga.)	555
Bonner v. Rodman (N. C.)	271	Carolina Power & Light Co., Moore v. (N. C.)	596
Bowen v. De Loach (Ga. App.)	371	Carolina Telephone & Telegraph Co., Woodley v. (N. C.)	598
Bower v. Virginian R. Co. (W. Va.)	727	Carolis v. Atlanta (Ga. App.)	752
Bowman, Indiana & Ohio Live Stock Ins. Co. v. (W. Va.)	651	Carpenter v. First Nat. Bank (Ga. App.)	360
Bowman v. Kidd (Ga. App.)	167	Carpenter v. Hayhurst (W. Va.)	819
Boyd, Armstrong v. (Ga.)	780	Carr, Bernard Gloekler Co. v. (W. Va.)	732
Boyd, McNair v. (N. C.)	966	Carr, Holmes v. (N. C.)	413
Brackin, Jefferson Fire Ins. Co. of Philadelphia v. (Ga.)	467	Carr & Co. v. Southern R. Co. (Ga. App.)	41
Bradshaw v. Stansberry (N. C.)	302	Carroll v. Smith (N. C.)	497
Bradwell, Banks v. (Ga.)	572	Carswell v. State (Ga. App.)	589
Branham v. Artrip (Va.)	390	Carter, Planters' Oil Mill v. (Ga.)	1120
Breden v. Minneola Mfg. Co. (N. C.)	960	Case Threshing Mach. Co., First Nat. Bank v. (Ga.)	781
Brewer v. Wynne (N. C.)	629	Cash, C. L. Hardwick & Co. v. (Ga.)	532
Bridges, Owens v. (Ga. App.)	225	Cassela, Southern Power Co. v. (S. O.)	453
Bridgewater Mfg. Co. v. Funkhouser (Va.)	1074	Cathy, Richter v. (Ga. App.)	179
Brinkley v. Knight (N. C.)	260	Caudell v. Athens Sav. Bank (Ga.)	776
Britt v. State (Ga. App.)	859	Cavanaugh v. Jarman (N. C.)	673
Brock v. Brock (Ga.)	473	Cedartown Lumber Co., Lyon v. (Ga. App.)	236
Brock, Burriss v. (S. C.)	193	C. E. Holmes & Co., Hyer v. (Ga. App.)	58
Brooke v. Georgia Peruvian Ochre Co. (Ga. App.)	362	Central Georgia Power Co., Flemister v. (Ga.)	148
Brooks v. Tinsley (Ga. App.)	160	Central of Georgia R. Co., Eubanks v. (Ga. App.)	488
Brothers v. Horne (Ga.)	468	Central of Georgia R. Co. v. Fleming (Ga. App.)	369
Brotherton v. Stricklin (Ga.)	459	Central of Georgia R. Co. v. McKey (Ga. App.)	378
Browder-Manget Co., Daniel v. (Ga. App.)	237	Chamberlin-Johnson-Du Bose Co., James G. Wilson Mfg. Co. v. (Ga.)	465
Brown, Alabama Great Southern R. Co. v. (Ga.)	1113	Chambers, Stark v. (Ga.)	535
Brown, Charleston & W. C. R. Co. v. (Ga. App.)	932	Champion Mfg. Co., American Mfg. Co. v. (Ga. App.)	485
Brown v. Frierson (S. C.)	791	Chandler v. Baggett (Ga. App.)	179
Brown v. Hawkins (Ga. App.)	76	Charleston & W. C. R. Co. v. Brown (Ga. App.)	932
Brown v. Southern R. Co. (Ga.)	152	Charleston & W. C. R. Co. v. Thompson, two cases (Ga. App.)	242
Brown v. State (Ga. App.)	177	Charleston & W. C. R. Co., Varnville Furniture Co. v. (S. C.)	700
Brown v. State (Ga. App.)	231	Chas. F. Dunn & Sons Co., Williams v. (N. C.)	512
Brown v. State (Ga. App.)	1133	Chattanooga & C. I. R. Co. v. Morrison (Ga.)	903
Brown Guano Co. v. Coker (Ga. App.)	582		
Brown's Estate, In re (S. C.)	791		
Bryant v. Georgia Fertilizer & Oil Co. (Ga. App.)	236		
Bryant Lumber Co. v. Coppock-Warner Lumber Co. (N. C.)	282		

	Page		Page
Chattooga Oil Mill Co., Justice v. (Ga. App.).....	223	Cooper, Union Mut. Ass'n v. (Ga. App.)...	220
Cheatam, McCullers v. (N. C.).....	306	Cooper & Sons v. Bell (Ga. App.).....	380
Cheesebrow v. Point Pleasant (W. Va.)....	350	Coppock-Warner Lumber Co., Bryant Lumber Co. v. (N. C.).....	282
Cherry's Will, In re (N. C.).....	288	Corporation Commission v. Bank of Jonesboro (N. C.).....	308
Chesapeake & O. R. Co., Ashbaugh v. (W. Va.).....	741	Cosper v. State (Ga. App.).....	94
Chitty v. Oliver (Ga. App.).....	496	Cowart v. Singletary (Ga.).....	196
Christian, Dale v. (Ga.).....	1127	Cox, Davis v. (Ga. App.).....	383
Citizens' Bank of Valdosta, Mobley v. (Ga. App.).....	77	Cox v. Manning (Ga. App.).....	484
Citizens' Nat. Life Ins. Co., Peeples & Tygart v. (Ga. App.).....	1130	Cox, Martin v. (Ga. App.).....	39
Citizens' Sav. Bank v. Efrd (S. C.).....	637	Cox, Simpson v. (S. C.).....	102
City Drug Co. v. American Soda Fountain Co. (Ga. App.).....	376	Cox v. State (Ga. App.).....	909
City of Americus v. Phillips (Ga. App.)....	36	Craig & Wilson v. Stewart & Jones (N. C.)	1100
City of Anderson v. Fant (S. C.).....	641	Craven v. Martin (Ga.).....	568
City of Atlanta, Alexander v. (Ga. App.)....	177	Croghan v. Worthington Hardware Co. (Va.).....	1039
City of Atlanta, Carolis v. (Ga. App.).....	752	Cronin v. State (Ga. App.).....	747
City of Atlanta, Davis v. (Ga. App.).....	747	Crosby v. Wiggins Land Co. (S. C.).....	897
City of Atlanta, Potts v. (Ga.).....	110	Crouch, William James' Sons Co. v. (W. Va.).....	815
City of Atlanta, Wallace v. (Ga.).....	554	Cumberland County Agr. Soc., Smith v. (N. C.).....	632
City of Bainbridge v. Smith (Ga. App.)....	1130	Cumberland v. Cumberland (W. Va.).....	1010
City of Blue Ridge, Douthit v. (Ga. App.)..	744	Curry v. State (Ga. App.).....	771
City of Carrollton, Jones v. (Ga. App.).....	583	Dailey, Noll v. (W. Va.).....	668
City of Dalton, Hardwick v. (Ga.).....	553	Dale v. Christian (Ga.).....	1127
City of Fairmont, Parker v. (W. Va.).....	660	Dameron v. Rowland Lumber Co. (N. C.)..	607
City of Fitzgerald, Sedimeyr v. (Ga.).....	469	Daniel, Ballard v. (Ga. App.).....	376
City of Jefferson, Phillips v. (Ga. App.)....	222	Daniel v. Browder-Manget Co. (Ga. App.)	237
City of Macon v. Leonard (Ga. App.).....	241	Daniel v. Dixon (N. C.).....	425
City of Raleigh v. Durfey (N. C.).....	434	Daniels, State v. (N. C.).....	953
City of Rome v. Ford (Ga. App.).....	243	Dare County Com'rs, Smith v. (N. C.).....	1113
City of Rome, Glanton v. (Ga. App.).....	225	Davenport v. Commissioners of Pitt County (N. C.).....	423
City of Rome, Lumpkin v. (Ga. App.).....	158	Davenport, Dr. Shoop Family Medicine Co. v. (N. C.).....	602
City of Savannah, Thorpe v. (Ga. App.)....	949	Davidson v. Davidson (W. Va.).....	998
C. J. Roehr & Co., Hall v. (Ga. App.).....	379	Davis, Ansley v. (Ga.).....	454
Clark v. Georgia Fertilizer Works (Ga. App.).....	1134	Davis v. Atlanta (Ga. App.).....	747
Clark v. Nickell (W. Va.).....	1020	Davis v. Cole Bros. (Va.).....	1033
Clark, Wilson v. (Ga. App.).....	86	Davis v. Cox (Ga. App.).....	383
Clarke, Blakely Artesian Ice Co. v. (Ga. App.).....	526	Davis v. Spragg (W. Va.).....	652
Clegg, Martin v. (N. C.).....	1105	Davis, Turner v. (N. C.).....	257
C. L. Hardwick & Co. v. Cash (Ga.).....	532	Davison v. Sibley (Ga.).....	855
C. L. Ritter Lumber Co. v. Coal Mountain Min. Co. (Va.).....	322	Dawkins v. Dawkins (W. Va.).....	822
Coal Mountain Min. Co., C. L. Ritter Lumber Co. v. (Va.).....	322	Dawson v. State (Ga. App.).....	745
Cobb, Coffey v. (Ga.).....	568	Dean v. Reynolds Home Mixture Guano Co. (Ga. App.).....	86
Cobb, State v. (N. C.).....	419	Deaver-Jeter Co. v. Southern R. Co. (S. C.)	709
Coffey v. Cobb (Ga.).....	568	Dell School v. Peirce (N. C.).....	687
Coker, Brown Guano Co. v. (Ga. App.).....	582	De Loach, Bowen v. (Ga. App.).....	371
Cole Bros., Davis v. (Va.).....	1033	Dennis v. Justus (Va.).....	1077
Coleman v. George (Ga.).....	543	Devers v. Devers (Va.).....	1048
Collier v. State (Ga. App.).....	1130	Dickenson v. Ramsey (Va.).....	1025
Collins, Atlantic Coast Line R. Co. v. (Ga. App.).....	946	Dixon, Daniel v. (N. C.).....	425
Collins v. Board of Trustees of Davis and Elkins College (W. Va.).....	10	Dixon v. Dixon (W. Va.).....	1016
Collum v. Georgia Ry. & Electric Co. (Ga.)	475	Dixon, Seaboard Air Line R. Co. v. (Ga.)..	1118
Colonial Coal & Coke Co., Kiser v. (Va.)....	348	Dr. Shoop Family Medicine Co. v. Davenport (N. C.).....	602
Colonial Coal & Coke Co., Steele's Adm'r v. (Va.).....	346	Donaldson v. Morel (Ga. App.).....	492
Columbian Nat. Life Ins. Co. v. Mulkey (Ga. App.).....	482	Donohoe v. Fredlock (W. Va.).....	736
Columbia, N. & L. R. Co., Du Pre v. (S. C.).....	310	Dooley v. Seaboard Air Line R. Co. (N. C.).....	970
Columbus Power Co., Hutchinson v. (Ga.)..	1125	Douglas v. State (Ga. App.).....	1134
Comer & Co., Hillis v. (Ga. App.).....	930	Douthit v. Blue Ridge (Ga. App.).....	744
Commander, Griffin v. (N. C.).....	499	Downing Lumber Co. v. Riley (N. C.).....	605
Commissioners of Pitt County, Davenport v. (N. C.).....	423	Dozier v. Birmingham Fertilizer Co. (Ga. App.).....	927
Commonwealth, Armour & Co. v. (Va.)....	328	Drake v. Lewis (Ga. App.).....	167
Commonwealth, Draper v. (Va.).....	322	Drake, Phillips & Crew Co. v. (Ga. App.)	952
Commonwealth, Morgan v. (Va.).....	388	Draper v. Commonwealth (Va.).....	322
Commonwealth, Mullins v. (Va.).....	324	D. Rothschild & Co., Smith v. (Ga. App.)..	88
Connally v. Morrison (Ga.).....	119	Duane Chair Co. v. Jackson (Ga.).....	771
Cook v. Hightower & Co. (Ga. App.).....	165	Duke v. Pendergrass (Ga.).....	129
Cook v. State (Ga. App.).....	87	Duke v. State (Ga. App.).....	861
Cooper v. Cooper (Ga.).....	35	Dunn v. State (Ga. App.).....	170
Cooper v. Fosburg Lumber Co. (N. C.)....	272	Dunn v. State (Ga. App.).....	764
Cooper, Newton v. (Ga. App.).....	356	Dunn & Sons Co., Williams v. (N. C.).....	512
Cooper v. Seaboard Air Line R. Co. (N. C.)	418	Du Pre v. Columbia, N. & L. R. Co. (S. C.)	310
Cooper v. State (Ga. App.).....	764	Dupree's Will, In re (N. C.).....	611
Cooper v. State (Ga. App.).....	908	Durden v. Aycock Bros. (Ga. App.).....	213
		Durfey, City of Raleigh v. (N. C.).....	434
		Durfey, Fellows v. (N. C.).....	621
		Durham v. Page (Ga. App.).....	361

	Page		Page
Durham Traction Co., Pendergrast v. (N. C.)	984	Funkhouser, Bridgewater Mfg. Co. v. (Va.)	1074
Durrence v. Waters (Ga.)	841	Furr, Robinson v. (Ga.)	455
Early, Leftwich v. (Va.)	384	Gadlin v. State (Ga. App.)	751
Echle v. Southern R. Co. (S. C.)	793	Gardner v. North State Mut. Life Ins. Co. (N. C.)	806
Echols v. Green (Ga.)	557	Garland, Southern R. Co. v. (Ga.)	455
Edwards v. Guyton (Ga.)	195	Gaskins v. Gaskins, two cases (Ga. App.)	483
Edwards, Hall v. (Ga.)	852	Gaulden v. Wright (Ga.)	1125
Edwards v. Savannah Trust Co. (Ga. App.)	35	Gaymon, Rigby v. (S. C.)	518
Edwards v. Savannah & S. R. Co. (Ga.)	841	Gearreld v. Woodruff (Ga. App.)	355
Edwards, State v. (W. Va.)	1005	General Board of State Hospitals for Insane v. Robertson (Va.)	1064
Efrid, Citizens' Sav. Bank v. (S. C.)	637	Gent's Ex'r v. Pruner's Adm'r (Va.)	1044
Egnor, Freeman v. (W. Va.)	824	George, Coleman v. (Ga.)	543
Elgin City Banking Co. v. McEachern (N. C.)	680	George Gilmore & Co., Louisiana Red Cypress Co. v. (Ga. App.)	379
Elk Cotton Mills v. Grant (Ga.)	836	Georgia Coast & P. R. Co. v. Baxter (Ga. App.)	187
Ellard v. Smith (Ga.)	459	Georgia Fertilizer Works, Clark v. (Ga. App.)	1134
Ellen, Fidelity Trust Co. v. (N. C.)	263	Georgia Fertilizer & Oil Co., Bryant v. (Ga. App.)	236
Ellison v. Western Union Tel. Co. (N. C.)	277	Georgia Fertilizer & Oil Co., Johnson v. (Ga. App.)	1131
Elrod v. M. C. Kiser & Co. (Ga. App.)	375	Georgia Granite Co., Thomas v. (Ga.)	130
Elyea-Austell Co. v. Jackson Garage (Ga. App.)	38	Georgia Peruvian Ochre Co., Brooke v. (Ga. App.)	362
E. Matthews & Son v. Richards (Ga. App.)	227	Georgia Ry. & Electric Co., Binder v. (Ga. App.)	216
E. M. Grant & Co., Light v. (W. Va.)	1011	Georgia Ry. & Electric Co., Collum v. (Ga.)	475
Empire Life Ins. Co., Blalock v. (Ga. App.)	374	Georgia & F. Ry. v. Newton (Ga.)	142
E. T. Comer & Co., Hillis v. (Ga. App.)	930	Georgia & F. R. Co. v. Norman (Ga. App.)	86
Eubanks v. Central of Georgia R. Co. (Ga. App.)	488	Germania Bank, Grayson v. (Ga.)	124
Eureka Lumber Co. v. Whitley (N. C.)	268	Gibson v. Board of Com'rs of Scotland County (N. C.)	976
Evans v. Callaway (Ga.)	116	Gibson v. State (Ga. App.)	354
Evans v. State (Ga. App.)	916	Gillespie v. Bacon Pecan Co. (Ga. App.)	212
Everett, State v. (N. C.)	274	Gilmore & Co., Louisiana Red Cypress Co. v. (Ga. App.)	379
Everly, Hartmyer v. (W. Va.)	1093	Gipson v. Louisville & N. R. Co. (Ga. App.)	488
Ewell v. Ewell (N. C.)	509	Glanton v. Rome (Ga. App.)	225
Exum, Third Nat. Bank v. (N. C.)	498	Glass v. Lowry Nat. Bank (Ga. App.)	306
Fairmont & M. R. Co., Fleming v. (W. Va.)	826	Glawson, Southern Bell Telephone & Telegraph Co. v. (Ga.)	136
Faison v. State (Ga. App.)	39	Glawson, Southern Bell Telephone & Telegraph Co. v. (Ga. App.)	488
Farmers' Bank & Trust Co. v. Southern Granite Co. (S. C.)	985	Glens Falls Ins. Co., Bennettsville & C. R. Co. v. (S. C.)	717
Farmers' Ginnery & Mfg. Co. v. Thrasher (Ga.)	474	Globe & Rutgers Fire Ins. Co., Gross v. (Ga.)	138
Fant, City of Anderson v. (S. C.)	641	Gloekler Co. v. Carr (W. Va.)	732
Fellows v. Durfee (N. C.)	621	Gobble v. Orrell (N. C.)	957
Ferebee v. Norfolk Southern R. Co. (N. C.)	685	Goble, Yellow Poplar Lumber Co. v. (Va.)	1036
Fidelity Trust Co. v. Ellen (N. C.)	263	Gold, Lamon v. (W. Va.)	728
Fidelity & Deposit Co. of Maryland, Tatterson v. (Va.)	334	G. O. Loving & Co., Parker v. (Ga. App.)	77
Field, Latham v. (N. C.)	865	Gore v. Vines (W. Va.)	820
Fields & Chance, Franklin v. (Ga. App.)	366	Gossett v. Western Union Tel. Co. (S. C.)	309
First Nat. Bank v. Bank of Keystone (W. Va.)	649	Grafton Coal & Coke Co., Selvey v. (W. Va.)	656
First Nat. Bank, Carpenter v. (Ga. App.)	360	Grant, Elk Cotton Mills v. (Ga.)	836
First Nat. Bank v. Case Threshing Mach. Co. (Ga.)	781	Grant & Co., Light v. (W. Va.)	1011
First Nat. Bank, Herring v. (Ga. App.)	359	Grantham v. Lance (Ga. App.)	481
First Nat. Bank, Setze v. (Ga.)	540	Gray, Outlaw v. (N. C.)	676
Fisher v. Beach, Hinson & Co. (Ga. App.)	84	Gray v. State, two cases (Ga. App.)	223
Fisher, Rochelle Gin & Cotton Co. v. (Ga. App.)	584	Grayson v. Germania Bank (Ga.)	124
Fitts, Western Union Tel. Co. v. (Ga. App.)	156	Great Southern Accident & Fidelity Co. v. Guthrie (Ga. App.)	162
Flannery Co. v. James (Ga. App.)	912	Green, Echols v. (Ga.)	557
Flannigan v. State (Ga. App.)	745	Greer v. Arrington (W. Va.)	720
Fleming v. Central of Georgia R. Co. (Ga. App.)	369	Greer v. Pope (Ga.)	846
Fleming v. Fairmont & M. R. Co. (W. Va.)	826	Greer v. State (Ga. App.)	746
Flemister v. Central Georgia Power Co. (Ga.)	148	Gregory, McConnell v. (Ga.)	1128
Fogleman, State v. (N. C.)	879	Gresham v. Atlantic Coast Lumber Corp. (S. C.)	799
Ford v. Blackshear Mfg. Co. (Ga.)	576	Grief v. Kegley (Va.)	1062
Ford, City of Rome v. (Ga. App.)	243	Griffin v. Commander (N. C.)	499
Ford, Franklin v. (Ga. App.)	366	Grim, McCauley v. (Va.)	1041
Fortson v. State (Ga. App.)	746	Grimes, Harrington v. (N. C.)	301
Fosburg Lumber Co., Cooper v. (N. C.)	272	Griswold v. Western Union Tel. Co. (N. C.)	273
Fosburg Lumber Co., Powell v. (N. C.)	272	Gross v. Globe & Rutgers Fire Ins. Co. (Ga.)	138
Foster, Knight v. (N. C.)	614	Gudebrod, Triplett v. (Va.)	1045
Franklin v. Fields & Chance (Ga. App.)	366	Guerin v. Pittsburg, C. C. & St. L. R. Co. (W. Va.)	739
Franklin v. Ford (Ga. App.)	366		
Frederick, Wardlaw v. (Ga. App.)	523		
Fredlock, Donohoe v. (W. Va.)	736		
Freeman v. Egnor (W. Va.)	824		
Frierson, Brown v. (S. C.)	791		
F. T. Hardy & Co. v. Jones Bros. (Ga. App.)	246		

	Page		Page
Guptill v. Macon Stone Supply Co. (Ga.)	854	Hudgins v. State (Ga. App.)	367
Guthrie, Great Southern Accident & Fidelity Co. v. (Ga. App.)	162	Huffman v. Southern R. Co. (N. C.)	307
Guy v. Lanark Fuel Co. (W. Va.)	941	Huggins v. Atlantic Coast Line R. Co. (S. C.)	406
Haddon v. State (Ga. App.)	583	Huggins v. Price (S. C.)	798
Hale, Ludden & Bates Southern Music House v. (Ga. App.)	495	Humphrey v. Johnson (Ga. App.)	530
Hall v. Calhoun (Ga.)	533	Hunter v. Atlantic Coast Line R. Co. (N. C.)	610
Hall v. C. J. Roehr & Co. (Ga. App.)	379	Hunter v. State (Ga. App.)	752
Hall v. Edwards (Ga.)	852	Huntington Nat. Bank, Pomeroy Nat. Bank v. (W. Va.)	862
Hall, Mann v. (N. C.)	437	Hurry, Monroe v. (W. Va.)	830
Hall, Martin v. (Va.)	320	Hurt v. Barnes (Ga.)	775
Hall, Penton v. (Ga.)	465	Hurt's Adm'r, South Atlantic Life Ins. Co. v. (Va.)	401
Hall v. Studebaker Corp. of America (Ga. App.)	750	Hutchinson v. Columbus Power Co. (Ga.)	1125
Hammond & Sons, Harper v. (Ga. App.)	44	Hyer v. C. E. Holmes & Co. (Ga. App.)	58
Hancock v. Rogers (Ga.)	558	Hylton, Virginia Coal & Iron Co. v. (Va.)	337
Hanson v. State (Ga. App.)	176	Hyman, State v. (N. C.)	284
Hanvy v. Moore (Ga.)	772	Indiana & Ohio Live Stock Ins. Co. v. Bowman (W. Va.)	851
Hardee v. Tietjen (Ga.)	117	Isaacs v. Isaacs (Va.)	1072
Hardwick v. Dalton (Ga.)	553	Isley, State v. (N. C.)	1105
Hardwick & Co. v. Cash (Ga.)	532	Ivey v. Louisville & N. R. Co. (Ga. App.)	358
Hardy & Co. v. Jones Bros. (Ga. App.)	246	I. W. Bullock & Co., White Sewing Mach. Co. v. (N. C.)	1107
Harper v. V. Hammond & Sons (Ga. App.)	44	Jackson, Duane Chair Co. v. (Ga.)	771
Harrell, Mobley v. (Ga. App.)	372	Jackson v. State (Ga. App.)	377
Harrell v. Southern R. Co. (Ga. App.)	240	Jackson Garage, Elyea-Austell Co. v. (Ga. App.)	38
Harrington, Anderson v. (N. C.)	426	James v. Hill (Ga.)	782
Harrington v. Grimes (N. C.)	301	James, John Flannery Co. v. (Ga. App.)	912
Harris, Johnson v. (Ga. App.)	588	James' Sons Co. v. Crouch (W. Va.)	815
Harris v. Jones (Ga.)	841	James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co. (Ga.)	465
Harrison v. Lee (Ga. App.)	211	Jarman, Cavenaugh v. (N. C.)	673
Harrison v. Western Union Tel. Co. (N. C.)	281	Jarrard v. Hawes (Ga. App.)	873
Hartmyer v. Everly (W. Va.)	1093	J. B. Carr & Co. v. Southern R. Co. (Ga. App.)	41
Hartsfield, In re (Ga. App.)	225	Jeems v. Lewis (Ga. App.)	235
Hartz v. Hartz (Ga. App.)	230	Jefferson Fire Ins. Co. of Philadelphia v. Brackin (Ga.)	467
Harvey v. Rome Scale & Mfg. Co. (Ga. App.)	487	Jenkins v. State (Ga. App.)	861
Hatton v. W. D. Morton & Co. (Ga. App.)	371	Jennings v. State (Ga. App.)	756
Hawes, Jarrard v. (Ga. App.)	373	J. G. & G. W. Durden v. Aycock Bros. (Ga. App.)	213
Hawkins, Brown v. (Ga. App.)	76	J. K. Orr Shoe Co. v. Upshaw & Powledge (Ga. App.)	362
Hawkins, Simmons v. (Ga. App.)	179	John Flannery Co. v. James (Ga. App.)	912
Hay, J. T. McTeer Clothing Co. v. (N. C.)	955	John L. Roper Lumber Co., Weston v. (N. C.)	431
Hayes v. State (Ga. App.)	761	Johnson v. Georgia Fertilizer & Oil Co. (Ga. App.)	1131
Hayhurst, Carpenter v. (W. Va.)	819	Johnson v. Harris (Ga. App.)	588
Hebard Cypress Co., Holton v. (Ga. App.)	85	Johnson v. Humphrey (Ga. App.)	530
Heggie, Henry v. (N. C.)	982	Johnson, O'Hagan v. (N. C.)	450
Helmly v. Savannah Office Bldg. Co. (Ga. App.)	364	Johnson, Parker v. (N. C.)	430
Henderson, Louisville & N. R. Co. v. (Ga.)	556	Johnson v. Seaboard Air Line Ry. (Ga. App.)	91
Henry v. Heggie (N. C.)	982	Johnson v. Seaboard Air Line R. Co. (N. C.)	690
Henry v. Roberts (Ga.)	115	Johnson, Southern R. Co. v. (Ga. App.)	363
Herring v. First Nat. Bank (Ga. App.)	359	Johnson v. State (Ga. App.)	179
Herring v. Wallace Lumber Co. (N. C.)	876	Johnson v. State (Ga. App.)	524
Hester v. State (Ga. App.)	746	Johnson v. State (Ga. App.)	758
Heyward-Williams Co. v. McCall (Ga.)	133	Johnson, Wilson v. (W. Va.)	734
Hightower & Co., Cook v. (Ga. App.)	165	Jones v. Belle Isle (Ga. App.)	357
Hill, Barfield v. (N. C.)	677	Jones, Burney v. (Ga.)	340
Hill, James v. (Ga.)	782	Jones v. Carrollton (Ga. App.)	583
Hill, Sullivan v. (W. Va.)	670	Jones, Harris v. (Ga.)	841
Hill, Wright v. (Ga.)	546	Jones v. State (Ga.)	114
Hiller v. Bank of Columbia (S. C.)	899	Jones v. State (Ga. App.)	759
Hillis v. E. T. Comer & Co. (Ga. App.)	930	Jones v. Whiard (N. C.)	503
Hinchman, Turner v. (W. Va.)	18	Jones Bros., F. T. Hardy & Co. v. (Ga. App.)	246
Hindman v. Raper (Ga.)	945	Jones Bros. v. Watson (Ga. App.)	239
Hobbs v. Taylor (Ga. App.)	356	Jones & Co., Little Rock Furniture Co. v. (Ga. App.)	375
Hodges, Marion County Lumber Co. v. (S. C.)	1096	Joseph Dry Goods Co. v. Home Pattern Co. (Ga. App.)	356
Hodges v. Stuart Lumber Co. (Ga.)	462	J. T. McTeer Clothing Co. v. Hay (N. C.)	955
Hollinshead v. State (Ga. App.)	771	Justice v. Chattooga Oil Mill Co. (Ga. App.)	223
Hollis v. State (Ga. App.)	85	Justus, Dennis v. (Va.)	1077
Holloman, McKeel v. (N. C.)	445		
Holmes v. Carr (N. C.)	413		
Holmes & Co., Hyer v. (Ga. App.)	58		
Holt v. Wellons (N. C.)	450		
Holt v. Ziglar (N. C.)	805		
Holton v. Hebard Cypress Co. (Ga. App.)	85		
Home Pattern Co., Joseph Dry Goods Co. v. (Ga. App.)	356		
Honaker v. Shrader (Va.)	391		
Hoover v. Thames (S. C.)	795		
Horne, Brothers v. (Ga.)	468		
Hotsiniller v. Hotsiniller (W. Va.)	936		
House v. Universal Crusher Corp. (Va.)	1049		
Houston v. Strachan & Co. (Ga. App.)	495		
Howard v. Savannah Electric Co. (Ga.)	112		

	Page		Page
Justus, W. M. Ritter Lumber Co. v. (Va.)	1077	McCall, Heyward-Williams Co. v. (Ga.)	133
J. W. Scarborough & Co. v. Yarborough		McCauley v. Grim (Va.)	1041
(Ga. App.)	1131	McClanahan, Bernard v. (Va.)	1059
Keaton v. Birmingham Fertilizer Co. (Ga.		McClendon v. Temple Cotton Oil Co. (Ga.	361
App.)	754	App.)	1128
Kegley, Grief v. (Va.)	1062	McConnell v. Gregory (Ga.)	
Kelly, McEwen v. (Ga.)	777	McConnell v. New York Cent. & H. R. R.	
Kelly v. Whitley (Ga.)	472	Co. (N. C.)	974
Kelly & Vicars, Stonegap Colliery Co. v.		McCullers v. Cheatham (N. C.)	306
(Va.)	341	McCullin, Simmons v. (N. C.)	625
Kelsey, Salem Loan & Trust Co. v. (Va.)	329	McDonald v. McDonald Planing Mill Co.	
Kemp, Louisville & N. R. Co. v. (Ga.)	558	(W. Va.)	1081
Kenion, Allison v. (N. C.)	1110	McDonald Planing Mill Co., McDonald v.	
Kennedy, Atkinson v. (Ga. App.)	84	(W. Va.)	1081
Kerr Glass Mfg. Co. v. Americus Grocery		McDuffie v. Lummus Cotton Gin Co. (Ga.	
Co. (Ga. App.)	381	App.)	493
Kidd, Bowman v. (Ga. App.)	167	McEachern, Elgin City Banking Co. v.	
Kincaid v. State (Ga. App.)	770	(N. C.)	680
King-Hodgson Co., Stone v. (Ga.)	122	McEwen v. Kelly (Ga.)	777
Kiser v. Colonial Coal & Coke Co. (Va.)	348	McGregor v. Pilcher (Ga.)	35
Kiser & Co., Elrod v. (Ga. App.)	375	McGuire v. Old Sweet Springs Co. (W. Va.)	350
Kistler v. Southern R. Co. (N. C.)	676	McIver v. Seaboard Air Line Ry. (N. C.)	1107
Knight, Brinkley v. (N. C.)	260	McKeel v. Holloman (N. C.)	445
Knight v. Foster (N. C.)	614	McKey, Central of Georgia R. Co. v. (Ga.	
Knox v. Toccoa Furniture Co. (Ga.)	114	App.)	378
Lackens, Savannah Electric Co. v. (Ga.		McKinney v. Battle Bros. (Ga. App.)	92
App.)	53	Mackie-Crawford Const. Co. v. Ward (Ga.)	456
Lamm v. Lamm (N. C.)	290	McLain v. Allen (S. C.)	1
Lamon v. Gold (W. Va.)	728	McLain v. West Virginia Automobile Co.	
Lanark Fuel Co., Guy v. (W. Va.)	941	(W. Va.)	731
Lance, Grantham v. (Ga. App.)	481	McLaughlin, Thomson v. (Ga. App.)	182
Lang v. Montgomery (Ga.)	840	McMaster, State v. (S. C.)	405
Lansdell, Rome Ry. & Light Co. v. (Ga.		McNair v. Boyd (N. C.)	966
App.)	1131	McNally, Union Building & Loan Ass'n	
Lassiter v. Norfolk Southern R. Co. (N.		v. (S. C.)	796
C.)	264	McTeer Clothing Co. v. Hay (N. C.)	955
Latham v. Field (N. C.)	865	Macon, D. & S. R. Co. v. Anchors (Ga.)	153
Leary v. State (Ga. App.)	584	App.)	243
Leathers v. Raburn (Ga. App.)	946	Macon Stone Supply Co., Guptill v. (Ga.)	854
Lee, Harrison v. (Ga. App.)	211	Mallory, Richardson v. (Ga. App.)	362
Leftwich v. Early (Va.)	384	Mann v. Hall (N. C.)	437
Leonard, City of Macon v. (Ga. App.)	241	Manning, Cox v. (Ga. App.)	484
Lewis v. Drake (Ga. App.)	167	Manning v. State (Ga. App.)	905
Lewis, Jeems v. (Ga. App.)	235	Marion County Lumber Co. v. Hodges (S.	
Lewis v. Norfolk Southern R. Co. (N. C.)	283	C.)	1096
Lewis v. Yates (W. Va.)	831	Marlott, Cannon-Torrence Co. v. (N. C.)	1109
Light v. E. M. Grant & Co. (W. Va.)	1011	Marsteller v. Warden (Va.)	332
Lindsey, Seaboard Air Line R. Co. v. (Ga.		Martin v. Clegg (N. C.)	1105
App.)	361	Martin v. Cox (Ga. App.)	39
Little Rock Furniture Co. v. Jones & Co.		Martin, Craven v. (Ga.)	568
(Ga. App.)	375	Martin v. Hall (Va.)	320
Locklear v. Paul (N. C.)	617	Martin, Louisville & N. R. Co. v. (Ga.)	114
Locklear, West v. (Ga.)	855	Masonic & Eastern Star Home, Orinoco	
Lofton, Southern R. Co. v. (Ga. App.)	37	Supply Co. v. (N. C.)	964
Lotz v. Walker (Ga. App.)	169	Massachusetts Mut. Life Ins. Co., Barker	
Louisiana Red Cypress Co. v. George Gil-		v. (N. C.)	424
more & Co. (Ga. App.)	379	Massee, Ex parte (S. C.)	97
Louisville & N. R. Co. v. Butler (Ga.)	776	Massee, State v. (S. C.)	97
Louisville & N. R. Co., Gipson v. (Ga.		Masterson, Moughon v. (Ga.)	561
App.)	488	Mathers, Cable Co. v. (W. Va.)	1079
Louisville & N. R. Co. v. Henderson (Ga.)	556	Matthews & Son v. Richards (Ga. App.)	227
Louisville & N. R. Co., Ivey v. (Ga. App.)	358	May v. Sherrard's Legatees (Va.)	1026
Louisville & N. R. Co. v. Kemp (Ga.)	558	Mayo, Rawls v. (N. C.)	298
Louisville & N. R. Co. v. Martin (Ga.)	114	Mayor, etc., of Gainesville, Spencer v. (Ga.)	543
Lovett v. West Virginia Cent. Gas Co. (W.		M. C. Kiser & Co., Elrod v. (Ga. App.)	375
Va.)	1007	Meeks v. State (Ga. App.)	744
Loving & Co., Parker v. (Ga. App.)	77	M. H. White & Co. v. Winslow & White	
Lowery, Ballard v. (N. C.)	966	(N. C.)	261
Lowman, Alphin v. (Va.)	1029	Miller v. Atlantic Coast Line R. Co. (S. C.)	645
Lowry Nat. Bank, Glass v. (Ga. App.)	366	Miller v. State (Ga. App.)	232
Lowry Nat. Bank, Strickland v. (Ga.)	539	Milligan v. Alexander (W. Va.)	685
Lucas, State v. (N. C.)	674	Mills, Benton-Shingler Co. v. (Ga. App.)	755
Luck Const. Co. v. Russell County (Va.)	393	Mills v. Norfolk & W. R. Co. (W. Va.)	1090
Ludden & Bates Southern Music House v.		Mimbs v. Battle (Ga. App.)	922
Hale (Ga. App.)	495	Minneola Mfg. Co., Breeden v. (N. C.)	960
Lummus Cotton Gin Co., McDuffie v. (Ga.		Mobley v. Citizens' Bank of Valdosta (Ga.	
App.)	493	App.)	77
Lumpkin v. Rome (Ga. App.)	158	Mobley v. Harrell (Ga. App.)	372
Lynch v. O'Brien (Va.)	389	Mobley v. State (Ga. App.)	906
Lynn v. State (Ga.)	29	Modlin v. Smith (Ga. App.)	82
Lyon v. Cedartown Lumber Co. (Ga. App.)	236	Monds v. Dunn (N. C.)	303
McArthur v. Wilson (Ga. App.)	374	Monk v. National Bank of Tifton (Ga.	
McAulay v. McAulay (S. C.)	785	App.)	484
		Monroe v. Hurry (W. Va.)	830
		Montgomery, Lang v. (Ga.)	840

	Page		Page
Moore v. Carolma Power & Light Co. (N. C.)	596	Parker v. G. O. Loving & Co. (Ga. App.)	77
Moore, Hanvy v. (Ga.)	772	Parker v. Johnson (N. C.)	430
Moore v. Rosser (Ga. App.)	246	Parker & Glover, Blackstad Mercantile Co. v. (N. C.)	606
Moore v. Smith (Ga.)	1116	Parks, Swarthmore Lumber Co. v. (W. Va.)	723
Morel, Blackburn v. (Ga. App.)	492	Parish v. Yorkville (S. C.)	635
Morel, Donaldson v. (Ga. App.)	492	Pate v. Blades (N. C.)	608
Morgan, Allison v. (Ga. App.)	363	Patterson, State v. (S. C.)	522
Morgan v. Commonwealth (Va.)	388	Patterson, Alexander v. (Ga. App.)	482
Morgan v. State (Ga. App.)	247	Patterson, State v. (S. C.)	309
Morrison, Chattanooga & C. I. R. Co. v. (Ga.)	908	Paul, Locklear v. (N. C.)	617
Morrison, Connally v. (Ga.)	119	Payne v. Power (Ga.)	771
Morrison & Harvey, Pine Belt Lumber Co. v. (Ga. App.)	363	Payton v. Wheeler (Ga. App.)	81
Morrow v. State (Ga. App.)	63	Peavy v. Sangster (Ga. App.)	215
Morrow Transfer & Storage Co., Benjamin-Ozburn Co. v. (Ga. App.)	753	Peeples v. Wilson (Ga.)	466
Morton, Ocilla Southern R. Co. v. (Ga. App.)	480	Peeples & Tygart v. Citizens' Nat. Life Ins. Co. (Ga. App.)	1130
Morton & Co. v. Hatton (Ga. App.)	371	Peirce, Dell School v. (N. C.)	687
Mott v. Atlantic Coast Line R. Co. (N. C.)	867	Pender v. North State Life Ins. Co. (N. C.)	293
Moughon v. Masterson (Ga.)	561	Pendergrass v. Duke (Ga.)	129
Moultrie Compress Co. v. Byrom Cotton Co. (Ga. App.)	589	Pendergrast v. Durham Traction Co. (N. C.)	984
Mulkey, Columbian Nat. Life Ins. Co. v. (Ga. App.)	482	Penton v. Hall (Ga.)	465
Mullaly v. Smyth (S. C.)	634	Perkins v. State (Ga.)	1124
Mullins v. Commonwealth (Va.)	324	Peterson v. State (Ga. App.)	927
Murphy v. State (Ga. App.)	228	Phillips, City of Americus v. (Ga. App.)	36
Murray County v. Wilson (Ga.)	783	Phillips v. Jefferson (Ga. App.)	222
Mutual Aid Banking Co., Arey Distilling Co. v. (N. C.)	287	Phillips & Crew Co. v. Drake (Ga. App.)	952
Mutual Fire Ins. Co. v. Turner (Va.)	1067	Pierce, In re (N. C.)	507
Myrick v. State (Ga. App.)	580	Pierce v. Stallings (N. C.)	302
Myrick v. State (Ga. App.)	756	Pilcher, McGregor v. (Ga.)	35
Nash, State v. (W. Va.)	829	Pine Belt Lumber Co. v. Morrison & Harvey (Ga. App.)	363
National Bank of Tifton, Monk v. (Ga. App.)	484	Pittman v. State (Ga. App.)	915
Neal v. Neal (Ga.)	849	Pittman, Wright v. (W. Va.)	1091
Nesbit v. Webb (Va.)	330	Pittsburg, O. C. & St. L. R. Co., Bashar v. (W. Va.)	1009
Newby & White v. Board of Drainage Com'rs of Bear Swamp Drainage Dist. (N. C.)	266	Pittsburg, C. C. & St. L. R. Co., Guerin v. (W. Va.)	739
Newton v. Cooper (Ga. App.)	356	Planters' Oil Mill v. Carter (Ga.)	1120
Newton, Georgia & F. Ry. v. (Ga.)	142	Pomeroy Nat. Bank v. Huntington Nat. Bank (W. Va.)	662
New York Cent. & H. R. R. Co., McConnell v. (N. C.)	974	Pope, Avery & Co. v. (Ga. App.)	946
Nickell, Clark v. (W. Va.)	1020	Pope, Greer v. (Ga.)	846
Nobles v. State (Ga. App.)	861	Pope v. State (Ga. App.)	909
Noll v. Dailey (W. Va.)	668	Potts v. Atlanta (Ga.)	110
Norfolk Southern R. Co., Bell v. (N. C.)	421	Powell v. Fosburg Lumber Co. (N. C.)	272
Norfolk Southern R. Co., Ferebee v. (N. C.)	685	Powell v. Strickland (N. C.)	872
Norfolk Southern R. Co., Lassiter v. (N. C.)	264	Power, Payne v. (Ga.)	771
Norfolk Southern R. Co., Lewis v. (N. C.)	283	Powhatan Lime Co. v. Affleck's Adm'r (Va.)	1054
Norfolk & W. R. Co., Mills v. (W. Va.)	1090	Price, Huggins v. (S. C.)	798
Norman, Georgia & F. R. Co. v. (Ga. App.)	86	Providence-Washington Ins. Co. v. Spence (Ga. App.)	77
North Carolina Public Service Co., Barnes v. (N. C.)	881	Pruner's Adm'r, Gent's Ex'x v. (Va.)	1044
North Carolina R. Co., Shepherd v. (N. C.)	968	Quinlan v. State (Ga. App.)	768
North State Life Ins. Co., Pender v. (N. C.)	293	Raburn, Leathers v. (Ga. App.)	946
North State Life Ins. Co., Whitford v. (N. C.)	501	Raeferd Lumber Co. v. Rockfish Trading Co. (N. C.)	627
North State Mut. Life Ins. Co., Gardner v. (N. C.)	806	Raines v. State (Ga. App.)	860
O'Brien, Lynch v. (Va.)	389	Ramsey, Dickenson v. (Va.)	1025
Ocilla Southern R. Co. v. Morton (Ga. App.)	480	Raper, Hindman v. (Ga.)	945
Odum v. State (Ga. App.)	858	Rawls v. Mayo (N. C.)	298
O'Hagan v. Johnson (N. C.)	450	Reed, State v. (W. Va.)	939
Ohio Fuel Oil Co. v. Burdett (W. Va.)	667	Reidsville & S. E. R. Co. v. Baxter (Ga. App.)	187
Old Sweet Springs Co., McGuire v. (W. Va.)	350	Reliford v. State (Ga.)	1128
Oliver, Chitty v. (Ga. App.)	496	Renfroe v. State (Ga. App.)	758
Orinoco Supply Co. v. Masonic & Eastern Star Home (N. C.)	964	Reserve Gas Co. v. Carbon Black Mfg. Co. (W. Va.)	1002
Orrell, Gobble v. (N. C.)	957	Reynolds, Scott v. (N. C.)	960
Orr Shoe Co. v. Upshaw & Powledge (Ga. App.)	362	Reynolds Banking Co. v. Southern Pacific Guano Co. (Ga.)	132
Outlaw v. Gray (N. C.)	676	Reynolds Home Mixture Guano Co., Dean v. (Ga. App.)	86
Owens v. Bridges (Ga. App.)	225	Richards, E. Matthews & Son v. (Ga. App.)	227
Page, Durham v. (Ga. App.)	361	Richardson v. Mallory (Ga. App.)	362
Parker v. Sprunt (N. C.)	619	Richter v. Cathy (Ga. App.)	179
Parker v. Fairmont (W. Va.)	660	Ricks v. Ricks (Ga.)	775
		Rigby, Bland v. (W. Va.)	1013
		Rigby v. Gaymon (S. C.)	518
		Riley, Slaven v. (W. Va.)	1024
		Riley, W. J. Downing Lumber Co. v. (N. C.)	605
		Ritter Lumber Co. v. Coal Mountain Min. Co. (Va.)	322

	Page		Page
Ritter Lumber Co. v. Justus (Va.).....	1077	Shoop Family Medicine Co. v. Davenport	
Roberts, Henry v. (Ga.).....	115	(N. C.).....	602
Robertson, General Board of State Hos-		Shrader, Honaker v. (Va.).....	391
pitals for Insane v. (Va.).....	1064	Shrader, Wilson v. (W. Va.).....	1083
Robeson Cutlery Co., Rogers-McRorie Co.		Sibley v. Davison (Ga.).....	855
v. (Ga. App.).....	374	Silver v. State (Ga. App.).....	919
Robinson v. Furr (Ga.).....	455	Silverthorne v. Barnwell Lumber Co.	
Robinson v. Security Life & Annuity Co.		(S. C.).....	519
(N. C.).....	681	Silvey, Biggs v. (Ga.).....	857
Rochelle Gin & Cotton Co. v. Fisher (Ga.		Simmons v. Hawkins (Ga. App.).....	179
App.).....	584	Simmons v. McCullin (N. C.).....	625
Rockfish Trading Co., Raeford Lumber Co.		Simpson v. Cox (S. C.).....	102
v. (N. C.).....	627	Sims v. State (Ga. App.).....	1133
Rodman, Bonner v. (N. C.).....	271	Singletary, Cowart v. (Ga.).....	196
Roehr & Co., Hall v. (Ga. App.).....	379	Skinner v. State (Ga. App.).....	181
Rogers, Hancock v. (Ga.).....	558	Slaven v. Riley (W. Va.).....	1024
Rogers, Wilcox, Ives & Co. v. (Ga. App.)...	219	Small, Basnight v. (N. C.).....	269
Rogers-McRorie Co. v. Robeson Cutlery		Small v. State (Ga. App.).....	1134
Co. (Ga. App.).....	374	Smith v. Atlantic Coast Line R. Co. (N. C.)	433
Rome Ry. & Light Co. v. Lansdell (Ga.		Smith, Blake v. (N. C.).....	596
App.).....	1131	Smith, Carroll v. (N. C.).....	497
Rome Scale & Mfg. Co., Harvey v. (Ga.		Smith, City of Bainbridge v. (Ga. App.)...	1130
App.).....	487	Smith v. Cumberland County Agr. Soc. (N.	
Roper Lumber Co., Weston v. (N. C.).....	431	C.).....	632
Ross v. Ross (Va.).....	343	Smith v. Dare County Com'rs (N. C.).....	1113
Ross v. State (Ga. App.).....	746	Smith v. D. Rothschild & Co. (Ga. App.)..	88
Rosser, Moore v. (Ga. App.).....	246	Smith, Ellard v. (Ga.).....	459
Rothschild & Co., Smith v. (Ga. App.)....	88	Smith, Modlin v. (Ga. App.).....	82
Rowe v. Spencer (Ga.).....	144	Smith, Moore v. (Ga.).....	1116
Rowland Lumber Co., Dameron v. (N. C.)...	607	Smith v. Southern R. Co. (S. C.).....	1099
Royal Exch. Assur. of London v. Bennetts-		Smith v. State (Ga.).....	1127
ville & C. R. Co. (S. C.).....	104	Smith v. State (Ga. App.).....	51
Royal Fraternal Ass'n, Blount v. (N. C.)...	299	Smith v. State (Ga. App.).....	764
Ruffin, State v. (N. C.).....	417	Smith, State v. (N. C.).....	979
Russell v. State (Ga. App.).....	495	Smith v. Tatum (Ga.).....	775
Russell County, Luck Const. Co. v. (Va.)	393	Smith's Will, In re (N. C.).....	977
		Smyth, Mullaly v. (S. C.).....	634
Saffold v. State (Ga. App.).....	223	Snell v. State (Ga. App.).....	71
Salem Loan & Trust Co. v. Kelsey (Va.)...	329	South Atlantic Life Ins. Co. v. Hurt's	
Salter v. Bettison (Ga. App.).....	358	Adm'r (Va.).....	401
Sanders v. State (Ga. App.).....	745	South Georgia R. Co. v. Atkins (Ga. App.)	226
Sangster, Peavy v. (Ga. App.).....	215	Southern Bell Telephone & Telegraph Co.	
Savannah Electric Co., Howard v. (Ga.)...	112	v. Glawson (Ga.).....	136
Savannah Electric Co. v. Lackens (Ga.		Southern Bell Telephone & Telegraph Co.	
App.).....	53	v. Glawson (Ga. App.).....	488
Savannah Ice Co. v. Canal-Louisiana Bank		Southern Exp. Co., Sedbury v. (N. C.)....	286
& Trust Co. (Ga. App.).....	45	Southern Fixture & Cabinet Co., Watters	
Savannah Office Bldg. Co. v. Helmlly (Ga.		v. (Ga. App.).....	360
App.).....	364	Southern Granite Co., Farmers' Bank &	
Savannah Trust Co., Edwards v. (Ga. App.)	35	Trust Co. v. (S. C.).....	985
Savannah & S. R. Co., Edwards v. (Ga.)...	841	Southern Pacific Guano Co., Reynolds	
Scarboro, Wilson v. (N. C.).....	811	Banking Co. v. (Ga.).....	132
Scarborough & Co. v. Yarborough (Ga.		Southern Power Co., Appeal of (N. C.)...	1109
App.).....	1131	Southern Power Co. v. Cassels (S. C.)....	453
Scott v. Reynolds (N. C.).....	960	Southern Ry.-Carolina Division, Bennett	
Seaboard Air Line R. Co., Cooper v. (N. C.)	418	v. (S. C.).....	710
Seaboard Air Line R. Co. v. Dixon (Ga.)...	1118	Southern R. Co., Aldrich v. (S. C.).....	316
Seaboard Air Line R. Co., Dooley v. (N.		Southern R. Co., Brown v. (Ga.).....	152
C.).....	970	Southern R. Co., Deaver-Jeter Co. v. (S. C.)	709
Seaboard Air Line Ry., Johnson v. (Ga.		Southern R. Co., Eberle v. (S. C.).....	793
App.).....	91	Southern R. Co. v. Garland (Ga.).....	455
Seaboard Air Line R. Co., Johnson v. (N.		Southern R. Co., Harrell v. (Ga. App.)...	240
C.).....	690	Southern R. Co., Huffman v. (N. C.).....	307
Seaboard Air Line R. Co. v. Lindsey (Ga.		Southern R. Co., J. B. Carr & Co. v. (Ga.	
App.).....	361	App.).....	41
Seaboard Air Line Ry., McIver v. (N. C.)...	1107	Southern R. Co. v. Johnson (Ga. App.)....	363
Seaboard Air Line Ry., Watkins v. (N. C.)	273	Southern R. Co., Kistler v. (N. C.).....	676
Seaboard Air Line Ry., Williams v. (N. C.)	601	Southern R. Co. v. Lofton (Ga. App.).....	37
Seaboard Air Line Ry., Wynne v. (S. C.)	521	Southern R. Co., Smith v. (S. C.).....	1099
Security Life & Annuity Co., Robinson v.		Southern R. Co., Williams v. (Ga.).....	850
(N. C.).....	681	Spear, State v. (N. C.).....	869
Sedbury v. Southern Exp. Co. (N. C.).....	286	Spears, State v. (S. C.).....	315
Sedlmeyr v. Fitzgerald (Ga.).....	469	Spellman Seminary, Adair v. (Ga. App.)...	589
Sellers, Wolverine Soap Co. v. (Ga. App.)	246	Spence, Providence-Washington Ins. Co. v.	
Selvey v. Grafton Coal & Coke Co. (W.		(Ga. App.).....	77
Va.).....	656	Spencer v. Mayor, etc., of Gainesville (Ga.)	543
Selvey's Ex'rs v. Armstrong's Adm'r (W.		Spencer, Rowe v. (Ga.).....	144
Va.).....	1019	Spencer v. Spencer (N. C.).....	291
Setze v. First Nat. Bank (Ga.).....	540	Spicer v. State (Ga. App.).....	747
Shackelford, Arnold Grocery Co. v. (Ga.)	470	Spragg, Davis v. (W. Va.).....	652
Shelton, State v. (N. C.).....	583	Sprattling v. Westbrook (Ga.).....	536
Shelton v. White (N. C.).....	427	Spruill v. Bank of Plymouth (N. C.)..	262
Shepherd v. North Carolina R. Co. (N. C.)	968	Sprunt, Page v. (N. C.).....	619
Sherrard's Legatees, May v. (Va.).....	1026	Stallings, Pierce v. (N. C.).....	302
Shirley v. State (Ga. App.).....	752	Stanley v. Stembridge (Ga.).....	842

	Page		Page
Stansberry, Bradshaw v. (N. C.).....	802	State, Peterson v. (Ga. App.).....	927
Stark v. Chambers (Ga.).....	535	State, Pittman v. (Ga. App.).....	915
Starke v. Storm's Ex'r (Va.).....	1057	State, Pope v. (Ga. App.).....	909
State, Allen v. (Ga.).....	29	State, Quinlan v. (Ga. App.).....	768
State, Allen v. (Ga. App.).....	769	State, Raines v. (Ga. App.).....	860
State v. Atlantic & N. C. R. Co. (N. C.).....	447	State v. Reed (W. Va.).....	939
State v. Baltimore & O. R. Co. (W. Va.).....	834	State, Reliford v. (Ga.).....	1128
State, Barlow v. (Ga. App.).....	93	State, Renfroe v. (Ga. App.).....	758
State, Bearden v. (Ga. App.).....	79	State, Ross v. (Ga. App.).....	746
State, Beddingfield v. (Ga. App.).....	581	State v. Ruffin (N. C.).....	417
State, Black v. (Ga. App.).....	173	State, Russell v. (Ga. App.).....	495
State v. Blease (S. C.).....	247	State, Saffold v. (Ga. App.).....	223
State, Britt v. (Ga. App.).....	859	State, Sanders v. (Ga. App.).....	745
State, Brown v. (Ga. App.).....	177	State v. Shelton (N. C.).....	883
State, Brown v. (Ga. App.).....	231	State, Shirley v. (Ga. App.).....	752
State, Brown v. (Ga. App.).....	1133	State, Silver v. (Ga. App.).....	919
State, Bugg v. (Ga. App.).....	748	State, Sims v. (Ga. App.).....	1133
State, Butts v. (Ga. App.).....	87	State, Skinner v. (Ga. App.).....	181
State, Cameron v. (Ga. App.).....	745	State, Small v. (Ga. App.).....	1134
State, Carswell v. (Ga. App.).....	589	State, Smith v. (Ga.).....	1127
State v. Cobb (N. C.).....	419	State, Smith v. (Ga. App.).....	51
State, Collier v. (Ga. App.).....	1130	State, Smith v. (Ga. App.).....	764
State, Cook v. (Ga. App.).....	87	State v. Smith (N. C.).....	979
State, Cooper v. (Ga. App.).....	764	State, Snell v. (Ga. App.).....	71
State, Cooper v. (Ga. App.).....	908	State v. Spear (N. C.).....	869
State, Cosper v. (Ga. App.).....	94	State v. Spears (S. C.).....	315
State, Cox v. (Ga. App.).....	909	State, Spicer v. (Ga. App.).....	747
State, Cronin v. (Ga. App.).....	747	State, Stewart v. (Ga. App.).....	225
State, Curry v. (Ga. App.).....	771	State, Stewart v. (Ga. App.).....	228
State v. Daniels (N. C.).....	953	State v. Stone (S. C.).....	108
State, Dawson v. (Ga. App.).....	745	State, Taylor v. (Ga. App.).....	862
State, Douglas v. (Ga. App.).....	1184	State, Taylor v. (Ga. App.).....	924
State, Duke v. (Ga. App.).....	861	State, Tedder v. (Ga. App.).....	580
State, Dunn v. (Ga. App.).....	170	State, Timmons v. (Ga. App.).....	216
State, Dunn v. (Ga. App.).....	764	State, Trueheart v. (Ga. App.).....	755
State v. Edwards (W. Va.).....	1005	State v. Vaughn (S. C.).....	312
State, Evans v. (Ga. App.).....	916	State, Vernon v. (Ga. App.).....	85
State v. Everett (N. C.).....	274	State v. Wade (S. C.).....	106
State, Faison v. (Ga. App.).....	39	State, Walker v., two cases (Ga. App.).....	771
State, Flannigan v. (Ga. App.).....	745	State v. Watkins (N. C.).....	619
State v. Fogleman (N. C.).....	879	State, Weatherington v. (Ga. App.).....	240
State, Fortson v. (Ga. App.).....	746	State, Webb v. (Ga.).....	1126
State, Gadlin v. (Ga. App.).....	751	State v. White (N. C.).....	297
State, Gibson v. (Ga. App.).....	854	State v. Wilkerson (N. C.).....	888
State, Gray v., two cases (Ga. App.).....	223	State, Williams v. (Ga. App.).....	207
State, Greer v. (Ga. App.).....	746	State, Williams v. (Ga. App.).....	763
State, Haddon v. (Ga. App.).....	583	State, Williams v. (Ga. App.).....	767
State, Hanson v. (Ga. App.).....	176	State, Wilson v. (Ga. App.).....	767
State, Hayes v. (Ga. App.).....	761	State, Wimberly v. (Ga. App.).....	767
State, Hester v. (Ga. App.).....	746	State, Wimbish v. (Ga. App.).....	744
State, Hollinshead v. (Ga. App.).....	771	State, Wyatt v. (Ga. App.).....	748
State, Hollis v. (Ga. App.).....	85	State Board of Health, Thomas v. (W. Va.).....	725
State, Hudgins v. (Ga. App.).....	367	Steadman, Stevens v. (Ga.).....	564
State, Hunter v. (Ga. App.).....	752	Steele's Adm'r v. Colonial Coal & Coke Co. (Va.).....	346
State v. Hyman (N. C.).....	284	Stembridge, Stanley v. (Ga.).....	842
State v. Isley (N. C.).....	1105	Stevens v. Steadman (Ga.).....	564
State, Jackson v. (Ga. App.).....	377	Stevens, Tennessee Valley Fertilizer Co. v. (Ga.).....	840
State, Jenkins v. (Ga. App.).....	861	Stewart v. State (Ga. App.).....	225
State, Jennings v. (Ga. App.).....	756	Stewart v. State (Ga. App.).....	228
State, Johnson v. (Ga. App.).....	179	Stewart & Jones, Craig & Wilson v. (N. C.).....	1100
State, Johnson v. (Ga. App.).....	524	Stone v. King-Hodgson Co. (Ga.).....	122
State, Johnson v. (Ga. App.).....	758	Stone, State v. (S. C.).....	108
State, Jones v. (Ga.).....	114	Stonegap Colliery Co. v. Kelly & Vicars (Va.).....	341
State, Jones v. (Ga. App.).....	759	Storm's Ex'r, Starke v. (Va.).....	1057
State Kincaid v. (Ga. App.).....	770	Strachan & Co., Houston v. (Ga. App.).....	495
State, Leary v. (Ga. App.).....	584	Strickland, Cable Piano Co. v. (N. C.).....	506
State v. Lucas (N. C.).....	674	Strickland v. Lowry Nat. Bank (Ga.).....	539
State, Lynn v. (Ga.).....	29	Strickland, Powell v. (N. C.).....	872
State v. McMaster (S. C.).....	405	Strickland v. Strickland (S. C.).....	520
State, Manning v. (Ga. App.).....	905	Stricklin, Brotherton v. (Ga.).....	459
State v. Massee (S. C.).....	97	Stuart Lumber Co., Hodges v. (Ga.).....	462
State, Meeks v. (Ga. App.).....	744	Studebaker Corp. of America, Hall v. (Ga. App.).....	750
State, Miller v. (Ga. App.).....	232	Sullivan v. Hill (W. Va.).....	670
State, Mobley v. (Ga. App.).....	906	Supreme Ruling of Fraternal Mystic Circle v. Blackshear (Ga. App.).....	210
State, Morgan v. (Ga. App.).....	247	Swann v. Arlington Oil & Guano Co. (Ga. App.).....	476
State, Morrow v. (Ga. App.).....	63	Swanson, Western & A. R. Co. v. (Ga. App.).....	77
State, Murphy v. (Ga. App.).....	228	Swarthmore Lumber Co. v. Parks (W. Va.).....	723
State, Myrick v. (Ga. App.).....	580		
State, Myrick v. (Ga. App.).....	756		
State v. Nash (W. Va.).....	829		
State, Nobles v. (Ga. App.).....	861		
State, Odum v. (Ga. App.).....	858		
State v. Patterson (S. C.).....	522		
State v. Patterson (S. C.).....	309		
State, Perkins v. (Ga.).....	1124		

	Page		Page
Swiger, Carnegie Natural Gas Co. v. (W. Va.).....	3	Wallace v. Atlanta (Ga.).....	554
Swygert Bros. v. Bank of Haralson (Ga. App.).....	759	Wallace Lumber Co., Herring v. (N. C.).....	876
Syracuse Ins. Co. v. Bennettsville & C. R. Co. (S. C.).....	104	Ward, Mackle-Crawford Const. Co. v. (Ga.).....	456
Tatterson v. Fidelity & Deposit Co. of Maryland (Va.).....	334	Warden, Marsteller v. (Va.).....	332
Tattnall Bank, Butler v. (Ga.).....	456	Wardlaw v. Frederick (Ga. App.).....	523
Tatum, Smith v. (Ga.).....	775	Warrick v. Taylor (N. C.).....	286
Taylor v. Buffalo Collieries Co. (W. Va.).....	27	Waters, Durrence v. (Ga.).....	841
Taylor, Hobbs v. (Ga. App.).....	356	Watkins v. Seaboard Air Line Ry. (N. C.).....	273
Taylor v. State (Ga. App.).....	862	Watkins, State v. (N. C.).....	619
Taylor v. State (Ga. App.).....	924	Watson v. American Nat. Bank (Ga. App.).....	586
Taylor, Warrick v. (N. C.).....	286	Watson, Jones Bros. v. (Ga. App.).....	239
Tedder v. State (Ga. App.).....	580	Watters v. Southern Fixture & Cabinet Co. (Ga. App.).....	360
Temple Cotton-Oil Co., McLendon v. (Ga. App.).....	361	W. D. Morton & Co. v. Hatton (Ga. App.).....	371
Tennessee Valley Fertilizer Co. v. Stevens (Ga.).....	840	Weatherington v. State (Ga. App.).....	240
Teter, Woods v. (W. Va.).....	658	Weaver, Armistead v. (Ga.).....	783
Thames, Hoover v. (S. C.).....	795	Webb, Nesbit v. (Va.).....	330
Third Nat. Bank v. Exum (N. C.).....	498	Webb v. State (Ga.).....	1126
Thomas v. Georgia Granite Co. (Ga.).....	130	Wellons, Holt v. (N. C.).....	450
Thomas v. State Board of Health (W. Va.).....	725	West v. Locklear (Ga.).....	855
Thomas, Thompson v. (N. C.).....	898	Westbrook, Spratling v. (Ga.).....	536
Thomasville Live Stock Co. v. Atlantic Coast Line R. Co. (Ga. App.).....	162	Western Union Tel. Co. v. Calhoun (Ga. App.).....	370
Thompson, Charleston & W. C. R. Co. v., two cases (Ga. App.).....	242	Western Union Tel. Co. v. Calhoun (Ga. App.).....	371
Thompson v. Thomas (N. C.).....	896	Western Union Tel. Co., Ellison v. (N. C.).....	277
Thomson v. McLaughlin (Ga. App.).....	182	Western Union Tel. Co. v. Fitts (Ga. App.).....	156
Thorpe v. Savannah (Ga. App.).....	949	Western Union Tel. Co., Gossett v. (S. C.).....	309
Thrasher, Farmers' Ginney & Mfg. Co. v. (Ga.).....	474	Western Union Tel. Co. Griswold v. (N. C.).....	273
Tietjen, Hardee v. (Ga.).....	117	Western Union Tel. Co., Harrison v. (N. C.).....	281
Timmons v. State (Ga. App.).....	218	Western & A. R. Co. v. Swanson (Ga. App.).....	77
Tinsley, Brooks v. (Ga. App.).....	160	Weston v. John L. Roper Lumber Co. (N. C.).....	431
Toccoa Furniture Co., Knox v. (Ga.).....	114	West Virginia Automobile Co., McLain v. (W. Va.).....	731
Town of Calhoun, Hall v. (Ga.).....	533	West Virginia Cent. Gas Co., Lovett v. (W. Va.).....	1007
Town of Dunn, Monds v. (N. C.).....	303	W. H. Cooper & Sons v. Bell (Ga. App.).....	380
Town of Grantville, Woodward Lumber Co. v. (Ga. App.).....	221	Wheeler, Payton v. (Ga. App.).....	81
Town of Guyton, Edwards v. (Ga.).....	195	Whichard, Jones v. (N. C.).....	503
Town of Henderson, Board of Com'rs of Vance County v. (N. C.).....	442	White, Shelton v. (N. C.).....	427
Town of Point Pleasant, Cheesebrow v. (W. Va.).....	350	White, State v. (N. C.).....	297
Town of Yorkville, Parrish v. (S. C.).....	635	White, Winslow v. (N. C.).....	258
Triplett v. Gudebrod (Va.).....	1045	White Sewing Mach. Co. v. I. W. Bullock & Co. (N. C.).....	1107
Trueheart v. State (Ga. App.).....	755	White & Co. v. Winslow & White (N. C.).....	261
Tumlin Co., Beck v. (Ga. App.).....	587	Whitford v. North State Life Ins. Co. (N. C.).....	501
Turlington v. Aman (N. C.).....	1102	Whitley, Eureka Lumber Co. v. (N. C.).....	268
Turner v. Bank of Maysville (Ga. App.).....	180	Whitley, Kelly v. (Ga.).....	472
Turner v. Davis (N. C.).....	257	Whitney, Atlantic Coast Line R. Co. v. (Ga. App.).....	181
Turner v. Hinchman (W. Va.).....	18	Wiggins Land Co., Crosby v. (S. C.).....	897
Turner, Mutual Fire Ins. Co. v. (Va.).....	1067	Wilcox, Ives & Co. v. Rogers (Ga. App.).....	219
Tyler & Tomlinson v. Arnett (Ga. App.).....	482	Wiley v. Ball (W. Va.).....	659
Union Building & Loan Ass'n v. McNally (S. C.).....	796	Wilkerson, State v. (N. C.).....	888
Union Mut. Ass'n v. Cooper (Ga. App.).....	220	William James' Sons Co. v. Crouch (W. Va.).....	815
Universal Crusher Corp., House v. (Va.).....	1049	Williams v. Chas. F. Dunn & Sons Co. (N. C.).....	512
Upshaw & Powledge, J. K. Orr Shoe Co. v. (Ga. App.).....	362	Williams v. Seaboard Air Line Ry. (N. C.).....	601
Varnville Furniture Co. v. Charleston & W. C. R. Co. (S. C.).....	700	Williams v. Southern R. Co. (Ga.).....	850
Vaughan v. Bank of Cobbtown (Ga. App.).....	1130	Williams v. State (Ga. App.).....	763
Vaughn, State v. (S. C.).....	312	Williams v. State (Ga. App.).....	207
Verdel, Bell v. (Ga.).....	849	Williams v. State (Ga. App.).....	767
Vernon v. State (Ga. App.).....	85	Willingham v. Buckeye Cotton Oil Co. (Ga. App.).....	496
V. Hammond & Sons, Harper v. (Ga. App.).....	44	Wilson v. Clark (Ga. App.).....	86
Vines, Gore v. (W. Va.).....	820	Wilson v. Johnson (W. Va.).....	734
Virginia Coal & Iron Co. v. Hylton (Va.).....	357	Wilson, McArthur v. (Ga. App.).....	374
Virginia Oil & Gas Co., Atkinson v. (W. Va.).....	647	Wilson, Murray County v. (Ga.).....	783
Virginian R. Co. v. Bell (Va.).....	396	Wilson, Peeples v. (Ga.).....	466
Virginian R. Co., Bower v. (W. Va.).....	727	Wilson v. Scarboro (N. C.).....	811
Wade, State v. (S. C.).....	106	Wilson v. Shrader (W. Va.).....	1083
Walker, Lotz v. (Ga. App.).....	169	Wilson v. State (Ga. App.).....	767
Walker v. State, two cases (Ga. App.).....	771	Wilson Mfg. Co. v. Chamberlin-Johnson-DuBose Co. (Ga.).....	465
Walker v. Wood (Ga. App.).....	905	Wimberly v. State (Ga. App.).....	767
		Wimbish v. State (Ga. App.).....	744
		Winslow v. White (N. C.).....	258
		Winslow & White, M. H. White & Co. v. (N. C.).....	261

	Page		Page
Withers v. Board of Com'rs of Columbus County (N. C.).....	615	Wright, Gaulden v. (Ga.).....	1125
Witt v. Baker (Ga. App.).....	243	Wright v. Hill (Ga.).....	546
W. J. Downing Lumber Co. v. Riley (N. C.).....	605	Wright v. Pittman (W. Va.).....	1091
W. M. Ritter Lumber Co. v. Justus (Va.).....	1077	Wyatt v. State (Ga. App.).....	748
Wolverine Soap Co. v. Sellers (Ga. App.)..	248	Wyatt v. Wyatt (Ga. App.).....	372
Wood, Walker v. (Ga. App.).....	905	Wynne, Brewer v. (N. C.).....	629
Woodley v. Carolina Telephone & Telegraph Co. (N. C.).....	598	Wynne v. Seaboard Air Line Ry. (S. C.)...	521
Woodruff, Gearreld v. (Ga. App.).....	355	Yarborough, J. W. Scarborough & Co. v. (Ga. App.).....	1131
Woods v. Teter (W. Va.).....	658	Yates, Lewis v. (W. Va.).....	831
Woodward Lumber Co. v. Grantville (Ga. App.).....	221	Yates v. Yates (Va.).....	1040
Worthington Hardware Co., Croghan v. (Va.).....	1039	Yellow Poplar Lumber Co. v. Goble (Va.).....	1036
Wright v. Bank of Southwestern Georgia (Ga. App.).....	184	Yesbik, Macon, D. & S. R. Co. v. (Ga. App.).....	243
		Zachry v. Zachry (Ga.).....	115
		Ziglar, Holt v. (N. C.).....	805

REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

VIRGINIA.

Rafferty v. Heath, 78 S. E. 641.

Southern R. Co. v. Rice's Adm'x, 78 S. E. 592.

See End of Index for Tables of Southeastern Cases in State Reports

†

THE SOUTHEASTERN REPORTER VOLUME 79

McLAIN v. ALLEN et al.

(Supreme Court of South Carolina. July 2, 1913.)

1. EVIDENCE (§ 314*)—HEARSAY.

Where, in an action by an administrator to sell a lot to pay debts of decedent, the defendant claimed title to the lot by adverse possession, testimony of a witness that a real estate agent had collected rent for the house for the decedent prior to his death was not hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

2. EVIDENCE (§ 294*)—DECLARATIONS—PEDIGREE.

Any person, whether a stranger or a relative, who is acquainted with a family and reputation in the family, can testify as to the pedigree and relationship of members of the family, and as to common rumor in the community as to this pedigree and relationship, and as to the declarations of the family as to pedigree, kinship, relationship, marriages, births, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1152; Dec. Dig. § 294.*]

3. WITNESSES (§ 287*)—REDIRECT EXAMINATION—BRINGING OUT ENTIRE CONVERSATION.

Where the part of a conversation testified to by a witness on cross-examination was not brought out by any questions asked of the witness, and such conversation had previously been excluded, questions on redirect examination calling for the rest of the conversation were properly ruled out.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 1000-1002; Dec. Dig. § 287.*]

4. TRIAL (§ 192*)—INSTRUCTION—CHARGING ON FACTS.

Where, in the trial of the title to a lot, the defendant set up title by adverse possession, a charge that defendant must have had the lot for 10 full years prior to the commencement of the action in May, 1910, was not a charge on the facts, as it simply stated a fact about which there was no controversy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

5. TRIAL (§ 374*)—ISSUES.

The court has the right in all equity cases to submit both the legal and equitable issues raised by the pleadings to the jury, and need not require them to return a general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 884; Dec. Dig. § 374.*]

Appeal from Common Pleas Circuit Court of Kershaw County; Geo. W. Gage, Judge.

Action by George W. McLain, administrator, against Edward Allen and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Defendants' exceptions are as follows:

"First. For error in his honor in allowing the witness George McLain to testify as follows, over the objection of this defendant: 'Q. Did you ever receive rent, before Henry Davis died, from the house, from anybody? A. From Mr. Moore. Q. Who was Mr. Moore? A. Real estate agent. Q. Where is he now? A. In New York, I am told. He would collect rent for Henry Davis, bring it to me, and I would give him the receipt for old man Henry. Old man Henry authorized me to receive \$1.80 for him, and to keep it for him, and when he came to the shop I would give it him. The Court: I think it competent for the witness to say he collected rent from the property and turned it over to Henry Davis.' Whereas, it is respectfully submitted that the court should have held the said testimony incompetent, and merely hearsay, and should have excluded the same.

"Second. For error in admitting the declarations of the witness Mary Carter as to pedigree of Henry Davis, Eliza Villepigue, and Allen, over the objections of this defendant; she being a stranger, and having no relationship to the said Henry Davis, Eliza Villepigue, or Allen—the court holding as follows: 'You can prove it by anybody who knows; if a stranger knows, as well as a relative, can prove it by stranger.' Whereas, the court should have held, it is respectfully submitted, that the said testimony was incompetent and inadmissible.

"Third. For error in not allowing the witness Rose Woodside to state in full her conversation with Henry Davis, after respondent's attorneys had brought out part of said conversation in reference to permission granted her by Henry Davis to do certain things in reference to said lot, and for error in refusing to allow appellants' attorney to examine said witness in reference thereto, as follows: 'Mr. De Loach: Now he has brought out part of the conversation with Henry—Mr. Wittkowsky: I have brought out nothing. Mr. De Loach: What did Henry say? Mr. Wittkowsky: We object, under section 400. The Court: What part did he bring out? Mr. De Loach: In regard to his permission. The Court: Overruled.'

"Fourth. For error in charging the jury as follows: 'Now, it is important to fix the date.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
79 S.E.—1

This action was begun May, 1910; that is the reckoning point, May, 1910. Rose must have had that land for 10 full years before that date; that is to say, she must have had it, been on it, in May, 1900, and held it from May, 1900 to May, 1910—not only held it, but held it adversely against the owner.' Whereas, it is respectfully submitted, his honor, the circuit judge, should have left it to the jury to fix the point from which to reckon the 10 years' adverse holding, and should not have limited the adverse holding from May, 1900, to May, 1910.

"Fifth. For error in charging the jury that May, 1910, was the reckoning point in fixing the point from which to reckon the adverse holding, same being a charge upon the facts. For error in submitting to the jury the issues herein in the form of three questions, as set forth in his charge, as follows: 'The first is: Was Henry Davis the owner of the premises? The second: Is the title of the premises now in Allen? Third: Is the title in the premises in Rose Woodside by adverse possession? And you answer these questions "Yes," or "No," as you determine the facts, and sign your name as foreman.' Whereas, it is respectfully submitted that his honor, the presiding judge, should not have submitted the issues in this form, and he committed error in not charging the jury the facts to be determined by them should be under the rule that the plaintiff is required to make out his case by the greater weight of the evidence."

W. B. De Loach, of Camden, for appellants. Kirkland & Kirkland and L. A. Wittkowsky, all of Camden, for respondent.

WATTS, J. This was an action by the plaintiff against the defendant for the sale of real estate in the aid of personality to pay debts, etc., and the appellant, Rose Woodside, was made a party to that suit, and made answer denying the allegations of the complaint, and set up adverse possession in her of the land in dispute. The case came for trial at the November term of the court for Kershaw county before Judge Gage in November 1912. Upon the trial his honor submitted to the jury certain issues, and the finding by the jury was against the contention of the appellant, and after entry of judgment she appealed, and asks reversal on five exceptions, which should be set out in the report of the case.

[1] The first exception alleges error in the admission of certain testimony of the witness George McLain by reference to what took place. Objection was made to only two questions, to wit: "Did you ever receive rent, before Henry Davis died, from the house, from anybody?" Answer: "From Mr. Moore." "Who was Mr. Moore?" Answer: "A real estate agent." The court ruled this competent, and we do not think it was incompetent for the witness to show that he collected rent from the house in question and

paid it over to Henry Davis; and the testimony of another time during the trial showed that Moore was a real estate agent, that he collected rent for the house in question during the lifetime of Henry Davis, and paid it over to Davis. In addition, it appears from the testimony of John A. Sheorn that he was a real estate agent, and collected rents for this house from Rose Woodside, and that the rents were collected for Henry Davis, and paid over to John McLain by instructions from Davis. The witness George McLain testifies to a fact within his own knowledge that the rent was collected for Henry Davis, and that this statement was not based upon a statement made by Moore. This exception is overruled.

[2] The second exception imputes error in admitting over appellants' objection to the declarations of a stranger as to the pedigrees of Henry Davis, Eliza Villepigue, and Allen. Mary Carter did not testify as to the declarations of any other party; but her testimony was as to facts within her own knowledge, the objection was as to her testimony that she was not related to the parties, and could not testify as to family relation. The appellant has misconstrued the rules applicable to the introduction of declarations as to relationship. It is not necessary to show, that the witness testifying is related to any of the parties, whose relationship is in question. There is no authority that so holds. Any person acquainted with a family and reputation in the family can testify as to the pedigree and relationship of members of the family, and as to common rumor in the community as to this pedigree and relationship, and as to the declarations of the family as to pedigree, kinship, relationship, marriages, births, etc. The witness' testimony was as to facts known to her, and it was competent for her to testify as to her familiarity with the family and the reputation in the family in regard to the relationship in question. John Carter, who was not a relative, was permitted to testify along same line without objection, and there was no evidence on part of appellant introduced at the trial in contradiction of that introduced by respondent as to relationship. "The evidence of a witness whose knowledge with reference to the subject was derived from an intimate acquaintance with the family is admissible as to such facts of the family history as marriages, kinship, name, and death." Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358, 8 Ann. Cas. 641. "Declarations of deceased persons as to pedigree of a person with whom they were closely connected in life though not related in blood or marriage have been held competent evidence." 9 Ency. of Evidence, 742. See, also, section 991, Wigmore on Evidence, 1490.

[3] The third exception complains of error in not allowing the witness Rose Woodside to repeat the whole of the conversation

with Henry Davis, when part of it was brought out by attorney for respondent on cross-examination. By reference to what took place at the time complained of, it will be seen that the counsel for respondent did not ask any question in regard to a conversation with Henry Davis, nor ask any question which would require any part of such conversation in response to the question, and any answer by her to question asked, which brought in such conversation, was not responsive to the question, and his honor had previously ruled out any conversation between this witness and Henry Davis, deceased, and properly sustained objection at this time as to any question asked witness as to conversation with the deceased Davis. This exception is overruled.

[4] The fourth exception alleges error on the part of the judge in charging the jury that Rose Woodside must have had the land for 10 full years before the date of the commencement of this action in May, 1910. This was not a charge on the facts; it simply stated a date when action was commenced, disclosed by the pleadings in the case. There was no controversy over this. "Statement of what facts are admitted or not contested is not a charge on the facts." *Trapp v. Western Union Telegraph Co.*, 92 S. C. 218, 75 S. E. 210.

[5] The fifth exception is overruled, as the circuit judge has the right in all equity to submit issues to jury, the pleadings raise both legal and equitable issues and the legal issue as to title to land is triable by jury. *McCreery & Land & Investment Co. v. Meyers*, 70 S. C. 282, 49 S. E. 848; *Poston v. Ingraham*, 76 S. C. 167, 56 S. E. 780; section 312, Code Civ. Proc. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

CARNEGIE NATURAL GAS CO. v. SWIGER et al.

(Supreme Court of Appeals of West Virginia.
May 27, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§§ 76, 167*)—STATUTES (§§ 76, 112*)—CONSTITUTIONAL LAW (§§ 251, 281*)—RIGHT OF WAY FOR PIPE LINES—"DUE PROCESS."

Chapter 74, Acts 1907 (Code Supp. 1909, c. 42, §§ 18, 20), amending and re-enacting sections 18 and 20, of chapter 42, Code 1906, and providing thereby for an alternative method of condemning land or easements by pipe line companies for transporting carbon oil or natural gas, is valid, and not violative, either of section 30, art. 6 (Code 1906, p. ix), or sections 9 and 10, art. 3, of the Constitution (Code 1906,

pp. 1, ii) of this state, or of the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 200-203, 451-456; Dec. Dig. §§ 76, 167;* *Statutes*, Cent. Dig. §§ 77½-78½, 140½; Dec. Dig. §§ 76, 112;* *Constitutional Law*, Cent. Dig. §§ 726, 727, 732, 880; Dec. Dig. §§ 251, 281.*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

2. EMINENT DOMAIN (§ 191*)—RIGHT OF WAY FOR PIPE LINES — DESCRIPTION — SUFFICIENCY.

Such right of way or easement authorized when less than the fee is taken need not describe a definite width or depth, but must pursue a definite line, with courses and distances given, and have definite and fixed termini.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

3. EMINENT DOMAIN (§ 34*)—RIGHT OF WAY FOR PIPE LINE—PUBLIC USE.

The evidence in this case sustains the finding and judgment of the court below as to the public use of the right of way or easement proposed to be taken.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 80; Dec. Dig. § 34.*]

4. EMINENT DOMAIN (§ 34*)—PIPE LINES—CONDEMNATION OF RIGHT OF WAY—PUBLIC USE.

Where by general law such pipe line company is authorized to take such rights of way or easements for its public service, the right of the public therein, and the reasonableness of the charges for the service, though not written in any statute or ordinance, is sufficiently protected by general law, to warrant the taking thereof for such public use.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 80; Dec. Dig. § 34.*]

5. EMINENT DOMAIN (§ 66*)—PUBLIC SERVICE CORPORATION—DISCRETION.

Where such public service corporation is so authorized, and enters upon and assumes the duties of its public service, there is public need for rights of way and easements justifying the taking of private property therefor, and what is necessary is generally a matter within its discretion not controllable by the courts.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

6. EMINENT DOMAIN (§ 34*)—PIPE LINES—CONDEMNATION OF RIGHT OF WAY.

That but few persons are being served at the time such right of way or easement is proposed to be taken will not defeat the right of such company to take such right of way or easement if the real purpose is to serve the public.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 80; Dec. Dig. § 34.*]

7. EMINENT DOMAIN (§ 66*)—PIPE LINES—CONDEMNATION OF RIGHT OF WAY—PUBLIC BENEFIT—QUESTION FOR COURT.

The question of the public need or benefit of such proposed right of way or easement is generally a question for the court and not one of fact for jury trial.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

Error to Circuit Court, Harrison County.

Action by the Carnegie Natural Gas Company against A. G. Swiger, the Swiger Coal Company, and others. From a judgment for

plaintiff, the defendants named bring error. Affirmed.

Charles G. Coffman, of Clarksburg, for plaintiffs in error. Hall & Hall, of New Martinsville, for defendants in error.

MILLER, J. Petitioner elected to proceed pursuant to the alternative method prescribed by section 20, c. 42, Code Suppl. 1909, chapter 74, Acts 1907, to condemn an easement or right of way less than a fee for a natural gas pipe line through defendant's lands, according to a plan attached to the bond tendered defendant showing the route of its proposed pipe line through his lands.

Failing to agree with him as to the damages, and defendant refusing to accept the bond tendered him, petitioner, after five days notice, presented the same to the Judge of the Circuit Court in vacation, as prescribed by the statute, and also its petition praying among other things that said bond be approved. Whereupon defendant appeared and demurred to the petition, which being joined in by petitioner and argued by counsel the court took time to consider, giving to petitioners, over objection by defendant, leave to file said bond and to make the same part of the record, but denying petitioner, until the further order of the court or judge, right of entry on the land.

On a later day, having considered the matters of law arising upon the prior proceedings, the judge was of opinion to approve the bond, unless within three days defendant should except to the form, amount, or surety, and file his exceptions with the clerk, and to that end continued the case to July 22, 1911, in chambers.

On the day to which the case was so adjourned defendant again appeared, and tendered and asked leave to file certain objections in writing to the proceedings, also their objection to the amount and form of the bond, none to the surety, and also some nine special pleas in writing, and an additional paper entitled plea and further exceptions to the bond and approval thereof; and also made other motions not material and which need not be considered.

At a later day the demurrer was overruled, defendant's pleas numbered 1, 2 and 3, and his so-called plea and further exceptions were filed, but pleas numbered 4 to 9, inclusive, were rejected, and issue was joined on the several pleas filed. Without passing on the exceptions to the bond the court directed the testimony to be taken on the issues presented by the pleas, and on final hearing, on September 29, 1911, pronounced the judgment now complained of, finding that petitioner had the right to condemn the right of way or easement over defendant's lands for the purposes set forth in its petition, and finding the same sufficient in all particulars, approved the bond filed, and further found, ordered and directed that petitioner had the right to

and might at any time and immediately, if necessary, enter upon said easement or right of way for the purpose of constructing its pipe line as proposed in its petition, to which rulings and judgment exceptions were taken and saved on the record.

The pleas rejected so far as material are covered by those filed and there was no prejudicial error in rejecting those not filed. The issues presented by the demurrer and the several pleas and motions filed, and to which the evidence relates, will now be considered.

[1] First, it is affirmed that said chapter 74, Acts 1907, amending and re-enacting sections 18 and 20 of chapter 42, providing thereby for the alternative method of condemning land or easements by pipe line companies organized for transporting carbon oil or natural gas, is unconstitutional: (1) For infringing section 30, art. 6, of the constitution (Code 1906, p. lx), providing that "No act hereafter passed, shall embrace more than one object, and that shall be expressed in its title"; (2) for the infraction of section 39, of the same article (Code 1906, p. lxi), providing "And in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case"; (3) because violative of the due process provisions of section 10, art. 3 (Code 1906, p. li), of our constitution, and of the fourteenth amendment to the federal constitution, and (4) because it authorizes the taking of private property for public use without just compensation paid or secured to be paid, contrary to section 9, art. 3 (Code 1906, p. li), of our constitution.

On the first proposition it is contended that the object of the act is concealed in the title, and falls within the condemnation of our case of *Stewart v. Tennant*, 52 W. Va. 559, 572, 44 S. E. 223. The title of the act is: "An act to amend and re-enact sections eighteen and twenty of chapter forty-two of the code, relating to taking land without the owner's consent for purposes of public utility." Before the adoption of our Code of 1868, and in a proceeding begun under Code Va. 1860, and before the statute so specifically provided, the right of a pipe line company, organized for transporting carbon oil, to take land by condemnation was upheld by this court. *West Va. Transp. Co. v. Vol. O. & C. Co.*, 5 W. Va. 382. Prior to chapter 18, Acts 1881, our statute did not as therein enumerate the public uses for which private property might be taken or damaged. Among the purposes enumerated in section 2 of that act, is, "Fifth—For companies organized for the purpose of transporting carbon oil by means of pipes or otherwise." Pipe lines for transporting natural gas are not mentioned. So far as we know there were no pipe lines then existing in this state for transporting either oil or natural gas, except the West Virginia Transportation Company, plaintiff in the case just referred to. By chapter 7,

Acts 1885, companies organized for transporting natural gas were included in said section 2, and the method of procedure prescribed for taking land for public utility was the same for all companies. The law so remained until the passage of the Act of 1907, now in question. By section 18, of said chapter 42, as thus amended, pipe line companies were included along with railroad companies, entitled to describe as to any or all of the land proposed to be taken an estate or interest therein less than a fee. And by the amendment of section 20, thereof, the alternative method of procedure for such pipe line companies was prescribed, in the three paragraphs added thereto, and which paragraphs constitute the subject of the constitutional objections already alluded to. By the first of these paragraphs it is provided that in addition to the other procedure, such company may at its election attempt to agree with the owner as to the damages, falling in which, it shall tender him a bond with sufficient surety to secure him payment of the damages, to which bond a plan showing the route of the proposed pipe line shall be attached; and upon the acceptance of this bond the right of the applicant to enter upon the enjoyment of the easement shall be complete; if the owner refuse to accept the bond it is provided that the same shall be presented to the circuit court or the judge thereof in vacation, after five days written notice to the owner stating the time and place of such proposed presentation, and which shall state that unless exceptions to the form, amount or surety of the bond be filed within three days after presentation said bond shall be approved by the court. The second of the added paragraphs provides that if no exception be filed thereto the court shall approve the bond and direct the same, with the plan attached, to be filed for the benefit of both owner and applicant; but if exception be filed the court is required to fix a day, not more than five days thereafter for the hearing thereof, and may require evidence as to the sufficiency of the sureties, and amount of the bond, and may require new surety, and a bond for a larger amount, or in a more satisfactory form, and upon the approval of the bond and filing thereof the right of the applicant to enter as aforesaid shall be complete. The third of the added paragraphs provides: "Upon petition of either the property owner or the applicant, at any time after said bond shall have been presented and filed, five disinterested freeholders shall be appointed as in this chapter provided, to serve as commissioners to ascertain what will be a just compensation to the person entitled thereto for the easement so appropriated, and thereafter the proceedings shall be in accordance with the provisions of this chapter."

The question now recurs, is the object of the act so concealed as to render it void for embracing more than one object in its title?

We think not. The only object of the amendment of said section eighteen was to classify pipe line companies along with railroads as entitled in certain cases to take "an estate or interest less than a fee." This amendment was certainly fairly covered by the title of the act. The only purpose of the amendment of section 20, evidently because the Legislature thought it expedient and proper, was to provide a more speedy and summary remedy for obtaining possession of the easement than in other cases. We see nothing in this not fairly covered by the title of the act. It is certainly comprehended in the title of the act amendatory of the general law relating to the taking of land without the owners' consent for the purpose of public utility. The only change effected is in the method of procedure and in the form of security, not in the essential rights of the owner of the land. His right of trial by jury on the question of damages, and to contest before the court the right to take the land, is fully preserved. In this case the court did not approve the bond or let the applicant into possession, until all issues on the pleas filed had been fully heard on the merits, a commendable practice when as in this case the right to take and the public purpose of the taking has been challenged by the owner of the land. Besides, everything is covered into the general law. The act involved in *Stewart v. Tennant* was a special act; its title was: "An Act concerning the limitation of actions in certain cases." As the court says in that case, an examination of the act shows its singleness of object, and that it is not constitutionally objectionable on that ground. The remaining question decided was, whether that object was sufficiently expressed in the title, and it was held not to be so expressed. We need not repeat here the reasonings in that case differentiating it from a case like this, involving an act amendatory of a general law, covering the whole subject of taking private property for public utility. The generality of the title of the act involved in *Stewart v. Tennant* distinguishes it from this case, and renders inapt as well that case as other authorities cited and relied upon by the plaintiff in error, namely, 1 *Lewis' Sutherland Stat. Const.* § 123; *Beverly v. Wain*, 57 N. J. Law, 143, 144, 30 Atl. 545; *Cooley's Const. Lim.* (7th Ed.) 205; *Board of Supervisors v. McGruder*, 84 Va. 828, 832, 6 S. E. 232; *State v. Steelman*, 66 N. J. Law, 518, 49 Atl. 978; 26 Am. & Eng. Ency. Law, 582. In the act here involved the sections of the general law so amended were inserted at large in the new act, in compliance with another provision of section 30, art. 6, of the constitution. The cases decisive of the real question here presented are *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 980, and *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278. In *Heath v. Johnson*, the act involved was entitled "An Act to amend, 'An Act to amend and re-enact section 58 of chapter 45 of the

Code of West Virginia.' That act was objected to as violative of article 6 of the constitution. This court said in that case: "We do not think this objection to the law is sound. The provision cited seems to refer rather to original acts than to those which are only amendatory; but, supposing it to apply to the latter, when the amendment in its title points not only to the chapter which is to be amended, but to the very section, it seems to us to amount to a sufficient expression of the object of the law to prevent any of the evils which the constitutional provision was intended to remedy." The first point of the syllabus in that case is: "When the title of an original act of the legislature sufficiently expresses its object in the manner required by the constitution, an act amendatory thereof may, by its title, simply refer to the section of the original act which it is intended to amend, and this will be a sufficient compliance with section 30 of article 6 of the constitution." *Roby v. Sheppard* is equally in point, as points 2 and 3 of the syllabus, and the reasons of the court, 42 W. Va. at pages 289-292, inclusive, 26 S. E. 278, will show. See, also, 12 Ency. Dig. Va. & W. Va. Rep. 777.

The next question is does the amending act of 1907 violate section 39, art. 6, of the constitution, inhibiting special legislation where a general law would be proper? It seems almost a waste of time to reply to this proposition in view of what has been said on the first. It is contended, however, that as the amendments affected only pipe line companies transporting oil and natural gas, their effect was to single out that class of corporations and legislate specially with reference to them, and to bring the act within the inhibition of the constitution. To support this proposition counsel cite and rely on *State v. Cooley*, 56 Minn. 540, 58 N. W. 150; 1 *Lewis' Sutherland Stat. Const.* 149, 353; *In re Church*, 92 N. Y. 1; *Wheeler v. Philadelphia*, 77 Pa. 338, 348; *Wallis v. Williams*, 101 Tex. 395, 108 S. W. 153; *Palcher v. U. S.* (C. C.) 11 Fed. 47; *Ex parte Westerfield*, 55 Cal. 550, 38 Am. Rep. 47; *Groves v. County Court*, 42 W. Va. 596, 26 S. E. 460; *McEl-downey v. Wyatt*, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609; *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825; *Cooley's Prin. Const. Law*, 241, 243, 244; *Cooley's Const. Lim.* 502; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. We think these authorities quite inapt to support the proposition. All pipe line companies carrying oil and gas as a class are included in the provisions of the statute. The statute is but an amendment of the general law, which itself covers all classes of corporations given the right of eminent domain, none are excepted. The procedure for obtaining the land or easements thereon is the same, except that pipe line companies, if they so elect, may give the bond prescribed and if accepted by the owner,

or if not, approved by the court, they may enter immediately. There was good reason in the mind of the legislature no doubt for this provision, to meet exigencies and conditions peculiar to that class of public service corporations. Can it be rightfully said that such an amendment of the general law amounts to a segregation of individuals or corporations from a class to which they properly belong, so as to bring it within the constitutional mandate? We think not. An examination of the authorities cited will show we think that they relate to special statutes, applicable to particular persons, less than a class. There is no more reason for saying that the act in question is special legislation, because it provides for an alternative method of procedure for pipe line companies in section 20, than for saying that section 18, before the amendment, was special legislation, because with respect to railroads it provided that they might take an estate or interest therein less than a fee. The general law before the amendment put corporations given the power of eminent domain into several classes. Pipe line companies for carrying oil and gas were put into a class by themselves. The special provisions of the statute as amended, objected to, cover all corporations of this class. *State v. Cooley*, relied on, says: "A law is general, in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons; * * * while a special law is one which relates and applies to particular members of a class." Substantially the same definition is given in some of the other authorities cited. In the California case a statute which prohibited baking on Sunday was held unconstitutional, because it picked out the baking business only, making it class legislation, when the law would have been as applicable to all other traders as to it. Our cases of *Groves v. County Court* and *McEl-downey v. Wyatt* are equally inapt. The first says: "Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances." *McEl-downey v. Wyatt* says: "A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special." In our opinion the act involved is not special legislation.

Next, is the statute violative of the due process provisions of our constitution and of the federal constitution? Clearly not. Notwithstanding the provision for giving bond to make entry on the land the applicant is not permitted, without acceptance by the owner, or upon due notice to him and approval by a court having jurisdiction, to put a single foot upon the land sought to be taken; and if, as in this case, any question is made as to the right of the applicant to take, or the public purpose for which he proposes to take the land, is made, these questions will properly be tested by the court before approval of

bond or right of entry become complete. Besides, would not injunction lie under the provisions of section 20, to protect the owner? Due process does not necessarily mean process of a court. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this is provided for there is that due process of law which is required." Brannon on the Fourteenth Amendment, 467. The authorities cited by counsel for plaintiff in error are equally decisive of this proposition. Our decisions say: "Due process of law means, as used in said section, in the due course of legal proceedings according to those rules and forms, which have been established for the protection of private rights, securing to every person a judicial trial before he can be deprived of life, liberty or property." *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583; *Williams v. Freeland*, 19 W. Va. 599; *Griffie v. Halstead*, 19 W. Va. 602; *Peerce v. Adamson*, 20 W. Va. 57; *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727. That the statute in question by proper proceedings fully protects the rights of the owner not only appears from its provisions, but has complete demonstration in the present proceeding taken under it. Defendant has been permitted to make every defense and oppose every legal obstacle in the way which could possibly be afforded him. Why, therefore, should we dwell further on this proposition?

The next constitutional argument is based on section 9, art. 3, of our constitution, against the taking of private property without just compensation *paid, or secured to be paid*. It is contended that the provision of section 20, relating to the giving of bond does not satisfy the requirements of the constitution, "paid, or secured to be paid." Certainly a bond, if good in form, sufficient in amount and with sufficient surety, would satisfy the requirement "secured to be paid." But it is insisted that the land itself should be made the primary security, and title and the right reserved. This would not always furnish the best security for the liberal findings of commissioners and juries in such cases. The bond provided is to serve in case the owner and applicant are unable to agree. If the bond is deficient in form, amount, or surety, ample provision is made in the statute for correcting these defects. It is furthermore insisted that the bond should not be approved or entry made until the damages have been assessed by commissioners or jury. In the early Virginia case of *Tuckahoe Canal Co. v. Tuckahoe & James River R. R. Co.*, 11 Leigh, Anno. 552, 36 Am. Dec. 374, a general statute, passed at the session of 1836-37, gave similar rights to railroad companies to enter upon land before condemnation and assessment of damages, and providing for injunction against the owner from interference, except in certain cases. This

statute was upheld by the Virginia court. This case is cited in *Spencer v. Point Pleasant & Ohio R. R. Co.*, 23 W. Va. 406. Speaking of the constitution and with reference to the statute there involved, providing that after the damages should be assessed, the condemning railroad might be enjoined from the use of the right of way until the damages assessed should be fully paid, the court by Judge Green says, 23 W. Va. at page 412: "Indeed, had the Legislature gone still further and permitted a railroad company to take possession of the land it wanted to condemn, when it first instituted its proceedings to condemn the land, before even the appointment of commissioners, without paying anything to the owner on simply giving a bond, with approved security, to pay the just compensation when ascertained, it would in so doing be complying with the words of our Constitution." True he adds: "But it does seem to me that it would be violating its spirit, if the spirit of this constitutional provision is correctly set forth by Chancellor Kent in the quotation which we have made from him, and I think that the real spirit of it is correctly stated by him." This expression is obiter. Chancellor Kent was apparently speaking of constitutional provisions limited to language like the first clause of our section 9, art. 3, providing that "Private property shall not be taken or damaged for public use, without just compensation." But with reference to the taking of such property for the purpose of *internal improvements*, the language of the next provision is "until just compensation shall have been paid, or secured to be paid." The expression "secured to be paid" must be construed according to the plain import of the words, unless a different meaning clearly appears from the context. A pipe line for transporting natural gas for the public use is an "internal improvement" within the meaning of our constitution. *West Va. Transp. Co. v. Vol. O. & C. Co.*, supra, 5 W. Va. page 388. That a statute like the one in question here is not objectionable on constitutional grounds is clear from *Tuckahoe Canal Co. v. Tuckahoe & James River R. R. Co.*, supra. Judge Tucker (11 Leigh. [Va.] at page 80, 36 Am. Dec. 374) says: "It seemed to be considered by the counsel, that the condemnation must precede the execution of the work. This is, I conceive, a misconception of the law. The company have a right to proceed with their work before condemnation; and, indeed, there is no absolute obligation on them, to institute the process for assessing the damages to the land, since in case of their default the owner himself may do so. It is, therefore, clear that the work is not to be suspended until the damages are assessed and paid; and this is rendered more undeniable by the 13th section, which in connexion with the previous sections provides, that 'in the mean time' (that is, while the process of valuation or assessment is go-

ing on) 'no injunction shall be awarded to stay the proceedings of the company in the prosecution of their works, unless,' &c. It was not then necessary, that the damages should have been assessed and paid before the company proceeded to the erection of their bridges." In *Old Colony R. Co. v. Framingham Water Co.*, 153 Mass. 561, 27 N. E. 662, 13 L. R. A. 332, it was held that the provision for compensation for land taken by water companies, precisely the same as the public statute relating to railroad companies, except that the selectmen of the town were thereby made the tribunal to determine the sufficiency of the security instead of the county commissioners, was held to be sufficient, and not violative of the constitution. That provision of the statute was that the water company might, "upon application by either party, require the Company to give security to the selectmen of said town for payment of all damages that may be awarded to them; and if, upon petition of the owner, the security appears to the selectmen to have become insufficient, they shall require the giving of further security." The Supreme Court of Pennsylvania, in *Wallace v. Railroad Co.*, 138 Pa. 168, 22 Atl. 95, construing a statute from which the provisions of our act now under consideration were evidently taken, held, that after a bond had been taken with security approved a bill in equity would not lie against a railroad company to restrain the completion of the railroad, on the ground that both the railroad company and sureties had become insolvent. And speaking of the term security in the constitution of that state, that court says: "The only reasonable, and therefore the true construction of the word 'secured' in the constitution, is that it shall be made reasonably safe or sure that the owner of the property taken shall be able to collect the compensation for it, and the words 'sufficient sureties' in the act, must be construed to mean such sureties as at the time they are taken make it reasonably certain that the owner of the property taken can collect from them a just compensation." According to these authorities there can be no question that the bond provided for in the statute fully answers the requirement of the constitution "secured to be paid."

[2] The next point of error urged, is that the easement or right of way proposed is without width or depth or definite description. The plan attached to the bond shows the outside boundaries of defendant's land, and fixes the right of way or easement proposed to be taken through the same by reference to a distinct line of survey, with definite termini and definite and distinct courses and distances, so that there can be no doubt or controversy as to the true location of the line of the proposed right of way or easement. The petition filed by the applicant even more definitely describes this line, and alleges that

the only pipe line which petitioner proposes to lay upon said route will be six inches in diameter and will be used exclusively for the transportation of natural gas. The application we think conforms strictly to the letter as well as the spirit of the statute. The plan required by the statute is one "showing the route of the proposed pipe line over said land." The plan attached to the bond in this case does that. Can more be required? We think not. The petition says the pipes will be buried under the surface of the ground to such a depth as not to interfere with the use of the land for agricultural purposes. True the application calls for no specific width, but the proposal is for a mere right of way or easement to bury a six inch pipe line upon defendant's land and maintain it there. When so buried the surface will be subject to use and occupation by the owner, except in so far as such use and occupation may interfere with petitioner's right to install and maintain the pipe line in place. After installation all that a right of way or easement of this character would call for would be right of entry and of ingress and egress to keep the line in repair. Unless a definite width should be actually taken to the exclusion of the owner of the fee, which would be unduly burdensome on both applicant and owner, no definite width could be accurately described. But it is argued that without width and depth it will be impossible to determine the damages. We think there is no difficulty confronting commissioners or juries on this score. The character of the entry and of the use and occupation of land for an easement or right of way of this character is so well understood in the country these days that we think a jury would find little difficulty, certainly not more so than in other cases, in reaching a proper estimate of the damages; not only this, but the jury could and would be enlightened by evidence on the question, and thereafter the owner of the right of way or easement would always be confined to a reasonable use, and liable to damages for abuse of his right. We think the statute clearly contemplates the taking of such a right of way or easement. Our case of *Crosier v. Brown*, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N. S.) 174, says in the first point of the syllabus, that "An easement of private way over land must have a particular definite line." That case related to a private way over another's land. It had no particular width or depth. In *Lovett v. Gas Co.*, 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230, the gas company it seems had condemned strips eighteen inches wide through two tracts of land, which of course might be done, but every one knows that eighteen inches would not be sufficient for ingress and egress in the work of laying and maintaining such a pipe line. The question which we have here, however, was not decided in that

case. In *Gas Transportation Co. v. Wilson*, 70 W. Va. 157, 73 S. E. 306, the proposition was apparently the same as in this case, to take a mere right of way or easement less than a fee over defendant's land. The only question decided there, which can have any application here, was, that in such cases the landowner is entitled to damages not alone for the estate or interest actually taken but also damages to the residue, the fee in the whole tract, including therein the fee in that part of the tract covered by such right of way. We are of opinion to overrule this point of error.

[3] The next point is that the public use of the proposed right of way or easement is not sufficiently shown to warrant the judgment complained of. This question is raised by the demurrer, by the pleas filed, as well as by some of those rejected. The cases relied upon in support of this proposition are: *Salt Co. v. Brown*, 7 W. Va. 198; *B. & O. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va. 812; *Varner v. Martin*, 21 W. Va. 534; *Railroad Co. v. Iron Works*, 31 W. Va. 710, 8 S. E. 453; *Cemetery Association v. Redd*, 33 W. Va. 262, 10 S. E. 405; *Fallsburg Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855; *Charleston Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410; *Railroad Co. v. Coal Co.*, 62 W. Va. 185, 57 S. E. 401. In substance it is said of them that they affirm the following propositions: (1) That the use which the public is to have of the property taken must be fixed and definite, and on terms and charges fixed by law; (2) that such public use must be a substantial beneficial one, obviously needful for the public, which it cannot do without, except by suffering great loss or inconvenience; (3) that the necessity for condemnation must be apparent and that the public need must be an imperious one. These propositions are drawn mainly from the language of Judge Green in *Varner v. Martin*, supra. That case involved the constitutionality of an act of the Legislature giving right to take the land of another for a private way. The questions involved were rather legislative than judicial. The propositions were correctly applied in that case. True it is, however, that courts may generally inquire into the question whether the property proposed to be taken is for a public use, even though the condemnor be of a class of persons or corporations authorized to take land for public use. The court below properly exercised this jurisdiction in this case. It permitted issues to be made up to try this question, and by finding and adjudging that the petitioner had the right to take the property by condemnation, it necessarily decided that the use to which the right of way or easement proposed to be taken was to be devoted was a public use, giving the right to take. We do not propose to enter upon any lengthy discussion or review of the prior decisions of the court.

[4] On the first proposition, that the public use must be fixed and definite, and on terms and charges fixed by law, we observe first, that the legislature by general law has conferred upon pipe line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. Pipe lines for transporting oil must carry oil, as railroads must carry passengers and freight, at reasonable rates, if such rates are not fixed by statute. Pipe line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities. Are not the rights of the public so fixed sufficiently definite to answer the requirements of the law? We think so. The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation. *Charleston Gas Co. v. Lowe*, supra, and *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602, recent decisions of this court support these conclusions. *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715, 109 S. W. 328, 86 L. R. A. (N. S.) 456, as well as *Olmsted v. Proprietors of the Morris Aqueduct*, 47 N. J. Law, 311, are likewise in point. So also are the cases of *Gibbs v. Balt. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; *Munn v. Illinois*, 94 U. S. 133, 24 L. Ed. 77.

[5] On the question of the public necessity for the use of the property, covered by the last two propositions relied on, it may be said generally, that when a public service corporation is organized to serve the public it assumes the duties and responsibilities incident to that service and imposed upon it by law. If such corporation be a pipe line company to transport or serve the public with gas, it must of necessity have land or rights of way from the source of supply to the places of consumption. It is unnecessary to argue at this day that natural gas for light, heat and power is of great public utility, and if the public is served there is imperious demand for rights of way or easements in that service. Where a public service corporation has a public duty to perform what is necessary in the way of easements and other means of performing this service is largely a matter within its discretion. It is so with railroad companies, and we see no reason why the same rule should not apply to pipe line companies transporting gas. When the legislature clothed this class of companies with the power of eminent domain we must assume that it understood the

nature of the public service to be performed, and determined that there was sufficient public necessity therefor. Want of general public necessity was urged in *Hydro-Electric Co. v. Liston*, supra, and the question was there met on the authority of *Lewis on Eminent Domain*, by the proposition, that the question was not a judicial but a legislative one; that whether necessity for taking the land exists in favor of the condemnor is largely a matter for its own determination.

[6] But it is argued that but few persons are or will be served in West Virginia by the proposed pipe line; that most of the gas is and will be transported into Pennsylvania; that the petitioner is a corporation under the laws of Pennsylvania, and that its principal business is to produce gas and transport it into that state, and that the sovereign right of eminent domain is properly limited to the service of the people of the state where the power is invoked. While the petitioner is a foreign corporation it avers and proves its authority to do business in this state. Having obtained authority to do business here, section 30, chapter 54, Code 1906, confers upon it the same rights, powers and privileges, and imposes upon it the same duties and liabilities, and subjects it to the same rules and regulations as domestic corporations. *Floyd v. Loan & Investment Co.*, 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805. Section 24, chapter 52, of the Code, provides that, "Such company shall, for the purpose of transporting natural gas, oils and water, be considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state." The petition avers and the evidence shows that petitioner is serving many persons in this state with gas. True, but few at present are being served by the particular line in question, but it avers and proves its willingness to serve all persons applying, subject to its proper rules and regulations. It avers and proves that it has fixed reasonable prices and rates for such service. If the petitioner is serving the people of West Virginia with gas, and all who apply, as it avers and proves, it cannot be denied the right of eminent domain because it serves the people in another state into which its pipe lines go. There is not a particle of evidence in the case showing or tending to show that petitioner has ever neglected its duty toward the people of this state. That but few are shown to be taking gas from the particular line sought to be extended through defendant's land is of little consequence. The petitioner is seeking business. Practically the same objections were interposed to the rights of the petitioner in *Hydro-Electric Co. v. Liston*, and were met in the same way that we have met them here.

[7] Lastly, it is urged that it was error to deny the defendant the right of trial by jury,

on the question of the public need or benefit of the proposed pipe line. This the authorities hold is a judicial question, and not one of fact to be tried by a jury. *Hydro-Electric Co. v. Liston*, supra; *Sisson v. Buena Vista County*, 128 Iowa, 442, 104 N. W. 454, 70 L. R. A. 440.

The foregoing conclusions lead to an affirmation of the judgment, and this will be the mandate of the court.

LYNCH, J., absent, having decided case in circuit court.

COLLINS et al. v. BOARD OF TRUSTEES
OF DAVIS AND ELKINS COL-
LEGE et al.†

(Supreme Court of Appeals of West Virginia.
June 17, 1913.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 113*) — NOTICE TO
OWNER—PAYMENT TO PRINCIPAL CONTRAC-
TOR.

The present mechanics' lien law, Code 1906, ch. 75, gives right of direct lien to one performing labor or furnishing material under a contract with the principal contractor or his subcontractor, and no notice to the owner in advance of the performance of labor or furnishing of material is necessary to a protection of the right as against payments by the owner to the principal contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 148; Dec. Dig. § 113.*]

2. MECHANICS' LIENS (§ 115*)—PAYMENT TO
PRINCIPAL CONTRACTOR—DEFECTS.

Under the mechanics' lien law (Code 1906, ch. 75), payment by the owner to the principal contractor of a part or all of the contract price constitutes no defense against a lien the right to which exists or is incipient by the performance of labor or the furnishing of material prior to the payment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

3. MECHANICS' LIENS (§ 100*) — PRINCIPAL
CONTRACTOR — EFFECT — RECORDED CON-
TRACTS.

By recording the contract with the principal contractor pursuant to Code 1906, chapter 75, section 5, the owner may limit his liabilities under the contract so that the amounts to be paid by him shall not exceed in the aggregate the contract price, and such amounts may include any payment, pursuant to the contract, made by the owner to the contractor when no incipient or perfected right to lien exists for labor performed or material furnished before the payment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 133; Dec. Dig. § 100.*]

4. MECHANICS' LIENS (§ 100*) — RECORDING
OF CONTRACT — NOTICE TO LABORERS AND
MATERIALMEN.

When the contract between the owner and the contractor is recorded, one proposing to perform labor or to furnish material under a contract with the principal contractor or his subcontractor, must take notice of the times of payment of the contract price provided for therein; and any payment made according to the terms of the recorded contract before the beginning of the performance of labor or the furnishing of material will limit a lien for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

such labor or material to the amount of the contract price unpaid.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 133; Dec. Dig. § 100.*]

5. QUESTION NOT DECIDED.

Quere: May the building contract be recorded for the limiting of the owner's liability against liens without its being acknowledged or proved?

6. MECHANICS' LIENS (§ 105*)—PERSONS ENTITLED—SUBCONTRACTORS.

A subcontractor in the sense of one to whom a specific portion of the work is sublet by the principal contractor, may assert a lien under Code 1906, ch. 75, sec. 3.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 137; Dec. Dig. § 105.*]

7. JUDGMENT (§§ 948, 951*)—RES JUDICATA—PLEADING.

Res judicata must be pleaded or shown by the record. It can not be availed of merely by citation to a published opinion.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1787-1793, 1808-1812; Dec. Dig. §§ 948, 951.*]

Williams, J., dissenting. Poffenbarger, J., dissenting in part.

(Additional Syllabus by Editorial Staff.)

8. CONSTITUTIONAL LAW (§ 70*) — JUDICIAL POWER.

The Supreme Court of Appeals must apply legislative enactments as it finds them, though their policy or effect may be subject to sound criticism.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

Appeal from Circuit Court, Randolph County.

Action by Creed Collins and others against Board of Trustees of Davis and Elkins College and others. From a judgment for plaintiffs, defendant College appeals. Modified and affirmed.

E. A. Bowers, of Elkins, and Price, Smith, Spilman & Clay, of Charleston, for appellant. W. B. Maxwell, D. H. Hill Arnold, and Talbott & Hoover, all of Elkins, for appellees.

ROBINSON, J. The decree sought to be reversed by this appeal subjects to sale the building and grounds of the Davis and Elkins College for the satisfaction of mechanics' liens.

The Board of Trustees contracted with Hobbs & Co. for the erection of the college building at the price of \$47,378. The contractors so far proceeded with their undertaking that approximately \$40,000 of the contract price was paid them under monthly estimates of the architect, as provided in the contract. Then, insolvency of the contractors intervened, and by proceedings in the Federal Court they were involuntarily declared bankrupts. In the bankruptcy proceedings, receivers appointed for the bankrupt contractors were directed to complete the building. The remainder of the contract price in the hands of the Board of Trustees, approximately \$7,000, was taken over by the bankruptcy court and applied toward the completion of the con-

tract by the receivers. When the building was completed a considerable sum remained as assets of the bankrupts and was applied as such in the bankruptcy proceedings. Thus, it will be observed, about \$40,000 of the contract price was voluntarily paid by the owner to the contractors, and the residue was paid out by the owner under the order of the bankruptcy court.

Because of the insolvency of the contractors, many liens under Code 1906, chapter 75, section 3, were asserted against the property for labor performed and material furnished prior to the bankruptcy. It seems that the claims of the direct laborers were satisfied by orders and disbursements made in the bankruptcy court. The suit which we have before us involves the enforcement of liens claimed by material men and subcontractors of specific portions of the work. It is of course a proceeding under the statute, directed against the property, while the bankruptcy case had only to do with the residue of the contract price as assets of the bankrupt contractors.

Upon the report of a commissioner a number of liens have been decreed against the property, amounting in the aggregate to nearly \$15,000. Appellant, the Board of Trustees, mainly insists that the property is not at all subject to any of these claims. Specific exceptions to certain of the claims decreed as liens are also assigned.

The main contention that the property is not at all subject to the claims that have been decreed as liens against it is based on the fact that all of the contract price was paid out by the owner. It is submitted that since about \$40,000 of the contract price had been paid to the contractors before the claims were asserted as liens, and since the residue was paid on the contract by order of the bankruptcy court, there is no liability against the property under the statute giving liens to mechanics, laborers, and others. In other words, it is insisted that when the contract between the owner and the contractor is recorded, the owner may pay out the contract price pursuant to the terms of the contract without liability for the claims of those who have performed labor or furnished material for the building, as long as the owner is given no notice that such claimants will look to the property for the payment of their claims. Under the present mechanics' lien law, that enacted by the Legislature of 1891 and slightly amended in 1903, all of which is contained in Code 1906, chapter 75, we can not sanction this contention.

[8] That for which appellant contends was our law of mechanics' liens prior to our present law. It was the law as contained in Code 1887, chapter 75. Perhaps it was the better law; but as judges we have no province to say that it was, or to adopt it for that reason. Moreover, it may be that we should return to the principles of the enactment contained in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Code 1887, chapter 75; but it is for the Legislature and not for this court to say that we shall. We must apply legislative enactments as we find them, though their policy or effect may be subject to sound criticism.

It will be necessary to define in a general way the meaning of the provisions of the present mechanics' lien law in relation to the rights of those performing labor or furnishing material under a contract with the principal contractor, since appellant contends for a construction widely at variance with that which we must announce.

By our former statute it indeed was provided that a mechanics' lien only affected what had not been paid by the owner to the contractor at the time the notice of the claim of lien was given, unless the person claiming had given notice to the owner before doing work or furnishing material that he would look to the owner for payment. No such provision is made by the present statute. The present law does provide, in section 3, for the claimant's notice to the owner before doing work or furnishing material, but that is clearly in another connection and for a wholly different purpose. We shall see that a very different scheme of the limiting of the owner's liability is embodied in the present statute, as compared with that contained in the former law.

[1] The present statute gives a direct lien to one performing labor or furnishing material under a contract with the principal contractor or his subcontractor. To that extent it embodies the so-called Pennsylvania system as contradistinguished from the New York system which was the basis of the former statute contained in Code 1887, ch. 75. Phillips on Mechanics' Liens, sec. 57; Boisot on Mechanics' Liens, sec. 225; 27 Cyc. 89; Hunter v. Truckee Lodge, 14 Nev. 24. But in construing the present statute, section 3, which gives this direct lien, must be read in connection with section 5, whereby the owner may limit his liabilities by recording his contract with the principal contractor.

[2, 3] Section 5 provides that "no payment by the owner or his agent, to a contractor, shall effect or impair the lien of a laborer, or material man, provided for in section three." But this provision is immediately followed by these words: "But such owner may limit his liabilities so that the amounts to be paid by him shall not exceed in the aggregate, the price stipulated in the said contracts between himself and the contractor, by having the said contract, or so much thereof, as shows the contract price, and the times of its payment, recorded in the office of the clerk of the county court of the county, where such house or other structure is situated, prior to the performance of the labor and the furnishing of the material, or the machinery for the same." Here we have that which gives the owner right to limit his liabilities under the contract. It does not define the liabilities as being merely those arising from

liens. It is broad enough to take in any other liability under the contract. The provision, however, must be taken in relation to the preceding one that says no payment shall affect or impair any lien. Both provisions must be given effect. Taken together, they plainly say that though no payment by the owner to the contractor may affect or impair a lien, still the owner may record the building contract and thereby limit his liabilities under it, so that the amounts to be paid by him shall not in the aggregate exceed the contract price.

Now, the act says that the recording of the contract shall operate to confine the "amounts to be paid" by the owner to the contract price. What amounts? We must say all amounts that are properly payable under the contract, whether they are payable by its terms or by the law in relation to liabilities for liens. The recordation must not only show the contract price but "the times of its payment." Why give notice of the times of payment? Surely this must be for the purpose of notifying those about to perform labor or furnish material that part of the contract price may have theretofore been paid by the owner so that a lien for labor thereafter performed or material thereafter furnished will not affect the full contract price. It is plainly implied that if the contract is recorded, payments to the contractor according to the terms of the contract may sometimes safely be made by the owner. But we have seen that they can not be made to the impairment of liens. In view of the words of both of the provisions, we must hold that the first provision means that payments under the terms of the recorded contract can not be made to the impairment of liens that exist or have incipently set in by virtue of section 3 when the payment under the contract becomes due. Suppose, however, that no liens have attached when a payment under the contract becomes due—that all labor or material has been paid for in cash by the contractor to that time. Or, suppose that the contractor has obtained waiver of all liens that have set in to that time. The payment can then be made without affecting any lien, if the contract is recorded. It is then an 'amount to be paid' under the contract that is protected by the recording. It is a liability then due, because no liens have set in. The contract demands that the owner pay it to the contractor and the law does not forbid, since payment will not affect any existing right to lien. It is one of "the amounts to be paid by him," in the language of the act. When paid, it counts on the limit of liabilities. Liens thereafter attaching are limited by such payment. And it is for this reason that the recordation must show the times of the payment. When one is about to perform labor or to furnish material, he has notice by the recorded contract that payments may have been made and his right to lien thereby cut down or limited to the residue of the con-

tract price. The laborer or material man, before performing or furnishing, must take notice of the times of payment mentioned in the contract, whenever that contract is recorded. What other purpose could there be for the requirement that the recording shall show the times of payment?

We hold, therefore, that the owner must take notice of all liens under section 3 that have set in when a payment to the contractor becomes due; that he can at no time make a payment under the contract to the impairment of a lien that may be perfected and relate back under section 3 to a time prior to the proposed payment, on account of labor performed or material furnished before that time. But we also hold that the laborer or material man must likewise take notice of all payments that have become due and may have been paid under the terms of the contract prior to the beginning of the performance of labor or the furnishing of material by him.

We do not overlook the fact that under section 3 the right to lien begins to run when any labor is performed or material furnished, and that the incipient right continues on down during the performance and furnishing and even for thirty-five days thereafter. Let it be distinctly noted that we hold that after such lien right begins to run, the owner can not pay to the contractor even at the times mentioned in the recorded contract without still being liable to the laborer or material man. But where a payment at a time and in the amount mentioned in the contract can be made without interference of liens, or where it can be made by the contractor's clearing up all lien liabilities to the date of the same, it may be made by the owner and thereafter his liability for liens is reduced accordingly.

[4] When the contract is recorded, the amount of the contract price is, in a sense, a fund for the payment of liens given by section 3, for which fund the property may be resorted to, but the evident meaning of section 5 is that the fund may be reduced by payments made in accordance with the recorded contract, as to those who do not begin to perform labor or furnish material until after those payments are made. This provision works no injustice to laborers or material men. They may observe by the recorded contract when payments by the owner to the contractor may be made thereunder. They may ascertain what amount of the contract price is still in the hands of the owner before they begin to perform labor or to furnish material, and may refuse to extend credit to the contractor if they deem their right to lien security insufficient. They may in advance of giving their labor or material observe that by this limiting statute the fund has been so far paid to the contractor that it would be unsafe for them to extend credit because of the limited amount remaining, or because of many liens to which the remaining

amount may be subject. On the other hand to hold, indeed in the face of the plain import of the provision for limiting liabilities, that the owner can not make a payment to the contractor without taking the risk of liens that may begin to set in long after the payment is due under the contract, is virtually to hold that the owner for his own protection must hold all the contract price in his hands until all work under the contract is finished, so as to be able to pay out prorately the amount in case mechanics' liens taken in the end should exceed it. Such a holding would be onerous on both contractor and owner. It would annihilate the contract between them as to the times of payment. If the contractor did not have independent means to carry on the work, it would readily cause him to fall in the execution of the contract, and would most frequently cause the owner the annoyance of liens on his property and the task of clearing them therefrom. It was certainly not so intended. The construction we give is the one justified by the spirit and purpose of the law, as well as by the letter of the law. It does no more than to enjoin on the contractor the payment of all bills for labor and material of every kind that have accrued to the date of the payment provided for in the contract, and the securing of waivers of liens therefor, before the owner can pay him according to the provisions of the contract. How well do we all know that the fulfillment of this injunction by the contractor always proves beneficial to himself as well as to the owner.

It is only when the contract is not recorded that the right to liens given by section 3 to those performing labor or furnishing material under a contract with the principal contractor or his subcontractor, has full sway. The alternative provision immediately following the provision for recording the contract makes this clear. When, however, the contract is recorded, the limitations by the statute on the right to liens under section 3 are such as to modify materially that right, as we have shown.

While it appears in the case under consideration that all of the contract price was paid by the owner to the contractors, the latter part thereof by the judgment of the bankruptcy court, still no case is pleaded or proved that brings appellant within any saving of the statute in relation to the limiting of liabilities under the building contract by the recording thereof. Though we consider the contract a recorded one, still appellant has made no showing that any payment of the contract price by the owner limited its liabilities thereunder in any way. The contract calls for monthly payments by the owner to the contractor in no specific amounts, but only for monthly payments of ninety per cent of the estimated work done at the time of each payment. It is not shown when the work was begun so that we may fix the dates when the monthly payments became due, nor

is it shown what the date and amount of each payment was. Therefore, we can not see that any payment under the contract was made so as to be out from under liens claimed, or so as to limit the liens to any particular part of the fund. The burden was on appellant to show that its liabilities for liens was limited. As far as we can see from the record, none of the liens proved, reported, and decreed were limited by any of the payments which appellant made to the contractors. Indeed, from the record generally it would seem that all the payments, other than the one under the order of the bankruptcy court, were made regardless of the liens claimed. If appellant could have proved otherwise, it should have done so before submitting its case for final determination.

[6] The contract between the owner and the contractors involved in this case was recorded without having been acknowledged or proved by witnesses. The question whether it is a recorded contract in contemplation of the statute is raised and argued. We need not say, in view of our finding that no case of a limiting of liabilities is made, even if the contract was properly recorded. The aggregate of the liens claimed and involved in this case, about \$15,000, is far under the \$40,000 of the contract price paid by the owner to the contractors. The question of recording, therefore, becomes an immaterial one.

[6] It is submitted as to several of the liens decreed that they are not valid because claimed by parties to whom the contractors sublet portions of the work. It is said that a subcontractor of this character is not given a lien by the statute. We interpret the statute otherwise. Section 3 gives the right of lien to "every material man, workman, laborer, mechanic or other person, performing any labor or furnishing any material or machinery, under a contract with a principal contractor or his subcontractor." This is a broad provision. It surely gives right of lien to any one performing a portion of the work and furnishing material therefor under any kind of subcontract. All those mentioned are indeed subcontractors. The statute does not undertake to make distinction between them based on the kind of subcontract they fulfill. Nor shall we undertake to do so. The statute even allows those contracting with a subcontractor to take a lien. Shall we cut out the intermediate man? Note that it says, "or other person, performing any labor or furnishing any material or machinery, under contract with the principal contractor." That is, "any person who performs any labor or furnishes any material under a contract with the principal contractor." Is not one who erects the foundation or a porch under a contract with the principal contractor within this clause? Does he not perform labor and furnish material under his contract with the principal

contractor? Does the statute make any distinction between this sort of subcontractor and one who performs a day's labor or furnishes a single plank? Plainly, the only test is that of a contract with the principal contractor. Such a contract makes one a subcontractor. Though the subcontract may be of the character that the subcontractor does not himself personally perform the labor or furnish the material, he is still one "performing labor and furnishing material." "Under statutes providing for liens in favor of persons who 'perform' labor, the better doctrine is that one who furnishes the labor of his employes, such as a contractor, is to be considered as performing labor." 20 Amer. & Eng. Enc. Law, 340. The distinction sought to be made is not justified by the plain language of the statute. Moreover, it is too refined to be practical. Indeed, it is apparent that the plain import of sections three and five is to protect all persons who put labor or material into a building under contract with the principal contractor or his subcontractor, and though in different connections in these sections different terms are employed to designate such persons, the terms should be considered as used interchangeably and as referring to this same class of persons.

[7] It is suggested in appellant's brief that the question of the liability of the property for the liens claimed against the same in this suit is *res judicata*—that the bankruptcy court decided that which we are called upon to decide. This point is not sustained by the record. Indeed *res judicata* is not pleaded or presented by the record in any way. Of the orders and judgments of the bankruptcy court the record shows only that the contractors were declared bankrupts and that the residue of the contract price was expended under the order of that court. Such action by the bankruptcy court affects no question in this suit. We are cited to the published opinion of the court in the bankruptcy case. That alone will not do for a showing of *res judicata*. It appears from the opinion that the case involved only ascertainment of the assets of the bankrupts and ascertainment of the debts to which those assets were liable. For the purposes of that case all the mechanics' liens involved here, but one, were upheld as valid against the assets of the bankrupts. However, the case in bankruptcy did not and could not involve the question whether the property of appellant was liable for these mechanics' liens. Appellant was not the bankrupt, nor could these liens be there adjudicated as against its property.

The exception to the lien decreed Hanley, based on the fact that he was one of the bondsmen of the contractors, is not well taken. It suffices to say that no case was pleaded, or otherwise made out, calling for an adjustment of liabilities between Hanley and appellant.

Lyon, who was a subcontractor for the plumbing work, finished his contract under the receivers. It is contended that he lost his right to lien because he did not assert his claim by notice to the owner within thirty-five days after ceasing to perform labor and furnish material for Hobbs & Co. He gave the notice within the statutory time after ceasing work under the receivers. Was he working under the same contract? If so, he could claim the lien within thirty-five days after finishing it. He testifies that he proceeded under the old contract; the receiver who negotiated with him in the matter testifies that he made a new and independent contract with him. Thus the evidence is in direct conflict. We give weight to some considerations which tend to show that Lyon was merely completing his original subcontract under the successors of the contractors, the receivers, and to the fact that the commissioner found in favor of the lien and the court below confirmed that finding. The exception will be overruled.

The cross-assignment of error as to the lien of Kane & Keyser Hardware Company will be sustained. We are of opinion that the commissioner improperly disallowed a large part of the claim asserted by this company, and that the court erroneously overruled the exception to the report of the commissioner in this particular. The lien claimed was for the sum of \$1,941.20. The amount allowed and decreed was \$656.43, with interest to February 15, 1910, making in all the sum of \$886.17 as of that date. The decree should have been for the full amount claimed, with interest to February 15, 1910, making the sum of \$2,622.56 as of that date. From the evidence it appears that the items for which the lien is asserted are all within one continuous contract or running account, and that the commissioner was in error in considering that the right to lien had been lost as to some of the items by reason of lapse of time. We can not uphold the contention that the materials were furnished for separate and distinct purposes or under distinct contracts or orders. Therefore the decree will be modified and corrected as to the mechanic's lien of Kane & Keyser Hardware Company. The amount covered by that lien will now be decreed to be \$2,622.56, as of February 15, 1910, instead of \$886.17 as of that date.

If the college corporation is not protected by the bonds it took from the contractors and must lose the amount of the liens decreed, it is indeed unfortunate. But its officers in that event must be themselves chargeable with the blame. The contract with Hobbs & Co. in express terms gave them the right to retain from any payment of the contract price as it became due an amount sufficient to cover all claims of laborers or material men that had become chargeable to the property at the time. The law enjoined on them the duty to look out for liens of

subcontractors, in any event. They could have fully protected the college corporation. But instead, they paid over to the contractors, ostensibly on the personal responsibility of the latter. An investigation before payment, such as owners under our law must make, would have disclosed the very claims now decreed against the property.

The decree in this cause must be affirmed, except so far as hereinbefore modified and corrected in relation to the lien of Kane & Keyser Hardware Company.

WILLIAMS, J. (dissenting). I think it is essential to determine whether the contract between the trustees and the Hobbs & Co. was recorded, in order to determine the rights of the appellees. If it was not a recordable paper, I admit that the simple act of spreading it upon the record by the clerk would not amount to a recordation. *Raines v. Walker*, 77 Va. 92; *Abney v. Lumber Co.*, 45 W. Va. 446, 32 S. E. 256; *Coal Co. v. Smith*, 63 W. Va. 587, 60 S. E. 593.

It is contended that it was not recordable because it was not authenticated. I do not think authentication is necessary. There is nothing in the mechanics' lien statute requiring it to be acknowledged or verified, to make it recordable. *Boisot on Mechanics' Liens*, § 78, says: "Where the statute does not expressly so require, it is not necessary that a written contract, intended to secure a mechanics' lien, should be authenticated before being recorded, nor need it be verified by affidavit." Section 3, chapter 74, Code 1906, provides, in case of sale of goods where the seller delivers possession but retains title until the goods are paid for, that the sale shall be void as to creditors of, and purchasers without notice, from such buyer, unless a notice of such reservation be recorded in the clerk's office of the county where the property is. There is no authentication required by that statute and this court has held that none is necessary to make the contract recordable. *Wagon Co. v. Hutton*, 53 W. Va. 154, 44 S. E. 135; *Hatfield v. Haubert*, 51 W. Va. 190, 41 S. E. 144. And further, as indicating that the contract need not be acknowledged, the owner is not required to record the whole of his contract but may record only "so much thereof, as shows the contract price, and the times of payment." The contract in this case was recorded July 9, 1903, before any work had been done or material furnished by appellees. The statute says the owner may limit his liabilities, so that the amount to be paid by him shall not exceed in the aggregate the price fixed in the contract, by recording his contract with the principal contractor. I think it is clear that the purpose of recordation is to protect the owner so that he may not be compelled to pay, in the aggregate to all persons concerned, any more than he agreed to pay the principal contractor; and at the same time to notify the laborers.

and materialmen of the price contracted for with the contractor, and of the times when the payments therein become due. *Boisot on Mechanics' Liens*, § 78; *Pimlott v. Hall*, 55 N. J. Law, 182, 26 Atl. 94; *Ayres v. Revere*, 25 N. J. Law, 474.

A comparison of the present statute with the mechanics' lien law, as it was in 1887, will afford material aid, I think, in ascertaining the purpose for which the changes in the law were made.

Some of the prominent features of the former statute were as follows:

(1) It gave the principal contractor, the laborer, and materialmen liens of equal dignity.

(2) It required *thirty* days' written notice to the owner, after ceasing to furnish material or perform labor, in order to preserve the lien.

(3) It limited all liens to the balance due from the owner to the principal contractor, at the time he was given notice of the lien, unless he had been notified in writing by the laborer or materialman, before he did any work or furnished material, that he would look to him for his pay; and in such case the lien was for the full value of the work done or material furnished by such person after giving notice, notwithstanding it might exceed the contract price.

(4) It made no provision for recording the contract, and permitted the owner to make payments to the contractor according to the terms of his contract, and thus to affect or limit the liens of the laborer and materialman pro tanto, unless he had been notified by them in writing, as above stated.

The distinguishing features of the present law are:

(1) It subordinates the lien of the principal contractor to the liens of the laborer, materialman, and subcontractor, and makes the latter liens of equal dignity.

(2) The time within which notice of the lien is to be given the owner is changed from thirty to *thirty-five* days.

(3) It contains the same provision as the old law, whereby the laborer or materialman may secure a lien for the full amount of his claim, by notifying the owner in writing before performing labor or furnishing material, that he will look to him for his pay; and, in the event such notice is given, it dispenses with the thirty-five days' notice, unless the owner, in writing, requires it. It also gives the owner the right to demand of the laborer or materialman, in writing, that he file with him his itemized account; and, in the event of his failure to do so within ten days thereafter, releases the owner and his property from any liability for all work or material done or furnished, prior to the time of his giving the notice.

(4) It does not expressly limit the amount of liens to the price stipulated with the principal contractor, but it provides that the owner may do so by having his contract with

the principal contractor, "or so much thereof, as shows the contract price and the times of its payment," recorded.

If the owner records his contract before any work is done or material furnished, the liability of his property for liens is no greater, I think, than it was under the law of 1887. That such is the result of recording the contract, is clearly implied from the language of the latter part of section 5, which says what shall be the effect of his failure to record his contract. It says that, if he fails to record the contract, the property shall "be held liable for the true value of all labor done, and material and machinery furnished therefor, prior to such recording, although the same may exceed, in the aggregate, the price stipulated in the contract between the owner and the contractor." Note the words, "prior to such recording." Must not the converse of this be true? If his property is made liable because of his failure to record his contract, is it not clear that the Legislature intended that the recording should have the effect to relieve it of liability; and more especially so, when the act expressly says the owner may thus limit his liability so that the amount for which the property is liable shall not exceed, in the aggregate, the amount stipulated in the contract. What effect should be given to the language of section 5, viz.: "No payment by the owner or his agent, to a contractor, shall affect or impair the lien of a laborer, or materialman, provided for in section three of this chapter." To give it full effect, as if it stood alone, would nullify the provision for limiting the owner's liability, and would prevent him from carrying out his contract with the principal contractor. But all parts of the act must be given some effect and all made to harmonize, if possible. Hence the effect of that provision must be limited. To what extent? The opinion limits its application to payments made to the principal contractor, after the materialman or laborer has begun to furnish material or perform labor, notwithstanding the owner has recorded his contract before that time, and gives no effect to the recordation as a notice to the lien claimants. But the statute says that, if he fails to record his contract, he shall only be liable for what has been done prior to the recording of the contract. To my mind, that means that if the owner records his contract before anything is done or furnished, his property is not liable, unless he has received the written notice which section 3 provides may be given him by the laborer or materialman, before he has begun work or furnished material. Hence, I think, the words, "No payment by the owner," etc., should be construed to mean, no payment made by the owner to the principal contractor, before his contract shall have been recorded, shall impair the lien of a laborer or materialman provided for in section 3 of this chapter.

The construction placed upon that clause of the statute by the opinion imposes upon the owner the burdensome duty of ascertaining that every materialman and laborer is paid the full amount due him for material or labor, before he can safely make a payment to the principal contractor according to the terms of his contract. It will place upon him the burden of giving personal oversight to the construction of his building, to ascertain who is doing labor upon it, and, if possible, who is furnishing material to be used in its construction, the very thing which, as it appears to me, the making and recording of his contract was designed to relieve him of. I think the recordation of the contract is designed to be constructive notice to every materialman and laborer, who thereafter becomes interested, both as to the price for which the contractor has agreed to build the house and the amounts and times when he is to receive his payments. And, having such notice, they must assume that the owner will comply with his contract and make payments when they become due; and in order that their liens shall attach to and bind such payments, they must give to the owner the written notice, provided for in section 8, that they will look to him for pay. It seems to me that this construction is not only consistent with the language of the statute, but is much more reasonable and practical than the one given in the opinion, and will operate justly upon all persons interested. If the owner is to be held liable, notwithstanding the recording of his contract, for all labor and material done and furnished after the recording of it, he is in a position where he is liable to be imposed upon, if the principal contractor happens to be a dishonest man. The contractor usually buys his material from many different persons, located in different parts of the country, and the owner must get his information from him on whose order they were furnished. And if he fails to give him correct information, and the owner should make payment to the contractor, he would, nevertheless, be liable to the materialman according to the opinion, even though he had recorded his contract. By the law of 1887, which did not provide for recording the contract, the owner could pay to the contractor, and thereby cut off the liens of the materialmen and laborers, pro tanto, unless he had received written notice that he would be looked to for payment. I think the clause in question was designed to prevent a payment to the principal contractor from having that effect only in case the contract was not recorded.

The contract in this case was recorded before any material was furnished or work done; there is no evidence that the trustees were notified in writing by any of the lien claimants that they would be looked to for

pay before they did work or furnished material; the decree shows that the property is made liable for several thousand dollars more than the contract price; and, for the foregoing reasons, I think the decree should have been reversed.

POFFENBARGER, J. (concurring). I concur in the conclusion in this case, but not in the construction of the statute adopted by my Associates. Under the rules of interpretation, a slight and unnecessary implication raised from certain terms used in section 5 of the statute cannot be permitted to limit, cut down, or destroy the positive terms of section 8, giving the laborer and materialman liens for their labor and materials, superior to that of the principal contractor, and of section 5 itself, saying no payment to a contractor shall impair those liens.

No extensive argument in support of this position is offered here, because it rests upon the plain letter of the statute, entirely accordant with its spirit. Since the terms thereof contravene no constitutional provision nor settled policy or system of law pertaining to a different subject, there is no basis for an assumption or presumption of legislative intent to except anything therefrom by implication, as is sometimes the case. To effect an exception by an implication arising from the terms of the statute itself, not from presumption founded upon a constitutional limitation or an established principle of public policy, the implication must be a necessary, not a mere probable or possible one. The court here limits and restrains the express terms of sections 3 and 5 of the statute by a clearly unnecessary and barely probable or possible implication.

I must dissent from another proposition asserted by the opinion. Section 3 gives no lien to a subcontractor as such. He has a lien only for labor, materials, or machinery furnished by him, and none for any share in the principal contractor's profit. The first proposition asserted by my Associates will permit the owner and principal contractor, by the terms and provisions of their recorded contract, to defeat claims of laborers and materialmen, and the second will permit the same thing to be done by transactions between the principal contractor and the subcontractor, contrary to the manifest purpose and spirit of the statute as well as its letter.

Properly applied, the statute may be more onerous and burdensome upon owners and principal contractors than due protection to the rights of laborers and materialmen requires, but that does not justify any modification by the courts. It is a question of policy or expediency for the Legislature. Nothing will bring about the repeal of a bad law more quickly or effectually than rigid enforcement thereof.

TURNER et al. v. HINCHMAN et al.
(Supreme Court of Appeals of West Virginia.
Dec. 19, 1912. Rehearing Denied
June 30, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 196*)—EXECUTION—UNDUE INFLUENCE.

When a deed is made by a man 88 years of age, long suffering from painful disease, feeble in body and mind from age and disease, which deed conveys all his lands, of great value, to two sons, in whom he reposed confidence, who transacted his business, and resided close to him, the deed drawn by one of the sons at his own home, not in the presence of the father, executed in the presence of the two sons, in the absence of four daughters living at a distance, the deed not read or explained to the father, the sons having had a private interview with him the day before, which deed conveys to the sons all the father's land, of great value, whereas the daughters are to be paid money far less than the value of the land. He had often expressed an intent to bestow his land equally upon all his children. At the date of the deed one of the sons held a deed for all his father's land. The father, within a few months before and after the deed to the two sons, made wills and deeds inconsistent with the deeds to the two sons, as if he still owned the land. These circumstances make a strong prima facie case of undue influence, and call for clear evidence of fair dealing on the part of the sons.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593, 649; Dec. Dig. § 196.*]

2. DEEDS (§ 211*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

The facts and circumstances of this case establish undue influence upon the grantor in the procurement of a deed conveying land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

Williams and Robinson, JJ., dissenting.

Appeal from Circuit Court, Kanawha County.

Bill by William Turner and others against Joseph W. Hinchman and others. From judgment for defendants, plaintiffs appeal. Reversed and remanded.

Vinson & Thompson and T. J. Bryan, all of Huntington, for appellants. J. S. Miller, C. H. Hudson, and Ellison & England, all of Logan, and Geo. J. McComas, of Huntington, for appellees.

BRANNON, P. By a deed dated May 29, 1905, James H. Hinchman conveyed to his two sons, George R. Hinchman and Joseph W. Hinchman, five tracts of land in Logan county aggregating 1,162 acres. This is a suit brought by other children of James H. Hinchman to annul and set aside the deed on the grounds that James H. Hinchman was mentally incompetent to make it, and that his sons obtained it by undue influence upon their father. The case resulted in a decree dismissing the suit, from which William Turner and wife and other parties have appealed.

The evidence in the case is from many witnesses on both sides. It is useless to recite

it. We have come to the conclusion, from the evidence and circumstances of the case, that James H. Hinchman was mentally incompetent to make the deed, from weakness of mind and undue influence exerted upon him by his sons, leaving his mind not free.

[1, 2] Opinion evidence is given on both sides to show that he was competent and incompetent. Perhaps we may say that this oral evidence of incapacity is stronger than that of his capacity, because coming from persons who were with Hinchman more than those asserting his capacity and better able to judge. But we test the case more by the circumstances, and when we add to those circumstances, beyond dispute the oral evidence of incompetency, we think such oral evidence has great weight, taken along with such circumstances. James H. Hinchman when he made that deed had attained the great age of 88 years. He was then, and for some time before had been, afflicted with chronic diarrhoea, angina pectoris, and senile infirmities. He was confined to his bed most of the time, for several years not going out. His acts touching his valuable estate were utterly inconsistent with each other, and tend to show that he really did not know his estate or its value, and had no fixed ideas as to the object of his bounty. He had left six children, the two sons to whom the deed in question was made and four daughters. See how unreasonable and inconsistent were his acts as to his land. By a deed the 19th of March, 1904, he conveyed all these lands to one son, George R. Hinchman. Though not the owner of the land after that deed, yet he made a will on the 30th of August, 1904, at the instance of Joseph Hinchman, saying that he understood that a deed was on record purporting to be signed by him, conveying to George R. Hinchman said land, and reciting that at the date of the deed he was sick and unable to transact business of any character on the account of ill health and age, and saying that George Hinchman that day prepared and brought it to him in the nighttime, and without reading it insisted on his father executing it, and had paid nothing, and had thereby obtained from him, against the interest of his other children, and without just reason to do so, all the real estate owned by him; and saying that it was not his purpose to discriminate against his other children and take from them an equal share of his estate in favor of George Hinchman; and saying that George had obtained the deed by misrepresentation, undue influence, and improper conduct, and that he (the father) desired to annul it, and to give all his children equal shares; and by said will he devised said land equally among his children. James H. Hinchman had been recorded of Logan county, and had been a member of the House of Delegates in days gone by, and yet his mind had so far weakened that he did not

know that he could not by will cancel the deed to his son or give the land to others. The old man thought he was still owner of the land.

What his next act? George Hinchman likely heard of that will. He went to his father with a prepared deed, and had him execute it on the 15th of September, 1904, conveying the same land by more particular description, saying this second deed was to cure any defect that might exist in the former deed by reason of vagueness of description. The former deed seems sufficient in this respect, and the true reason likely was to get the father's confirmation and doubly bind him, and to frustrate and defeat the will of 30th of August, 1904. On the stand he said that he got up his deed to make assurance doubly sure. He was after the lion's share. Now, on the 12th of September, three days before this confirmatory deed, he wrote his father, as is not denied, that he had just been fixing to come to see him, when a child took sick. The letter went on to say, "I have that deed made to you all right, and will have it recorded today. I have had it wrote some time, but never got a notary here, so Marg could sign it. I will be up as soon as I can." This shows that his father had requested a reconveyance, and that George acceded to it; but lo, three days later, this reconveyance turns out to be one by which the old deed to George is approved and re-executed by his father. This goes to show, not only undue influence and fraud, but weakness of mind of the father. If competent, why would he consent to a deed confirming a deed which he had asked to be revoked?

What the next act? In October, 1904, James H. Hinchman brought a suit against George Hinchman to cancel the two deeds which James H. Hinchman had made to him, alleging in his bill that George R. Hinchman had advised him to convey his land to him so that it could be better divided among his children, and promising to hold it for them all, and that he came with the deed of the 15th of September at night, when the old man was sick in bed, and that he executed the deed, being at the time so sick and feeble that he could not understand it, and that it was procured by fraud and misrepresentation. He alleged that he wanted all children to share, and that George had promised to reconvey, as he could not make a division between the children, and that he (the father) thought he was only getting back his land by this deed. This is very likely. He made his son Joseph his attorney in fact to attend to all his business, and Joseph was active in the prosecution of this suit by producing witnesses and taking other steps in it. As witness the old man swore, in a deposition in that suit as to the September deed, that he thought it gave him his land back, as George had promised. A compromise was made of

that suit and it was dismissed. It seems clear that by the compromise the land was to be conveyed back to James H. Hinchman and divided between the six children equally. By deed dated the 29th of May, 1905, George R. Hinchman conveyed the land back to his father, and by deed of the same date the father conveyed the same land to his two sons, George and Joseph Hinchman, the deed in controversy in this case. On June 23, 1905, the father, James H. Hinchman, made a will by which he confirmed the deed which he had made to George and Joseph Hinchman of the 29th of May, 1905. If that deed was good, why this will? Did the sons fear as to its validity, and desire their father to confirm it by will? The old man seems to have thought that he still owned the land and could devise it. A little later on, on the 27th of July, 1905, James H. Hinchman made another will, which was probated. This will states that certain litigation between James H. Hinchman and George R. Hinchman had been compromised, and that the compromise was not carried out according to the agreement, and that it had come to his knowledge that a deed was on record purporting to have been made by him, James H. Hinchman, on the 29th of May, 1905, conveying all his real estate to Joseph W. Hinchman and George R. Hinchman, and that said deed was contrary to his wishes, because he desired a fair division made of all his property between all his heirs. This will then repudiated and rescinded the deed of May 29, 1905, as being no act of the testator. The will further recites that it had come to the knowledge of the testator that a will was in existence purporting to be made by him, conveying all his real estate to Joseph W. Hinchman and George R. Hinchman, and stating this was contrary to his wishes. By the will of 27th of July he devises all his land equally among all his living children and the children of one dead. The old man seemed not to comprehend that he did not own the land; he seemed to think he could yet give it to his children impartially by will.

Now may we not say that these acts of James H. Hinchman, making inconsistent disposal of this land, giving by one act to George R. Hinchman, by another to his two sons, by another to his children equally—six of these inconsistent acts within 16 months—show that he was incompetent? He does and undoes. These circumstances are strong to show that the old man was in second childhood. He was broken by age and disease and suffering. He was a mental wreck. He was plastic clay in the potter's hand. We can the more truly say this when we reflect that he did not write one of these papers, but they were brought to him by interested parties. It does not appear that he suggested or drew up or originated any of these inconsistent papers. It does not appear that he manifested any desire as to the disposition of

his property other than a heartfelt desire that all his children should share equally. That was his only ruling purpose. Those inconsistent papers go to show that James H. Hinchman in the dotage of age and weakness of body would yield to any child that would solicit his action. He had no force of will to resist. If not so, why would he yield to first one, then another? The very fact that he was once a man of intellect lends strength to the statement that he was later an imbecile; for if he had not lost all his natural business capacity, we would not find him making such inconsistent papers, such disposition of his property. No man in his senses would do this. This charge of incompetency is sustained by the shocking injustice to his daughters from the deed involved in this suit. The land was about 1,300 acres in a fine coal region in Logan county, worth anywhere from \$30,000 to \$50,000. The four daughters had never received anything from their father. That deed gave each of them only \$1,500. The sons got the lion's share. Can we think that a man who had held a responsible position, and of good character and principle, who is shown to have had strong love for his children, would thus make rich men of two sons and give his daughters pittance?

Any one reading a deposition given by James H. Hinchman a few months before the date of the deed must be struck with the fact that he was of very feeble mind. I cannot give the details of that deposition, but it shows great feebleness of mind. So much as to the want of capacity of James H. Hinchman to make the deed. As to Joseph W. Hinchman, he was an active prosecutor of that suit, in the name of his father, to set aside the two deeds made by his father to George R. Hinchman, based on the charge of mental weakness of his father. By letters to his sisters he called upon them to fight George R. Hinchman in the suit to set aside those deeds. In letters to his sisters he did this, and denounced his brother as guilty of fraud, calling him a "sneak thief." He said in one letter that his father was "but a poor old feeble thing; he is a mental and physical wreck & the man that would dare to take advantage of him how could I call him my brother." In a letter about the suit of his father against George R. Hinchman he said: "I have got pap fully awakened, but he is just like a little child, perfectly inactive, forgetful, and indifferent. Have to tell him again to day what I told him day before yesterday." He told several persons that owing to age and infirmity he was a mental wreck and incapable of transacting any business of importance, and, childlike, could be influenced to sign any paper, and said he would so state on oath. Such was Joseph's opinion as to his father's mental condition. So much as to the question of capacity of James H. Hinchman to make the deed.

Now as to undue influence. The two brothers were men of mature age and seemed astute. They lived within less than a mile of their father's house. The old man transacted no business, but left it all to those two sons, particularly to George R. Hinchman. The daughters lived in another county. They and their husbands seldom saw the old man, but those two sons were in almost daily intercourse with their father. George R. Hinchman cut a large amount of timber from his father's land and received the money therefor, and collected oil rental, and deposited the money in his own name in the bank. He did not turn it over to his father, and only paid him petty sums now and then. When his father sued him to set aside the two deeds above mentioned, he also sued him in assumpsit for those moneys, claiming some \$5,000. All the evidence shows that the old man had confidence in these sons, committed all his business to them, and that they had unbounded influence over him. They could get him to make any paper they wished, as shown by the inconsistent papers, above mentioned, and other evidence. On Sunday May 28th, George and Joseph Hinchman went to their father's home. One of them came from Ohio, to which he had a few weeks before moved. Shortly before that, about the 5th of May, the two brothers had arranged a compromise of the suits to cancel the deed to George Hinchman, by which compromise George was to give up the land, and it was to be divided equally among the six children. For such a result Joseph Hinchman had been struggling for months. On that Sunday a private conference took place between the father and those two sons. A grandson swears that one of the sons suggested to him that he and his wife, then living with James H. Hinchman, visit a neighbor and leave the two sons with their father, as they had some business matters to talk over with him. The grandson and his wife did so. The two sons and their father had that conference to themselves. What did they say to the old man? We do not know. Did they tell him that on the next day the compromise would be carried out and thus misrepresent the character of the deed which the old man made next day? Did they tell him that he was to get back his land and make a deed of equal division among all the children? Or did they overween him to consent to the deed of the next day, giving all his large estate to the two sons. That secret conference speaks strongly in this case. It was on Sunday. The case was pressing. It is not without force to remark that George and Joseph seemed afraid to say whether they were there together. They say that they cannot say as to this. Strange! But there they were. George had a deed for all the land. The old man says George made a proposition. What? There he was, having all the land in his clutch. He had re-

ceived it in trust to divide among all the children. Perhaps he said to his father, "If you will deed the land to me and Joseph, I will surrender the land to you." He had the land in his hand as a weapon of coercion. Both brothers may have used it as a club to compel such deed. The old weak man, thus coerced, was in vinculis, moved by undue influence.

We do not deny the rule of *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788, that a man is presumed to be able to make a deed; we do not say that Hinchman was incompetent to make a free and voluntary deed, but, old and weak as he was, he was not free under the circumstance that George had his land and could dictate terms of surrender. Anyhow, the next day is born a deed by which the old man gives all his land, worth from \$30,000 to \$50,000 then, and prospectively more, to his two sons. Joseph Hinchman, who had been writing to his sisters that he was fighting for equal division, suddenly deserts them, and becomes owner of half himself and concedes the other half to his late antagonist. Sudden change this desertion of his allies. What is the reasonable explanation? Confederacy and combination between the two brothers to wrong the sisters, and defeat their father's cherished object, equality between the children of his loins. What did the aged man think the deed meant? Joseph had been made by him, by power of attorney, his agent to transact his business. Joseph had been fighting George to cancel the deed. They compromised. The father thought they had made peace; that Joseph had succeeded in regaining his land. What more reasonable than to say that he thought he was getting back his land, and distributing it after his death among all his children? How could he think that Joseph, whom he had chosen to fight for his children, was doing anything else? Why did the compromise perish so soon? It perished, as in thousands of instances, at the bidding of gain. Who believes, knowing that, the father who wanted equality would so suddenly change and sedately cut off his daughters? In a will made in less than two months before his death, when he was nearing its portal, he denounced that deed, declaring that it was contrary to his wish, tried to carry out that wish by devise equal among all his children. Anybody reading this case must realize more clearly than I can express it, that the deed of May 29, 1905, is the child of undue influence and fraud upon an old dying father. See the injustice it has done among children having equal claims. George Hinchman had received thousands of dollars from his father's money for timber and oil rental, for which he never accounted. He and his brother get \$12,000 each, likely much more, in land. The sisters get \$1,500 each, and out of this the hard deed makes

them deduct certain costs. The boys indeed get the lion's share. We know that George R. Hinchman importuned his father to make a conveyance, as he told his father that if he intended to give him anything he wanted it at once, as life was uncertain. This demand resulted in the deed of March 19, 1904, giving George all the land. He had his aim set all the time to secure the lion's share.

I might detail other circumstances against this deed, but it is useless. "We admit that if a party is capable, his wish is law, but there is no fixed rule; each case must stand on its own facts, and the facts in one case rarely govern another," says *Greer v. Greer*, 9 Grat. (Va.) 330. There it is laid down as a rule that: "Although the grantor or testator may labor under no legal incapacity to do a valid act or make a contract, yet if the whole transaction, taken together with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void."

I find in *Minor on Real Property*, § 1164, the following in respect to unjust acts: "This class comprehends cases where advantage has been taken of the mental weakness; or of the necessities or actual condition of one of the contracting parties, putting him under the power of the other; or of undue influence arising out of the nature of the social relation in which the parties stand to each other; or of business relations inconsistent, for the time being, with the transaction in question. Weakness of mind alone, where there is a legal capacity for business, does not invalidate an instrument; but if connected with any circumstances of surprise, inadequate consideration, undue influence, or the like, it affords strong and, in general, satisfactory proof of fraud. The question always is whether the party has yielded an intelligent and willing consent to the transaction; and if it appear, considering all the facts—mental weakness being one—that such consent is wanting, the act is void." *Samuel v. Marshall*, 3 Leigh (Va.) 567, lays down this principle, namely: "A person, reduced to a state of mental imbecility by habitual intoxication, makes a voluntary and irrevocable deed of gift of his whole estate, to a cousin german, to the disinheritance of his half-sisters, reserving the use to the donor for life, without any reasonable motive assigned for such an act: held fraud and imposition may be inferred from the circumstances, and from the very nature of the contract; and this deed of gift is fraudulent and void."

Hartman v. Strickler, 82 Va. 238, tells us that when a will of an old man differs from his previously expressed intention, and, in favor of those standing in relation of confidence, it raises a violent presumption of fraud and undue influence, which must be overcome by satisfactory testimony. Repeat-

ed in *Whitelaw v. Simms*, 90 Va. 588, 19 S. E. 113.

"This deed was prepared by Joseph Hinchman at his own home, not at his father's home, not in his presence. It was not read to him. These are important facts. The deed was handed to him while in or sitting on his bed. He was nearly blind. When asked if he understood it he remarked, 'We have talked it over.' But what the talk of the day before was we do not know. Perhaps he was told he was getting back his land, or making a division of it among his children. The notary who took his acknowledgment is clear that the deed was not read to the old man, but he had it in his hand as if reading it. A physician swears that he knew the old man could not read well. May we not ask, Why was not so important a deed read and explained to the frail old man?"

The fact that the execution of a will was kept secret from some of the children is often entitled to great consideration in connection with evidence tending to show undue influence. "Thus, where a testatrix was old and feeble, with a mind so impaired that she was easily influenced by those possessing her confidence, * * * and her will was executed in the presence of one of her children, who was greatly benefited by it, the court regarded the secrecy of its execution as a circumstance tending to establish undue influence." 31 Am. St. Rep. 684. There we also see that when it is alleged that the instrument was procured by undue influence, or was made while its maker was not of disposing mind, the fact that its provisions are not in harmony with a free and rational mind must always lend probability to the charge. It may happen, too, that the evidence discloses what were the affections and wishes of the testator but a short time before, and nothing has occurred to change them, and the act is variant from them, the change must be explained; else it will show that his act was not that of a free and disposing mind. We know the old man's cherished intent of equality among his children. We see nothing to make him change it, except the pressure of his two sons to grasp the lion's share. Why should they get all?"

In *Leonard v. Burtle*, 226 Ill. 422, 80 N. E. 992, the syllabus is as follows: "Proof that the testatrix, who was old and feeble, reposed great confidence in her son, who acted as her agent, and that the latter procured his attorney to draw the will, and that the son and the attorney were alone with testatrix at the drawing and execution of the will, which made the son practically the only beneficiary of a large estate, whereas the other children and grandchildren were given but small amounts, establishes prima facie the charge of undue influence by the son."

I quote from 1 Underhill on Wills, 197, the following: "Thus if the testator is an old and feeble man, unable to devote his atten-

tion to the active management of his estate, and if he had for some time prior to the execution of the will permitted the legatee to exercise an exclusive and complete control of all his property, the drawing of a will in his own favor by the confidential agent, to the total exclusion of the claims of members of the testator's family, would be a circumstance of the greatest suspicion; presumption of fraud and of undue influence would, in such a case, be almost irresistible. But it is still a presumption of fact and may be rebutted. The clearest evidence would be required from the proponent, extending much further than mere proof of due execution and acquaintance with the contents of the will." Pomeroy's Eq. § 947, says that when mental weakness and failure of memory are accompanied by other inequitable incidents, equity will annul the conveyance, and the burden, where there is real weakness, is on the grantee to show "perfect fairness and capacity." Our own case of *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682, holds such principles where an interested party draws a will. See 31 Am. St. Rep. 685.

I do not intend to say that mere relationship affords a legal presumption of undue influence; but I do say that it is an important fact to be considered in connection with other circumstances of the case. I do not deny the principles laid down in *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788, and *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383, and like cases, that a man is presumed to be competent at the factum of a deed; but each case stands on its own facts and circumstances, and I place the decision of this case on its facts and circumstances differing it from those cases. I draw a marked distinction between those cases and this. In them the parties making the instruments were active in having them prepared, whereas in this case the father did not do so, but the deeds were made ready in his absence by the beneficiary.

Our conclusion is to reverse and set aside the deed of the 29th of May, 1905, from James H. Hinchman to George R. Hinchman and Joseph W. Hinchman, and remand the case for other purposes contemplated by the bill.

POFFENBARGER, J. (concurring). The rule announced by this court in *Black v. Post*, 67 W. Va. 253, 67 S. E. 1072; *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140; *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348; *Teter v. Teter*, 59 W. Va. 449, 53 S. E. 779; *Noffsinger v. Farnsworth*, 46 W. Va. 410, 33 S. E. 246; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; and *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383—renders it very difficult to overthrow a deed or will for mental incompetency or undue influence, or both. Tested by that rule, the grantor in the deed here as-

sailed was clearly competent to execute a voluntary deed, and that rule will sustain this deed against many of the facts relied upon as proving the exercise of undue influence. But this case is distinguished from those referred to by two weighty circumstances, not found in any of them, numerous inconsistent dispositions indicative of defective mentality respecting the disposition of property by gift, and contemporaneous possession of the title to the property by one of the grantees, naturally and necessarily working restraint and control of the will, wishes, and power of the grantor. As to his property, he was not a free agent, because it was already out of his ownership and beyond his control, and in the hands of the son as a weapon of coercion. At the date of the deed of May 29, 1905, and the execution thereof, father and sons did not stand at arm's length and on an equal footing. The aged and feeble father was not then in law the owner of his very considerable estate, nor in a position to do with it as he pleased. One of the sons had previously gotten the title thereto in himself, and the father was then endeavoring to regain it. Mentally and physically unable personally to conduct the litigation necessary to reclamation, he had intrusted this important business to his other son. When both sons appeared, recommending a compromise, a relinquishment of at least one-half of the land and all the money in controversy, we may well suppose the father felt still more deeply his helpless position.

The deed, making flagrantly unequal distribution of the estate, corresponds in character with the untoward circumstances under which it was made. On the face of the transaction, we perceive the natural relation of cause and effect, calling for a satisfactory explanation. These circumstances shift the burden of proof to the shoulders of the grantees, under a well-settled equity principle. A mortgagee, or other person, having in his hands the title to another's property as a security or for some other special purpose, and obtaining an absolute conveyance or acquittance as to the equity of redemption in some form, must show he obtained it fairly. *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515. Though the element of purchase is not involved here, the principle applies, for the advantage of the grantee over the grantor, the inequality of footing, giving rise to the presumption of unfairness in the class of cases referred to, is present and presumptively operative. This rule applies in cases of admitted competency on the part of the grantor. This circumstance, regarded in equity as a coercive influence strong enough to overpower the will of men in full possession of mental vigor and power, may well be supposed to doubly influence the aged, afflicted, deserted, and mentally weak. Under such circumstances, these two sons were un-

der a duty, in securing a conveyance of their father's estate, to proceed in such manner as to place their good faith in the transaction beyond question and leave no doubt as to the grantor's full knowledge of the purpose and character of the conveyance and his full, free, and deliberate choice in the matter of the disposition of his property by gift.

The unusual and anomalous character of the transaction here involved becomes manifest when the attendant circumstances are compared with those under which testamentary gifts are generally made. Ordinarily the donor has full and unquestioned dominion, and his will, not that of the donee, is dominant, controlling, and has free course. Here the donor legally had nothing in his power to give. It was already in the hands of one of the donees. The latter, not the real owner, was master of the situation, and the former an antagonist or suppliant.

If the record can be said to disclose any effort to show the fairness of the transaction, it is abortive. The two sons went to the father in secret, and prearranged some sort of an understanding as to a deed. Then one of them prepared it, not in the presence and under the direction of the donor, but at his own home some distance away. It was not read and explained to the grantor. Nobody was present when he signed it except the two sons and the notary, who took his acknowledgment. They say he had the deed in his hands as if reading it, but do not say he actually read it. Under the circumstances, it ought to appear, not only that he read it, or that it was read to him, but also that it was fully explained to him, and the question of his comprehension of the full meaning and import thereof placed beyond the shadow of a doubt.

The claim of an equity in the two sons, conforming to the character and effect of the deed, is founded upon transactions dating back to the year 1871, more than 30 years prior to the date of the deed. This is the old deed found among the grantor's papers, indicating intent, at the time of its execution, to convey the land to the two sons in consideration of love and affection and covenants of maintenance of the grantor and his wife during their natural lives. It is claimed this deed was actually delivered and then lost, and that it was made partly in consideration of indebtedness of the grantor to be paid by the two sons. If there was such indebtedness and they paid it, and the delivery of the deed was postponed pending the discharge of the indebtedness, they were no doubt entitled to a delivery thereof within 10 or 15 years after the date of the deed. Or, if it was delivered and then lost 15 or 20 years before the date of the deed in question here, there is no evidence of any effort to procure a new deed, and it is highly improbable that these two men, entitled to a valuable estate, would remain silent for so long a period, with knowledge of the nondelivery

or loss of their muniment of title. The facts and circumstances are inconsistent with the theory of reliance upon an equitable title to the land or title under the lost deed. The evidence of this claim is obviously lacking in certainty and directness.

WILLIAMS, J. (dissenting). I think the decision of this case clearly wrong, if former decisions by this court of similar cases are to have any weight as precedents. I think the evidence in the case of *Teter v. Teter*, 59 W. Va. 449, 53 S. E. 779, and *Black v. Post*, 67 W. Va. 253, 67 S. E. 1072, and others I might name, make much stronger cases against the validity of the deeds thereby assailed than appellants have made in the present case, and yet in those cases this court held that the evidence was not sufficient to overthrow the deeds.

The law presumes the grantor was competent, and that his deed was made without undue influence, or fraud, and imposes the burden upon plaintiffs, who have assailed it, to overcome those presumptions by proof. I do not think the proof, in the present case, is sufficient to overcome either of the presumptions. On the question of competency, I think the testimony of Mr. Hinchman himself, taken to be read as evidence in the suit then pending against his son, George, and the testimony of persons who had dealings with Mr. Hinchman, not very remote from the time the deed in question was made, is the most valuable evidence in the case on that point. True, Mr. Hinchman was enfeebled by disease and age, and at times was forgetful. Loss of memory is common to old age. But I cannot doubt that he then well knew the property which he was conveying, and the persons to whom he was conveying it, and also knew the legal effect of his deed. That knowledge is sufficient to satisfy the legal requirement as to capacity. That he was physically weak does not prove that his mind was so impaired that he did not know what he was doing. A sample of his own testimony, taken in March, 1905, about two months before the deed in controversy was made, will best illustrate the state of the old gentleman's mind at that time: "Q. State your age, residence, and occupation. Ans. I was 87 years old the 4th day of last January, Logan county, West Virginia. My occupation now is sitting around the fire. Q. Are you the plaintiff in this suit? Ans. Yes, sir. Q. How many children have you living? Ans. Four. Q. How many dead that have living heirs? Ans. Two. Q. What relation are you to the defendant? Ans. I am sorry to tell you that I am his father."

He had been a man of more than ordinary mind, he had served as clerk of the court of his county for a number of years, and had represented his county in the state Legislature, and, not more than four or five

years before his death, he served as secretary to the board of education of his school district. Mr. Curry, the assessor, visited him on the 9th or 10th of April, only five or six weeks before the deed was made, and he states that Mr. Hinchman gave him a list of his property on that occasion. Millard Stafford, his grandson, and Millard's wife, were living with him at the time. They both testified as plaintiff's witnesses, and their testimony, I think, proves his capacity, beyond question. None of the witnesses were experts, and their mere opinions concerning his capacity are of little value. The witnesses who have given opinions as to his competency are about equal in number, pro and con. The state of the old man's mind can be best judged by what he said and did, at the time, and near the time, when the deed was executed. Millard Stafford and his wife had been living with him about six months, and Millard says that his sons, Joe and George, came to see their father on Sunday, the day before the deed was executed; that Joseph told witness that he and George wanted to have a talk with their father about the suit, which he then had against George, and which Joseph was seeking to have settled; that he had better take his wife, and go over to Huse Ellis'; that he and his wife did go to Ellis', and returned that evening about 4 o'clock, and found Joe and George still there. But before Millard and his wife left the house, the old gentleman was seized with a severe pain, and Millard and George helped him to bed. He was suffering with arteriosclerosis which at times would give him violent pain, and after the pain would pass off he would then be able to be up and go about the house, and it would be some time before another attack. True, Millard Stafford gives it, as his opinion, that the old man was not capable of making a deed. But the following facts, and conversations with him, related by Millard as having taken place on the day before, and on the same day on which the deed was made, are worth more to prove competency than the mere opinions of all the witnesses who have testified in the case. They are facts which are like figures, and from such facts the court can reach its own conclusion. He says: "Grandpap was sitting at the kitchen window, and he said that he didn't believe that George was going to do what he promised to do, and that he was going back on him. I asked him what he promised to do, and he said, 'I made a proposition to him yesterday evening, and it was for him to deed me back the land as it was, and George took me up on the first proposition.' " Stafford further says that at noon on the following day the old man told him "that George had done what he promised to do, and that he had deeded his land back to him and taken the deed to be put on record for him." Continuing, this witness also

says that, on the same day, and only a short while after the foregoing statement was made to him by his grandfather, he went down to his Uncle Joe's, and his Uncle Joe told him how the matter had been fixed up, and that it was altogether different from what his grandfather had told him. Now, if Stafford's evidence proves anything, it proves that the old man was capable of making his son George some kind of a proposition respecting the settlement of the pending lawsuit between them. Moreover, it proves that he was capable of recollecting it on the next day after it was made. Does that not prove capacity? I think it does. I will again refer to this bit of testimony, a little later on, in relation to its bearing on the question of fraud and undue influence. Can any one, for an instant, believe that was the whole of the understanding, or agreement, between George and his father? Certainly not, it is altogether unilateral. But it is very reasonable to believe that it was all of it that was told to Stafford. The old man had reason to keep the part which he was to perform to himself.

Helen Stafford, Millard's wife, says that at times the old man "seemed that he wasn't exactly right in his mind." She also says that on the day before the deed was made he was not well, "but on that day (May 29, 1905) he seemed pretty pert." Now, taking the testimony of these two witnesses together, it proves that on May 28th, the day on which he was seized with severe pains, and therefore less capable of transacting business than when not suffering physically, he was capable of submitting to his son George a proposition whereby the pending suit was to be settled, and was capable on the next day of recollecting it, and of expressing a fear that George would not comply with his promise to carry it out. If he had capacity to do that on the 28th, does it not show sufficient capacity to execute a deed, and would he not have even greater capacity on the next day, when he was not suffering so much pain, but was able to be out of bed and to occupy a seat by the kitchen window? I have no doubt that he had all the capacity the law requires a grantor to have in order to make a good deed. It is proven by facts, not opinions of biased, non-expert witnesses, and the proof is established by plaintiff's own witnesses. That he thereafter made wills, inconsistent with his deed, proves nothing as to capacity. It only proves that he afterwards changed his mind. He was very old, and no doubt childish, a condition common to most persons who live to so great an age, and I have no doubt he was influenced to change his mind on account of the importunities of plaintiffs, or at least of some of them, who were less favored by the deed than the two sons. That the deed made an unequal distribution among his children proves nothing as to

capacity, nor can it properly be said to savor of injustice. The property was old man Hinchman's, and he had a right to do what he pleased with it. It is a common occurrence, in making disposition of their property, for parents to make an unequal division of it among their children. We do not know what may have influenced Mr. Hinchman to do so, and we have no cause to inquire into his motive for giving his sons the lion's share. The law justifies his deed, if he was competent to make it, and was not deceived.

Is the charge of fraud and undue influence sustained? I think not. Giving all the evidence that appears in the case the greatest force to which it is legally entitled on this point, it proves no more than that the two sons had an opportunity to commit a fraud, had they been so disposed. But we held in *Black v. Post*, 67 W. Va. 253, 67 S. E. 1072, that fraud could not be inferred from mere opportunity to commit it. Should we infer that fraud was actually committed because the sons asked Stafford and his wife to visit a neighbor near by, in order to give them an opportunity to adjust a matter of business, and settle a bitterly contested lawsuit between the father and one of the sons, in which the other son was acting as attorney in fact for the father? I think not. It is perfectly natural and reasonable that they should want to transact such business in private. Important business is usually transacted in private. Again, is it at all probable that Joe Hinchman would have told Millard Stafford, on the same day, and almost immediately after, the deed had been executed exactly how the business had been settled, if he and his brother George had, in fact, practiced a fraud on their old father? It is unreasonable to think so. It is a circumstance, which, to my mind, is more consistent with square dealing than with fraud. Instead of proving that the old man submitted to his son George a proposition on the 28th, which he accepted, and agreed to consummate on the 29th, but that, instead of carrying it out, he united with his brother, Joe, in the fraudulent consummation of a wholly different arrangement, Millard Stafford's testimony tends to prove the contrary. That which the old man told Stafford was to be done harmonizes with the presumed fairness of what was done. Stafford does not say that his grandfather told him *all* that was embraced in the proposition that he submitted to George, and even if he had told him all that had passed between him and George, and it had afterwards turned out differently, it would not be sufficient to prove fraud. Because the old man might very reasonably have agreed to a different proposition when he and George met. But Stafford's testimony does not prove that a proposition, different from the one which the old man had made to George, was actually

carried into the deed. He says the old man told him that George had agreed to deed the land back to him, but he does not say that he told him what he, the old man, had agreed to do with it after he got it. So much of the agreement as the old man told him George was to perform was in fact performed, but what the old man was to do was not apparently made known to Stafford. So that, what the old man told him George had agreed to do is altogether consistent with what his uncle Joe told him had actually been done. George did reconvey to him the land, just as the old man said he had agreed to do. But is it unreasonable to suppose that the old man purposely withheld from his grandson information respecting the disposition which he was to make of the land after it was reconveyed to him? I think not, because he knew it would cause dissatisfaction among his other children, as soon as it became known to them. Again, if the sons had planned to deceive their father, why did they not send Stafford and his wife away from the house on the day the alleged fraud was consummated, rather than on the day before, when the agreement was made? They were at home on the 29th of May.

In 1904 the old man had conveyed all his land to his son George, and there was a bitterly contested suit then pending to have the deed set aside, and depositions of many witnesses had been taken. It was a doubtful contest, and no one could anticipate the outcome of it. Now, does it comport with good reason to say that George had consented to surrender that contest and reconvey all the land to his father, for no other consideration than that he should receive an equal share in the land with the other children? I think not. He knew he would certainly get that much by inheritance, in case the deed should be declared void. Because, if the old man was incapable of disposing of his property by making an unequal division of it in George's favor, he was equally incapable of making any kind of disposition of it, either by deed or will, which would operate to defeat his inheritance.

The previously expressed intention of the old man to make all his children equal in the distribution of his property is not evidence to defeat his deed. His intentions may have changed, and the execution of the deed is the best possible evidence that he did change his mind, if, in fact, he ever intended to make them equal. That Mr. Hinchman was easily influenced, and could have been unduly influenced by the persuasions of his two sons, does not prove that he was, in fact, unduly influenced by them to make the deed. We repeat, the law does not infer fraud from mere opportunity to commit it. The proof in this case rises no high-

er than to show opportunity to commit fraud.

Two deeds were executed on the 29th, one to Mr. Hinchman and the other by him. One was acknowledged by him, and the other by his son George. The notary testifies that, while he was writing out the certificate of George's acknowledgment, the old man was looking over the other deed. He was an intelligent man, and the presumption is that he read it. It is not necessary that it should have been read to him. Again, if the sons were engaged in a game of fraud, it is not to be presumed that they took the notary into their confidence; neither is it reasonable to suppose that they would have undertaken it in his presence. There was too much risk of its discovery.

Much probative force seems to be given, in the majority opinion, to the letters written by Joe to his sisters, pending the suit between the old man and George, concerning the view Joe then had as to the old man's mental condition, and also as showing deception and fraud on his part. His conduct, in that regard, was certainly not commendable, nor even excusable. But he was then seeking to enlist the sympathy and assistance of his sisters, in a suit against George, which he was prosecuting under power of attorney from his father. The old man was then living, and none of his children had any kind of interest in his lands of which they could be defrauded. While the old man lived they could have no estate in his land. And, even if Joe did deceive his sisters, it does not prove that he deceived his father into making the deed. But whatever effect Joe's conduct might have, as proof of his own bad faith, it cannot be read as evidence against George. It was a transaction between other parties, and the familiar maxim, "*res inter alios acta alteri nocere non debet*," applies.

I am clearly of the opinion that the evidence is wholly insufficient to overcome the legal presumptions that James H. Hinchman was capable of executing the deed, and that its execution was unattended with fraud. On the contrary, every fact proven, in relation to the execution of the deed, is perfectly consistent with fair dealing. It became known, as soon as the deed was made, how the old man had disposed of his property; he lived for nearly four months thereafter, and plaintiff made no effort to take and preserve his testimony.

In conclusion, it appears that the suit of James H. Hinchman against George Hinchman was settled and dismissed, in consideration of the deed which the majority opinion holds to be void. Is it not exceedingly unfair to George Hinchman to declare this deed void, and not restore him to his rights as they were before that suit was dismissed? The parties should be placed in statu quo, but how can that be done? Is there not great danger that the decision of this court

may operate to do him an irreparable injustice? I would affirm the decree.

ROBINSON, J. (dissenting). The decision of the majority meets an emphatic, but respectful, dissent on my part. It is totally at variance with principles enunciated in *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383; *Delaplain v. Grubb*, 44 W. Va. 613, 30 S. E. 201, 67 Am. St. Rep. 788; *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Teter v. Teter*, 59 W. Va. 449, 53 S. E. 779; *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140; *Black v. Post*, 67 W. Va. 253, 67 S. E. 1072, and other cases. The evidence in the case does not overthrow the presumption in favor of the mental competency of the grantor in the deed. Nor does it successfully assail the deed as one secured through fraud or undue influence. It is useless to mention significant features of the testimony not discussed in the majority opinion. To say the least, the evidence is conflicting along every line. Different minds might draw different conclusions from it. An able and cautious chancellor has passed on it. A well known and salutary rule forbids that his finding and the decree made thereon be overthrown.

TAYLOR v. BUFFALO COLLIERIES CO.†
(Supreme Court of Appeals of West Virginia.
April 29, 1913.)

(Syllabus by the Court.)

1. CONTRACTS (§ 147*)—CONSTRUCTION—INTENTION.

In construing the provisions of a contract in an effort to ascertain the true intent, meaning, and purport thereof, courts will and must always examine the contract in its entirety, or such parts thereof as may disclose or tend to disclose the object and purpose sought to be attained by the parties thereto.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

2. CONTRACTS (§ 156*)—CONSTRUCTION—GENERAL TERMS.

Where a particular purpose is sought by a contract, and the language pertaining thereto is clear and certain, no general terms used therein will extend the meaning thereof beyond the intent and purpose so definitely expressed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 737; Dec. Dig. § 156.*]

3. CONTRACTS (§ 147*)—CONSTRUCTION—INTENTION.

The court should regard the obvious intent and design of the parties, and the object to be attained by them, as well as the language of the instrument itself.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

(Additional Syllabus by Editorial Staff.)

4. MINES AND MINERALS (§ 70*) — MINING LEASE—CONSTRUCTION.

Under a mining lease, which, in the first clause, specifically described the property leased, and in a subsequent clause reserved to the owner an interest in such property a 5 per

cent. interest in the "property or lease herein demised, contracted, and described," which interest should be held in the nature of paid-up and nonassessable stock in the lessee's company, which stock should be evidenced by 5 per cent. of every issue of capital stock of the company, such owner was entitled to 5 per cent. only of the stock issued under authority vested in the company at the time of contracting, and not to any part of stock issued under authority subsequently regularly acquired from the state after the company had acquired valuable mining property other than that covered by the lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 192-197; Dec. Dig. § 70.*]

Appeal from Circuit Court, Mingo County.

Action by R. N. Taylor against the Buffalo Collieries Company. From a judgment for defendant, plaintiff appeals. Modified and affirmed.

G. R. C. Wiles, of Williamson, and Campbell, Brown & Davis, of Huntington, for appellant. Stokes & Bronson, of Williamson, for appellee.

LYNCH, J. The bill in this cause was dismissed by the circuit court, upon defendant's demurrer thereto. Plaintiff appeals.

His right to relief is based upon a contract between him and Leftwich (who is not a party and apparently not interested) and the Buffalo Collieries Company, dated August 3, 1903. It is unnecessary to quote more than two clauses of the contract, the first and the thirteenth, because they sufficiently express the true intent, meaning, and purpose thereof, so far as necessary to the proper determination of plaintiff's right to the relief sought:

"First. That in consideration of the terms, conditions, and stipulations hereinafter set out, to be kept and performed by the parties hereto respectively, the parties of the first part do hereby let and lease to the party of the second part, with the consent of the Buffalo Land & Coal Company, which said consent is hereto attached, as part of this lease, the exclusive right and privilege of mining, shipping, and selling all the coal on, under, and from the premises hereinafter described (800 acres), together with the privilege of manufacturing coke and all other by-products of coal on and from said premises, for a term of 50 years, or until all the merchantable coal on, in, and under said land shall have been mined and removed therefrom."

"Thirteenth. It is further agreed, stipulated, and understood by and between the parties hereto that the lessors, Everett Leftwich and R. N. Taylor, shall have and do hereby retain and reserve unto themselves, their heirs or assigns, a one-tenth interest in and to all the rights, privileges, and property interest in or pertaining to the property or lease herein demised, contracted, and described, which interest shall be held in the nature, shape, and condition of paid-up and nonas-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied.

sessable stock in the lessee's company, which stock shall be evidenced by certificate properly issued, executed, and signed by the proper officers of said company, one-half of the said 10 per cent. of the stock of said company to be issued to each of the lessors above named or his personal and legal representatives separately and in such denomination as he may direct; but in case no such direction be given then the proper officers of said company shall issue to each of the lessors above named 5 per cent. of each and every issue of stock which may now or hereafter be made, and evidence the same by one certificate for each lessor or his representatives, as above, covering his said 5 per cent. of said stock issued, whether preferred, common, or otherwise, and whenever or under whatever circumstances said company, its successors or assigns, may issue any stock. And whenever said company, its successors or assigns, may issue any stock of whatever kind, or for whatever purpose, 10 per cent. of such stock shall be issued to said lessors as above described, and the said 10 per cent. shall be paid-up and nonassessable stock, without cost to or charge upon the said lessors above named or their representatives; and the holders of the nonassessable stock herein provided for shall be entitled to their pro rata dividends as are other stockholders."

By its articles of incorporation and charter, defendant was authorized to issue, and subsequent to its organization did issue, 1,000 shares of its capital stock, of the par value of \$50 per share, and distributed the same to its stockholders in the proper proportions, including the plaintiff, to whom it issued 5 per cent. thereof, or 50 shares. Of this plaintiff does not complain. Some time thereafter he sold and assigned, in the usual manner, the certificate thereof so delivered to him.

The gravamen of the complaint alleged by the bill is that from time to time thereafter, and without plaintiff's knowledge until within a few months before the institution of the suit, defendant obtained from the state, by the regular method, authority to increase its capital stock to a maximum of \$300,000, and that, pursuant thereto, it did increase the same from \$50,000 to or near the authorized maximum limit, 5 per cent. of which, though demanded by him, it has failed and refused to issue to him, which he claims under the provisions of the thirteenth clause of the contract. As incident to the rights thus asserted, plaintiff, by the bill, further complains of defendant's denial of the privileges legally due him as one of its stockholders. He admits that defendant has successfully conducted its corporate business, has acquired and is operating mining leases on lands other than those leased to it by himself and Leftwich, "and has lately acquired and is now the owner of large holdings of valuable real estate purchased from the profits made

in its said business of mining and shipping coal, * * * and has made large dividends and profits," in which it refuses him any participation under the contract as he interprets it. The relief sought is a decree requiring defendant to issue to him 5 per cent. in value of the shares issued by it in excess of the first issue of 1,000 shares, and to accord to him all the rights and privileges of a stockholder therein, and for discovery and an accounting.

[1, 2] The provisions of clause 13 are, it is true, comprehensive and explicit, and, on a cursory examination, seem to sustain plaintiff's claim to relief. But, when carefully examined, and tested by the canons of construction applicable alike to all contracts whatever their purpose or character, the proper conclusion accords with the rulings of the circuit court on the demurrer to the bill. As is said in *Natural Gas Co. v. Oil Co.*, 56 W. Va. 402, 49 S. E. 548: "When a contract is made for the accomplishment of one main purpose, as is usually the case, it is necessarily the purpose of both parties, the thing on which their minds met, and as to which they are in perfect accord; and every provision of the contract must be read in the light of such purpose. In other words, the whole instrument must be considered in seeking its true meaning." See, also, *Mining Co. v. Fuel Co.*, 69 W. Va. 47, 70 S. E. 857; *Lumber Co. v. Wilson*, 69 W. Va. 598, 72 S. E. 651; *Johnson v. Welch*, 42 W. Va. 18, 24 S. E. 585; *Hurst v. Hurst*, 7 W. Va. 289; *Oil Co. v. Knox*, 68 W. Va. 362, 365, 69 S. E. 1020; *Coal Co. v. Coal Co.*, 67 W. Va. 503, 515, 68 S. E. 124. "Where a particular purpose is to be accomplished, and the language which expresses it is clear and certain, no general words used in the same agreement shall extend the meaning of the parties." *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Ice Co. v. Ice Co.*, 99 Va. 245, 37 S. E. 851; *Glenn v. Building Co.*, 99 Va. 695, 40 S. E. 25; 9 Cyc. 579, 584, 587. Measured by these principles, established by this court and in accord with our views, is plaintiff's interpretation of the contract under consideration the proper interpretation thereof? The answer to this inquiry finally determines the issues between the parties to the controversy.

[3] Plaintiff's contention is that, by clause 13, he is entitled to, and has the equitable right to compel defendant to issue to him, a definite percentage of its capital stock, whenever or for whatever purpose or character issued, whether issued for operations on the premises leased by him and Leftwich, or by others with whom or in whose lands or the coal thereunder the plaintiff has not and possibly may never have any interest or claim—a right without limit in duration, except perhaps by the dissolution or insolvency of the corporation. Of course, courts cannot, nor do they attempt to, either make contracts for parties competent to transact

business for themselves, or relieve them from self-imposed imprudent agreements, except where fraud is charged and clearly established. They seek only, by fixed and definite rules, to ascertain and declare, not whether the terms of the contract are prudent or imprudent, but what the actual terms of their agreement are, and, when thus determined, to enforce them according thereto.

[4] With this purpose in view, it is, as heretofore stated, necessary to construe clause 13 in connection with the first clause, because thereby the parties identify or provide means for identification of the property to which the agreement relates, and to which clause 13 refers. The latter states with precision that "it is further agreed, stipulated, and understood by and between the parties hereto that the lessors, Everett Leftwich and R. N. Taylor, shall have and do hereby retain and reserve unto themselves, their heirs and assigns, a one-tenth interest in and to all the rights, privileges, and property interest in or pertaining to the *property or lease herein demised, contracted, and described*"—thus clearly limiting the application of the otherwise general and comprehensive subsequent provisions thereof to the particular property forming the subject-matter of the entire contract. This limitation is further prescribed by the additional provision that the one-tenth "interest" in "the rights, privileges, and property" therein "demised, contracted, and described" "shall be held in the nature, shape, and condition of" paid-up and nonassessable shares in each and every issue of the capital stock of the company, of whatever character, for whatever purpose, or whenever issued, pertaining, not generally to all the property thereafter acquired by it, but specifically to the property which the contract definitely describes, and to which its application is thereby confined. This is a reasonable construction thereof, and the one apparently first adopted by the plaintiff, because he delayed assertion of any claim to or share in the authorized increase from February, 1907, the date when authorized, the certificate for which was promptly recorded in the proper office of Mingo county, until June, 1910. This delay he seeks to excuse by an indefinite statement that he "has lately discovered" the authority thus acquired by the defendant. As further evidence of an intent, sufficiently expressed in the lease, that the interest of the plaintiff should be limited to the demised premises, the contract provides, in addition to clause 13, for a rental of 10 cents per ton and a minimum royalty of \$5,000 annually. Any other construction or interpretation of these provisions is not only unreasonable, but in violation of the established rules therefor previously announced herein, as well as in conflict with the real purpose expressed in the agreement.

Not having asked and not granted leave

to amend his bill before final decree, and asking it now, the decree of the circuit court is to that extent modified, and, as so modified, it is affirmed.

ALLEN v. STATE.

(Supreme Court of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 603*)—CONTINUANCE—DENIAL OF MOTION.

It does not appear that there was any abuse of discretion in overruling a motion for a continuance in the present case, there being no showing on the part of the movant that the absent witness resided in the county in which the case was pending, or even in this state. Motions for a continuance are peculiarly within the discretion of the trial court, and that discretion will not be controlled by this court, unless it has been manifestly abused. *Hardy v. State*, 117 Ga. 40, 43 S. E. 434.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

2. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—EXPRESSION OF OPINION.

The court did not err in charging the jury that "in prosecutions for rape the fact that the woman made complaint soon after the assault took place is evidence, but the particulars of the complaint cannot be gone into." This was a statement of a general legal principle, and did not amount to an expression of an opinion on the facts of the instant case. Nor was it unauthorized by the evidence in the case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

3. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to authorize the verdict of the jury; and that verdict, having received the sanction of the trial judge, will not be disturbed here.

Error from Superior Court, Fayette County; R. T. Daniel, Judge.

Bob Allen was convicted of crime, and brings error. Affirmed.

W. B. Hollingsworth and J. W. Culpepper, both of Fayetteville, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, and T. S. Felder, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

LYNN v. STATE.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. GRAND JURY (§ 7*)—ORGANIZATION—VALIDITY.

By the act approved August 18, 1911 (Acts 1911, p. 81), creating the Dublin judicial circuit, four terms of court were created for Laurens county, namely, January, April, July, and November, and it is provided in this act that the grand juries of the counties of the circuit shall not be convened except for the spring and fall terms of the court, unless in the discretion of the presiding judge it shall be deemed expedient to call a special session of the grand jury at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

some other term. At the close of the October term, 1912, of the superior court of Laurens county the presiding judge drew the required number of names of persons to serve as grand jurors at the January term, 1913, of the superior court. Before any indictment was returned against them the defendants challenged the array of grand jurors, for the alleged reason that they could only be convened legally at the April and October terms of the court. A demurrer was filed to the challenge to the array, which was sustained by the court. After indictment, and before arraignment, the defendants filed a plea in abatement, substantially on the same grounds as set out in the challenge to the array. A demurrer was likewise filed to the plea in abatement, and sustained by the court. *Held*, that the court did not err in sustaining the demurrers.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 2, 16, 21; Dec. Dig. § 7.*]

2. JURY (§ 66*) — PANEL — JOINT CRIMINAL TRIAL.

Where two persons are jointly indicted for murder, and a panel of 48 jurors is put upon them as trial jurors, and they elect to be tried together, they cannot demand a panel of 96 jurors from which to strike.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290, 306; Dec. Dig. § 66.*]

3. CRIMINAL LAW (§§ 422, 763, 764, 1173*)—HOMICIDE (§§ 144, 301*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS—MOTIVE—CREDIBILITY OF WITNESSES—EVIDENCE.

The court did not err in refusing to give the jury the written requests to charge as contained in the third, fourth, fifth, and sixth divisions of the opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988, 1731-1748, 1752, 1768, 1770, 3164-3168; Dec. Dig. §§ 422, 763, 764, 1173.* Homicide, Cent. Dig. §§ 281, 624, 633; Dec. Dig. §§ 144, 301.*]

4. CRIMINAL LAW (§§ 427, 779*)—CONSPIRACY — CIRCUMSTANTIAL EVIDENCE — INSTRUCTIONS.

The instruction contained in the seventh division of the opinion was not erroneous.

(a) A conspiracy may be shown by circumstantial evidence, as well as direct testimony.

(b) That there was no conspiracy charged in terms in the bill of indictment between the defendants jointly indicted does not make the giving of a correct instruction to the jury on the subject of conspiracy error, where there is evidence to authorize such a charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012-1017, 1858; Dec. Dig. §§ 427, 779.*]

5. CRIMINAL LAW (§ 695½, New, vol. 17 Key-No. Series)—WITNESSES (§ 37*)—COMPETENCY—TRIAL—RECEPTION OF EVIDENCE—RULING.

Where objection is made to the admissibility of testimony, and the court does not rule upon the objection, but the testimony is allowed to go to the jury, the failure of the court to rule upon the evidence, under the facts, is equivalent to overruling the objection.

(a) That a witness did not hear all of the conversation between two defendants, jointly indicted, and about which he is asked to testify, is no ground of objection to his stating so much of it as he did hear.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

6. CRIMINAL LAW (§ 427*)—EVIDENCE—CONSPIRACY.

Where two persons are jointly indicted for murder, and the state relied largely upon circumstantial evidence for conviction and the existence of a conspiracy to commit the murder,

it was not error to admit the following letter to the deceased in evidence (which, according to admission of counsel for defendants in open court, was written jointly by the defendants), as tending to show a conspiracy between them: "Dublin, Ga. Dec. 13th 1912. Uncle Frank Hightower Alonzo and the children is planning to go and getting ready to go to Wilks Co next Tuesday, they will be gone three days you dont know how desolate it is out here when me and the baby is left alone. We cant all leave on account of our stock. We have plenty of lightwood ready cut. You can come in your wagon every day and get a load I will give you a good, good good dinner. Please come visit me in my loneliness. You will never regret the time. Alice Lynn R 6 Dublin, Ga."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012-1017; Dec. Dig. § 427.*]

7. WITNESSES (§§ 274, 355*)—CRIMINAL LAW (§ 1169*) — EVIDENCE — CHARACTER OF DEFENDANT—COMPETENCY OF WITNESSES—APPEAL—HARMLESS ERROR.

A witness was called by the defendant for the purpose of proving his general good character. On direct examination he testified that he did not know the defendant's general character; that all he knew was personal. The court declared the witness incompetent, and he withdrew from the witness chair. Subsequently the state asked leave to put the witness back on the stand as defendant's witness and cross-examine him, which was allowed to be done by the court. The witness, over objection of defendant's counsel, testified in answer to a question from state's counsel: "I have heard him [the defendant] use words that carried with them a meaning which implied a threat on his [Davis, a third person] life." *Held*, that this was error, but under the facts of this case will not require a new trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1154-1156, 965, 966; Dec. Dig. §§ 274, 355.* Criminal Law, Cent. Dig. §§ 754, 8088, 8130, 8137-8143; Dec. Dig. § 1169.*]

8. VERDICT SUSTAINED—NO ERROR.

The evidence is sufficient to authorize the verdict.

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

A. L. Lynn was convicted of murder, and brings error. Affirmed.

Davis & New, of Dublin, for plaintiff in error. El. L. Stephens, Sol. Gen., of Wrightsville, J. S. Adams and Davis & Sturgis, all of Dublin, and T. S. Felder, Atty. Gen., for the State.

HILL, J. At the January term, 1913, of the superior court of Laurens county, A. L. Lynn and Alice Lynn, his wife, were jointly indicted and tried for the murder of F. M. Hightower. The jury rendered a verdict finding the defendant Alice Lynn not guilty, and the defendant A. L. Lynn guilty, with a recommendation to life imprisonment in the penitentiary. To the judgment of the court overruling his motion for a new trial, A. L. Lynn excepted.

[1] 1. One ground of the amended motion for a new trial is because the court erred in sustaining a demurrer filed to the challenge to the array of grand jurors before they had returned a true bill against the defendants. The grand jury by whom the defendant was

indicted was drawn at the regular fall term of court, and summoned to appear at the next term, to wit, the January term, when they were impaneled. At that term the defendant was indicted. He challenged the array on the ground that the grand jury was not a legal one. He contended that the provision of the act creating the Dublin circuit (Acts 1911, p. 82), which provides that the grand juries of the counties of that circuit "shall not be convened except for the spring and fall terms of the court unless in the discretion of the presiding judge it shall be deemed expedient to call a special session of the grand jury at some other term," was unconstitutional because not uniform with the practice in regard to summoning grand juries for each term of court prescribed by general laws, and also because the grand jury were not called in special session at the January term of court in accordance with that act, if it were constitutional. It is unnecessary to decide whether the provision of the act above quoted is or is not constitutional. In either event the grand jury which indicted the defendant was a legal grand jury, and that is all that concerns him. Under the general law provision is made for having a grand jury at each term of court. Penal Code, § 823. If, therefore, the above-quoted provision is invalid and should be stricken from the act, under the general law a grand jury could be drawn at the fall term of court and summoned for the next regular term thereafter, to wit, the January term. If, on the other hand, the provision of the act above quoted should be held to be constitutional, there is nothing in it which would make the grand jury so drawn and summoned an illegal grand jury. It declares that the grand juries shall not be "convened" except for the spring and fall terms of the court unless in the discretion of the court it shall be deemed expedient "to call a special session of the grand jury at some other term." When the presiding judge drew a grand jury at the fall term of court, and caused the jurors so drawn to be summoned to appear at the January term thereafter, and impaneled them and caused them to proceed to discharge the duties of a grand jury, this was sufficient evidence that in his discretion he deemed it necessary for the grand jury to be in session at that term, and that he called a special session of the grand jury thereat. No formal order or declaration further than this was necessary for that purpose. The act requires the grand jury to be convened at the spring and fall terms of the court, and leaves it to the discretion of the presiding judge to call a special session of the grand jury at some other term. It was held in *Tompkins v. State*, 138 Ga. 465, 75 S. E. 594, that grand jurors who had served at one regular term of the superior court were declared by the Legislature to be ineligible for jury duty at the next succeeding term, and that under the act creat-

ing the Dublin circuit the presiding judge could not summon a grand jury which had served at one regular term to serve at the next succeeding regular term of court. It was suggested that probably, under the power to call a special session of the grand jury at some other term, the same grand jury might be recalled at such a term as grand juries could be called in special session under the general law; but what was said in regard to calling back a grand jury to serve at two succeeding terms was not a construction of the entire provision of the act, or a declaration that it had no meaning except in regard to such a situation. In the present case there was no effort to require a grand jury which had served at one term to return and serve at the next succeeding regular term. A new grand jury was drawn at the fall term, and summoned to serve at the January term, and then impaneled. As to that situation, the action of the judge was a sufficient compliance with the provision of the act authorizing him to call a special session of the grand jury at the January term. Thus, if the constitutional attack on this provision of the act should be sustained, under the general law the grand jury which indicted the defendant was legally drawn, summoned, and impaneled at the term when the indictment was found. If the provision of the act should be treated as valid, what was done was a sufficient compliance with its terms, and the grand jury was a legal grand jury. This being so, in either event the court properly refused to sustain the challenge to the array and the plea in abatement, which raised the same question.

[2] 2. After arraignment a panel of 48 traverse jurors was put upon the defendants, A. L. Lynn and Alice Lynn, and a list of the names of the 48 jurors was furnished them, and the court ordered the striking of the jury from the list so furnished. The defendants objected to the ruling of the court that they strike from the list of 48 jurors, and demanded a panel of 96 jurors to be furnished them before being compelled to commence their strikes. The defendant assigns error on the refusal of the court to furnish a panel of 96 jurors, insisting that, as there were two defendants on trial jointly, each defendant was (as the court held) entitled to 20 peremptory strikes, and as the defendants were jointly indicted and jointly on trial, they were entitled to a panel of 96 jurors from which to commence striking, so that each might have his or her 20 peremptory challenges with knowledge of the personnel of the entire panel of 96. At common law the preparation of a list of those liable to be summoned to serve as jurors at a succeeding term of court was unknown. The sheriff, coroner, or officials known as "elisors" had an uncontrolled discretion to summons such "good and lawful men" as they might select, by virtue of a writ of venire facias. This practice was said to have led to abuses, mainly in "packing

juries," and blackmailing citizens. 1 Thompson on Trials, § 13. To prevent a recurrence of this evil, statutes have been passed in nearly, if not all, American states, providing for the drawing from the jury box, previously prepared by officials designated for that purpose under fixed rules, at "a given time before the commencement of any term of court, or at other stated periods, of a list of persons, within the county, or other jurisdiction, from whom jurors are to be summoned." *Id.* § —. Thus, our statute provides how juries are impeled to try any person indicted for a felony: "When any person shall stand indicted for a felony, the court shall have impaneled forty-eight jurors, twenty-four of whom shall be taken from the two panels of petit jurors, from which to select the jury. If the jury cannot be made up of said panel of forty-eight, the court shall continue to furnish panels, consisting of such number of jurors as the court, in its discretion, may think proper, until a jury is obtained." And see section 863. The defendant can require no more than the statute grants to him. He is granted a panel of 48 jurors; and, while two were indicted jointly, each had the right, as did the state, to a severance on the trial, if the election was made. Penal Code, § 995. Had the defendant elected to be separately tried, he would have had a full panel of 48 jurors from which to strike. But as he did not elect to sever, but to be tried jointly, it cannot be held that he was entitled, as a matter of law, to a panel of 96 jurors. It is apparent what such a ruling would lead to, if a number of persons were jointly indicted and all the defendants elected to be jointly tried, and each insisted on the rule contended for here. The defendant is entitled to all that the statute grants to him, and no more, and it grants to him a panel of 48 jurors, and the right to sever on the trial. If, therefore, he was furnished a panel of 48 jurors, as required by the statute, and he declined to sever on the trial, he has been deprived of no right. See *Cason v. State*, 134 Ga. 786 (1a), 68 S. E. 554.

[3] 3. Error is assigned because the court left off the last clause of the following request to charge the jury: "Before there can be any conviction of murder, either express or implied, malice must be shown from the evidence. Where the state proves the killing, a presumption of malice arises; but where the defendant admits the killing with a deadly weapon, but adds an explanation which might negative malice, no presumption would arise that the homicide was murder from such an admission. In other words, where the killing is shown by the admission, and at the same time the admission is made there is an explanation justifying the defendant, it is still necessary in order for the jury to convict, for the state to prove malice, either express or implied." The charge and refusal

to charge could not have injuriously affected the defendant A. L. Lynn. It could only apply to the defendant Alice Lynn, who admitted the killing and sought to justify it, and who was acquitted by the jury. The state did not rely upon any confession of the defendant A. L. Lynn, and he could not therefore be hurt by the charge as given, and the refusal to charge.

4. It was not error to refuse to give the following charge to the jury: "The state is not compelled to show a motive in order to convict of murder, provided either express or implied malice is shown, but there can be no conviction of murder without either the proof of express malice, or a presumption from which malice can be implied, for there is no murder without malice, and no malice without motive, and the absence of the proof of motive is a strong circumstance in favor of innocence, and this is especially true where the guilt of the accused is doubtful." *Campbell v. State*, 124 Ga. 432 (5), 435, 52 S. E. 914.

5. Error is assigned because the court refused to instruct the jury as requested by the defendant in writing, as follows: "I also charge you, if you believe that the deceased was attempting to have carnal knowledge of Mrs. A. L. Lynn forcibly and against her will, that her husband A. L. Lynn would have been justified in killing the deceased." The court did not err in refusing to charge as requested. There was no evidence to authorize the charge, nor was there any evidence to show that any assault had been made upon the defendant Mrs. A. L. Lynn, or that her husband, A. L. Lynn, had killed the deceased to prevent an assault being made upon his wife. Her statement, not under oath, that she killed the deceased could not be taken as evidence in favor of her husband. *Berry v. State*, 122 Ga. 429, 50 S. E. 345. The defendant's whole defense was based on the theory that he was not present at the killing, or that he took any part in it; he sought to establish an alibi, and to prove that at the time of the killing he was at a place other than the scene of the homicide. The court had fully instructed the jury as to the right of the defendant Alice Lynn to protect herself from the assault she claimed was made upon her, but he correctly declined to charge that her husband would have been justified in killing the deceased under these circumstances, or on the theory that it was necessary for him to kill the deceased to prevent the assault from being made.

6. The court did not err in refusing to give the following request to charge to the jury: "I charge you, gentlemen of the jury, that the testimony of a detective or person interested in the outcome of the case, or that has any prejudice or bias resting on his mind against the accused, should be scanned with care. A detective or person interested in the outcome of the case is not thereby rendered incompetent from testifying, and no person, no matter how much they are inter-

ested, or how strongly they are prejudiced, or how unworthy they are of belief, and [are?] merely for that reason rendered incompetent as a witness, but their testimony must be admitted, and their truthfulness or untruthfulness is to be determined by the jury." The competency of testimony is for the court to determine, and the weight to be given it and the credibility of the witnesses is exclusively for the determination of the jury. *Calvin v. State*, 118 Ga. 73, 75, 44 S. E. 848; *Merritt v. State*, 107 Ga. 875 (4), 34 S. E. 361; *Ryder v. State*, 100 Ga. 528 (6), 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. Rep. 334; *Rouse v. State*, 135 Ga. 227, 69 S. E. 180.

[4] 7. The following charge of the court was not erroneous: "The state contends in this case that there was a conspiracy on the part of the defendants A. L. Lynn and Alice Lynn to take the life of the deceased, F. M. Hightower. It is for you to determine from the evidence whether or not there was a conspiracy. A conspiracy may be defined as a combination or agreement between two or more persons to do an unlawful act. The existence or nonexistence of a conspiracy or common intent may be established by proof of acts and conduct, or by proof of express agreement, if any. It may be proved by circumstantial evidence, as well as direct testimony. If you determine there was a conspiracy between two or more persons to do the act alleged in the indictment, then I charge you that any act done in pursuance of that agreement, by any one of the persons to the agreement, is the act of both, if done within the scope of the agreement. If you believe there was a conspiracy and common intent between the defendants to do an unlawful act, as charged in this true bill of indictment, then I charge you, if one of them, if there was such, did the act alleged in the indictment—that is kill F. M. Hightower—and the other defendant stood by aiding and assisting about the act, then the other would be guilty of the act that the one who struck the fatal blow would be guilty of." It is insisted that this charge was error because there was no evidence to support or warrant a charge on the question of conspiracy, and that the charge amounted to an expression of opinion on the part of the court that there was a conspiracy between the movant and his wife, Alice Lynn; also that the charge "raised circumstantial evidence to the same dignity as that of positive evidence." We do not think the charge open to any of the objections urged against it. There was sufficient evidence to warrant a charge on the law of conspiracy, and the fact that the indictment did not in terms charge a conspiracy did not make it erroneous for that reason. Nor is the charge open to the objection that a conspiracy cannot be shown by circumstantial evidence. This court has repeatedly ruled that a conspiracy may be shown by such evidence. *Turner v. State*, 138 Ga. 808, 812, 76 S. E. 349; *Dixon v.*

State, 116 Ga. 186 (9), 42 S. E. 357; *McElroy v. State*, 125 Ga. 37 (2), 53 S. E. 759; *Weaver v. State*, 135 Ga. 317 (1), 69 S. E. 488.

[5] 8. The defendant and his wife were jointly indicted for murder. On their trial certain evidence of a detective was offered by the state, which tended to show a confession on their part while they were confined in jail. The witness testified to certain conversations between the husband and wife, secured by means of a dictagraph, which had been placed in the cell occupied by them. It is insisted that this evidence was inadmissible because the testimony of the witness showed that he did not hear all of the conversation, and that a part of their conversation would not be admissible unless all of it was heard by the witness. To the objection thus urged the court did not rule one way or the other, but the testimony was before the jury, and was argued by the attorneys to them. Under the facts the failure of the court to rule upon the objection urged to the admissibility of the evidence was equivalent to overruling the objection. As to the first ground of the objection, that the witness was incompetent to testify unless he heard all of the conversation, this court has held that the fact that a witness did not hear all of a conversation between defendants jointly indicted, and about which he is called to testify, "is no ground of objection to his stating so much of it as he did hear." *Westmoreland v. State*, 45 Ga. 225 (3); *Woolfolk v. State*, 85 Ga. 71 (12), 99, 11 S. E. 814.

[6] 9. The following letter was offered in evidence by the state, and evidence was introduced to prove its execution by the defendants jointly: "Dublin, Ga. Dec. 13th 1912. Uncle Frank Hightower Alonzo and the children is planning to go and getting ready to go to Wilks Co next Tuesday, they will be gone three days you dont know how desolate it is out here when me and the baby is left alone. We cant all leave on account of our stock. We have plenty of lightwood ready cut. You can come in your wagon every day and get a load I will give you a good, good good dinner. Please come visit me in my loneliness. You will never regret the time. Alice Lynn R 6 Dublin, Ga." It was admitted by counsel for the defendants, in open court, that the defendant Alice Lynn wrote a portion of the letter, and, owing to her nervous condition, her husband, A. L. Lynn, wrote the remainder, but objection was made to its being admitted in evidence, on the ground that it was irrelevant, and had no bearing one way or the other on the case. We think the letter was admissible as tending to show a conspiracy on the part of Lynn and his wife to have the deceased visit their home for the purpose of murdering him, as contended by the state. This theory was contested by the defendants, and for the purpose indicated it was admissible in evidence.

[7] 10. The sixteenth ground of the motion

assigns error because, during the progress of the trial, "and while witnesses were being examined in behalf of the defendant, and, as movant contends, specifically in behalf of himself, the witness M. H. Blackshear was called to the stand by the defendants for the purpose of proving their good character, but said witness testified as follows: Witness was asked: 'Q. Do you know Mr. and Mrs. A. L. Lynn? A. I know Mr. A. L. Lynn. Q. How long have you known him? A. I have known him seven or eight years. Q. Do you know his character or general reputation in the neighborhood? A. I don't think I do; the only knowledge I have of him is personal.' The court held that said witness had not qualified as a character witness, and no further questions were then asked said witness by either side, and he was excused. The following day, after the defendants had closed their testimony, and the state was offering testimony in rebuttal, Capt. W. O. Davis, who was examining the witnesses for the state stated to the court as follows: 'I desire to recall Mr. Blackshear for the purpose of examining him on the cross as the defendant's witness.' This being allowed by the court, witness was asked the following questions: 'Q. Did you ever hear Mr. A. L. Lynn threaten to kill Mr. Geo. B. Davis?' This was objected to by movant, on the ground that the witness had not qualified as a character witness on the direct examination, and had not testified to good character on the direct, and that it was not lawful for any witness who had failed to qualify as a character witness on the direct to answer specific acts of bad character on the cross examination, which objection was overruled by the court, and the witness answered as follows: 'A. Yes, sir; I have heard him use words that carried with them a meaning which implied a threat on his life. Q. Why did he do it? A. I presume it was because he was very angry. Q. What had Mr. Davis done to him? A. It was in connection with a suit that Mr. Davis had brought for Mr. Lynn's brother against A. L. Lynn.'" The defendant objected to this testimony going to the jury, and excepted to the ruling of the court overruling the objection. We understand the general rule to be that where the defendant's character is put in evidence, and a witness for the defendant has testified on direct examination as to the defendant's general good character, he may, on cross-examination, be questioned as to specific acts of bad character or of violence on the part of the defendant. Did the testimony in this case come up to this rule? On direct examination the witness answered, as to his knowledge of the general reputation of the defendant in the neighborhood: "I don't think I do; the only knowledge I have of him is personal." We think the court correctly held that the witness was not qualified as a character witness. But the serious question arises when the witness, who was

put back on the stand by the state to be cross-examined, testified: "I have heard him [the defendant] use words that carried with them a meaning which implied a threat on his [Geo. B. Davis'] life." Do these words mean that the defendant was a man of violent character? Can the question be asked on cross-examination, and the answer admitted, as not being in violation of the rule as to proof of violent character on the part of the defendant, who had voluntarily put his character in issue by other witnesses? And did the question and answer prejudice the defendant before the jury so as to require a new trial? There are cases in which it has been held that where there is ample competent evidence to support the verdict, a new trial will not be granted notwithstanding evidence had not been erroneously admitted to the jury. *Luby v. State*, 102 Ga. 633, 646, 29 S. E. 494. The defendant had put his good character in issue. As to whether it was good is a substantive fact, and the jury will consider and weigh the evidence on that question in connection with all the other evidence offered by the state, in arriving at their verdict. His good character is not a substantive defense, but may be considered by the jury, and may of itself raise a doubt in their minds as to his guilt. See *Scott v. State*, 137 Ga. 337 (3), 73 S. E. 575. We think it was error to allow the witness to answer the question propounded as to specific threats of violence; and, while the answer is not a direct statement of a threatened act of violence on the part of the accused, it might be equivalent to that. But we do not think the evidence could have been prejudicial to the defendant, under the facts of this case. The person said to have been threatened by the defendant was, according to the record, Mr. George B. Davis, counsel for the defendant in this case, and who examined the witnesses for him. If the language objected to amounted to a threat on the life of Mr. Davis—and we doubt it—it made little impression on the witness Blackshear, for he testified further, "If I had thought he was going to kill you, Mr. Davis, I would have told you." If the language of the defendant testified to, therefore, made no impression on the mind of the witness who heard it that it amounted to a threat to take the life of Mr. Davis, it can hardly be supposed that it would impress the jury that it was a threat to take Mr. Davis' life, or to impress them with the idea that the defendant was such a violent man as that he would likely commit a homicide without sufficient provocation. It will be observed that the witness did not testify that the defendant was a man of violent character. He merely said that he had heard him use words which carried a meaning that implied a threat on the life of the person alleged to have been threatened. We cannot conceive that a jury of average intelligence would be influenced by language so hedged about as to convey only the idea that a threat was

implied. The language itself was not given. Surely no jury trying one for his life would convict merely because of this testimony. And while we think that the admission of the evidence was erroneous, we cannot say it was sufficiently so to require a new trial, especially in view of the fact that the jury knew that the "implied" threat was with reference to one of defendant's own counsel. *Elliott v. State*, 132 Ga. 758 (1), 64 S. E. 1090; *Strickland v. State*, 137 Ga. 115, 116 (5a), 72 S. E. 922; *Chestnut v. State*, 112 Ga. 366 (1), 37 S. E. 384.

[8] 11. The evidence was sufficient to support the verdict; and none of the assignments of error are such as to require the grant of a new trial.

Judgment affirmed. All the Justices concur; BECK and ATKINSON, JJ., specially.

McGREGOR v. PILCHER et al.

(Supreme Court of Georgia. Aug. 13, 1913.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There being no complaint that any error was committed upon the trial, and the evidence being sufficient to authorize the verdict, the court did not err in refusing a new trial.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action between L. D. McGregor and W. W. Pilcher and others. From the judgment, McGregor brings error. Affirmed.

John T. West, of Thomson, and Wm. M. Hawes, of Warrenton, for plaintiff in error. E. P. Davis and M. L. Felts, both of Warrenton, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

COOPER v. COOPER.

(Supreme Court of Georgia. Aug. 13, 1913.)

(Syllabus by the Court.)

REFUSAL OF NEW TRIAL.

There being no complaint that any error of law was committed upon the trial, and the evidence being sufficient to authorize the verdict, the court did not err in refusing to grant a new trial.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action between Lizzie Cooper and Tom Cooper. From the judgment, Lizzie Cooper brings error. Affirmed.

Johnson & Johnson, of Gainesville, for plaintiff in error. J. G. Collins, of Gainesville, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

EDWARDS v. SAVANNAH TRUST CO. (No. 4,556.)

(Court of Appeals of Georgia. Aug. 16, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 499*) — ACTION ON NOTE—PAYMENT.

"The maker of a negotiable promissory note pays the amount due thereon to any person other than the holder at his own risk, and a defense to an action on such note, setting up payment to one authorized by the holder to collect for him, casts upon the defendant the burden of showing, not only that he has paid the money, but that he has made payment to a person authorized by the holder to receive it, or else that it actually reached the holder's hands."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1682, 1695-1697; Dec. Dig. § 499.*]

2. BILLS AND NOTES (§ 426*) — PAYMENT — EVIDENCE.

In the present case there was no evidence from which the jury could rightly infer that the person to whom the alleged payment was made was the agent of the holder, or was authorized generally or specially to receive for it payment of the note, or that the holder ever received the money; and, the only defense made being that of payment, the court did not err in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1223-1232; Dec. Dig. § 426.*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Action by the Savannah Trust Company against J. R. Edwards. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error. Travis & Travis, of Savannah, for defendant in error.

RUSSELL, J. [1, 2] The facts in this case bring it squarely within the rule stated in the headnotes, which we quote from *Bank of the University v. Tuck*, 101 Ga. 104, 28 S. E. 168. It appears from the record that the plaintiff in error has fully paid the note, and it is indeed (as he insists) a hardship that he is compelled to pay the note the second time. However, the rule is well settled that the maker of a note, who pays it to any other person than the holder, does so at his peril. There does not appear in the case any proof that Heyward & Co., the original payees of the note sued on, were the agents of the Savannah Trust Company, the holder of the note. When Edwards made each payment upon his note, it was his duty to himself to have seen that Heyward & Co. had the note, and that the payments were properly credited upon it, and when he made the final payment he should have demanded the surrender of the note. If he had done this, he would have ascertained that before its maturity the note had been transferred as collateral to the Savannah Trust Company, and he would thus have been

saved having to pay it a second time. While the hardship of having to pay a note the second time is very great, one who does not exercise sufficient care to ascertain whether the person to whom he is paying the money really owns the note or not cannot complain of the result of his own carelessness.

It developed upon the trial that almost all of the testimony of T. S. Heyward was without any probative value whatever. His testimony certainly did not establish the fact that he was authorized to collect the note as agent for the Savannah Trust Company, nor even establish that it was the custom of the Savannah Trust Company to permit its debtors to collect notes placed with it as collateral; for the witness who testified to this point, in his first answer upon cross-examination, stated that he did not know, of his own personal knowledge, anything he had testified to. The chief complaint of the plaintiff in error is that the court erred in ruling out his own testimony. This testimony merely showed payment in full on his part to the original payees of the note; but there was nothing in his testimony which was relevant so far as the Savannah Trust Company, the plaintiff in this case, was concerned. As to the Savannah Trust Company the payments to Heyward & Co. were entirely irrelevant. It is perhaps true that the court ruled out this testimony at too early a stage in the trial. If subsequently evidence had been tendered which would show that Heyward & Co. were still the owners of the note at the time that the payments were made, or if there had been any proof that Heyward & Co. were authorized to collect the note in behalf of the Savannah Trust Company, this ruling would have been error. But, since there was no such evidence, the ruling did not harm the defendant, or afford him any ground for complaint.

This note appears to have been twice transferred—first by Heyward & Co. to the Electric Fertilizer Company, and thereafter by that company pledged as collateral to the Savannah Trust Company. Without the production of the note, the maker was not required to pay Heyward & Co., for, as he knew, the note was negotiable. There was no error in directing the verdict for the plaintiff.

Judgment affirmed.

MAYOR, ETC., OF AMERICUS v. PHILIPS. (No. 4,500.)

(Court of Appeals of Georgia. Aug. 16, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 101*)—CHANGE OF STREET GRADE—LIABILITY TO ABUTTING OWNER.

A municipal corporation is liable to a property owner for the damage consequent upon altering the grade of the street or sidewalk in

front of his premises, whereby his means of ingress and egress are impaired or destroyed, or a diminution of the market value of his property results. *Central of Ga. Ry. Co. v. Garrison*, 12 Ga. App. 369, 77 S. E. 193, and cit.; *City of Atlanta v. Green*, 67 Ga. 386; *Augusta v. Schrameck*, 96 Ga. 426, 23 S. E. 400, 51 Am. St. Rep. 146; *Roughton v. Atlanta*, 113 Ga. 948, 39 S. E. 316; *Columbus v. McDaniel*, 117 Ga. 823, 45 S. E. 59; *East Rome v. Lloyd*, 124 Ga. 852, 53 S. E. 103; *Rome v. Rhodes*, 134 Ga. 650, 68 S. E. 330.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.*]

2. EMINENT DOMAIN (§ 203*)—CHANGE OF STREET GRADE—EVIDENCE OF DAMAGE.

The fact that the plaintiff had put down a brick sidewalk in front of his property, and had been required to pay for the curbing thereof, was illustrative of the value of the premises prior to the municipal improvement by which he alleged he had been injured, and was therefore properly admitted in evidence. The fact that the grade on which the sidewalk had been put down was fixed by the city engineer was irrelevant; but, as the objection went to the evidence as a whole, the court was not required to separate the irrelevant testimony from that which was relevant, in order to exclude the former.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 542; Dec. Dig. § 203.*]

3. MUNICIPAL CORPORATIONS (§ 845*)—CHANGE OF STREET GRADE—EVIDENCE OF DAMAGE.

There was no demurrer to the petition, and since it was therein alleged that the city, in raising the grade of the street in front of the plaintiff's property, had failed, neglected, and refused to provide suitable and adequate means for the conveyance of the volume of water which flowed through a natural depression of the land at that point, and by reason of this failure water dammed up and ponded into an alleyway adjacent to his lot, whence it flowed into his store, any testimony tending to show that his store was subject to overflows of rain-water, caused by failure to provide adequate means of conveyance for the water, was relevant and material. While the petition may be subject to special demurrer calling for information as to how the water dammed up by the elevation of the street and sidewalk flowed into the plaintiff's property, still in the absence of such demurrer it was permissible for him to prove that, owing to the city's act in raising the sidewalk, water overflowed his store, and to prove that the water entered either in front, or in the rear, or upon the side, or from all these directions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.*]

4. MUNICIPAL CORPORATIONS (§ 845*)—CHANGE OF STREET GRADE—EVIDENCE OF DAMAGE.

Under the allegations of the petition, evidence that water overflowing from an inadequate manhole spread over the street and sidewalk, and thence flowed into the plaintiff's store, was admissible.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.*]

5. TRIAL (§ 228*)—INSTRUCTION—LANGUAGE—DEFINITENESS.

The action being one to recover damages for injuries to the plaintiff's storehouse, and consequent diminution of the market value of the storehouse and the lot whereon it was situated, it was not error for the court, in charg-

ing the jury, to refer to the lot as "the property."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 509-512, 526; Dec. Dig. § 228.*]

6. TRIAL (§ 259*)—INSTRUCTIONS.

The defendant pleaded that the grade of the street had been changed with the consent of the plaintiff. In the absence of an appropriate written request for more specific instructions, the court was not required to give the jury the meaning of the word "consent," as defined in section 4490 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648-650; Dec. Dig. § 259.*]

7. EMINENT DOMAIN (§§ 79, 80*)—CHANGE OF STREET GRADE—WAIVER OF DAMAGES—"WAIVER."

Since "waiver" is a relinquishment of a known right, the court correctly charged the jury that the plaintiff would have to be in possession of all the facts, and know the condition in which the municipal improvement in question would leave his property, before he could be so bound by his consent or acquiescence in the proposed municipal improvement as to waive any damages which might result to him thereby.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205-214; Dec. Dig. §§ 79, 80.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381.]

8. MUNICIPAL CORPORATIONS (§ 839*)—CHANGE OF STREET GRADE—LIABILITY FOR DAMAGES.

According to the evidence, the overflows into the plaintiff's store were of such character, and occurred at a time sufficiently antecedent to the action, as to raise the inference and authorize the presumption that the municipality knew of the defects in the sewer, to which the injury of the plaintiff's property was traceable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1759; Dec. Dig. § 839.*]

9. EXCESSIVE DAMAGES.

The verdict is supported by evidence which would have authorized a larger finding in behalf of the plaintiff than that returned by the jury, and the contention that it is excessive is without merit.

Error from City Court of Americus; W. P. Wallis, Judge pro hac.

Action by M. B. Phillips against the Mayor, etc., of the City of Americus. Judgment for plaintiff, and defendant brings error. Affirmed.

Hollis Fort, of Americus, for plaintiff in error. L. J. Bialock and J. A. Hixon, both of Americus, for defendant in error.

RUSSELL, J. Judgment affirmed.

SOUTHERN RY. CO. v. LOFTON. (No. 4,437.)

(Court of Appeals of Georgia. Aug. 16, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 400*)—INJURY TO LICENSEE ON TRACK—QUESTION FOR JURY.

The court did not err in overruling the demurrer.

(a) It is for the jury, and not for the court, to say whether it is want of ordinary care for a licensee, who does not know that a train is due

or coming, to step upon a railroad track without looking for the approach of a train. Failure to look out for a train may be such negligence as will defeat a recovery for any injuries which might have been avoided by the injured party; but the question as to whether, under the facts and circumstances of a particular case, it was the duty of the licensee to look and listen (or look, if a deaf man), is for determination by the jury.

(b) In an action by a wife against a railway company for the killing of her husband, it is alleged that he was proceeding along a pathway between the main line and a side track on the north side of the main line to the defendant's depot, for the purpose of becoming a passenger upon one of the defendant's trains; that the pathway was such that the defendant was bound to anticipate the presence of pedestrians thereon, and that it crossed to the south side of the defendant's main line to the usual place of taking on and putting off passengers at the defendant's depot; that as he was crossing this track, at the usual and customary place, in plain view of the defendant's engineer, he was struck and killed by an engine which was 40 feet away at the time he started to cross, and which was running at a speed of from 15 to 20 miles an hour, although a municipal ordinance forbade that the train should be operated at a greater rate of speed than 6 miles per hour; that the deceased was hard of hearing, but the employees of the railway company did not blow a whistle, sound a bell, or give any other signal as required by law, when approaching the crossing mentioned in the petition, and even after they saw him, or could have seen him if they had been keeping a lookout in anticipation of his presence at that time and place, the emergency brakes were not applied, nor any other effort made to slacken the speed of the train. It was alleged that the defendant was negligent in failing to anticipate the presence of pedestrians, or to keep a proper lookout, and in operating the train at from 15 to 20 miles an hour, in violation of a municipal ordinance; and it was charged that by the use of ordinary care the train might have been stopped by the use of emergency brakes before reaching the point where the deceased was struck, if any effort had been made to stop the train after the defendant's servants in charge of the train became aware of his presence upon the track. *Held*, that the petition shows a case for submission to a jury, in order that they may determine, in the light of any evidence that may be submitted, whether the running of the train in the place in question, at the speed designated, was in violation of the alleged municipal ordinance, and was, for this or any other reason, negligence as related to the deceased, whether the engineer, under the circumstances, should have looked out for the deceased, and, if so, whether he failed to observe that duty. Furthermore, in view of the amendment alleging willful and wanton negligence, the jury may find, if the allegations of the petition be supported by evidence, that the negligence of the defendant's agents was so gross as to be wanton. The decision in this case is controlled by the rulings of the Supreme Court in *Crawford v. Southern Railway Company*, 106 Ga. 870, 33 S. E. 826, and *Ashworth v. Southern Railway Company*, 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

Error from City Court of Baxley; A. V. Sellers, Judge.

Action by Mary Lofton against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet, Twitty & Reese, of Brunswick, and J. B. Moore, of Baxley, for plaintiff in error. Parker & Highsmith, of Baxley, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J. (concurring specially). I concur in the judgment of affirmance solely on the ground that in the petition as amended it is alleged that after the defendant's servants saw the person for whose homicide the suit is brought, and observed his presence in a position of peril, they could, in the exercise of ordinary care, have avoided killing him. Under the facts alleged the plaintiff is not entitled to recover for mere negligence less than willfulness and wantonness. *McIver v. Georgia Southern & Florida Railway Company*, 108 Ga. 306, 33 S. E. 901; *Roach v. Atlanta Railway Company*, 119 Ga. 98, 45 S. E. 963; *Georgia Railroad Company v. Williams*, 3 Ga. App. 274, 59 S. E. 846; *Central of Georgia Railway Co. v. Mullins*, 7 Ga. App. 381, 66 S. E. 1028.

ELYEA-AUSTELL CO. v. JACKSON GARAGE. (No. 4,538.)

(Court of Appeals of Georgia. Aug. 15, 1913.)

(*Syllabus by the Court.*)

EVIDENCE (§ 445*)—PAROL EVIDENCE—CONTRACTS.

The rule that parol evidence is inadmissible to add to, take from, or vary a written contract has no application in a case where a waiver of one of the stipulations of the contract is asserted, and it is proved that the waiver was subsequent to the execution of the original contract. The general rule does not purport to exclude negotiations respecting written contracts, except such as are prior to or contemporaneous with the making of the written instrument, and it is admissible to prove by parol a subsequent partial modification or the entire discharge of the contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.*]

Error from City Court of Jackson; H. M. Fletcher, Judge.

Action by the Elyea-Austell Company against the Jackson Garage, a partnership. Judgment for defendants, and plaintiff brings error. Affirmed.

C. L. Redman, of Jackson, for plaintiff in error. W. E. Watkins, of Jackson, for defendants in error.

RUSSELL, J. The Elyea-Austell Company sued the Jackson Garage, of Jackson, Ga., a partnership, upon an account, and the jury returned a verdict in favor of the plaintiff, but only for a portion of the amount claimed. Thereupon the plaintiff moved for a new trial, and it excepts to the judgment overruling this motion.

Upon the trial the plaintiff's president tes-

tified to the correctness of the account as stated. Among other defenses, the defendants sought to recoup damages on account of an alleged breach of one of the stipulations of the contract between the parties, and it appears from the verdict that the jury sustained this contention. In the contract, which was introduced by the defendants, the plaintiff agreed not to sell "Indian" motorcycles at a discount in the territory allotted to the defendants, during the continuance of the agreement. It appears from the evidence that in violation of this stipulation, the plaintiff sold to Edwards and Jenkins, both of whom live at Jackson, Ga., an Indian motorcycle at the list price of \$225. Edwards and Jenkins both testified that the plaintiff told them they had a contract with the Jackson Garage by which they could not ship the motorcycle to Jackson, and so it was shipped to the purchasers at Locust Grove. According to the stipulation of the contract in question, the discount which would have represented the profit to the defendants, in case they had sold the motorcycle to Edwards and Jenkins, was 20 per cent. of the list price of \$225, or \$45, which the jury apparently allowed the defendants to recoup. There was other testimony on the part of the defendants which authorizes and accounts for the remainder of the difference between the amount of the verdict and the sum originally claimed by the plaintiff.

In the contract introduced by the defendants there is a stipulation requiring the Jackson Garage to carry a sample motorcycle or motorcycles always in stock during the continuance of the agreement, but the defendants testified that subsequently to the signing of the contract, the Elyea-Austell Company agreed to waive this condition. The testimony as to this waiver was permitted by the court, over the objection of the plaintiff that it was inadmissible to vary the written contract by parol evidence. The error assigned upon the admission of this testimony is the only point seriously insisted upon here. The burden of the plaintiff's complaint is that the court erred in allowing the defendants to testify that the portion of the contract (wherein the plaintiff agreed that the defendants should have a certain commission on motorcycles) was waived in respect to the condition requiring the defendants to keep a sample motorcycle on exhibition. We find no error in the ruling upon the admissibility of the evidence. The case is not one of an attempt to alter or vary the terms of a written contract, by seeking to prove a prior or contemporaneous parol agreement, but is one in which the testimony is to the effect that subsequently to the execution of the contract, and entirely disconnected therewith, there was an express waiver of the condition to which we have referred.

The cases cited by counsel for plaintiff in

error do not sustain his contention. In *Hawkins v. Studdard*, 132 Ga. 268, 63 S. E. 852, 131 Am. St. Rep. 190, Judge Holden points out that parol testimony as to the agreements in question were contemporaneous with the contract, and the same is true of the case of *Reams v. Thompson*, 5 Ga. App. 226, 62 S. E. 1014, in which Judge Powell delivered the opinion of this court. The rule stated in the headnote is announced in *Loveless v. Bridges*, 136 Ga. 339 (1), 71 S. E. 166, and it had been previously and frequently recognized by the Supreme Court and by text-writers. See *Jones on Evidence*, 442, 557; *Civil Code*, § 5794.

Judgment affirmed.

FAISON v. STATE. (No. 5,023.)

(Court of Appeals of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 825*)—INSTRUCTIONS—SUFFICIENCY—REQUESTS.

While it is the duty of a judge in the trial of a criminal case to state the contentions of both the state and the defendant, still, in the absence of a request for more definite instructions, a statement by the court that the grand jury has returned an indictment against the defendant, charging him with the offense of murder, and that to this the defendant has filed a plea of not guilty, which makes the issue for them to try, sufficiently presents the issue. Especially is this true where the court, in its instructions, defines the various grades of homicide applicable to the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2006; Dec. Dig. § 825.*]

2. HOMICIDE (§ 309*)—INSTRUCTIONS—EVIDENCE.

In the present case testimony was adduced which tended to show a mutual intent to fight, and which authorized the instruction of the court upon the subject of voluntary manslaughter. *Gann v. State*, 30 Ga. 67; *Young v. State*, 10 Ga. App. 116, 72 S. E. 935; *Rickerson v. State*, 10 Ga. App. 464 (1), 73 S. E. 681.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649, 650, 652-656; Dec. Dig. § 309.*]

3. CRIMINAL LAW (§ 824*)—INSTRUCTIONS.

"Where the court gives in charge to the jury the principles of law with respect to the right of a slayer to kill in order to prevent the commission of a felony, the failure to define the term 'felony,' as used in such charge, in the absence of a request to give such definition, is not error requiring a new trial." *Helms v. State*, 138 Ga. 827 (7), 76 S. E. 353.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

4. HOMICIDE (§ 340*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

The defendant, having been convicted of voluntary manslaughter, cannot complain of the alleged errors of the court in charging the law of murder.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

5. HOMICIDE (§ 300*)—CRIMINAL LAW (§ 1122*)—APPEAL—RECORD—INSTRUCTIONS.

Under the evidence there was no error in charging the jury upon the subject of justifi-

ble homicide, as contained in section 70 of the Penal Code of 1910, nor the doctrine of reasonable fears as contained in section 71; and, since there was no request that the entire charge be sent up in the record, it is not made to appear that the charge of the court as to mutual combat, and the defense which could arise under section 73 of the Penal Code, was so given as to confuse the jury, or that this instruction was injurious to the defendant. Where only fragmentary excerpts from the charge, in themselves abstractly correct, are presented for the consideration of this court, and the plaintiff in error does not cause the entire charge to be transmitted to this court, it will be presumed that the instruction of which complaint is made was properly qualified, and so presented as not to be confusing to the jury or injurious to the defendant.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300;* *Criminal Law*, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.*]

6. HOMICIDE (§ 300*)—INSTRUCTIONS—DEFENSE.

Upon an inspection of that portion of the charge to which general exception is taken, on the ground that the charge upon sections 70, 71, and 73 of the Penal Code of 1910 followed in such quick succession as to confuse the jury, it appears that the exception is without merit.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

7. REVIEW.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Johnson County; K. J. Hawkins, Judge.

Charley Faison was convicted of voluntary manslaughter, and brings error. Affirmed.

J. L. Kent, of Wrightsville, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

RUSSELL, J. Judgment affirmed.

MARTIN v. COX. (No. 4,573.)

(Court of Appeals of Georgia. Aug. 16, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 221*)—DEMURRER TO PETITION—ERROR IN OVERRULING—EFFECT.

Since the trial judge erred in overruling the demurrer to the petition, the further proceedings on the trial were nugatory.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 567; Dec. Dig. § 221.*]

2. CONTRACTS (§ 10*)—VALIDITY—UNILATERAL CONTRACT.

The contract upon which the plaintiff based his right of action is plainly unilateral, for under it he did not assume an obligation to sell the stock which he contended the defendant had bound himself to buy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

Error from City Court of Columbus; G. Y. Tigner, Judge.

Action by W. J. Cox against M. M. Martin. Judgment for plaintiff, and defendant brings error. Reversed.

S. M. Davis and Wynn & Wohlwender, all of Columbus, for plaintiff in error. McCutchen & Bowden, of Columbus, for defendant in error.

RUSSELL, J. Cox sued Martin, alleging that Martin entered into a contract with him to purchase from him 12 shares of the capital stock of the Martin Furniture Company at a price not less than \$1,500, and that he tendered the stock to Martin in pursuance of the contract, stating his desire to sell, but that Martin refused to take the stock, and consequently is indebted to him in the sum of \$1,500, with interest. The contract (a copy of which is attached to the petition) was as follows: "State of Alabama, Jefferson County. This agreement, entered into this the 19th day of August, 1909, witnesseth: That I, M. M. Martin, do hereby agree to purchase of Wm. J. Cox, one year from date, 12 shares of the capital stock of the C. A. Martin Furniture Company, at a price to be mutually agreed upon of not less than \$1,500, should said W. J. Cox wish to sell same. Should the said Wm. J. Cox desire to sell, he shall give to the said M. M. Martin 30 days' notice of his intention to sell." [Signed] M. M. Martin. W. J. Cox." The jury found a verdict in favor of the plaintiff for \$1,500. The defendant excepted to the overruling of his demurrer to the petition, and also to the judgment overruling his motion for a new trial.

[1] 1. The motion for a new trial contains 19 grounds, in which error is assigned upon various rulings as to the admissibility of testimony, and upon instructions to the jury. We shall not concern ourselves with any discussion of the numerous grounds of the motion for a new trial, for the reason that, in our opinion, the court erred in overruling the demurrer to the petition. The demurrer should have been sustained and the petition dismissed. For that reason all of the subsequent proceedings in the trial were nugatory.

[2] 2. In the demurrer the point is made that the contract upon which the suit is based is unilateral. It is specifically pointed out in three grounds of the demurrer that by the alleged contract the plaintiff was not bound to sell his stock, or to do any other thing whatsoever, and that he made no promise or agreement whatsoever. Nothing is better settled than that neither party to an ostensible executory contract is bound, unless both parties are bound. "That the promise by one with nothing in return is void is axiomatic." Bishop on Contracts (2d Ed.) 35. Of course, this statement does not apply in full force to an option, because it is equally well settled that a contract by which the owner of property agrees with another that the latter shall have the right to buy the property at a fixed price within a certain time, if based upon a valid consideration, is

binding and will be enforced. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 8 L. R. A. 94; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Linn v. McLean*, 80 Ala. 360; *Souffrain v. McDonald*, 27 Ind. 269; *Herrman v. Babcock*, 103 Ind. 461, 3 N. E. 142. An option rests upon the principle that "it is just as competent for a man to bind himself to make a contract of sale as it is for him to bind himself to buy a contract of sale." *De Rutte v. Muldrow*, 16 Cal. 505. We think that under the rule laid down in *Morrow v. Southern Express Company*, 101 Ga. 810, 28 S. E. 998, in which it was said that, "where mutual promises are relied upon as consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties; and if one assume under such an agreement to do a special act beneficial to another, and that other under the terms of the contract is under no obligation to perform any act of corresponding advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform," the demurrer raising the point that the contract in the present case is without consideration is good. See, also, *Cooley v. Moss*, 123 Ga. 707, 51 S. E. 625.

Without ruling upon this point, however, it is very clear, from a reading of the contract which we have quoted, that the contract is unilateral, and this phase of the case is not affected by the fact that Cox, as well as Martin, signed the instrument. Martin promised to buy the stock from Cox, if Cox, at the time designated, wished to sell it; but Cox did not promise to sell his stock to Martin, even if Martin should wish to buy it at that time, nor did he in any way obligate himself to sell, no matter how anxious Martin might be to buy. Under the provisions of the instrument Martin was bound to buy, but Cox was not bound to sell. The ruling upon the demurrer is controlled by the decisions of the Supreme Court in *McCaw Manufacturing Co. v. Rountree*, 115 Ga. 408, 41 S. E. 664, *Simpson v. Sanders*, 130 Ga. 265 (1), 60 S. E. 541, and *Mallet & Nutt v. Watkins*, 132 Ga. 700, 64 S. E. 999, 131 Am. St. Rep. 226, and the decision of this court in *Oliver Construction Company v. Reeder*, 7 Ga. App. 276, 66 S. E. 955. In the latter case Judge Powell says: "It would be profitless for us to elaborate the proposition that a contract, to be enforceable, must be mutual. Negotiations, propositions, and tentative understandings between parties do not become contracts until both parties are bound. * * * Generally speaking, if one party cannot hold the other to the terms of the contract, and compel him to perform under it, or bring an action against him for his refusal to perform, the transaction is unilateral, and no contract exists as against either party."

Judgment reversed.

J. B. CARR & CO. v. SOUTHERN RY. CO.
(No. 4,316.)

(Court of Appeals of Georgia. June 25, 1913.)

(*Syllabus by the Court.*)

1. TORTS (§ 1*)—CONTRACT LIABILITY—LEGAL DUTY.

A tort may consist in the violation of a public duty imposed by the general law upon all persons occupying the particular relation involved in the given transaction or *res gestæ*. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded upon a contract. In such a case the liability arises out of the breach of duty incident to and created by the contract, but is only dependent upon the contract to the extent necessary to raise the duty. The tort consists in the breach of duty.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. §§ 1, 3, 5; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7007-7009.]

2. DAMAGES (§ 20*)—TORTS—NATURE OF RECOVERY.

The petition sets forth an action *ex delicto*, and therefore the plaintiffs were not restricted to the recovery of such damages as were reasonably within the contemplation of the parties, but were entitled to recover for such damage as might be properly directly traceable to the defendant's neglect or failure to use due care in delivering the shipment which it had accepted for transportation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 55-57; Dec. Dig. § 20.*]

3. CARRIERS (§ 105*)—TRANSPORTATION OF FREIGHT—DELAY—DAMAGES.

Where, in a suit brought to recover damages on account of the failure of a common carrier to deliver a shipment within a reasonable time, it appeared from the petition that the plaintiffs were contractors constructing a building under a time limit, and that the material constituting the delayed shipment was of an unusual kind, especially designed for the building then under construction, items of damages set forth in the petition, consisting of wages paid to a workman who was idle while waiting for the shipment, the expense of tracing the shipment, the forfeit which the contractors were compelled to pay by reason of the delay, and interest upon money which they were for the same reason compelled to borrow, were not subject to demurrer as being too remote for recovery.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 451-458; Dec. Dig. § 105.*]

4. CARRIERS (§ 105*)—TRANSPORTATION OF FREIGHT—DAMAGES—LOST TIME.

The court properly sustained the demurrer to those items of damages set forth as "lost time" of the two partners composing the plaintiff firm upon the ground that such damages were too remote; it not appearing how or why it was necessary for the plaintiffs to lose the time, or (except as a conclusion of the pleader) that they did not or could not at that time have obtained any other contracts of employment of the value alleged, especially since the petition alleges that the plaintiffs were contractors, and, in the absence of distinct allegations, showing a certainty of profits, it would be entirely speculative as to whether the contractors would have made or lost money upon the contract, even if they had had the opportunity of making another contract within the time alleged to have been lost.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 451-458; Dec. Dig. § 105.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. B. Carr & Co. against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Green, Tilson & McKinney, of Atlanta, for plaintiff in error. McDaniel & Black, of Atlanta, for defendant in error.

RUSSELL, J. The plaintiffs, who are alleged to be a firm of contractors engaged in the construction of houses and other buildings, filed a suit against the Southern Railway Company for damages for failure to deliver within a reasonable time a shipment which it had accepted for transportation. The petition sets out that plaintiffs were under contract to build a courthouse for Columbia county, Ark. They had the inside woodwork gotten out by the Woodward Lumber Company of Atlanta, Ga. The Woodward Lumber Company delivered a car of this inside finish to the defendant railway company at Atlanta, Ga., consigned to J. B. Carr & Co. at Magnolia, Ark. This finished building material was loaded in Illinois Central car No. 15,934, and was delivered to the railway company with direction, as appears from the bill of lading, to transport the same by way of the Queen & Crescent route at Meridian, Miss. It is alleged in the petition that instead of transporting the car load of material as directed in the bill of lading, and as it had contracted to do, the Southern Railway Company carried the car to Chattanooga, Tenn., and there delivered the car load of building material to the Queen & Crescent route marked "Empty," and that it was thus carried to Louisville, Ky., as an empty car, and lay there for two months, although two weeks was a reasonable time for the transportation of the car from Atlanta to Magnolia, Ark. The petition alleges that "said Southern Railway Company was negligent in the transmission of said car of builder's material from Atlanta, Ga., to Magnolia, Ark., in that said car was by said Southern Railway Company negligently marked 'Empty' and delivered to said Queen & Crescent route at Chattanooga, Tenn., to be carried to the yards of the Illinois Central Railroad at Louisville, Ky., to which place said car load of material was carried as an empty car, as above stated, and there remained until on or about the 30th of July, 1906, as above stated; said Southern Railway thus negligently diverting said car from the route directed in said bill of lading and thus causing an unusual, unnecessary, and unreasonable delay in the transmission of said car from Atlanta, Ga., to Magnolia, Ark." The plaintiffs made constant effort to trace the car, and the condition of the courthouse was such that the inside finish was needed by the middle of June, 1906, and this material would have been at its destination, in the ordinary course, within this time, and yet

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiffs did not receive it until two months thereafter.

It is alleged that, because of the delay consequent upon the nondelivery of the car load of material, the plaintiffs were compelled to suspend work on the construction of the courthouse about the middle of June, 1906; that they were compelled to keep certain of their men employed upon the construction of the courthouse on wages; that by reason of said nondelivery they were compelled to pay El. A. Zobell \$3 per day for 45 days, amounting to \$135 during which time Zobell was idle by reason of the nondelivery of said car of material; that petitioner H. A. Carr, by reason of the nondelivery of said car of builder's material, lost two months of time while waiting at Magnolia, Ark., for said car, which time was worth \$100 per month or \$200; that petitioner J. B. Carr lost two months of time while waiting at Magnolia, Ark., for the same reason, and his time was worth \$200 per month or \$400; that petitioners were compelled to expend \$114.20 for the expenses of J. B. Carr on two trips from Magnolia, Ark., to Atlanta, Ga., and return, in their efforts to locate the car of builder's material; that the contract of the petitioners with said Columbia county, Ark., provided for a forfeit of \$20 per day should petitioners fail to complete the courthouse by the 27th day of July, 1906; that by reason of the nondelivery of said car of material they were unable to complete the courthouse until the 29th day of September, 1906, when the petitioners, by compromise, settled the forfeit, due to their failure to complete the building on time, for \$200; that by reason of the delay caused by the nondelivery of the car they were compelled to borrow \$14,000 and pay interest thereon for two months, amounting to \$186.66. The petitioners therefore place their damages at \$1,235.86, with interest from the 15th day of August, 1906, alleging that they were "damaged by the negligence of the Southern Railway Company as above stated."

The ninth paragraph of the petition alleges that: "By reason of the above-stated facts, said Southern Railway Company is indebted to your petitioners in the sum of \$1,235.86, with interest from the 15th day of August, 1906, which amount has been demanded of said company by your petitioners, and payment of the same was refused by said company, and is still refused." Attached to the petition as an exhibit is a bill of lading acknowledging receipt of a car of builder's material, I. C. 15934, consigned to "J. B. Carr & Co." at "Magnolia, Ark.," and marked "c/o Q. & C. at Meridian, Miss."

The defendant demurred to the petition generally, because no cause of action is set out, and because the items composing the \$1,235.86 sued for are not a subject-matter of recovery, and not the legitimate consequences of the failure of the company to de-

liver the shipment, as the items of damage could not have been held to have been reasonably within the contemplation of the parties when the shipment was delivered to the defendant. The defendant demurred specially to the eighth paragraph (in which the various items of damage are set forth as a whole), and also demurred specially to each specific item set forth in paragraph 8. The trial judge sustained the demurrer and dismissed the petition.

[1] 1. Necessarily the first question which presents itself is whether the action is one for damages arising ex contractu or is one for a tort based upon a breach of public duty, in which the contract is only referred to as a necessary matter of inducement and to fix liability upon the tort-feasor, for the learned trial judge, in sustaining the demurrer which sets up that the damages could not be held to be reasonable in the contemplation of the parties, must have adjudged that the suit was one upon contract. In suits to recover damages for breach of contract, the damages recoverable must necessarily be such as were within the contemplation of the parties, but in an injury due to tort any damages may be recovered which might reasonably have been anticipated as a consequence of the breach.

[2] We think the petition in the present case is very plainly an action upon a case in which the injured party is proceeding for a wrong, and that the contract is not counted on, though it is necessarily shown, in order to make it appear how the wrong was injurious. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded upon a contract. 1 Addison on Torts, § 27. And in such a case "the liability arises out of a breach of duty incident to and created by the contract; but it is only dependent upon the contract to the extent necessary to raise the duty. The tort consists in the breach of duty." *Id.* note 1. Tested by these principles, this action is not a suit to enforce a contract, though the contract is referred to when it asks for damages. Since the breach of the contract alleged is a breach of a public duty by a common carrier, the action must be construed as one ex delicto. Even if there were doubt upon the question, we should hold, as has been several times held, that the doubt should be resolved by construing the action as one sounding in tort, since a waiver of the tort must be implied when, in such a case, the action is based upon the contract.

Pleadings are always to be construed most strongly against the pleader, and it is true that the ninth paragraph of the petition, if standing alone, would incline us to the view that the plaintiffs were attempting to sue, in the same action, for a tort and upon a contract, but the defendant did not take this view and has filed no demurrer raising this point; and, while the ninth paragraph is somewhat inconsistent with the petition as a

whole, it cannot be held to detract from or withdraw the allegations in the other paragraphs of the petition which plainly evidence the intention of the plaintiffs to stake their case upon a tort. We do not consider that the fact of the bill of lading being attached to the petition evidences any intention on the part of the plaintiffs to sue upon the contract, because, as was held in *City & Suburban Railway Co. of Savannah v. Brauss*, 70 Ga. 376: "The tort in such a case is connected with the contract only as it enabled the tort-feasors to bring the wrong into it. * * * If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded upon a contract. * * * And in such a case, the liability arises out of a breach of duty incident to and created by the contract; but it is only dependent upon the contract to the extent necessary to raise the duty. The tort consists in the breach of duty.'"

[3] The insistence of the defendant was that the damages sought to be recovered were not in the contemplation of the parties; and, if the suit could be held to be an action *ex contractu*, the demurrer should properly have been sustained, because it is very easy to see that neither party, at the time of making the contract, contemplated that any of the losses or expenditures claimed by the plaintiffs would be probable or necessary. Construing the action, however, as we do, as one in tort, it is entirely immaterial that these matters were not within the contemplation of the parties at the time the contract for shipment was made. The tort-feasor is liable for any damages consequent upon his act and which are directly traceable to it, if they could reasonably have been anticipated as likely to be the result of his neglect or failure to perform his duty. In an action sounding in tort, the measure of damages is different from that in an action based upon a contract. In a suit upon a contract, no element of damage is recoverable, unless it can reasonably be considered to have been within the contemplation of the parties at the time they entered into the contract. In actions *ex delicto*, however, the rule of liability is much broader. "In the field of delict liability is much more far reaching. Here the rule is that the wrongdoer is liable for all consequences which naturally follow from his wrongful act, provided only they be not too remote." 1 *Street on Foundations of Legal Liability*, 88, and citations. In other words, according to Mr. Street, foresight and hindsight respectively furnish the key to the question of the extent of liability in the respective fields of contract and tort.

The rule, as we understand it, is well stated in *Stevens v. Dudley*, 56 Vt. 166: "The general rule is that the person who is guilty of a negligent act is responsible for all the injurious results which flow therefrom by ordinary natural sequence without the interposition of any other negligent act or over-

powering force. * * * It is the unexpected, rather than the expected, that happens in the great majority of the cases of negligence."

Measured by the rule laid down by Mr. Street in his *Foundations of Legal Liability*, vol. 1, p. 90, the present action must be treated as one *ex delicto*, because the law of negligence is one single homogeneous body of legal principle, and negligence considered as pure delict cannot be dis severed from negligence considered as a breach of imposed positive duty. Foresight of harm is an essentially antecedent condition of liability, but, when negligence is shown, a defendant, who is charged with the discharge of a duty to the public, is chargeable with all the injurious consequences which proximately follow and which are not too remote. Mr. Bevan, in his work on *Negligence* (1 Bevan, *Negligence in Law*, 106), says that reasonable foresight of harm supplies the criterion for determining the preliminary question as to whether negligence in fact exists in a particular case, but that, notwithstanding negligence being established, the extent of liability is determined by the rule of liability which applies in tort; that is to say, liability for established negligence extends to all consequences of which that negligence can be considered the legal, natural, and proximate cause. Upon this point see *Chappell v. Western Railway of Alabama*, 8 Ga. App. 792, 70 S. E. 208, citing *Atlantic Coast Line R. Co. v. Daniels*, 8 Ga. App. 775, 70 S. E. 203. The rule announced in *City & Suburban Railway Co. of Savannah v. Brauss*, supra, has been followed in *Head v. Georgia Pacific R. Co.*, 79 Ga. 353-360, 7 S. E. 217, 11 Am. St. Rep. 434; *Southern Bell Telephone & Telegraph Co. v. Earle*, 118 Ga. 507(5)-510(5), 45 S. E. 319; *Wolff v. Southern Ry. Co.*, 130 Ga. 251, 60 S. E. 569.

We have dealt with the measure of damages, in the determination of the nature of the action, because none of the items of damage alleged by the plaintiffs would be recoverable if the action is one upon the contract, since none of them could be said to be properly within the contemplation of the parties at the time the contract was made. On the other hand, construing the contract, as we must, as one in tort, dependent upon the defendant's breach of duty, as evidenced by the contract, we will next inquire whether any or all of these items of damage are too remote to be the subject-matter of recovery. Of course what we shall say upon this point is not conclusive, except as a matter of law, for of course the plaintiffs will have to prove the allegation that these damages were, as alleged, the necessary result of and directly traceable to the alleged failure to "deliver within a reasonable time." We think that if the plaintiffs establish the allegation that it was necessary, in anticipation of the daily arrival of the finished inside work of the

courthouse, to retain the services of Mr. Zobell, and they paid him the sum mentioned, they would be entitled to recover it, upon proof of the allegations as to the cause of the delay. Likewise it has been ruled more than once by the Supreme Court that the necessary expenses for tracing lost shipments is a proper subject of recovery in an action for damages, such as the present case. We think, also, that the plaintiffs are entitled to recover the amount they paid in compromise of the penalty for failing to complete the buildings in time, provided the jury are satisfied that their liability to this penalty was due to the delay in the delivery of the shipment set out in the petition. And if, by reason of the delay, the plaintiffs were required, in order to maintain their credit and meet demands when due, to borrow \$14,000, which they would not have had to borrow but for the delay in delivery of this shipment, they would be entitled to have judgment, for the reasons stated in the headnote.

[4] We think the trial judge properly sustained the demurrer, so far as relates to the alleged value of the time of the two partners composing the plaintiff firm, upon the ground that these items were too remote for recovery, since there are no allegations showing how or why it was necessary for the plaintiffs to lose the time, and it not appearing, except as a conclusion of the pleader, that these contractors did not or could not at that time have obtained any other contracts of employment of the value alleged. This is especially true since the petition alleges the plaintiffs were contractors, and, in the absence of distinct allegations showing a certainty of profits, it would be wholly speculative as to whether the contractors would have made or lost money upon the contract, even if they had had the opportunity of making another contract within the time alleged to have been lost.

Judgment reversed.

HARPER v. V. HAMMOND & SONS. (No. 4,583.)

(Court of Appeals of Georgia. Aug. 16, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE.

The mere fact that a book is kept in ledger form is not a valid objection to its admission as a book of original entries, under section 5769 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

2. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE.

Even if the book offered in evidence in this case was not a book of original entries, it was properly admitted in corroboration of an admission by the defendant that he was indebted to the plaintiffs in an amount approximately the same as that claimed by them. Whether the

plaintiffs' witnesses, who testified to the correctness of the entries, be considered as clerks or as partners, their testimony as to the correctness of the books was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

3. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE.

As a general rule, the testimony of those persons who have knowledge of the facts from which the books are made up is in itself primary evidence, and the books themselves are admissible only by way of corroboration. The provisions of the Code are designed to admit the books of original entries as direct and primary evidence in cases such as those where, perhaps, the fact of the delivery of specific items of an account, or the performance of particular services, cannot otherwise be definitely proved, and in similar cases.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

4. REVIEW ON APPEAL.

The trial judge did not err in overruling the exceptions of law and of fact to the report of the auditor, and in rendering judgment for the plaintiffs.

Error from Superior Court, Chattooga County; J. W. Maddox, Judge.

Action by V. Hammond & Sons against C. D. Harper. Judgment for plaintiff, and defendant brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error. C. D. Rivers, of Summerville, for defendants in error.

RUSSELL, J. Hammond & Sons sued Harper in the county court of Chattooga county upon an account, and that court rendered judgment for the plaintiffs. Upon appeal to the superior court his honor, Judge Maddox, referred the case to Hon. J. M. Bellah as auditor, and the auditor filed a report finding in favor of the plaintiffs an amount \$13 less than their claim. The defendant filed exceptions both of fact and of law, and the case was as a whole submitted to the judge of the superior court without intervention of a jury. The only exception of law complains that the auditor erred in admitting the plaintiffs' ledger as a book of original entries. The exception of fact was based upon the contention that the evidence of V. Hammond did not prove a complete admission of indebtedness on the part of the defendant, and also that, in the absence of the plaintiffs' ledger, there was no evidence whatever to support the finding in favor of the plaintiffs.

[1] 1. The testimony as to the book which the auditor admitted in evidence as the plaintiffs' book of original entries was to the effect that, while memorandum entries in pencil were made by the Hammond boys at the time of each purchase in small memorandum books (about 4x7 inches), each item was shortly thereafter transcribed upon what the witnesses called the "ledger." In no instance was there delay beyond Saturday night of each week in transcribing these

items, and the only purpose of the so-called "ledger" seems to have been to separate into distinct accounts the purchases made by the different tenants or croppers of the defendant. We think it is well settled that the provisions of section 5769 of the Civil Code, in so far as they relate to books of original entry, are not confined to mere memorandum slips, or memorandum books upon which is first entered a memorandum of a buyer's purchase. We think the trial judge rightly held, from the description of the so-called ledger given by the witnesses, that it was a book of original entries. "The mere fact that a book is kept in ledger form is not a valid objection to its admission as a book of original entries." 9 Am. Eng. Enc. Ev. 922; *Bush v. Fourcher*, 3 Ga. App. 43, 59 S. E. 459; *Bracken v. Dillon*, 64 Ga. 250, 37 Am. Rep. 70; *Hinkle v. Smith & Son*, 127 Ga. 437, 56 S. E. 464. This principle is also recognized by the courts of last resort of other states. *Sanborn v. Cunningham*, 33 Pac. 894; *Faxon v. Hollis*, 13 Mass. 427; *Swain v. Cheney*, 41 N. H. 232; *Wells v. Hatch*, 43 N. H. 246; *Jones v. De Kay*, 3 N. J. Law, 955; *Rodman v. Hoops*, 1 Dall. (Pa.) 85, 1 L. Ed. 47; *Hoover v. Gehr*, 62 Pa. 136; *Mathews v. Sanders*, 15 Ark. 255.

[2] 2. We are of the opinion that the testimony of V. Hammond as to the defendant's admission of indebtedness was properly admitted by the auditor. It is true that the admission did not go to the exact amount claimed by the plaintiffs; but it included that amount, for it can be construed as an admission of a greater liability than that claimed by the plaintiffs. For this reason, even if the book tendered by plaintiffs was not admissible at the time it was first offered, the error was harmless, and was cured by the subsequent testimony as to the defendant's admission of liability. Whether the Hammond boys be considered as clerks or as partners, their testimony was admissible; for if they be considered as clerks, the bias of interest is removed, and if they were partners in the firm of V. Hammond & Sons (and they testified that they together made all the entries), their testimony would be admissible as that of a party who kept no clerk.

[3] 3. As a general rule, the testimony of those persons who have knowledge of the facts from which the books are made up is in itself primary evidence, and the books themselves are admissible only by way of corroboration. The provisions of the Code are designed to admit the books of original entries as direct and primary evidence in those cases where, perhaps, the fact of the delivery of specific items of an account, or the performance of particular services, can-

not otherwise be definitely proved, and in similar cases. *Bush v. Fourcher*, supra; *Swift v. Oglesby*, 8 Ga. App. 544, 70 S. E. 97; *Alexander Lumber Co. v. Withers Foundry Works*, 9 Ga. App. 268, 70 S. E. 1125. As was ruled by the Supreme Court in *Hinkle v. Smith*, 127 Ga. 437, 56 S. E. 464, the book, when taken in consideration with the testimony as to the defendant's admission of indebtedness, "only tended to prove facts already established by other uncontradicted evidence," for the defendant withdrew all of his testimony which tended to show that he had paid the account by putting an equal amount into a business venture in Chattanooga.

[4] 4. The trial judge did not err in overruling the exceptions of law and of fact to the report of the auditor, and in rendering judgment for the plaintiffs. The only real question raised in the case was whether the auditor erred in admitting Hammond & Sons' ledger. The only parties who made entries in the book both testified fully and satisfactorily to the correctness of these entries, and the case was tried under the rule laid down by Judge Lumpkin in *Day v. Crawford*, 13 Ga. 510, when he said: "Let the clerk prove the books who made the entries in the due course of his business." Under the evidence, the book which is called the ledger in this case was no more than a "daybook" or journal, from which were copied, item by item, the temporary memoranda of purchases made by the defendant's agents. Only the book of original entries is admissible in proving an account, under the provisions of section 5769; but it is the nature of the proof in relation to the book, and not the name by which the book is called, which must at last determine whether the book in question is or is not the book of original entries.

Judgment affirmed.

SAVANNAH ICE CO. v. CANAL-LOUISIANA BANK & TRUST CO.

CANAL-LOUISIANA BANK & TRUST CO. v. SAVANNAH ICE CO.

(Nos. 4,720, 4,743.)

(Court of Appeals of Georgia. May 20, 1913.
Rehearing Denied June 25, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 180*)—"CHARTER"—DUTY OF STOCKHOLDERS—DIVERSION OF ASSETS.

The charter of a corporation is a contract between the state and the shareholders and between the shareholders themselves. The state contracts to permit the exercise of the powers granted in the charter, and not to impair the obligation of any contract made in pursuance thereof. The shareholders engage not to exceed the powers conferred upon them by law, and each stockholder, by accepting the charter, agrees with the others not to divert the assets of the corporation to a purpose foreign to the objects of the organization. As to this matter

*Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 99 Cal. xix.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the law makes no distinction between public and private corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665-673; Dec. Dig. § 180.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1088-1090; vol. 8, p. 7600.]

2. CORPORATIONS (§ 370*)—POWERS.

Corporations are granted no rights and clothed with no powers except those which are expressly conferred by law or the charter, or which arise therefrom by necessary implication.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1518; Dec. Dig. § 370.*]

3. CORPORATIONS (§ 484*)—POWERS—LENDING OF CREDIT.

No corporation, whether public or private, organized under the laws of this state can, in the absence of express charter authority so to do, lend its credit for the mere accommodation of third persons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

4. CORPORATIONS (§ 467*)—POWERS—COMMERCIAL PAPER—ACCOMMODATION INDORSEMENT.

Authority to make an accommodation indorsement of commercial paper will not be implied from the power to lend or borrow money on such paper and generally to exercise the powers usually incident to corporations under the laws of this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1831; Dec. Dig. § 467.*]

5. BILLS AND NOTES (§ 367*)—ACCOMMODATION PAPER—BONA FIDE PURCHASER—CORPORATIONS.

If a corporation having the power to indorse commercial paper in furtherance of its business should indorse and put such paper in circulation, a bona fide purchaser thereof will be protected, even though the indorsement was made merely for the accommodation of third persons, if he have no notice of this fact.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 947, 948; Dec. Dig. § 367.*]

6. BILLS AND NOTES (§ 337*)—ACCOMMODATION PAPER—BONA FIDE PURCHASER—CORPORATIONS.

The plaintiff in this case was not a bona fide holder of the note sued on, without notice of the character and purpose of the defendant's indorsement; and the evidence demanded a finding that the contract of indorsement was for the mere accommodation of the maker of the note, and that the indorsing corporation received no benefit from its indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856-863; Dec. Dig. § 337.*]

7. CORPORATIONS (§ 603*)—MERGER—OWNERSHIP OF STOCK.

Though one corporation may own all the stock in another corporation, the two do not become merged but remain separate and distinct legal entities.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2404-2409; Dec. Dig. § 603.*]

8. CORPORATIONS (§§ 385, 388, 487*)—"ULTRA VIRES ACT"—ESTOPPEL—RIGHT TO RESCIND CONTRACT.

An ultra vires act of a corporation is one in excess of charter power. A corporation may, like any other person, be estopped to plead the want of authority of an agent to do an act which the corporation had the legal right to perform, but a corporation is not estopped to challenge the legality of an ultra vires contract which is executory, unless some innocent person has been misled to his injury and has part-

ed with something upon the belief that the contract was executed in furtherance of the corporate enterprise. If an ultra vires contract be executed, the corporation cannot retain the benefit which it has received and repudiate the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1545-1547, 1556-1567, 1893-1898; Dec. Dig. §§ 385, 388, 487.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7145-7146.]

9. PRINCIPAL AND SURETY (§ 177*) — ACCOMMODATION INDORSEER—NATURE OF CONTRACT.

The contract of a surety or accommodation indorser, being to pay if the maker does not, is executory until payment by the surety is actually made.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 177.*]

10. CORPORATIONS (§ 487*) — ILLEGAL CONTRACT—RATIFICATION.

A corporation cannot ratify a contract which it has no legal power to make.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893-1898; Dec. Dig. § 487.*]

11. CORPORATIONS (§ 487*) — ILLEGAL CONTRACT—RIGHT TO ENFORCE—RATIFICATION.

An executory contract of a corporation wholly beyond the scope of corporate power cannot be enforced against it by one who, at the time the contract was made, had notice of its illegality, even though all of the stockholders assented to its execution or ratified it after it was made. This rule is applied whether the corporation be of a public or a private nature, and without reference to whether any public policy is contravened by the contract, or any interests of creditors are injuriously affected by it. The stockholders in a corporation cannot substitute their will for the legislative grant of power.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893-1898; Dec. Dig. § 487.*]

12. JUDGMENT FOR PLAINTIFF UNAUTHORIZED.

The evidence demanded a judgment in favor of the defendant, and it was error to award judgment for the plaintiff.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Canal-Louisiana Bank & Trust Company against the Savannah Ice Company. From the judgment defendant brings error, and plaintiff files cross-bill. Judgment on main bill reversed and on cross-bill affirmed.

Osborne & Lawrence, of Savannah, for plaintiff in error. W. L. Clay and O'Byrne, Hartridge & Wright, all of Savannah, for defendant in error.

POTTLE, J. The Canal-Louisiana Bank & Trust Company sued the Savannah Ice Company, a corporation, upon a promissory note made by the Crescent Ice Company to its own order and indorsed by that company and the defendant. The defendant pleaded that its indorsement was merely for the accommodation of the maker; that it had no charter authority to indorse for accommodation; and that these facts were well known to the plaintiff. A demurrer to this plea was overruled and exceptions pendente lite duly filed

by the plaintiff. The case was submitted to the judge without the intervention of a jury, and he rendered a judgment in favor of the plaintiff. The defendant has filed a bill of exceptions complaining of this judgment, and the plaintiff excepts to the overruling of its demurrer to the defendant's plea.

The judgment of the trial judge in favor of the plaintiff was based upon the following facts: The Central Ice Company was incorporated under the laws of New Jersey and organized for the purpose of holding and owning stock in a number of subsidiary companies engaged in the business of the manufacture and sale of ice. It owned all of the capital stock of the Savannah Ice Company, except one share issued to each of the directors to qualify them to act as officers of the company. In like manner it owned all the shares, except the directors' shares in several other subsidiary companies. It owned two-thirds of the stock of the Crescent Ice Company; the other third being held by the Electric Corporation of Boston. Each of these various subsidiary companies had been in the habit of lending its credit to the other companies at various times in order to aid them in the conduct of their business. The Crescent Ice Company was in need of money to be used in rehabilitating its plant and aiding it in the conduct of its business. The owners of the stock in this company, to wit, the Central Ice Company and the Electric Corporation of Boston, agreed to supply the funds necessary for the purpose; the Central Ice Company to furnish two-thirds and the Electric Corporation one-third. A part of the money to be supplied by the Central Ice Company was realized from a note (of which the note sued on was a renewal) for \$6,000, dated March 19, 1900, due four months from date, executed by the Crescent Ice Company, payable to its own order, and indorsed by the maker and the Savannah Ice Company by its president, Louis P. Hart. This note was discounted in the regular course of business by the Canal-Louisiana Bank & Trust Company. It was renewed ten different times; the principal being reduced somewhat in amount by payments. The note sued on was for \$5,000 principal, and was dated October 16, 1911, and became due January 14, 1912. The stockholders and directors of the Central Ice Company and of the Savannah Ice Company were identical, with the following exceptions: R. G. Hopkins and one Mulky were directors and stockholders of the Central Ice Company, but had no connection with the Savannah Ice Company. R. W. Hopkins resigned as director in both companies in December, 1909, and in the spring of 1910 Joseph A. Bailey succeeded Hopkins as a director in both companies. R. G. Hopkins resigned as a director in the Central Ice Company on May 15, 1911. All of the directors of the Savannah Ice Company, except Hill, were directors in the Crescent Ice

Company, and, in addition, there were three other directors who had no connection with the Savannah Ice Company. Hart, the president of both the Central Ice Company and the Savannah Ice Company, testified that every director and stockholder in the Savannah Ice Company and every director in the Central Ice Company, except Mulky, knew of the manner in which the original note discounted with the bank was indorsed and discounted. On May 25, 1909, at a stockholders' meeting of the Savannah Ice Company, a resolution was passed ratifying, approving, and confirming all of the acts of the board of directors for the past year. On May 3, 1910, and again on April 13, 1911, similar resolutions were passed by the stockholders of the Savannah Ice Company, and at the last meeting all the acts of the officers of the company in making indorsements in the name of the company were ratified and confirmed. The Savannah Ice Company was incorporated for the purpose of buying, selling, and manufacturing ice, beer, soda, and mineral waters, and generally to conduct a wholesale or retail jobbing and commission business in all kinds of personal property. The charter authorized the company amongst other things, to "lend or borrow money on note, bill, bond, pledge, deed, mortgage, or other obligations and liens," and generally to exercise such powers as are usually incident to corporations under the laws of this state.

[1, 2] 1. The charter of a corporation, whether granted directly by the General Assembly or by the executive or judicial department of the government under authority delegated by the General Assembly, is a contract between the state and the shareholders, and between the shareholders themselves. The obligation of the state is that it will permit the shareholders to exercise the power and enjoy the privileges granted in the charter, and that the contracts of the corporation, made in pursuance of the charter, will not be impaired by the state. The shareholders on their part contract with the state that they will not exceed the powers granted in the charter, and agree with each other that they will devote the assets of the corporation to the objects and purposes of the charter and not otherwise. *Central Railroad Co. v. Collins*, 40 Ga. 583, 624; *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 829, 78 S. E. 600. No principle is better settled in this state than that the stockholders in a corporation are granted no rights and clothed with no powers except such as are expressly set forth in the charter or as arises therefrom by necessary implication. 3 Enc. Dig. Ga. Rep. 641. This principle has been embodied in the statutory law of this state in reference to corporations chartered by the superior court. "Corporations thus created may exercise all corporate powers necessary to the purpose of their organization, but shall make no contract or purchase or hold any property of

any kind, except such as is necessary in legitimately carrying into effect such purpose, or for securing debts due to the company." Civil Code, § 2823 (5). Under the present law of this state, corporations exercising a public or quasi public function are chartered by the Secretary of State, except municipal corporations which are chartered directly by the General Assembly. All other corporations are chartered by the superior court. The primary object of every private corporation, other than charitable or eleemosynary institutions, is private gain for its stockholders. The contract which every shareholder makes with the others is that the funds and property of the corporation will be used solely for the benefit of the shareholders and in the manner set forth in the charter.

[3, 4] It is not open to serious argument that, in the absence of charter authority, a corporation has no right to lend its credit for a purpose which will not promote the objects and purposes of the corporation. *First National Bank v. Monroe*, 135 Ga. 614, 69 S. E. 1123, 32 L. R. A. (N. S.) 550; *Houser v. Farmers' Supply Co.*, 6 Ga. App. 102, 64 S. E. 293. There is nothing in the charter of the Savannah Ice Company which either expressly or by necessary implication authorized it to lend its credit for the mere accommodation of third persons. No such power will be presumed to have been granted unless the language of the charter requires such a construction. It is the duty of the governing authorities of a corporation to devote its assets for the benefit of its stockholders; and it would require express language in a charter to authorize a court to hold that the corporation had the power to divert its assets to a purpose wholly foreign to the business which the corporation was organized to carry on, and in a manner detrimental to the interests of the stockholders. The assets of a corporation constitute a trust fund to be administered for the benefit of the shareholders and creditors of the corporation. Without express authority so to do, the officers of a corporation have no power to use its funds for any other purpose.

[5] The Supreme Court of this state has held that a bona fide purchaser for value of a note indorsed by a corporation for accommodation only, and without notice of the real character and purpose of the indorsement, will be protected even though the corporation had no authority to make the indorsement. *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171. That decision is based upon the theory that, since a corporation has the power to make and indorse negotiable instruments in the course of its business in furtherance of its enterprise, one who acquires for value such an instrument, made or indorsed by a corporation, has the right to assume that it was executed or negotiated in

due course of business and not for accommodation.

[6] The record in the present case, however, does not justify the conclusion that the plaintiff bank was an innocent purchaser of the note sued on. The note was made by the Crescent Ice Company payable to its own order, and this fact alone was enough to suggest to the bank that the Savannah Ice Company probably had no interest in the proceeds of the note. But in addition to this, before the original note was discounted by the bank, the Crescent Ice Company, acting through its president, Louis P. Hart, wrote to the bank a letter stating that the ice company applied for a loan of \$6,000 for four months, upon a paper which would be indorsed by Louis P. Hart and the Savannah Ice Company, with the understanding that not less than 15 per cent. of the loan would be kept on deposit with the bank, and that at least 25 per cent. of it would be paid on maturity. Inclosed with this letter was a copy of the last financial statement of the Savannah Ice Company. A short while after this letter was written the loan was made, and the money was deposited in the bank to the credit of the Crescent Ice Company. The bank was chargeable with notice of the law of this state which prohibits a corporation from making accommodation indorsements, and therefore knew that the Savannah Ice Company had no power to lend its credit in the absence of express charter authority so to do. Certainly the bank was not justified in assuming that charter authority had been granted. On the contrary, persons dealing with a corporation must assume that it has no power to use its assets or pledge its credit, except to subserve the interests of the stockholders and the enterprise which the corporation is authorized to carry on. The bank knew that the principal business of the Savannah Ice Company was the manufacture and sale of ice. Its very name imported this. When the bank accepted the indorsement of this corporation and advanced its money on the faith of it, it did so with the knowledge that the corporation had no power to make the indorsement.

[7] It is also contended that the indorsement of the Savannah Ice Company was in due course of business and for its own benefit, and not for the mere accommodation of the Crescent Ice Company. It is urged that the Central Ice Company and the Savannah Ice Company were substantially one and the same; that the money supplied by the bank was directly for the benefit of the Central Ice Company; and that for this reason the advancement of the money inured to the benefit of the Savannah Ice Company. A corporation is a legal entity, separate and distinct from the stockholders. A corporation represents all of the stockholders, but for many purposes is regarded as a distinct entity. Hence, though one person should

acquire all the stock in a corporation, the individual shareholders and the corporation would still in law be two separate and distinct persons. And so one corporation may own all the stock in another corporation, but the two corporations do not become merged, but remain separate and distinct entities. See Waycross Airline Railroad Co. v. Offerman & Western Railroad Co., 109 Ga. 827, 35 S. E. 275; Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669, 110 Am. St. Rep. 207. Although it appears from the record that, at the time the original note was discounted at the bank, the Central Ice Company owned all of the stock in the Savannah Ice Company, except the directors' shares, still, in law the two corporations were as separate and distinct as if the Central Ice Company had owned none of the stock of the Savannah Ice Company. And the latter company had no more power to lend its credit for the accommodation of the Central Ice Company than it did for any other purpose. So that, even if the indorsement could be treated as having been for the benefit of the Central Ice Company, it was none the less ultra vires.

[8, 9] It is next insisted that the indorsement should not be regarded as merely for accommodation, because it was made in accordance with a system of financing the subsidiary companies which the parent company had been conducting for many years. It is argued that the holding company was really the head, having the will and the subsidiary companies were but the members of the body acting in response to this will; that in the past other members of this body had loaned their credit for the benefit of the Savannah Ice Company; and that the ice company's indorsement was really in return for similar favors of this kind which had been extended to it. The fact that these other companies had exceeded their charter powers and indorsed for the Savannah Ice Company and for each other could not render legal an act of the Savannah Ice Company in excess of its charter power. If two corporations should exchange indorsements in order to raise the same amount of money to be applied for the benefit of each, the one indorsement might be regarded as a consideration for the other, though it has been held that a corporation would not be liable even though its indorsement be on an independent consideration. *Rogers v. Jewell Belting Co.*, 184 Ill. 574, 56 N. E. 1017. But this is not the case here. The record discloses that the Savannah Ice Company received absolutely no present benefit from its indorsement nor promise of future benefit in consideration for the indorsement. And, unless it obtained one or the other, its indorsement must be treated as merely for accommodation.

[10, 11] Many of the adjudicated cases speak of two classes of ultra vires acts of corporations, one which is in excess of charter

power, and the other where an officer of a corporation undertakes to do an act, within the charter power which he had no authority to perform. In reality it is a misnomer to speak of the latter character of acts as ultra vires, because such acts are within the power of the corporation, and are simply in excess of the authority of the officer or agent attempting to perform them. Strictly speaking, an ultra vires act of a corporation is one which it has no power under its charter to perform. Some confusion has arisen in the decided cases on account of what seems to be a misapprehension of the distinction between these two classes of acts. Where a corporation has charter authority to do an act, it will always be estopped to question the authority of one whom it held out as having the power to act for it, or whose act has been ratified by the corporation after its performance. *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 55; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 673. A corporation can act only through its agent, and the law of principal and agent is applicable to it in substantially the same way as it is applied to natural persons. In reference to acts which are strictly ultra vires, the Supreme Court of the United States holds broadly that neither consent of, nor ratification by, all the stockholders can estop a corporation from pleading its want of power. *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950.

In *First National Bank of Concord v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007, the court said: "A contract of a corporation which is ultra vires in the proper sense (that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature) is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not be authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of a right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws." See, also, 4 Ency. U. S. Supreme Court Reports, 747.

In this state, however, the strict rule above announced has been modified to some extent so that with us the rule is that the

courts will not interfere with an ultra vires contract of a corporation which has been executed, but will refuse to aid in the enforcement of such a contract when it is merely executory. See *Harriman v. First Bryan Baptist Church*, 63 Ga. 186, 36 Am. Rep. 117; *Johnson v. Mercantile Trust Co.*, 94 Ga. 324, 21 S. E. 576; *Towers Excelsior & Ginnery Company v. Inman*, 96 Ga. 506, 23 S. E. 418; *Kohlruss v. Zachery*, 77 S. E. 812; *Cozart v. Georgia R. R. Co.*, 54 Ga. 380. This view seems to be in accordance with modern authorities. 1 *Clark & Marshall, Private Corporations*, § 206. It is very clear that the contract of indorsement was executory. The corporation engaged to pay if the maker did not, and until it complied with its engagement its contract was executory.

The serious question in the present case, and the one with which we have had most difficulty, is whether consent of all the stockholders of a private corporation to the performance of an ultra vires act, upon the faith of which another has parted with his money, would estop the corporation from pleading the illegality of the act. Of course, it would estop the individual stockholders who consented. And it is argued with a great deal of force that, since the corporation represents and acts for the stockholders, if all of them are estopped the corporation should likewise be estopped, unless the interest of the public or of creditors of the corporation are injuriously affected. The record is silent as to whether the Savannah Ice Company was in debt at the time it lent its credit to the Crescent Ice Company. It might well be said that one seeking to enforce an ultra vires act of a corporation carries the burden of showing that there were no creditors whose interests might be adversely affected, and also that the act was not in violation of any public policy. But we prefer to base our decision upon the broader ground that the consent of all the stockholders will not estop the corporation from challenging the legality of an act which is wholly beyond the scope of its charter powers. Nor does it occur to us that it would be necessary for the state to intervene where the act is in violation of some public policy, or that creditors should appear and directly challenge the legality of the act upon the ground that it injuriously affected their interests. It is the duty of a corporation to urge, in a suit upon an ultra vires contract, any defense which either the state or creditors might set up. Corporations are, and should be, held to a strict accountability for their acts. In return for the privileges conferred and the exemptions granted them by law, the shareholders should see that no act is performed in the name of the legal entity which is beyond the legitimate scope of the powers granted in the charter. The decided weight of authority in this country is that consent of the stockholders cannot

validate an act wholly beyond the corporate powers. 1 *Clark & Marshall, Private Corporations*, § 182, and cases cited; *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742, 30 C. C. A. 409; 4 *Ency. U. S. Sup. Court Reports*, 746, and cases cited.

The general rule is thus tersely stated by Judge Sanborn in *Park Hotel Co. v. Fourth Nat. Bank*, supra: "A contract which a corporation has no power to make it has no power to ratify and no power to estop itself from denying." A contrary view was taken by the Court of Appeals of New York in the case of *Martin v. Niagara Falls Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303, where it was held that, where an accommodation indorsement by a corporation was ratified by the stockholders and no other rights intervened, the corporation would be bound. See, also, *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 731, 61 Atl. 167; *Murphy v. Arkansas Land Co. (C. C.)* 97 Fed. 723. Using these decisions as authority, Cook, in his work on Corporations, states the law as follows: "The theory of a corporation is that it has no powers except those expressly given or necessarily implied. But this theory is no longer applied to private corporations. A private corporation may exercise many extraordinary powers, provided all of its stockholders assent and none of its creditors are injured. There is no one to complain except the state, and, the business being entirely private, the state does not interfere. Thus, 50 years ago the courts would summarily have declared it illegal for a business corporation to become an accommodation indorser of commercial paper. But to-day there is no rule of public policy which prohibits a private corporation having a capital stock from becoming the accommodation indorser of commercial paper, provided such indorsement is made with the knowledge and assent of all the directors and stockholders, and provided corporate creditors are paid." *Cook on Corporations* (6th Ed.) vol. 1, § 3.

In *Augusta R. R. Co. v. City Council*, 100 Ga. 701, 717, 28 S. E. 126, the foregoing extract from Cook was quoted, but without either approval or disapproval, and there is nothing in the facts of that case which called for a decision of the question now under consideration.

In *Dublin Fertilizer Works v. Carter*, 6 Ga. App. 835, 65 S. E. 1082, in a discussion of the subject of ultra vires acts of corporations, the court said: "None of the reasons upon which the doctrine of ultra vires is based apply to this contract. It is simply a contract made by a private trading corporation with an individual, opposed to no public policy, prohibited by no law of the state, and in which the public has no interest whatever; and, to strike down a contract of this character as being ultra vires, it seems to us would be to encourage dishonesty and a want of fair dealing as to private contracts, with-

out subserving any public benefit. We think, as above stated, that the contract now under consideration was not an ultra vires contract; but, even if it was, under the facts of this case it would seem to be inequitable and unjust to permit such a defense." In that case it was held that the act in question was not ultra vires, and therefore the discussion as to the rule which would have prevailed had the act been beyond the corporate power was obiter.

It is to be observed that in the above-quoted extract from Cook the author says that 50 years ago the courts would summarily have declared it illegal for a business corporation to become an accommodation indorser on commercial paper, but that to-day, if all the stockholders assent and creditors are not injured, such an act is held to be legal. The law of Georgia on that subject has been the same for many years. The statute expressly commands that the corporation shall make no contracts, except such as are necessary in legitimately carrying into effect the objects and purposes of the organization, or for securing a debt due to the company. Any contract, therefore, which comes within this statutory prohibition is void, and no consent or ratification can make an act valid which is absolutely void ab initio. In our view of the matter, stockholders in a corporation cannot by consent set aside and render void a limitation placed by law upon the corporate action. If they could, it would serve no good purpose to limit the powers of a corporation. The shareholders could receive all the benefits of incorporation and not be subject to any of the restrictions imposed upon them by law. See *Steiner v. Steiner Land Co.*, 120 Ala. 128, 26 South. 495, 497. If the view contended for by the defendant in error be sound, then a mercantile corporation, with the consent of all its stockholders, could embark in a manufacturing business or in other enterprises wholly foreign to the objects and purposes expressed in the charter. A corporation as an entity has no such power, and such power cannot be conferred upon it by its shareholders. If they themselves engage in an enterprise wholly foreign to the organization, they would be liable as individuals or as partners, but they cannot, by engaging in ultra vires acts, bind the corporation as a legal entity separate and distinct from the shareholders. We do not mean to say that a corporation can never be estopped, for there are instances where it is, such as where a bona fide purchaser acquires an obligation of a corporation which on its face appears to have been within the corporate power. But with this exception, and possibly one or two others, a corporation as such can never be estopped to plead the illegality of an act of its officers or agents wholly beyond the scope of the corporate business.

[12] The facts in the present case are prac-

tically undisputed, and the defendant was entitled to a judgment. The court properly overruled the demurrer to the defendant's plea, as it set forth a defense and was sufficient in form.

Judgment on main bill of exceptions reversed; on cross-bill affirmed.

SMITH v. STATE. (No. 4,787.)

(Court of Appeals of Georgia. Aug. 18, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1160*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The jury would have been authorized to acquit the accused, if it had believed his witnesses and his statement; but since the evidence in behalf of the prosecution authorized the jury to return a verdict of guilty, and there is no complaint that any error of law was committed on the trial, this court is without jurisdiction to set aside the finding of the jury. The issue is one wholly of fact, and the verdict was approved by the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

2. DISORDERLY HOUSE (§ 17*)—EVIDENCE—SUFFICIENCY.

To authorize conviction in a prosecution for the offense of keeping a lewd house, it is not enough to prove the general reputation of the house, or of its inmates, or both; for the gist of the offense is that the house was kept "for the practice of fornication or adultery," and the jury must be satisfied that acts of lewdness were practiced in the house in question, and that the house was maintained for the purpose of prostitution. Reputation for lewdness, however, may be a circumstance tending to show the character of the house, and may be considered by the jury in corroboration of such facts and circumstances as may reasonably satisfy them of the essential fact that fornication or adultery was actually committed therein.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 28-29; Dec. Dig. § 17.*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

H. H. Smith was convicted of keeping a disorderly house, and brings error. Affirmed.

B. P. Gaillard, Jr., of Gainesville, for plaintiff in error. Robt. McMillan, Sol. Gen., of Clarksville, for the State.

RUSSELL, J. The defendant was convicted of the offense of keeping a lewd house, and excepts to the judgment refusing a new trial. The only point made is that the verdict is contrary to law, because it is unsupported by the evidence submitted on the trial. The plaintiff in error relies upon the ruling of this court in *Coleman v. State*, 5 Ga. App. 766, 64 S. E. 828, and rulings of the Supreme Court in *Weems v. State*, 84 Ga. 461, 11 S. E. 501, and *Lightner v. State*, 126 Ga. 563, 55 S. E. 471.

[1] It is insisted that the evidence fails to show beyond a reasonable doubt that the house was kept for the purpose of the practice of adultery and fornication, and that the evidence fails to show that such an act

or acts were committed. A review of the record shows that the evidence in behalf of the defendant, if it had been believed by the jury in the exercise of their right of determining the credibility of witnesses, would have authorized the acquittal of the accused; but, on the other hand, it cannot be said that the evidence adduced by the prosecution was insufficient to authorize conviction. There is evidence that the plaintiff in error is a married man, whose family resided in the same town with himself. He did not live with his family, but lived in a room rented in an office building, though he provided for his children. One witness testified that this room was visited both day and night by women of bad character for lewdness. One woman of such reputation was shown to have been there more than once, under circumstances which authorized the inference that her presence was for the purpose of engaging in illicit intercourse with a man other than the defendant, whose name was not disclosed. On one occasion the police, after quite an effort, secured entrance to the defendant's room, and there found a man on the bed and a woman of alleged bad reputation in the room. At another time the policemen heard people talking in the defendant's room at night. They entered the room; the woman was not there, but on search they found her upon the roof, partially undressed; and other circumstances indicated that it was the accused who took this means of attempting to conceal her from the policemen. A witness testified that the defendant had tried to get him to go to this room to see a woman, and several witnesses testified that the reputation of the house and of the women who frequented the place was bad for lewdness. It was testified, and was admitted by the defendant in his statement, that he had paid off a claim for rent which was partly against the girl who was found in his room in company with a man by the name of Lowe. It is true that no witness saw the actual commission of any act of lewdness, but upon one occasion a witness saw a girl in the room with her dress up to her knees, and a man sitting on the bed who was very much excited and red in the face when the room was entered, and who did not want his name mentioned. Another witness saw the same woman in the room when the bed was in a torn-up condition, and a man lying on it. This witness testified that at another time he failed to find the woman in the room, but that the defendant admitted he had pushed her out of the window. We think the testimony as to the circumstances under which the woman was found more than once in the defendant's room with other men authorized the jury to infer that the offense of adultery and fornication, or adultery or fornication, was actually committed in the room in question, and is so corroborated by testimony as to the reputation of the place and the women, as well as

by the testimony to the effect that the defendant solicited one of the witnesses to meet a woman in his room, as to authorize the jury to find the defendant guilty.

[2] 2. We held in *Coleman v. State*, 5 Ga. App. 766, 64 S. E. 828, that it was error to instruct the jury that "it is not necessary for the state to prove that there were acts of adultery or fornication committed at such house," and the judgment refusing a new trial was reversed, for the reason that the probative value of the reputation of the house, as a circumstance corroborative of testimony, either direct or circumstantial, to the effect that acts of lewdness were actually committed in the house in question, is solely for determination by the jury, and the mere fact that a house has a bad reputation is not of itself sufficient to establish the fact that it deserves that reputation, so as to convict an occupant of the house of the statutory offense. To authorize conviction of the offense of keeping a lewd house, it is not enough to prove the general reputation of the house, or of its inmates, or both; for the gist of the offense is that the house was kept "for the practice of fornication or adultery" (Penal Code, § 382), and the jury must be satisfied that acts of lewdness were practiced in the house in question, and that the house was maintained for the purpose of prostitution. Reputation for lewdness may be a circumstance tending to show the character of the house, and may be considered by the jury in corroboration of such facts and circumstances as may reasonably satisfy them of the essential fact that fornication or adultery was actually committed therein. In the *Coleman* Case the judge, in effect, told the jury that the accused might be convicted upon mere proof of the reputation of the house and its inmates. In the present case, however, there is no complaint that the court fell into a similar error, and there is testimony sufficient to authorize the jury to infer, to the exclusion of every reasonable doubt, that the room in question, with the permission of the defendant, was used for purposes of prostitution, and that acts of lewdness were actually committed therein.

We recognize the principle announced in the ruling of the Supreme Court in the Cases of *Weems* and *Lightner*, *supra* (as will be seen by reference to the opinion of this court in *Conner v. State*, 3 Ga. App. 475, 60 S. E. 111), that one cannot be found guilty of illicit intercourse upon circumstantial evidence, where the incriminatory circumstances are as compatible with the theory of his innocence as with the inference of guilt. In the *Weems* and *Lightner* Cases the evidence showed nothing more than that the accused in each case had the opportunity (provided the female was willing) to commit the offense. In no case would this alone be sufficient to authorize conviction of an act of illicit intercourse. As to the fact of intercourse, this case might be somewhat similar

to the Weems Case, if the girl in question had only been seen once at the room of the accused; but, according to the testimony for the state, she was several times a visitor to the room of the defendant under circumstances which require explanation. The Weems Case is really very little in point, because in that case it was apparent that Weems did not have time to commit the adulterous act, which was prevented by the appearance of the prosecutor. As was said in *Johnson v. State*, 119 Ga. 446, 46 S. E. 634, the judgment of conviction in *Weaver v. State*, 74 Ga. 376, and in *Weems v. State*, supra, did not justify the inference, beyond a reasonable doubt, that the carnal act had been committed. The same principle is dealt with in *Sutton v. State*, 124 Ga. 820, 53 S. E. 381. In the *Coleman Case*, supra, this court very properly held that in a prosecution for keeping a lewd house the evidence must be sufficient to satisfy the jury that acts of lewdness were actually committed in the house in question. Proof of a single act would perhaps not be sufficient to authorize a conviction of keeping a lewd house; for this offense, in point of habitude, is similar to the offense of living in a state of adultery or fornication, in which a conviction would not be supported by proof of a single act of illicit intercourse. There is no intimation in the opinion in the *Coleman Case* that proof of the reputation of the alleged lewd house or of its inmates is not admissible in corroboration of other circumstances tending to show that the house in question is maintained for the purpose of prostitution. The decision upon this point is merely to the effect that mere proof of a reputation for lewdness is not sufficient to authorize conviction. The rule laid down in *Clement v. Kimball*, 98 Mass. 535, that "such testimony often becomes competent when there is other evidence in the case to show relations of an equivocal character," is clearly recognized.

If there was nothing more in this case than the proof of the reputation of the room and of the women who visited there, which was adduced by the state, or if the judge in the present case had instructed the jury that this testimony as to reputation would be sufficient to authorize conviction of the accused, the case at bar would be controlled by the ruling in the *Coleman Case*. Inasmuch, however, as there are circumstances which authorize the jury to infer that more than one act of lewdness was committed in the room rented by the defendant, the case differs from the *Coleman Case*. If the jury had been satisfied beyond a reasonable doubt, by the circumstances which surrounded the female in question upon the occasions when she was seen with other men in the room of the accused, that an illicit act had actually been committed, the proof of reputation and the frequency of the female's visits to the room,

when considered in corroboration of the circumstances indicating that sexual intercourse had taken place, would be sufficient to render the incriminatory circumstances far more consistent with guilt than with innocence.

The credibility of the witnesses as well as their prejudice or bias, if any existed, was exclusively for the jury, their finding is approved by the trial judge, and this court has no power to interfere.

Judgment affirmed.

SAVANNAH ELECTRIC CO. v. LACKENS. (No. 4,753.)

(Court of Appeals of Georgia. June 10, 1913.)

(*Syllabus by the Court.*)

1. NEW TRIAL (§§ 11, 163*)—ORDERS—JUDGMENT—DISCRETION.

A judgment overruling a motion for a new trial will not be reversed merely because in the order the trial judge recites, "So two juries have found on the facts in favor of the plaintiff, and I would not be justified in granting this motion, unless there has been an error of law committed by the court against the defendant." The proper construction of such an order is that, in view of the fact that the verdict complained of was the second concurrent verdict upon conflicting evidence, and the discretion of the trial judge was not as broad as it would have been had the first verdict been under review, he did not feel that he ought to interfere with the jury's finding.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 14-16, 330-332; Dec. Dig. §§ 11, 163.*]

2. CARRIERS (§ 348*)—INJURY TO PASSENGERS—INSTRUCTIONS—EVIDENCE.

The evidence was not such as to require an instruction that the plaintiff would not be entitled to recover if, by the exercise of ordinary care, she could have avoided the consequences of the defendant's negligence. The proximate cause of the plaintiff's injury was the sudden jerk of the car from which she was attempting to alight, and the consequences of this negligence could not have been avoided after it became existent and operative.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1403-1405; Dec. Dig. § 348.*]

3. TRIAL (§ 191*)—INJURIES TO PASSENGERS—INSTRUCTIONS.

Construed in the light of the entire charge, there was not error in any of the instruction of which complaint is made in the motion for a new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 485; Dec. Dig. § 191.*]

4. CARRIERS (§ 318*)—INJURY TO PASSENGER—EVIDENCE.

The evidence authorized the verdict.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Martha Lackens against the Savannah Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Osborne & Lawrence, of Savannah, for plaintiff in error. Anderson, Cann & Cann, of Savannah, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

POTTLE, J. The plaintiff, who was a passenger on the defendant's railway, has twice recovered for personal injuries alleged to have been caused by the defendant's negligence. The trial judge set aside the first verdict, and, upon the hearing of the second motion for a new trial, passed the following order: "This case has been twice tried; two verdicts, one for \$5,000 and one for \$6,192, being rendered for plaintiff. On the second trial, in addition to the witnesses testifying on the first trial, Mrs. Smith and Mrs. Schloss testified for defendant. So two juries have found on the facts in favor of plaintiff, and I would not be justified in granting this motion, unless there has been an error of law committed by the court against the defendant. I do not think there is any reversible error complained of against the defendant, and the motion is therefore overruled and a new trial denied."

The petition contained two counts. The first count charged negligence in not giving the plaintiff sufficient time to alight from the street railway car after it had been stopped for that purpose, and in starting the car while the plaintiff was in the act of alighting therefrom. The second count need not further be referred to, since it is not relied on for a recovery, and there was no evidence in support thereof. The defendant filed no special defense, but contented itself with a general denial of all material averments, including the allegation that the plaintiff was free from fault.

[1] 1. Where there have been two concurrent verdicts in favor of a party litigant, the second grant of a new trial "on account of alleged conflict between the evidence and the verdict will be closely examined to see that the discretion of the court below has been justly and wisely exercised, in view of the peculiar issues and facts of each case, and having due regard to the general consideration of the fitness of juries to ascertain the facts, and the necessity that there must be some end to litigation." *Vassie v. Central of Ga. Ry. Co.*, 135 Ga. 8, 68 S. E. 782; *Stewart v. Central of Georgia Ry. Co.*, 3 Ga. App. 397, 60 S. E. 1. In the case last cited a number of the decisions of the Supreme Court are also referred to, from which the rule seems to be deducible that, where evidence decidedly preponderates in favor of the verdict, a second new trial should not be granted. In the case then under consideration this court followed the rule announced by the Supreme Court in *Taylor v. Central of Georgia Ry. Co.*, 79 Ga. 330, 5 S. E. 114, to the effect that the power of the courts to grant new trials is not limited as to the number of times it may be exercised, "but the presumption of the legality of such grant weakens upon each concurrent verdict." It must be admitted that the rule denying to the trial judge the right to grant a second new trial upon conflicting evidence, where the evidence decidedly preponderates in fa-

vor of the verdict, is not altogether satisfactory. The preponderance of the evidence is not always with the greater number of witnesses, and it is frequently doubtful where the legal preponderance lies. There may be one witness known to the jury and judge to be a man of absolute integrity and impartiality, and, in their opinion, the testimony of this witness might properly outweigh that of a dozen witnesses, whose testimony might not, on account of interest or bias, or friendship for one of the parties, or on account of the knowledge the judge or the jury might have of their character, be entitled to as much weight as that of the one witness upon whose testimony the verdict was based. These are some of the considerations which give sanctity to the jury's finding after it has met the approval of the trial judge. Frequently from the printed record the preponderance of the evidence seems to be against the verdict, and sometimes it is actually so; but the reviewing court is not in as good position to determine where the preponderance lies as is the judge who has presided during the trial, seen the witnesses, noted their manner of testifying, and has felt the force of that indefinable something which can only be derived from the atmosphere of the trial. Sometimes truth can be felt when it cannot be seen; and the trial judge is in a much better position than the appellate court to feel its influence and recognize its presence.

While under the law of this state, the line between the duty of the trial judge and that of the jury is clearly marked, and their functions are separate and distinct, the duty of the judge being confined to instructing the jury in the principles of law applicable to the case and in policing the trial to see that no element of unfairness enters into it, and that of the jury being to find the facts and apply the principles of law as given them in charge by the court, still the judge is given the power to veto the jury's finding of the facts, and such finding will not be approved by the reviewing court, unless it has received the express or implied sanction of the trial judge; and this would seem to apply without reference to the number of concurrent verdicts of the jury, although we are not called on now to decide whether or not the veto power of the judge might be lost after a number of concurrent verdicts have been returned in favor of the same party. But the sanction of the verdict by the trial judge need not be express; it is to be implied from his failure to disapprove, evidenced by the overruling of the motion to set aside the verdict. Whenever a motion for a new trial is overruled by the presiding judge, there is a presumption that the verdict has met with his approval, because it is his duty, when considering the motion, to pass upon the facts; and this court is bound to presume that he has performed this duty, unless the contrary affirmatively appears. Hence it follows that he who

asserts that the trial judge has failed to exercise the discretion imposed upon him by law, and which the law imperatively requires him to exercise, must bring clear and unmistakable proof of that fact. If, in passing upon the motion for a new trial, the trial judge asserts in his order that he has no authority to interfere with the jury's finding upon the issues of fact, he has failed to exercise the discretion imposed upon him by law, and the case will be dealt with upon the assumption that the judge would have granted a new trial if he had thought he had the power to do so. See *Merchants' & Miners' Transportation Co. v. Corcoran*, 4 Ga. App. 654, 62 S. E. 130; *Savannah Electric Co. v. Badenhop*, 6 Ga. App. 371, 376, 65 S. E. 50; *Walters v. State*, 6 Ga. App. 565, 566, 65 S. E. 357; *Livingston v. Taylor*, 132 Ga. 9, 63 S. E. 694; *Central of Georgia Ry. Co. v. Harden*, 113 Ga. 453, 38 S. E. 949. If, however, the order of the trial judge is equivocal and susceptible of two constructions, that interpretation will be given it which is in consonance with the theory that the trial judge has performed his duty and exercised the discretion vested in him by law.

Some stress is laid by the defendant in error upon the fact that this is the second verdict, and that the judge has not as broad discretion as he would have had had the finding in the plaintiff's favor been the first one. It is true that the judge's discretion is somewhat weakened after the second verdict, but in passing upon the second verdict it is as much his duty to exercise whatever discretion he had as it is to exercise the broader discretion with which the law vests him in dealing with the first verdict. Evidently the purpose of the law is to require the trial judge to give more force and effect to each succeeding verdict. It makes no difference how greatly the evidence may preponderate in favor of the verdict, if there be a conflict, however slight, the discretion of the trial judge in setting the first verdict aside will never be controlled. In reviewing that verdict he may enter the jury box and become both judge and jury. In reviewing the second verdict he may and ought to resolve his doubts in favor of the jury's finding. And with each succeeding verdict the power of the jury increases, and that of the judge diminishes in a corresponding degree. If the judge is clear that the second verdict is wrong, he should set it aside; but if, in passing upon the second verdict, the trial judge entertains doubt in reference to the truth of the case, and in overruling the motion for a new trial says, in substance, "Had I been on the jury, I would probably not have found this verdict, but the question is doubtful, and I will resolve my doubts in favor of the jury's finding," he would be doing merely what the law says he ought to do, and an order to that effect would not be regarded as such a disapproval of the verdict as that the reviewing court would be bound to assume that the

judge had failed to exercise the discretion imposed upon him by law. In the present case the trial judge said: "So two juries have found on the facts in favor of the plaintiff, and I would not be justified in granting this motion, unless there has been an error of law committed by the court against the defendant." In the light of the principles above discussed, and especially of the rule which requires us to assume, until the contrary appears, that the judge has performed his duty, what construction should be given this order? It means, we think, simply that the judge was of the opinion that, in view of the fact that this was a second verdict, he did not have as broad discretion as he would have had in dealing with a first verdict; and that for that reason he would not be justified, under the rules of law applicable to the case, in setting aside the verdict. In other words, that while he would not, perhaps, have made the finding had he been on the jury, he did not feel that, with the diminished discretion which the law gives him, it would be right to set the verdict aside. The trial judge who passed upon this motion is one of the fairest and ablest magistrates whose decisions are subject to review by this court. He is familiar with the rule of law which requires him, in passing upon a motion for a new trial, to exercise such discretion as the law imposes upon him. Properly construed, we do not think there is anything in the order which requires a finding that he has failed to perform this duty.

[2] 2. It remains to be determined whether any error of law has been committed of sufficient materiality to require a reversal of the judgment overruling the motion for a new trial. The judge charged the jury, in substance, that if the defendant failed to exercise extraordinary care in giving the plaintiff reasonable time in which to alight from the car, and negligently caused the car to move while she was in the act of alighting, and the injury was due to this failure to exercise such extraordinary care, the plaintiff would be entitled to recover. Error is assigned upon this instruction, upon the ground that the court failed, in the same connection, to charge the jury that the plaintiff would not be entitled to recover if, by the exercise of ordinary care, she could have avoided the injury. In another part of the charge the jury were distinctly instructed that the plaintiff could not recover if the injury was caused by her own negligence, or if she could have avoided the consequences to herself caused by the defendant's negligence. The duty imposed by law upon the plaintiff to exercise ordinary care to avoid the consequences of the defendant's negligence does not arise until that negligence is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. *Western & Atlantic Railroad Co. v.*

Ferguson, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802. It has been several times held that, where the pleadings and the evidence require it, the judge, even in the absence of a written request, should charge the jury that a plaintiff cannot recover on account of negligence, the consequences of which he could have avoided by the exercise of ordinary care. And where there is a general denial of the allegation that the plaintiff was free from fault it is not essential that this rule of law should be pleaded as an affirmative defense. *West End Ry. Co. v. Mozely*, 79 Ga. 463, 4 S. E. 324; *Atlanta Ry. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818; *Atlantic Coast Line Railroad Co. v. Canty*, 12 Ga. App. 411, 77 S. E. 659. In cases of suits by employees before the passage of the act of 1909, it was held that, if the judge instructed the jury that before the plaintiff could recover he must be entirely free from fault or negligence, it was not erroneous to fail to charge that he could not recover if, by the exercise of ordinary care, he could have avoided the consequences of the defendant's negligence. *Louisville & Nashville R. Co. v. Thompson*, 113 Ga. 983, 39 S. E. 483; *Georgia, Florida & Alabama Ry. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505. These decisions doubtless proceed upon the theory that an employé could not be wholly free from fault if, by the exercise of ordinary care, he could have avoided the consequences of the defendant's negligence, and that for this reason a general instruction that he must have been entirely free from fault or negligence was sufficient, in the absence of a written request for a more specific charge. It is, of course, not erroneous to fail to charge the rule of law now under consideration, unless both the pleadings and the evidence require such an instruction.

In the present case, the plaintiff having alleged that she was wholly free from fault, and this allegation having been denied, the pleadings were sufficient, under the authority of the *Mozely* and *Gardner* Cases, above cited, to raise an issue as to whether she could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. On principle it would seem that this rule of law constitutes an affirmative defense, and should be specially pleaded. Certainly, whether specially pleaded or not, it should not be given in charge, unless the jury would be authorized to find that the plaintiff could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. According to the testimony for the plaintiff, the car had come to a full stop, and she was in the act of alighting, when the car gave a sudden jerk, and she was thrown to the pavement. According to the testimony of the conductor and motorman and some of the passengers, the car had stopped, and the plaintiff was standing on the step, when she suddenly tumbled over

as if she had been pushed forward; there was no jerk, and the car was not in motion. One witness testified that the plaintiff fell after she had gotten off the car. One of the defendant's witnesses testified that the plaintiff was standing on the running board and stepped off while the car was moving, and the jerk of the car precipitated her to the ground. The jury evidently accepted the plaintiff's version of the transaction, and, if that be the truth of the case, the proximate cause of the plaintiff's injury was the negligence of the motorman in suddenly starting the car forward before she had time to alight. Under this theory the rule of law invoked, requiring the plaintiff to exercise ordinary care to avoid the consequences of the defendant's negligence, was not applicable; for, as was said by this court in the case of the *Georgia, Florida & Alabama Ry. Co. v. Sasser*, supra, "the beginning and the end of the whole casualty were included in the same twinkling of an eye," and there was nothing which the plaintiff could have done to avoid the consequences of the defendant's negligence after it became existent and operative. If the testimony of most of the defendant's witnesses be accepted as the truth of the case, the plaintiff's injury was the result of pure accident, for which nobody was to blame, and there was no negligence, the consequences of which it was her duty to avoid. Under the testimony of the witness Mrs. Schloss the defendant was not negligent in failing to stop the car before it reached the street crossing where the plaintiff desired to alight. If the plaintiff attempted to step off the moving car before it reached her destination, without the knowledge of the motorman, the defendant was guilty of no negligence. If the defendant was negligent in failing to stop promptly at the street crossing, the sudden jerk, and not the failure to stop, was the proximate cause of the injury; for, according to the testimony of Mrs. Schloss, the plaintiff was precipitated to the ground in consequence of a jerk, which the plaintiff had no reason to anticipate, and the consequences of which she could not have avoided. So that under no view of the evidence was an instruction upon this theory demanded.

The plaintiff in error relies upon the decision of the Supreme Court in the case of *West End Ry. Co. v. Mozely*, 79 Ga. 463, 4 S. E. 324. In that case the following instruction was held to be erroneous, because the judge failed to qualify it by charging that the plaintiff must have used ordinary care to avoid the consequences of the defendant's negligence: "If the plaintiff signaled the driver to stop, and the driver did not stop so as to allow the plaintiff reasonable opportunity to alight with safety, but the driver only slackened his speed, and the plaintiff, to avoid being carried beyond his destination, and availing himself of what op-

portunity was afforded him to alight, endeavored to get off the car while in motion and was thrown by a sudden jerk of the car, the defendant would be liable, provided you believe from the evidence that the driver was negligent in not stopping the car altogether." The Supreme Court held that this charge should have been further qualified by saying, "If the jury further believed that the plaintiff used all reasonable and ordinary care and diligence to avoid the consequences of the defendant's negligence to himself." Under the instruction just quoted the negligence of the defendant consisted in failing to stop the car at the plaintiff's destination. This negligence was necessarily apparent to the plaintiff. It was therefore his duty to use ordinary care to avoid the consequences of the negligence of the defendant in taking him beyond his destination. The act of attempting to alight from the moving car at his destination was not necessarily, as a matter of law, such negligence as would completely defeat his right to recover; but if he was lacking in ordinary care, and by the exercise of such diligence could have avoided the consequences of the defendant's negligence, he was not entitled to recover. There is no theory of the evidence in the present case which would bring it within the rule announced in the *Mozely Case*, unless it be that contained in the testimony of the defendant's witness Mrs. Schloss. While this witness does testify that the plaintiff was in the act of alighting from the moving car, taking her testimony altogether, the car suddenly started while the plaintiff was in the act of alighting, and this negligent act in suddenly starting the car was the proximate cause of the plaintiff's injuries. If the motorman knew that the plaintiff was endeavoring to alight, and suddenly accelerated the speed of the car, there was nothing that the plaintiff could have done to avoid the consequences of this act of negligence after it became apparent. On the other hand, if the motorman did not know, and by the exercise of due diligence could not ascertain, that the plaintiff was attempting to alight from the moving car, he was not guilty of negligence in moving it forward. Even assuming that the testimony of this witness is the truth of the transaction, the car was moving slowly when the plaintiff attempted to alight, and she doubtless would not have been injured at all if the speed of the car had not suddenly been increased. The sudden increase of speed, and not the failure to stop at the street crossing, was the proximate cause of the plaintiff's damage. So that, under any theory of the evidence, the jury were compelled to find that the plaintiff's injuries resulted from the negligence of the defendant

in suddenly jerking the car forward, and this was done so quickly that no amount of diligence would have availed the plaintiff after this negligence became apparent to her.

[3] 3. Complaint is also made of a charge which instructed the jury negatively that the plaintiff would not have a right to recover if her injuries were not due to one or more acts enumerated in the charge, among others, to the failure to warn her of the intention to start the car. The trial judge added that, if the plaintiff's injuries were due to the defendant's failure of duty in the respect indicated, she would have a right to recover. Taken alone, this extract from the charge might be subject to the criticism that it assumed that certain acts on the part of the defendant would be negligence, whereas this was a question exclusively for determination by the jury; but when it is read in the light of the entire charge (which is manifestly fair to the defendant, and, taken as a whole, clearly states the rule of law applicable to the case, and also the rule that it is for the jury to say whether the defendant has been negligent in the several respects alleged in the petition), we do not think a new trial is demanded on account of this extract.

[4] 4. The evidence fully authorized the verdict. The plaintiff in error contends that the great preponderance of the evidence is with the defendant and urges this as a reason why the judgment should be reversed because the judge failed to unqualifiedly approve the verdict. As illustrating what we have said above about doubts in reference to where the preponderance of the evidence lies, the evidence makes a different impression upon our minds from that which it has made upon counsel for the defendant. It is true the defendant had the greater number of witnesses, but the theory presented by them that the plaintiff, without any reason apparently for so doing, stood for some time on the step of the car, which had already stopped at her destination, and suddenly tumbled off without fault on the part of the defendant, and without any proof that she had had a sudden accession of illness, is very much more unreasonable than her theory that she was in the act of alighting from the car, which had come to a stop, and the motorman suddenly moved the car forward, and she was thrown to the ground. The plaintiff was a woman 56 years of age, and in all probability could not alight from a car as rapidly as could a person younger and more vigorous. One of the defendant's witnesses was impeached by proof of contradictory statements. The verdict was not legally excessive, and the judge did not err in overruling the motion for a new trial.

Judgment affirmed.

HYER v. C. E. HOLMES & CO. (No. 4,381.)
(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 308*)—WRITTEN INSTRUMENT—ATTACHMENT.

The court did not err in overruling the demurrers to the defendant's answer after the answer had been amended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 54, 935-941; Dec. Dig. § 308.*]

2. PLEADING (§ 237*)—APPEAL AND ERROR (§ 1052*)—EVIDENCE (§ 443*)—AMENDMENT—CONFORMITY TO EVIDENCE—PAROL TESTIMONY—WRITTEN CONTRACT.

Either party to a cause may, by proper amendment, conform his pleadings to the evidence which has been introduced, and after such amendment the court may properly refuse to rule out testimony, though it would originally have been irrelevant or incompetent. Under the amendment allowed by the court in this case, without objection, the oral evidence touching the written contract originally alleged in the petition was relevant and competent, and the court did not err in overruling the motion to exclude this testimony.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.* Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.* Evidence, Cent. Dig. §§ 2048-2051; Dec. Dig. § 443.*]

3. EVIDENCE (§ 94*)—"BURDEN OF PROOF"—WHAT CONSTITUTES.

One who assumes the burden of proof is only required to carry the burden of evidence until his contention has been prima facie established. The position of the "burden of proof" is determined by the pleadings, and as to this the burden of proof is unchanging; once imposed it remains. But the burden of testimony may be shifted and alternate between the parties according to the contingencies and crises of the trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 116, 117; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 1, pp. 904-907; vol. 8, p. 7593.]

4. TRIAL (§ 234*)—EVIDENCE (§ 75*)—PRESUMPTIONS—EVIDENCE WITHERED.

A trial judge in declaring that the party having the burden of evidence with regard to a particular fact has so discharged it that the burden of evidence has been shifted to his opponent may properly consider the question as to which party has within his possession or control the more precise and conclusive knowledge as to the particular fact or facts in issue. Generally, facts that are peculiarly within the knowledge of a party must be proved by him, and a judge may more promptly discharge a litigant from his burden of evidence either when knowledge as to the proposition is peculiarly within the power of his opponent, or where the proposition is a negative one. Where the means of proving a negative are not within the power of one of the parties, but all the proof on the subject is within the control of the other, who, if the negative is not true, can disprove it at once, the truth of the negative averment can be presumed from the fact that the party who has within his power proof (if such exists) that the negative is not true still withholds or does not produce such proof. In other words, in such a case, the burden of proof is thrown upon the party having the power to produce such proof to prove the affirmative against the negative averment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.* Evidence, Cent. Dig. § 95; Dec. Dig. § 75.*]

5. PLEADING (§ 237*)—AMENDMENT—SCOPE.

It is not error to allow an amendment to the pleadings, after the close of the evidence and the argument of counsel, provided the amendment is supported by evidence, and is not otherwise objectionable for such reason as the introduction of new parties or a new cause of action, and the like.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

6. CONTINUANCE (§ 46*)—GROUNDS—SURPRISE—MOTION.

A motion for continuance based upon the ground of surprise is defective, unless the court is advised in the showing for continuance wherein and in what respect the movant is not prepared to proceed with the trial, and how or why he will be better prepared to meet the issue in the event the court should continue the case upon his motion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 132-140; Dec. Dig. § 46.*]

(Additional Syllabus by Editorial Staff.)

7. EVIDENCE (§ 90*)—"ONUS PROBANDI."

The meaning of the term "onus probandi" is that, if the party who has the burden of proof does not offer any evidence in the case, the issue must be found against him (citing 1 Words and Phrases 906).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 112; Dec. Dig. § 90.*]

Error from City Court of Moultrie; W. E. Thomas, Judge.

Action by J. W. Hyer against C. E. Holmes & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

E. L. Bryan, of Moultrie, for plaintiff in error. T. H. Parker and Shipp & Kline, all of Moultrie, for defendant in error.

RUSSELL, J. The plaintiff in error brought suit against C. E. Holmes & Co. upon a note for \$3,500 and interest and attorney's fees. The note was payable to the order of the People's Bank of Pensacola, Fla., and in the course of the trial the petition was amended to show that it had been duly transferred and assigned to the plaintiff. The firm of C. E. Holmes & Co. was composed of several persons, and both the partnership and the individuals composing it were sued, but C. E. Holmes was the only partner served. Several amendments to his original answer, which were presented to and allowed by the court, are made the subject-matter of exception. As set out in his answer, as finally amended, his defense rested upon the proposition that he had sold to Hyer, the plaintiff, his fourth interest in the firm of C. E. Holmes & Co., upon Hyer's agreement to pay him \$10,000 for his interest, and also to pay the debts of the firm, provided they did not exceed \$35,000; that of these partnership debts the sum of \$6,000 was due to Holmes himself, as was also the note in suit; and that he not only did not owe the note for \$3,500, but the plaintiff owed him \$10,000, according to the terms of the contract of sale. The jury sustained his plea, and returned a verdict in his favor and against the plaintiff for \$10,000 principal.

\$3,500 interest to date, and costs of the suit. This writ of error presents for review certain rulings to which exceptions were taken pendente lite, and also the judgment overruling the motion for a new trial. There can be no question that the evidence authorized the finding of the jury, and, in fact, this is unquestioned in the brief of counsel for the plaintiff in error. It is insisted, however, that the verdict is wholly unwarranted because it depends upon and was induced by errors of the court in allowing amendments to the defendant's answer, and in admitting and refusing to exclude evidence which the plaintiff in error contends was illegal. Error is also assigned upon the refusal of the court to continue the case on the ground of surprise, and upon the allowance of an amendment to the answer after the evidence had been closed and the argument in the case concluded. Furthermore, it is strongly insisted that, since the defendant assumed the burden of proof, the court erred in holding, under the circumstances of the case, that it was not incumbent upon the defendant to prove that Hyer had not paid any more than \$35,000 of the debts of the partnership, as he had contracted to do. We will first consider the assignments of error relating to the amendments to the answer.

[1] 1. On February 15, 1912, the court permitted the defendant C. E. Holmes to amend his answer by setting up that at the time he delivered the property which consisted of his fourth interest in the firm of C. E. Holmes & Co. to Hyer and Gonzales he delivered to them all of his books of account, and other evidences of indebtedness by Holmes & Co., and that since then he had no access to those books, and was unable to furnish a list of the creditors of Holmes & Co. The amendment alleged also that the contract by which Hyer and Gonzales assumed to pay all the debts of Holmes & Co., including the note sued on, was in writing and executed in duplicate, but that the defendant had lost his copy of the contract, and it was impossible for him to attach a copy of the contract to the answer, but that at the time of the sale the principal creditor of Holmes & Co. was the firm of J. P. Williams & Co., which firm held a security deed to all of the real estate of Holmes & Co., and that the defendant delivered to Hyer and Gonzales a written order directing J. P. Williams & Co. to execute and deliver to Hyer and Gonzales title thereto, and that upon this instrument they secured and received from Williams & Co. the defendant's fourth interest in the partnership property. In the amendment the note which was the basis of the suit was stated to be one of the debts of the firm of Holmes & Co. which Hyer and Gonzales agreed to pay; and it was also alleged that the plaintiff had not paid the defendant a debt of \$6,000, included in the indebtedness of Holmes & Co., which

the purchasers of his interest assumed. By further amendment the defendant struck that portion of his original plea in which he prayed recoupment and judgment against the plaintiff for \$6,000 as evidenced by six notes of \$1,000 each alleged to be owned by the Citizens' Bank of Moultrie.

In the demurrer to this amendment it was insisted that, inasmuch as the defendant had assumed the burden of proof, he should be required to attach a list of the items of indebtedness, and also to attach a copy of the deed alleged by the defendant to have been executed by himself to the plaintiff and C. P. Gonzales, together with a copy of the alleged agreement to assume and pay certain indebtedness of C. E. Holmes & Co. We think the court was right in overruling this demurrer. A demurrer to the answer before amendment based upon several grounds had been overruled, but no exceptions to this ruling had been preserved. The only question then presented to the court was whether the court should require the defendant (who, according to the allegations of the original answer, had in his possession none of the documentary evidence which the plaintiff asked to be set out) to attach copies thereof upon pain of being dismissed if he failed to do so (and that, too, when it affirmatively appeared that this evidence was peculiarly within the knowledge and power of the plaintiff), merely because in his original answer the defendant had assumed the burden of proof. Even if the question can be raised by demurrer, the court, under the allegations in the original answer, did not err in allowing these amendments because no exceptions were filed to the order overruling the demurrer to the original answer, and that ruling was res judicata. Consequently, if the amendment merely amplified the statement of the cause of action set up in the original answer, without introducing a new cause of action or any additional party, it would be germane and allowable.

The propriety of the court's ruling upon the burden of proof cannot be tested by demurrer, but, even if it could, there is no merit in the demurrer, so far as it relates to this point, for the reason that in the original answer it is alleged that the plaintiff was in any event to pay as much as \$35,000 of the debts of C. E. Holmes & Co., and a list of the creditors, even if it were admitted to be correct, would not supply proof that any of the obligations due these creditors, or as much of them as might amount to \$35,000, had in fact been paid, or were not paid, by the plaintiff.

As to the contention that a copy of the documents referred to should be attached to the answer, it is only necessary to say that it is alleged in the answer that his copies had been lost, precluding the possibility of the defendant's doing more than setting out the substance of the contract, and it was alleged

that a duplicate copy of the contract was alleged to be in the possession of the opposite party and beyond the jurisdiction of this state; that is, in the state of Florida.

[2] 2. As to the other amendment, it will also be necessary to deal somewhat with the evidence, because some of the amendments were allowed after the introduction of testimony, and their propriety depends upon the pertinency of the testimony to the issue. As originally pleaded, the defendant's defense of recoupment was based upon the contract alleged to have been made with Hyer, and in writing. As amended, the contract was an oral contract made with Hyer contemporaneously with and as an inducement to a written contract by which the property in question was nominally sold to one C. P. Gonzales. But there was no real change in the statement of the cause of action, and no new party was introduced. Though the original petition set forth that the contract was between Hyer and the defendant Holmes, and the contract, when introduced, showed that the parties really mentioned in the writing were Holmes and Gonzales (instead of Hyer), still parol evidence to the effect that the contract was in fact made between Hyer and Holmes, and that at Hyer's instance, for reasons sufficient to himself, Gonzales' name was used instead of his own, was admissible. Of course, the rule is well settled that parol evidence is generally inadmissible to vary the terms of a contract, but it was for the jury to say whether or not the substitution of Gonzales' name for that of Hyer's, in the contract, and at Hyer's request, was fraudulent, and the suggested substitution made with the view of enabling Hyer to evade his obligation and avoid paying for the property he had purchased from Holmes. There were introduced in evidence five notes for \$1,000 each, signed by J. W. Hyer as trustee, which it was testified were a part of the consideration of the contract of purchase, and the contract of sale signed by Holmes was transferred by Gonzales to Hyer within a few days after its execution, and, in pursuance of the contract, J. P. Williams & Co. conveyed, not to Gonzales, but to Hyer, Holmes' fourth interest in 16,912 acres of land in Santa Rosa county, Fla., with sawmills, eight miles of railroad, and the appurtenant engine and rolling stock. It is undisputed in the evidence that Hyer got Holmes' fourth interest in the partnership assets of C. E. Holmes & Co. It is undisputed that he, and not Gonzales, carried on all the negotiations leading up to the purchase and its consummation. According to the defendant's contention, the larger portion of the purchase price had not been paid to him, and the note upon which Hyer was suing him should have been paid by Hyer and the indebtedness discharged, instead of being transferred to Hyer as the purchaser thereof. It was not denied, even by Hyer himself, that he was to

pay as much as \$35,000 of the debts of Holmes & Co. as part of the consideration of his purchase from Holmes, and it appeared from the testimony that immediately after Hyer's purchase all of the books of the firm of C. E. Holmes & Co. were turned over to Hyer, and that they were not afterwards seen by Holmes. It seems to us that this testimony was relevant, and was properly admitted, in order that the jury might be able to do justice in the case, and that it is immaterial whether the amendments or the evidence came first. If the court, upon the statement of counsel as to what he expected to prove, allowed the amendments setting up the facts substantially as above, then the court did not err in admitting the evidence in support of the amendments, or in refusing to exclude it upon motion of the plaintiff. If the evidence was first admitted, then the amendments were proper, because they conformed to the evidence, and yet did not introduce a new cause of action.

[3] 3. One of the main contentions of the plaintiff is that, even conceding that there was a contract such as was alleged by the defendant, and that by its provisions the plaintiff was bound to pay the indebtedness of Holmes & Co. to the extent of \$35,000, nevertheless, since the defendant had assumed the burden of proof, it devolved upon the defendant to prove that the plaintiff had not in fact paid that amount. In other words, the insistence of the plaintiff is that the defendant, having assumed the burden of proof, failed to carry that burden unless he established a negative, even though the proof upon the subject was alleged and shown to be peculiarly within the power of the plaintiff and beyond the control of the defendant. The point was raised first by demurrer, and then by motion to exclude the testimony in behalf of the defendant, and lastly it was presented in the motion for new trial. Nothing is better settled than that, where one who is sued upon a promissory note assumes the burden of proof (and thus admits that the plaintiff is entitled to recover unless he establishes the defense upon which he relies), he must establish his affirmative defense by a preponderance of evidence, just as the plaintiff is required to do in a case in which no admissions are made. But the terms "burden of proof" and "burden of evidence" are not synonymous. The burden of evidence may shift, but the burden of proof, either when imposed by law or when voluntarily assumed, is unchanging. *Martin v. Munroe*, 130 Ga. 79, 60 S. E. 253. The legal obligation of carrying the burden can only be fulfilled by producing such preponderance of evidence as to satisfy the minds of the jury when the evidence has finally been concluded. However, just as the defendant may admit a *prima facie* case in behalf of the plaintiff upon whom the law originally places the burden of making out his case, so the defendant

may make out a *prima facie* case in rebuttal of the plaintiff's *prima facie* case, equally as strong; and since the plaintiff cannot recover although he may have established a *prima facie* case, either by evidence or admission, unless the evidence in his favor preponderates, when the defendant has made out a *prima facie* case as strong in his behalf as that admitted in behalf of the plaintiff, it would seem that the burden of evidence would be shifted, and the plaintiff would be required to produce such additional evidence in support of his *prima facie* case as would overbalance the *prima facie* defense of the defendant before the plaintiff would be entitled to recover.

[4] 4. "The term 'burden of proof' means that the burden is coextensive with the legal proposition sought to be proved, and it applies to every fact which is essential to or necessarily involved in a proposition. It does not apply to facts relied on in defense to establish an independent proposition, however inconsistent such proposition may be with that on which the plaintiff's cause depends. If the defendant furnish proof of an independent proposition which is inconsistent with that on which the plaintiff's case rests, the burden is on the plaintiff, not to disprove those particular facts, nor the proposition which they tend to establish, but to maintain the proposition on which his own case rests, notwithstanding the adverse testimony and the whole evidence in the case." *Wilder v. Coles*, 100 Mass. 487, 490. "There is a manifest distinction between the 'burden of evidence' and the 'burden of proof.' How far the burden of evidence may bear upon a party to litigation is usually more for the jury to determine as a matter of fact than for the ruling of the court as a matter of law. Generally, the burden of proof upon any affirmative proposition necessary to be established as the foundation of a suit does not shift from plaintiff to defendant, while the burden of evidence, or of the weight or preponderance of evidence, or the burden of explanation, may shift from one side to the other, according to the testimony." *Buswell v. Fuller*, 89 Me. 600, 36 Atl. 1059. So also in the case of *Feurt v. Ambrose*, 34 Mo. App. 360, 368, it was held that: "The 'burden of proof' which means the burden of establishing a case," and the well-settled law is that such burden "remains unchangeably throughout the entire case exactly where the pleadings originally placed it. The burden of proof in the sense of the 'burden of the evidence,' * * * may shift constantly as the evidence is introduced by one side or the other, as one scale preponderates over its fellow; but, when all the evidence is in, it is legally necessary to action by the tribunal that the final balance be one way. This necessity does not at any time shift, but remains constantly throughout the trial on one of the parties alone, to wit, on him who had

the affirmative. This is the burden of establishing the burden of proof."

The burden of proof is a rule of law, the burden or weight of the evidence is one of fact—the former belongs to the court, the other to the jury. "Whether the 'burden of proof' as to a certain fact is on the plaintiff or defendant the court will determine upon the settled rules of judicial evidence, one of which is that the burden of maintaining any issue of fact rests upon him who from the nature and character of the fact has or might have peculiar evidence thereon." *Little Pittsburg Co. v. Little Chief Co.*, 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226. We will consider the facts in the light of this rule.

The defendant Holmes began the case with both the burden of proof and the burden of evidence resting upon him. It devolved upon him to prove the execution of the contract and the delivery of the property as alleged in the plea. One of the stipulations of the contract was that the plaintiff should pay debts of the firm to the extent of \$35,000. At this point the question arises as to whether the defendant was compelled to prove, not only that the plaintiff contracted to pay the \$35,000 of debts, including the note upon which the plaintiff sued, but also whether the plaintiff had complied with his contract by paying the indebtedness, or had failed to comply therewith, a fact which must rest peculiarly within the knowledge of the plaintiff, and not the defendant. It was certainly not necessary for Holmes to show what amount was due by the firm at the date of the sale, for the reason (if there were no other) that it affirmatively appeared that all the records of this indebtedness were in the possession of the plaintiff and in the state of Florida beyond the jurisdiction of the court. And we do not think that the trial judge erred, under the peculiar circumstances of the case, in holding that the defendant's *prima facie* case was sufficient, without putting the defendant to the necessity of attempting to prove a negative as to the payment, the proof of which necessarily rested peculiarly within the knowledge of his opponent.

[7] The strict meaning of the term "onus probandi" is that, if the party who has the burden of proof does not offer any evidence in the cause, the issue must be found against him. 1 Words & Phrases, 905. When Holmes showed that he had fully complied with the contract to which he testified, the burden of evidence shifted, and it devolved upon Hyer to submit testimony showing that he had complied with the cross-obligations of the contract. As pointed out in the case of *Little Pittsburg Co. v. Little Chief Co.*, supra, this was a subsidiary fact, the establishment of which rested upon him, because, from the very nature and character of the fact, he should have had peculiar evidence upon the subject. C. E. Holmes & Company might have owed more than \$35,000, and yet Hyer

might not have paid a cent of it, though bound, according to the testimony of the defendant, to pay the debts of C. E. Holmes & Co. up to at least \$35,000 and more, before he could be relieved from the payment of \$4,000 retained by him to meet Holmes' share of any indebtedness in excess of \$35,000, and the \$6,000 due C. E. Holmes on the books of the company. The defendant showed that Hyer had not paid all the indebtedness by testifying that Hyer had never paid him the \$6,000 which C. E. Holmes & Co. were indebted to him (Holmes), nor the note of \$3,500 which was the subject-matter of the suit, and which, according to the defendant's testimony, should have been extinguished by Hyer's payment to the People's Bank.

In section 969 of 2 Chamberlayne's Modern Evidence the rule is announced as follows: "The incidence of the burden of evidence at the beginning of the trial is upon the party having the burden of proof—i. e., upon the actor—until he shall have established a prima facie case in his favor as to the truth of every material allegation embraced in his affirmative case. In discharging this burden of evidence it is not absolutely necessary that all essential facts should be established directly by the testimony of witnesses, the statement of documents, or the perception of the tribunal. The party having the burden of evidence may establish his prima facie case entirely by adducing evidence. As soon as the party having the burden of proof shows these facts, the burden of evidence, so far as he is concerned, is discharged and is transferred to his adversary, and remains with him so long as the actor's original case continues to retain its prima facie quality. The position of the burden of proof in the meantime stands in no way affected." Likewise, in section 971 of the same work, the author says: "The burden of evidence may, and frequently does, vibrate between the parties, and is a necessary and usual incident of any contest to be determined by the use of the facts, as the establishment of a prima facie case presents to a party the alternative of producing evidence to meet it or of being defeated in the action."

Under the contract established by the testimony of the defendant, if it was credible, Hyer was bound to prove that he had paid the \$35,000 indebtedness stipulated in the contract, and \$16,000 in addition, in order to defeat Holmes' right to recover. As already stated, no matter what the debts of Holmes & Co. amounted to, Hyer may not have paid any of them, and the facts regarding any payments made rested peculiarly within his (Hyer's) knowledge. Having proved the contract and the obligation of Hyer to pay the debts of Holmes & Co., the court properly held that it was necessary for Hyer to prove that he had made the payments in compliance with his obligation so to do, or that otherwise he would have failed to carry the

burden by law devolving upon him as a plaintiff, in spite of the admission of the defendant that prima facie he was entitled to recover. Furthermore, the only debts which could fall within the provisions of the contract, and which were shown to have been in existence, were both of them unpaid, according to the testimony of the defendant. If there is any presumption, either way, as to the existence of any other debts, it was to be presumed that there were no others, because the books of account which contained the statement of the indebtedness due by C. E. Holmes & Co. had been delivered to Hyer before the consummation of the contract. Hyer had ample opportunity to ascertain the amount of the indebtedness due by C. E. Holmes & Co., because these books showed all the accounts of all the creditors, including that of C. E. Holmes (who had a credit of \$6,000). Hyer was served with notice to produce these books, and, according to the testimony, they were in the state of Florida, beyond the jurisdiction of the court, and their production could not be compelled. In Chamberlayne's Modern Evidence (section 978 et seq.) the author well says: "In considering the amount of evidence necessary to shift the burden of proof, the court looks to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively. It is often said that facts that are especially within the knowledge of a party must be proven by him. This rule is especially applied where the facts particularly well known to the other side presents the further difficulty in the way of adequate proof that it is negative. Under the circumstances, it occurs with special frequency that the other party is called upon to prove it. It being within the administrative power of the court to decide at what point a prima facie case has been established—i. e., when the burden of evidence has been discharged—the presiding judge may well bear constantly in mind the relative ability of the parties to make proof upon a given point." If it is within the administrative power of the court to decide at what point a defendant who is endeavoring to set up a cross-action has established a prima facie case, then it cannot be said the judge in the present case erred in holding that the defendant was not required to prove that the plaintiff had not paid as much as \$35,000 of the debts of C. E. Holmes & Co., for "the burden of proof may be shifted when sufficient facts are established to raise a strong presumption in favor of the truth of the negative." *De Lachaise v. Maginnis*, 44 La. Ann. 1043, 11 South. 715. It is often impossible to prove a negative, and for this reason the degree of proof required to support a negative proposition and to shift the burden must vary according to the circumstances of the case. Often slight evidence will be sufficient to shift the burden to the

party having the greatest opportunity of knowledge concerning the facts in question. The defendant in his answer claimed that the plaintiff had not paid the \$35,000 of debts; he supported this by his testimony that two of the debts, amounting to nearly \$10,000, had not been paid. He showed that proof which would rebut his claim lay peculiarly within the knowledge and power of the plaintiff. The court did not err in adjudging that at that point the defendant had established a prima facie case. After all, the necessity of the plaintiff's producing the proof is settled by our own Code, for "where a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, or, having more certain or more satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded." Civil Code, § 5749.

[§] 5. One of the amendments to the allowance of which exception is taken, was presented after the conclusion of the evidence and the argument. The amendment appears to be pertinent to the evidence and germane to the issue. It is well settled that an amendment which meets these requirements is permissible at any stage of the case prior to the rendition of the verdict.

[§] 6. In the tenth ground of the amended motion for a new trial error is assigned upon the refusal of the court to continue the case, based upon the ground of surprise. The exact exception is as follows: "Because after the allowance of the amendment set forth in the ninth ground of this amended motion [movant] pleaded surprise and moved the court to continue the case, which plea and motion the court then and there overruled, which ruling of the court movant contends was improper and illegal." If, as a matter of fact, the motion to continue, based upon the ground of surprise, was properly made, then the assignment of error is not sufficiently full to present anything for our consideration. On the other hand, if the ground of the motion contains a true recital of what occurred, the court very properly overruled the motion to continue, because a motion for continuance, based upon the ground of surprise, must state how the party who asks a continuance is surprised. In other words, it must be made to appear to the court that there is some reason on account of which the party is less prepared to proceed with the trial than he would probably be if the motion to continue the case were granted.

The evidence fully authorized the finding in favor of the defendant below, and the trial judge did not err, either in the allowance of the amendments, the admission of the evidence, the refusal to continue the case, or in refusing a new trial.

Judgment affirmed.

MORROW v. STATE. (No. 4,880).

(Court of Appeals of Georgia. Aug. 15, 1913.)

(Syllabus by the Court.)

1. RAPE (§ 53*)—ASSAULT—CONSENT—SUFFICIENCY OF EVIDENCE.

Assuming that the female in this case was mentally capable of giving an intelligent consent to the act of sexual intercourse, the offense proved was no greater than an attempt to commit fornication, without an element of assault with intent to rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 53.*]

2. RAPE (§§ 12, 43*)—CAPACITY TO CONSENT—EVIDENCE.

Under the law of this state, sexual intercourse with an infant under 10 years of age is rape, as under that age the female is conclusively presumed to be incapable of giving consent, and the man is conclusively presumed to have used force. Between the ages of 10 and 14 years the law raises a presumption that the female is incapable of giving intelligent assent or dissent to the sexual act, and casts upon the man the burden of overcoming this presumption. After the age of 14 years the legal presumption arises that the female is mentally capable of giving consent, and the burden is on the prosecution, when consent is shown, to overcome this presumption. After the age of 14 years the question of physical development is relevant only for the purpose of illustrating the question of mental capacity. The test after this age is mental capacity to understand the sexual act and to give intelligent assent to its commission.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 11, 62, 65; Dec. Dig. §§ 12, 43.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5919-5925; vol. 8, p. 7778.]

3. RAPE (§ 53*)—ASSAULT—CAPACITY TO CONSENT—SUFFICIENCY OF EVIDENCE.

On the trial of an indictment for rape, where the female was over 14 years of age, and the evidence showed that she was neither "a lunatic, idiot, imbecile, or affected by insanity," and that, although weak in mental development, she was nevertheless mentally capable of comprehending and consenting to the sexual act, and did consent to the act, only expressing dissent to its consummation when she saw that she and the accused were discovered in flagrante delicto; that she neither then nor subsequently made any complaint, but afterwards on the same day saw the accused, and agreed to meet him on the next day for the purpose of renewing the illicit relations that had been interrupted—the conviction of the accused of the crime of assault with intent to rape was unauthorized by the evidence, and therefore was contrary to law.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 53.*]

4. SEXUAL INTERCOURSE—INCAPACITY TO CONSENT.

There was ample evidence to authorize the jury to find that Lillie Jones was mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment, in the matter of the sexual intercourse proposed by the defendant. In my opinion the case is fully controlled by the ruling of the Supreme Court in *Gore v. State*, 119 Ga. 418, 423, 46 S. E. 671, 100 Am. St. Rep. 182, and the judgment refusing a new trial should be affirmed. (Per Russell, J., dissenting.)

Error from Superior Court, Haralson County; Price Edwards, Judge.

B. R. Morrow was convicted of assault

with intent to commit rape, and brings error. Reversed.

Morrow was indicted for rape, and was convicted of the offense of assault with intent to commit rape. He made a motion for a new trial upon the general grounds and upon numerous special assignments of error. The motion being overruled, the case is here for review.

The evidence, substantially stated, is as follows: The accused was 63 years of age. The female alleged to have been assaulted was in her fifteenth year. The girl gives the following account of the occurrence: "I saw Mr. B. R. Morrow, the defendant in this case, along about January 11, 1913, this year. He came down to the mill that week, and told me to be sure to come to town, and he would give me a present. I worked at the mill. He told me to come to town Saturday afternoon. The mill closes down on Saturday sometimes half past 10 and sometimes 11. I went to town that afternoon to get some candy and stuff, and he seen me. No one was with me when I went to town. I met up with Mr. Morrow after I got to town. He told me to come down Head avenue; he had a nice present for me down there. He kept on, and said it was just a little piece; said right down there, the last house. I went down Head avenue; Mr. Morrow went ahead; I don't know how far ahead; just a little piece; I don't know how many feet. When we got down there to the old bridge, he went on up in the woods, and I started to turn around, and he made me go on. He took me by the hand and made me go. I didn't do anything; I was scared of him. He didn't do anything, only hold me by the hand and made me go. He didn't do anything until we got down there; then he laid me down. He started to stick his finger up me. I don't know what I mean by 'up me,' right there [indicating]. Then he didn't do anything until them men come on [the three men who surprised the parties], and I commenced screaming and tried to get away from him. I was lying down. He made me lie down. When he made me lie down I didn't do anything. What I done to keep him from making me lie down, I commenced pushing him, and hollered and cried, and told him I wanted loose. Then he wouldn't let me. He told me just to stay behind; they wouldn't see me; they would go on. Then he didn't do anything, only hold me; I got away from him. He was lying down on the ground. He was on his face, his side. I was right against him, under him. I saw him do something with his clothes. He commenced unbuttoning his pants. Then he commenced pulling that thing out. He didn't do anything with it. I got away from him when them men come. He never stuck anything else in me. When I went down there I didn't know what he wanted to do. I thought he had a present down there. When

I got up I went up to Mr. Wheeler's uptown. I then went into the drug store and got some ice cream. I don't know what Mr. Morrow tried to do at the bridge."

On cross-examination she further stated: "I went up there with him expecting to get a present. I don't know whether I resisted or not. The first thing when I got up there he made me sit down. He pulled me down. I was standing up. He was sitting on the ground when he pulled me down. He was holding me before he pulled me down, was hold of me all the time. He had a hold on my hand. There was a house on the hill right above us. I just sat down there by him. Then the next thing I saw those men were coming. When I saw them coming he had started to do something; had started to do that other thing; had started to put his hand under my dress. I don't know how far away those men were when I first saw them. I said: 'There are those men; they are following me from town.' Then I commenced trying to get up. I didn't try to get up before that. I had already lay down; he was right in front of me; he was trying to hide me. Mr. Morrow told me they wouldn't see me. Then I got loose and went on. I went a little piece and cut across through the woods, and went in that other way; went in that road. I didn't go back the same way I came. I was not hurt in any way. My clothing was not torn in any way. My clothing was not unbuttoned, disarranged, or anything of that sort. I don't know whether Mr. Morrow and me was good friends or not. I lived in his house. After this took place down there this time, I went on back to town, and I saw him again, and had another talk with him there, in Hattie Wheeler's presence. I agreed to meet him again the next day. I was going to meet him over there about the bridge, near our house, the next day, down below. I had met him frequently. I didn't tell Hattie anything that had taken place. I went on home that evening. I never told my folks anything about it. The first time I told it was to mama Sunday. I never did tell it until Mr. Pope, the marshal, went down to our house. When he went down there they asked me to tell it before he told it."

Two men who saw the accused and the girl talking together in town testified substantially as follows: They saw the girl and the accused talking together in town, and thought they were fixing to do something, and decided to watch them and to follow them. The accused went on down Head avenue in front of the girl, the girl following on behind; and when they got to the place where they finally stopped, the girl was about 100 yards behind him. The witnesses were about 40 yards distant, and saw that the accused was lying on top of the girl in the attitude of having sexual intercourse. He was making no motion, and neither was

she. Neither one said anything. "The girl first discovered us, and she apparently told the accused of our presence. She made no outcry or anything of that kind, and we heard no cry from any one. On seeing us the girl got up and walked off as quick as she got up. Then the accused went on over the hill. Nothing was said by either one of them. The accused did not have hold of the girl at all on the way down there, but went on in front of her. He did not have hold of her when they turned into the woods. The girl made no outcry, nor did she struggle to get away. We were where we could get a good view. After the occurrence that afternoon we saw the accused and the girl go off to themselves, talking, but we did not hear what they said."

In addition to the evidence relating to the actual occurrence, the state claimed that the girl alleged to have been assaulted was mentally incapable of consenting to sexual intercourse; that this mental incapacity was known to the accused, and for these reasons the accused was guilty, although no actual force was used by him in the endeavor to accomplish his purpose, and no resistance was made by the female. On the subject of the mental capacity of the girl, the following evidence, in substance, was introduced: The girl's mother testified that she was in her fifteenth year; that she had been to school in Carroll county about five months; that she started to school when she was eight or nine years old; that she learned to read by the pictures in the book; that she was not bright, and acted around the house like a child eight or nine years old; that she had never had her menstrual periods; that she was forgetful, and did not attend to her work unless her mother got behind her and made her do it; that she would work well when called on to do so; that she could write her name; that she helped the children in Carrollton. The father testified that the girl was forgetful, had learned to read and write by heart, had difficulty in learning to tell the time of day. She was permitted to collect her wages from the mill. She had worked for several years in the cotton mill, and the mill boss testified that she "did not make the best hand in the world," was negligent with her work; that the work she did was spinning; that she ran four sides; that the ordinary hand can run four to six sides, some run two or three; that she was not bright, and was forgetful. There are 128 threads on a side. There is 1 thread to every spindle. She looked after four sides, and there were at least 100 spindles on a side; that she looked after 400 spindles, which would be 800 strands that she kept constantly on her mind; that she got 56 cents a day, and sometimes she ran five sides and got more; that her work was never rejected, nor was she turned off for failure to do the work. A doctor, who was introduced, testified that

he had made no examination of the girl to determine as to her physical development, but that he had talked to her and to her parents, and that his opinion was that she was not a normal child of that age, was not able to grasp ideas like other people on various subjects; that she could speak vowels better than consonants; that on some things she was right bright, and of others she knew nothing at all; he could not state whether any sexual passion had been developed in her; sometimes girls while not developed mentally had developed strong sexual passions. This is, in substance, all the evidence in the case.

The accused in his statement to the jury, denied his guilt, saying that he had never in his life had sexual intercourse without the consent of the other party; that when he and the girl left the town Saturday afternoon it was in pursuance of a mutual understanding, for a purpose which she understood as well as he did; that he never pulled her down or used any force whatever, and never consummated the act of sexual intercourse with her that evening; that he had lived in the house with the girl and her parents for a while, and thought that she had as good sense as any girl that he ever saw.

W. L. Watterson, of Jonesboro, R. R. Arnold, of Atlanta, and Griffith & Matthews, of Buchanan, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, and U. G. Brock and M. J. Head, both of Tallapoosa, for the State.

HILL, C. J. (after stating the facts as above.) [1] 1. We will first consider the case on the assumption that the girl alleged to have been assaulted was of sound memory and discretion in a legal sense, mentally capable of understanding and consenting to the sexual act, for the purpose of determining if the facts show the commission of the crime for which the accused was convicted. Rape is defined by the Penal Code, § 93, as "the carnal knowledge of a female forcibly and against her will." This definition is taken from the common law, and is substantially the same in every country where the act is made a crime; and both the criminal act itself and the attempt to commit the criminal act have been visited from the earliest times with the heaviest penalties. To constitute this crime two things must concur: The man must use force to accomplish his purpose, and the act must be without the consent and against the will of the female. Though the man may use force, if eventually the woman consent there is no rape; and, if the woman does not actually consent, yet if the evidence discloses that the act is not against her will, there is no rape. In what is here said we are confining the discussion to the question of force which is used to overcome the woman, leaving out of consideration the question of fraud or any other un-

lawful means, such as threats, putting in fear, or intimidation of any character, confining ourselves to this phase of the question, we hold that the act, to constitute rape, must have been done by force and against the will or resistance of the female. Her resistance must not be a mere pretext, the result of womanly reluctance to consent to the intercourse, but the resistance must be up to the point where it is overpowered by actual force; and any fact tending to the inference that there was not the utmost reluctance and the utmost resistance should be always received by the jury as illustrating the question of force. If a female be apprehensive of the purpose of a man to have carnal knowledge of her person, and, remaining conscious, does not use all her own powers of resistance and defense, and all her powers of calling others to her aid, and does yield before being overcome by greater force, or by fear, or being surrounded by hostile numbers, a jury may infer that, at some time in the course of the act, it was not against her will. The phrase "the utmost resistance" is a relative one; the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than in another. In one case a woman may be surprised at the onset, and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed about that she cannot struggle. But whatever the circumstances may be, there must be the greatest effort of which she is capable to foil the pursuer and preserve the sanctity of her person. This is the extent of her ability. *Smith v. State*, 77 Ga. 705; *Vanderford v. State*, 126 Ga. 753, 759, 55 S. E. 1025.

Bearing these general principles in mind, let us apply them to the undisputed facts, for the purpose of determining if the crime of rape was contemplated or attempted by the accused. The man goes to where the girl is at work, and invites her to come to town the following Saturday, so he can give her a present. She accepts the invitation, and on the next Saturday we find her in town, talking to the man, under such circumstances as led three bystanders to observe their conduct and suspect their purpose. This fact alone is significant of a mutual unlawful design. The man does not then give her the present, but tells her he will give it to her in a certain place out of the town, and asks her to go with him there. They do not go off together. If their purpose had been proper, if she had really thought she was going with the man for the purpose of getting a present which he desired to give her, they would have gone away together. Instead of this they separate; he goes and she follows some distance behind. This separation is strongly indicative of conscious guilt. When they reached the woods near to the point of destination, the

man took her by the hand and made her go. She does not state that she refused to go, or evinced any reluctance in going, or made any resistance to his efforts to make her go, nor does she suggest that he used any force when taking her by the hand in compelling her to go with him. On the contrary, she declares that she "did not do anything," but that she was "scared of him." He did nothing to arouse her fears or to enforce her obedience. There were three men following her, and a house stood close by, yet she made no resistance and uttered no cry for help. She further states that when they got down by the "old bridge" "he laid me down," and then took a most indecent liberty with her person. Certainly she was then apprised of the fact that his purpose was not to make her a present, but that his intention was to commit some offense against her person. Nevertheless, she made no outcry or resistance to this indecent act of physical contact with her person. Her language shows that she fully understood what the act meant, yet her maidenly modesty made no protest, and she silently and unresistingly permitted other suggestive advances towards the consummation of a mutual intent. While she was lying down, according to her statement, he unbuttoned his pants and commenced pulling out his private, and lay down upon her person, but before the act was consummated she discovered the near presence of the three men. She says (and it is very significant) that just at this particular stage of the proceedings, observing the presence of the three men, she called the attention of the accused to them, declaring that they had followed her "from town."

Was not the fact that she suspected that these men were following her most significant of conscious guilt? When she saw them watching, then, and not until then, according to her testimony, did she cry out and endeavor to get away. But she did not cry out when she got loose, but ran away from those who would have responded to a call for assistance. She makes it very clear that the presence of the three men interrupted further proceedings between her and the accused, and testifies that the accused endeavored to shield her from discovery, and attempted to quiet her fears of discovery, telling her that they had not been seen. Is it not perfectly clear that her perturbation of mind was caused by the presence of the three men, and not by any conduct on the part of the accused? Can there be any rational doubt that it was the presence of the three men that prevented the consummation of the act of sexual intercourse, and not any resistance on the part of the girl? If she had doubted the purpose of the accused up to the time when they reached the place down by the "old bridge," she then became perfectly aware of it. If she had been a virtuous girl, her virtue would then have taken alarm.

She would have resisted to the extent of her physical power; she would have made an outcry; she would have called upon the three men who were watching for assistance; she would have gone to them for assistance, and not have gone rapidly away in an opposite direction, so as to avoid recognition. She then goes back to the town, joins a girl friend, makes no statement to the girl friend of the conduct of the accused, and in a short time thereafter she is seen again talking with the accused, and promises to meet him again, "over there about the bridge." Would she have made the promise, would she have acted in this way, if she had been a virtuous woman, outraged by the conduct of this man? Can there be any other rational interpretation placed upon her conduct in the light of all these facts but than this case was not one of assault with intent to rape, but a mutual attempt at fornication, the woman understanding and consenting to the act, and its mutually desired consummation only being prevented by the untimely appearance of the three spying persons. Is it not an absurdity to say, under these facts, that this girl was decoyed to this lonely place by the promise of a present, and there assaulted by the accused, with felonious intent?

We are not unmindful of the fact that she testified that she did make an outcry and did endeavor to get away from the accused, but these statements, as we have endeavored to show, are so at variance with all the facts of the case that they cannot be accepted as the truth of the transaction, but must be rejected as a mere pretense and excuse by the girl when she had become aware of the fact that her conduct with the accused had become known. She did not even make complaint to her mother or father when she went home. Her complaint followed the knowledge that the conduct of the accused and herself had been discovered. But why should she have made complaint when she had agreed to give her aged assailant another opportunity of assaulting her? Further, her statement that she made an outcry, and endeavored to get away from her lustful assailant, cannot be believed for another reason. The three men stood within 40 yards of the couple. Two of them, testifying for the state, said that the woman made no effort of resistance; that she made no outcry whatever. If she had made any outcry, and had made the resistance that she said she did, is it conceivable that these three men would have stood there silently by and made no effort to rescue her from the clutches of her assailant? Would they not have rushed to her assistance if they had seen the slightest evidence of any felonious assault upon her person? They regarded the act, as all the facts demonstrate, as being simply the act of a man and a girl indulging in unlawful sexual intercourse, or attempting to do so.

It may be said that this question was for

the jury. Indeed, it was so said by learned counsel for the state, and so it was; but this court cannot assume, under the facts of this case, that the jury, believing the girl to be of sound mind and fully capable of giving consent, made such resistance as indicated that the act intended or attempted by the accused was against her will. The jury must have based their verdict in this case upon the theory that the girl was non compos mentis, and that the accused knew of this fact and took advantage of it, and that it was only necessary to prove that he attempted to have carnal knowledge of her person; that she did not resist because she did not understand the nature and character of the act attempted, and that if she gave any consent it was due to her mental incapacity to understand the act, and that the attempt to have intercourse with a woman of her mental incapacity, even though no resistance was offered, was equivalent to the use of force.

[2, 3] 2, 3. It is well settled that the act of sexual intercourse with a woman who is so destitute of mind as to be incapable of giving consent is rape, though she does not resist. A learned writer on this subject lays down the following as a test of mental capacity in such cases: "The test of mental capacity under this rule is whether she was capable or incapable of giving consent, or of exercising any judgment in the matter." Clevenger on Medical Jurisprudence of Insanity, vol. 1, 202, and citations. The learned author, in a further discussion, uses the following language: "And very slight proof of force is necessary where the woman lacks the intelligence to comprehend the nature and consequences of the act, and to distinguish morally and legally between right and wrong; and, when the man does not suppose that he has her consent, the force required and which is involved in the carnal act is sufficient. But where the will is active, though perverted, the act is not rape, when all idea of force or unwillingness is distinctly disproved. And the mere fact that a woman is weak-minded does not disable or debar her from giving consent to the act, and intercourse with her when she was capable of exercising her will sufficiently to control her personal actions is not rape; and, if there is reasonable doubt whether force was used, the jury should acquit, though the woman was of weak mind. * * * The burden of proof of insanity at the time of the act, and that the carnal knowledge was obtained by force and without consent, rests with the prosecution. There must be some evidence that she was incapable from imbecility of expressing assent or dissent, and when consent is given from mere animal passion or instinct, it is not rape, and a conviction cannot be sustained, in the absence of evidence as to her general character for chastity and decency, or anything else, to raise a presumption that she did not consent.

Evidence of the connection and the imbecility alone is insufficient." The Supreme Court, in the case of *Gore v. State*, 119 Ga. 418, 46 S. E. 671, 100 Am. St. Rep. 182, quotes with approval this authority and declares that the test of mental capacity is as follows: "A man who has sexual intercourse with an imbecile female, who is mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, is guilty of rape, though no more force be used than is necessary to accomplish the carnal act, and though the woman offer no resistance." It has been decided by courts both in this country and in England that in females of diseased mentality, not reaching complete idlcy, if consent is given and no force employed, the crime is not rape, but where a state of idlcy from dementia or imbecility places the woman at the mercy of the ravisher, carnal intercourse is regarded as rape. See cases cited in Witthaus & Becker's Medical Jurisprudence, Forensic Medicine and Toxicology, vol. 2, p. 696. The jury should take into consideration the mental condition of the woman—whether this mental condition amounts to complete idlcy, or imbecility, or was short of this complete condition—in determining the question of the guilt of the accused.

Applying the test here laid down by the Supreme Court to the evidence relating to the mental capacity of the woman in this case, does it show that she was mentally incapable of giving consent to the act of sexual intercourse? Before making the concrete application of this test to the facts of the case, we will briefly discuss the age of consent under the laws of this state. The Penal Code (1910) § 34, provides that an infant under 10 years of age cannot be found guilty of any crime; and as the act of sexual intercourse implies the commission of a criminal act, an infant under 10 years of age could not be guilty of this offense. In passing, the writer takes occasion to say that in his opinion this age of consent is so low as to be an impeachment of the humanity and civilization of this state. It is a remarkable fact that while in the southern states a crime against the sanctity of the female person is more severely punished than in any other section of this Union, yet the age of consent in most of the Southern states is much lower than in the other states of the country, except in the state of Delaware, where the astounding and shocking age of consent is seven years, although in that state the age at which a female can be seduced is that of 16 years. In Georgia, between the ages of 10 and 14 years there is a legal presumption of incapacity to commit a crime, and the burden is upon the state, between these ages, to overcome by clear proof this presumption. Penal Code (1910) § 33. Under the statutes of this state an infant under 10 years cannot consent to sexual intercourse, and the fact that such is her age is conclusive that the act is done

forcibly and against her will. *Stephen v. State*, 11 Ga. 225; *Gosha v. State*, 56 Ga. 36. Where the infant is between the ages of 10 and 14 the legal presumption is that she cannot consent to sexual intercourse, and between these ages, in determining her capability to consent to carnal knowledge of her person, the jury may consider her physical and mental development. *Jones v. State*, 106 Ga. 365, 34 S. E. 174. After a female arrives at the age of 14, so far as the law is concerned on the question of mental capacity, she is a normal woman, in full possession of her mental and physical powers. In other words, after that time the question of age cuts no figure whatever in determining the question of consent, for even after that age, if the woman is mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, sexual intercourse with her is rape, although it may be accomplished without the use of any force except that which is necessary to accomplish the carnal act, and although the woman may interpose no resistance. If a woman consents to sexual intercourse after she reaches the age of 14 years, and the man is charged with the offense of rape, the burden is upon the state, in the absence of any fraud or other unlawful means to procure the consent of the female to the act, to prove the woman's mental incapacity. Legally she is presumed to be capable of giving consent after she reaches that age. It is not then a question of physical incapacity or lack of sexual desire on the part of the woman, but the sole question is one of mental incapacity, and this mental incapacity must reach the point where the woman is incapable of expressing any intelligent assent or dissent to the sexual intercourse.

Let us now briefly make an application of the evidence to the rule of law above indicated, and see if, under the test there laid down, the girl in this case was mentally incapable of expressing intelligent assent or dissent to the act of sexual intercourse. In the first part of this opinion, assuming that she was mentally capable, we have endeavored to show that the only rational conclusion is that she did consent to the act of sexual intercourse, which was only prevented by the proximity of the three men and her discovery of their presence. If we take her own testimony as the truth of the transaction, while it falls far short of showing such resistance to the act of sexual intercourse as would make a case of rape, or of attempt to rape, yet it does show that she fully realized the character of the act contemplated. Was it an intelligent assent? In other words, was she conscious mentally of the character of the act contemplated? Did she realize that it was wrong? The *res gestæ* throw a flood of light on this question, and in this light no doubt can be entertained that she was fully conscious of what the accused intended to do, and as fully conscious of the character of

the act. In the language of the Supreme Court in the case of *Gore v. State*, supra, the sole question to be determined is whether the facts of the present case bring it within the rule which declares the act to be rape "where the woman is so idiotic as to be incapable of expressing any judgment in the matter," or whether the girl belongs to "that class of unfortunate females who, while weak-minded, yet possess sufficient mental capacity to comprehend the nature and consequences of the act, and are able to bring to bear that judgment which a man with that knowledge would exercise." As before stated, the mere fact that a woman is weak-minded does not disable or debar her from giving consent to the sexual act. There must be some evidence that she was incapable, from imbecility, of expressing intelligent assent or dissent.

In our opinion the evidence on this subject, construing it most strongly in support of the verdict, falls far short of proving the girl in this case was an idiot, or an imbecile, or was afflicted with insanity. Indeed it is not insisted that she is idiotic, or that she is an imbecile, or that she is insane. The utmost extent to which the evidence goes is that she was not a girl of strong mind, or of normal intelligence. The evidence shows that she unfortunately had had little opportunity of developing her mind. She belonged to that unfortunate class of children whose parents, either from a lack of means, or from cupidity, or from incapability of appreciating its importance, refuse to give their offspring the opportunity of developing the intellect. The evidence of her parents is that her educational opportunities had been exceedingly limited; that she had been to school only a short time. Nevertheless, she was able to read, to memorize what she had read, and to write her name. Her mother states that she acted like a child of eight or nine years of age, and that her menstrual period had never come. We attach little importance to the evidence that she had not physically developed. We do not think that the fact of physical development after 14 years of age is to be considered, except as it may illustrate mental development. The opinion that she acted like a child of eight or nine years of age has no probative value. The work she did furnishes the most practical and satisfactory proof of capacity. The evidence shows that this girl had been working for three years in a cotton factory; that she had been earning 56 cents a day, sometimes more. The child was supporting her father's family by her labor. the boss of the mill testified that while not a bright hand, yet she did her work in a satisfactory manner. This witness further stated that her work at the cotton mill was spinning; that she ran four sides; that the ordinary hand ran from four to six sides; some only ran two or three; that he had not observed her ways and conduct at the mill,

to amount to anything; that at first it seemed she was not bright, and was forgetful. It is true that this witness said also that she was not attentive and neglected her work, and that she seemed to be not "real bright" that she neglected her work, but the work which she did in the mill speaks most strongly of her mental capacity, and has far more value than mere opinion. As before stated, the evidence shows that she ran four sides, 128 threads on a side, 1 thread to every spindle. Two ropes come down through the spools, called bobbins, and they are spun together; two strands of rope are put together and spun into one thread and put on the bobbin underneath. She looked after four sides, with at least 100 spindles on a side, 400 spindles, which would be 800 strands of this roping to be kept in mind. This work kept her constantly engaged. She could not have done the work satisfactorily unless she had the power of close attention, and close attention is one of the best tests of mental capacity. This witness further testified that she not only did this work for which she was paid 56 cents a day, but that some times she ran five sides, and that her work was never rejected, nor was she turned off for failure to do the work; that the majority of hands run from four to seven sides.

Testing this girl's mental capacity by her work, we find that she did the work with the same skill and ability as was done by a majority of those similarly engaged. Summing up the evidence as to this point, the utmost that can be said as to the mental incapacity of the girl is that she was weak-minded or dull, but it cannot be said that she was insane or non compos mentis. No material instance is given in the evidence of any exhibition of mental deficiency, but the testimony shows that she performed the difficult tasks assigned to her at the mill—tasks that required both responsibility and mentality—in the same manner as others performed them, and that she was paid for her work substantial wages. Her mental development was prevented by the poverty of her parents and by the lowliness of her condition. She was placed at manual labor when she should have been given an opportunity for mental development. Under the facts in this case this girl is very far from the standard laid down by our Supreme Court in the case of *Gore v. State*, supra, as being "so idiotic as to be incapable of expressing an intelligent assent or dissent, or exercising any judgment in the matter." Without discussing this phase of the case further, we conclude that while the accused was guilty of a most shameful act, he was not guilty of the crime of assault with intent to commit rape. We are satisfied that the shameful character of the act, considering the great disparity between the accused and the girl in age and experience aroused in the minds of the jurors a natural and altogether laudable sense of indignation, which prevented a

calm consideration of the evidence in the light of the well-settled principles of law announced in this opinion.

There are numerous assignments of error as to excerpts from the charge of the court. While the instructions as to mental capacity of the girl were not fully authorized by the evidence, in that they presented to the jury the issue of the girl's imbecility, idiocy, or insanity, without any evidence to authorize such presentation, yet the charge as a whole is a very able presentation of the issues in the case; but, in the view that we entertain of the evidence, as fully discussed in the opinion, we have concluded that the verdict is contrary to law, because wholly unauthorized by the evidence; and, therefore, whether there were any errors in the charge need not be decided.

Judgment reversed.

RUSSELL, J. (dissenting). [4] Times without number this court has held that it is without jurisdiction to set aside a verdict approved by the trial judge, if there was some evidence in support of the verdict, and if no material error of law was committed. Adhering to this well-settled rule, I cannot consent to reverse the judgment of the trial judge in refusing a new trial upon the record now before us. In my opinion there was ample evidence to authorize the jury to find that the injured female was an imbecile, incapable of exercising any will in regard to the attempted intercourse. If she was mentally incapable of consent to sexual intercourse, such intercourse with her would have been rape, and an attempt to have intercourse would be assault with intent to rape. According to the evidence which the jury had before it, this girl, a little more than 14 years of age, had never tried to count 50; her father had tried to teach her to tell the time of the day upon a clock, but she had never been able to acquire even this simple attainment. A physician, testifying as an expert, said she was no more developed than a child of eight years of age. The father and mother of the child both testified to circumstances which, in my opinion, fully authorized the jury to conclude that she was an imbecile. Who better than they (if they are credible witnesses) could state the facts? It is true, in stating the conclusion they reached from the circumstances which they detailed, they used no stronger expression than "weak-minded," but the use of this expression is illustrated both by the usual significance of that word in common parlance, as well as by that feeling of commiseration inspired by parental tenderness and a natural disinclination to disclose the affliction of their offspring. I think the jury were fully authorized to find that this child, who had been sent to school three separate times, covering in all a period of more than 18 months, and yet had not been able to learn all of her

letters; this child who could not tell the time upon a clock, although her brothers, much younger than herself, could do so; this child who read her books upside down, and whom her parents (dissuaded by affection from using a harsher term) described as "weak-minded"—was, in fact and in law, an imbecile. Above all this, the jury saw the girl as a witness; they heard her answers to the questions upon direct and cross examination. The jury had the opportunity of looking into the face, the eyes, and the very soul of the person whose imbecility is at issue in this case, while we can only view it in the cold lines of the transcript of the record.

The defendant had boarded in the house of this child's father. No man knew better than he her weakness. He inveigled her into the disgraceful position in which she was seen by the three young men (if it be assumed that she assented, or attempted to assent, to illicit intercourse) by the promise of giving her a nice present. This is one version of the case. But what rule of law is there under which it can be held that the jury did not have the right to believe the testimony of the girl upon this point, and find that she was induced by the promise of a present to go into the woods with the defendant, but that when the crucial moment arrived when the chastity of her person was to be violated, she resisted to the extent of her limited ability. There is a period of at least five minutes which is covered only by the testimony of the alleged injured female and the statement of the defendant. Why should not the jury have believed her version of what happened during this five minutes in preference to the defendant—a man of years and experience, whose own admission places him in the disgraceful position of trifling with a child, at best weak and unfortunate, and a member of a family in whose home he had been domiciled. However, without regard to conflicting testimony as to the details of the offense charged in the indictment, I rest my dissent upon the proposition that the testimony shows that the girl alleged to have been assaulted is in law incapable of consenting to sexual intercourse. It is uncontradicted (unless her appearance before the jury contradicted it) that this girl is no better developed, mentally or physically, than a child of eight years. It is well said in the opinion of the majority that the age of consent in this state is so low as to be an impeachment of our civilization. Unquestionably the age of consent in this state should be raised. But what practical protection would be afforded by raising the age of consent if the law did not, in its humanity, protect those who, regardless of their age, are, through imbecility, unable to consent? This protection—a defense against their own weakness—our law has ever undertaken to give to that unfortunate class who are of themselves incapable of exercising a rational choice. Even mature women of as little mentality as this girl are pro-

tected by law, not only against the animal lusts of members of the opposite sex, but against themselves as well; and men who, knowing of their imbecility, take advantage of their helpless condition to gratify their lustful propensities are guilty of rape, even if no more force is used than is required to perform the carnal act, and no resistance be offered by the female. To quote the language of the illustrious Chief Justice Campbell, in *Regina v. Fletcher*, 8 Cox C. C. 248 (L. R. L. C. C. 39): "It would be monstrous to say that these poor females are to be subjected to such violence without the parties inflicting it being liable to be indicted. If so, every drunken woman, returning from market, and happening to fall down on the roadside, may be ravished at the will of the passers-by."

One of the most important elements entering into the determination of the girl's imbecility naturally must have been her appearance and demeanor upon the stand. The judge and the jury saw her upon the stand, and we cannot put ourselves in the place of the judge and the jury. It is well settled that one may be convicted of rape of a mature woman who fails to resist because of imbecility. The female here involved was but little more than 14 years of age, and there was evidence that she was weak in mind. As was said by the Supreme Court in *Gore v. State*, 119 Ga. 423, 46 S. E. 673, 100 Am. St. Rep. 182, "The jury are constituted by law the judges of all these matters. They have by their verdict solemnly affirmed that the girl's intellect was so weak that she was incapable of consenting to the act of sexual intercourse, and we do not feel disposed to usurp their functions, and at this distance, upon a printed record, without ever having seen the girl, declare that we are better judges of the girl's mental condition than the members of the jury were. The trial judge also saw the girl and heard her testimony, and he is satisfied with the verdict."

I am fixed in the opinion that there was ample evidence to authorize the jury to find that Lillie Jones was mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter of the sexual intercourse proposed by the defendant, that the case is fully controlled by the ruling of the Supreme Court in *Gore v. State*, *supra*, and that the judgment refusing a new trial should be affirmed.

SNELL v. STATE. (No. 4,980.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 84*)—ACCESSORY BEFORE THE FACT.

In the indictment of an accessory before the fact it is not necessary to state the manner of committing the offense. It is sufficient to charge generally that he feloniously, willfully, and un-

lawfully did procure, counsel, and command the principal to commit it. The indictment in the present case was good as against both the general and special grounds of the demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 227, 228; Dec. Dig. § 84.*]

2. HOMICIDE (§ 100*)—ACCESSORY BEFORE THE FACT.

The verdict is without evidence to support it, and therefore is contrary to law.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 130; Dec. Dig. § 100.*]

(Additional Syllabus by Editorial Staff.)

3. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE—ATTEMPT TO PRODUCE ABORTION.

Under the express provisions of Pen. Code 1910, § 954, an indictment charging an assault with intent to murder, under section 81, making it such offense to cause death by an attempted abortion, is sufficient as against a general demurrer when the allegations are clear and distinct and in the language of the statute, though it does not allege the character of the instruments, and how and upon what part of the person of the female they were used.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

4. INDICTMENT AND INFORMATION (§ 84*)—ACCESSORY BEFORE THE FACT.

An indictment stating that accused "did then and there unlawfully, feloniously and willfully procure, counsel, and command" the principal to commit an assault with intent to murder, in violation of Pen. Code 1910, § 81, was sufficient to charge defendant as an accessory before the fact, though it did not specifically state the evidentiary facts as to how he procured, counseled, or commanded the principal to commit the crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 227, 228; Dec. Dig. § 84.*]

5. HOMICIDE (§ 142*)—VARIANCE—PRINCIPAL AND ACCESSORY.

A person indicted as an accessory before the fact to an assault with intent to murder, in violation of Pen. Code 1910, § 81, cannot be convicted, upon evidence which shows him to be a principal, either in the first or the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. § 142.*]

Hill, C. J., dissenting.

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Wm. Snell, alias Bill Jenkins, was convicted as an accessory before the fact to an assault with intent to murder, and brings error. Reversed.

The plaintiff in error was indicted and convicted as an accessory before the fact to an assault with intent to murder, under section 81 of the Penal Code, which reads as follows: "Any person who shall administer to any woman, pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be

necessary for such purpose, shall, in case the death of child or mother be thereby produced, be guilty of an assault with intent to murder." The indictment (omitting mere formal parts) is in the following language: "Charge and accuse W. F. Whitehead, of the county and state aforesaid, with the offense of assault with intent to murder, and Claud B. Gullatt, Tom Pace, and William Snell, alias 'Bill Jenkins,' with the offense of accessory before the fact to said assault with intent to murder; for that the said W. F. Whitehead, on the 20th day of July in the year 1912, in the county aforesaid, did then and there, unlawfully and with force and arms, use and employ a certain instrument and instruments to the grand jurors unknown, and by pressing upon the person of Ruby Osborn, she being then and there a woman pregnant with a child, said child being so far developed in its mother's womb as to be ordinarily called 'quick,' and said instrument and instruments and said pressure being then and there used and applied with intent thereby to destroy such child, and by the use of such instrument and instruments and by such pressure the death of such child was thereby produced, the use of said instrument and instruments and said pressure not being then and there necessary to preserve the life of said mother, nor having been then and there advised by two physicians to be necessary for such purpose; and for that the said Claud B. Gullatt, Tom Pace, and William Snell, alias 'Bill Jenkins,' being absent at the time of the commission of the crime aforesaid, by the said W. F. Whitehead, did yet then and there unlawfully, feloniously, and willfully procure, counsel, and command the said W. F. Whitehead to commit the crime of assault with intent to murder aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do say that the said W. F. Whitehead, in manner and form aforesaid, unlawfully and with force and arms did commit the crime of assault with intent to murder, and that the said Claud B. Gullatt, Tom Pace, and William Snell, alias 'Bill Jenkins,' being absent at the time of the commission of said crime of assault with intent to murder, did then and there unlawfully, feloniously, and willfully procure, counsel, and command the said W. F. Whitehead to commit the said crime in manner and form aforesaid, contrary to the laws of said state," etc. On this indictment the principal defendant, W. F. Whitehead, was tried and convicted; and when the plaintiff in error, William Snell, alias "Bill Jenkins," was arraigned he entered a demurrer to the indictment on the following grounds: "(1) Because said indictment sets forth no crime and charges no offense under the laws of said state against this defendant. (2) Because the charges and allegations constitute no crime under the laws of said state. (3) Because the charges and allegations in said indictment are too

vague and indefinite, and fail to put defendant on notice as to what specific conduct he has been guilty of, constituting said offense of accessory before the fact in said charge, and fails to put him on notice as to how and in what manner he has conspired and co-operated with the principal and with the other accessories named in said indictment in the commission of said crime. (4) Because the charges and allegations in said indictment fail to put this defendant on sufficient notice to enable him to prepare his defense, in that they are too vague and indefinite and fail to state where, when, and how this defendant 'procured' said W. F. Whitehead to commit this crime; whether by hiring with money or other things of value, by inducement, persuasion, or otherwise. (5) Because the charges and allegations in said indictment fail to put this defendant on notice sufficient to enable him to prepare his defense, in that they are too vague and indefinite and fail to state where, when, and how this defendant did 'counsel' said Whitehead to commit said crime, and what means were used to counsel said Whitehead in the commission of said crime. (6) Because the charge that this defendant did 'command' the said Whitehead to commit said crime fails to set forth where and how this defendant commanded the commission of said offense. (7) Defendant specially demurs to the following language in said indictment, to wit: 'Did then and there, unlawfully and with force and arms, use and employ a certain instrument and instruments to the grand jurors unknown, and by pressing upon the person of Ruby Osborn, she being then and there a woman pregnant with a child, said child being so far developed in its mother's womb as to be ordinarily called "quick," and said instrument and instruments and said pressure being then and there used and applied with intent thereby to destroy said child, and by the use of said instrument and instruments and by such pressure the death of said child was thereby produced;' because said language and charges do not set forth with sufficient particularity and definiteness to put this defendant on notice as to what kind or character of instrument and instruments were used, and does not set forth how said instruments were used, and does not set forth where said instrument and instruments were used, and does not set forth on what part of the person they were used by the said W. F. Whitehead; because said language and charges fail to set forth with sufficient particularity and definiteness as to what kind of pressure was used, nor how said pressure was used, nor upon what part of the person of Ruby Osborn said pressure was applied, nor with what means or instrument said pressure was applied and used." The trial judge overruled the demurrer, and exceptions pendente lite were duly filed. The accused was thereafter convicted, his motion for a new trial was

overruled, and he brings error. The view entertained by the majority of the court as to the evidence makes unnecessary a consideration of the special grounds of the motion for a new trial.

A. W. Cozart, of Columbus, for plaintiff in error. Geo. C. Palmer, Sol. Gen., of Columbus, for the State.

HILL, C. J. (after stating the facts as above). [3] The indictment was in the language of the statute, and it is declared in Penal Code 1910, § 954, that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury." While this section was intended to simplify criminal pleading, and in fact greatly does so, yet it was not intended by this section that it should not be necessary to set forth the offense and the time and place of committing the same, with sufficient certainty and description to put the accused on notice of the crime with which he is charged and to enable him to make his defense. *Burkes v. State*, 7 Ga. App. 39, 65 S. E. 1091; *Johnson v. State*, 90 Ga. 441, 444, 16 S. E. 92. In other words the section in question was not intended to dispense with the substance of good pleading, but was intended simply to do away with mere technicalities, allegations, and useless repetition. We think, therefore, that the indictment was certainly good as against a general demurrer. The allegations are full, clear, and distinct as to the principal perpetrator of the crime. The objection that it is too indefinite and vague, in that it fails "to set forth with sufficient particularity and definiteness to put the defendant on notice as to what kind or character of instrument or instruments were used, and does not set forth how said instruments were used, and does not set forth on what parts of the person they were used" by the principal perpetrator of the crime, is without merit. Even as to the principal perpetrator it was entirely sufficient to allege that in the act he used some instrument or instruments which were to the jurors unknown. Even if the instrument or instruments were known, it was not necessary to describe them or set them forth with particularity, or to allege anything further in regard to them than that the crime was committed by the use of an instrument or instruments by the principal offender. It was wholly immaterial to allege upon what part of the person of the female the instruments were pressed. If the pressure of the instruments upon any part of the person produced a criminal abortion, that would be sufficient, and it is not too much to expect of the intelligence of an ordinary jury that

they would fully understand that the use of the instruments and the pressure of the instruments was made upon that part of the body of the female upon which such use and pressure would accomplish the crime perpetrated. It was certainly not essential to tell in the indictment how the principal accused used the instruments; any use of the instruments upon the person of the female which produced the criminal result would support this allegation of the indictment. The means or manner of effecting the criminal intent or the circumstances evincive of the design with which the act, illegal in itself, was done are generally considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in the indictment. *Travis v. State*, 83 Ga. 372, 9 S. E. 1063; *Joyce on Indictments*, § 293. And it is an elementary principle of pleading that it is never necessary to allege in an indictment mere matter of evidence, unless it alters the offense. *Clark's Crim. Proc.* 166; *Joyce on Indictments*, § 295; *Minter v. State*, 104 Ga. 743, 748, 30 S. E. 989; *Brown v. State*, 116 Ga. 559, 562, 42 S. E. 795.

In the case of *Hall v. State*, 133 Ga. 177, 178, 65 S. E. 400, 401, the indictment alleged that the defendant committed the offense (assault with intent to murder) "by stabbing the said Henry Howell with a certain knife and with other sharp instruments to the grand jury unknown." The defendant demurred to the allegation that the stabbing was done "with other sharp instruments to the grand jury unknown," because it was too general to put the accused upon proper notice as to what instrument was alleged to have been used by him; also, because it was too indefinite in that the weapon alleged to have been used was not particularly set forth. It was held that there was no merit in the demurrer. See, also, *Hicks v. State*, 105 Ga. 627, 31 S. E. 579. In *Malone v. State*, 77 Ga. 767, Chief Justice Jackson, speaking for the court in passing upon the sufficiency of the indictment in that case, said: "The indictment is good. It is charged that with the knife, a weapon likely to produce death, the stabbing was done with intent to kill and murder." In other words, that the language was sufficiently specific to show that the knife was used to stab the decedent. It was immaterial in what part of his person the wound was inflicted. The allegations in the indictment in the present case are almost identical with those in the case of *Commonwealth v. Snow*, 116 Mass. 47, where the defendant was convicted of producing a criminal abortion. The following part of the indictment was held to be good: "A certain instrument, the name of which is to the jurors unknown." "In an indictment for assault with intent to murder, at common law, or under a statute which

does not specify the instrument, it has been held unnecessary to state the instrument or the means made use of by the assailant to effectuate the murderous intent." 1 Wharton, *Crim. Law* (10th Ed.) § 644; Wharton, *Crim. Pl. & Pr.* § 159; State v. Williams, 52 N. C. 446, 78 Am. Dec. 248. Mr. Bishop, in his *New Criminal Procedure*, says: "But in the absence of anything in the statute, the manner of the assault or of the beating, or the kind of weapon, need not be stated." 3 Greenleaf, *Ev.* (16th Ed.) § 49; 3 Bishop, *New Crim. Proc.* (2d Ed.) § 77 (3). "In a prosecution for administering a drug or medicine to a pregnant woman for the purpose of producing an abortion, it is not necessary to allege what drug or medicine was administered. An averment that it was a drug * * * calculated to produce an abortion is sufficient." Watson v. State, 9 Tex. App. 237. The indictment "need not describe instrument used or manner of use, provided it alleges the kind or character of the instrument, or that the manner of use is unknown." State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317. The allegation of the indictment in the present case is entirely sufficient under the statute, for the statute says that "any person who shall administer to any woman, pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child," with criminal intent, is guilty of assault with intent to murder. It is wholly unnecessary to describe in the indictment the manner in which the instruments were used. "It will be presumed that they were used upon her body." People v. Wah Hing, 15 Cal. App. 195, 114 Pac. 416; 2 Wharton, *Crim. Law* (11th Ed.) § 786. We therefore conclude that it is abundantly established by authority that the indictment in the present case is not subject to the objection urged against it, either as to the character of the instruments that were used, how they were used, or upon what part of the person of the woman they were used.

[1, 4] Now, as to the accessory before the fact. It is distinctly alleged in the language of the statute that, being absent at the time of the commission of the crime of assault with intent to murder, the accused "did then and there unlawfully, feloniously, and willfully procure, counsel, and command" the principal perpetrator to commit the crime as set out in the indictment. The objection to this language is that it does not specifically state where, when, and how the accessory before the fact named procured, counseled, or commanded the principal to commit the crime. These words must be taken in their popular sense; and their use sufficiently informs the accessory before the fact of the crime charged against him, to wit, that he did either counsel, command, or procure the commission of the crime by the principal ac-

cused. How it was done was a matter to be shown by the evidence. The demurrer on this point, we think, is fully controlled by the decision of the Supreme Court in the case of Rawlins v. State, 124 Ga. 31, 41, 52 S. E. 1, 5, as follows: "The indictment charges that the four alleged principals committed the offense of murder upon named persons, and then proceeds to charge that J. G. Rawlins and Frank Turner, being absent at the time of the commission of the crime, did 'unlawfully, feloniously, willfully, and of their malice aforethought procure, counsel, and command' the alleged principals to commit the crime. Complaint is made that there is nothing in this language which charges the alleged accessories before the fact with any act which would make them accessories. That which makes one an accessory before the fact is the procuring, counseling, and commanding another to commit a crime, and this is the only act necessary to constitute the offense; and when it is charged in the language of the statute that the accused did procure, counsel, and command the alleged principal to commit the crime, he is charged in terms with that which constitutes the offense, and it is hard to conceive how the charge could be made more clear and more specific." 3 Bishop, *New Crim. Proc.* (2d Ed.) § 8; Fulford v. State, 50 Ga. 591. We conclude that the trial judge properly overruled the demurrer on all the grounds therein stated, both general and special.

[2, 5] On the evidence the opinion of the majority of the court, prepared by Judge Pot-
tle, is as follows:

"Section 45 of the Penal Code contains, substantially, the common-law definition of an accessory before the fact. The accused was indicted as an accessory before the fact, and it is well settled that one so indicted cannot be convicted, upon evidence which shows him to have been a principal, either in the first or the second degree. The question, therefore, upon the merits is whether the accused procured, counseled, or commanded Dr. Whitehead to commit the abortion upon the female named in the indictment. It may be conceded that if he had advised another to procure Dr. Whitehead to commit the crime, he would have been as guilty as if he had directed, incited, or counseled the perpetrator of the crime to commit it; but in the opinion of the majority of the court the evidence does not show that the accused procured the commission of the crime within the meaning of section 45 of the Penal Code. There is no suggestion in the evidence that the accused had any conversation upon the subject with either Gullatt or Dr. Whitehead, or that he, either directly or indirectly, counseled or advised either of those persons to commit this crime. If the conviction can be supported at all, it must rest solely upon the fact that the accused furnished the room in which the crime was committed, with

knowledge, at the time it was furnished, that a criminal abortion was to be performed. This was his sole connection with the offense. He did not advise it, nor even in a remote way suggest to any person connected with the criminal transaction that an abortion should be performed. We do not think that mere knowledge that a crime is contemplated and the mere furnishing of a room in which that crime is to be committed will render the owner of the room an accessory before the fact to the crime. 'Any degree of incitement with the actual intent to procure the commission of the crime is sufficient;' but the authorities are all to the effect that there must be 'some degree of direct incitement.' See 1 Russell, *Law of Crimes* (7th Eng. Ed.) § 117, with references to numerous English authorities. For example, the author refers to the case of *R. v. Fretwell, L. & C. 161*. In that case the prisoner was requested by a pregnant woman, who sought to procure an abortion, to obtain, and he did obtain, for her corrosive sublimate; being influenced by a threat that she would destroy herself if she did not get it. He knew the purpose for which she wanted it; but, though he gave it to her for that purpose, he was unwilling that she should use it, and did not administer it to her nor cause her to take it. She did take it, however, and died in consequence. It was held that the prisoner could not be convicted as accessory before the fact. In another case the prisoner held stakes at a prize fight, which resulted in the death of one of the combatants. Cockburn, C. J., said: 'To support an indictment of being accessory before the fact of manslaughter there must be an active proceeding on the part of the prisoner; he is perfectly passive here; all he does is to accept the stakes.' *R. v. Taylor, L. R. 2 C. C. 148*. In *Hately v. State, 15 Ga. 346*, it is ruled substantially that the prisoner must have incited the commission of the crime before he can be convicted as accessory before the fact.

"The evidence in the present case does not show that the prisoner participated in the criminal offense performed by Dr. Whitehead. He neither counseled it, nor advised it, nor procured its commission, and it does not even appear that he was willing for the crime to be committed, except that he did permit the use of a room in his house in which the crime was committed. The prisoner was conducting an assignation house and was in the habit of letting his rooms for immoral purposes, and the woman and the putative father of the child occupied this room together for two days before the abortion was committed. The evidence shows that at this time the fact that the woman was pregnant could not have been ascertained by casual examination. After the crime was committed the accused cared for the woman, furnishing her food and necessary medical attention, all at his own expense, and simply, as the evidence discloses,

as an act of humanity. He was in no way concerned in the criminal act. There was no motive for its commission by him through the agency of another, and no reason whatever, as shown by the evidence, why he should have been interested in having the criminal abortion performed. If he was present in a legal sense when the crime was committed and aided and abetted it, he could be convicted as a principal in the second degree. Merely aiding the commission of the offense by furnishing a room within which the crime could be committed is not, without more, such a procuring of another to commit the crime as would render the accused guilty as an accessory before the fact. See 12 Cyc. 191 (2)."

I do not concur in the opinion of my Associates that the evidence was not sufficiently conclusive to support the charge against the accused of being an accessory before the fact. The distinctions between principals in the first and second degree and accessories before the fact are fanciful rather than substantial. All are deemed equally guilty and are punished alike. And it has been held that on an indictment against one as principal in the first degree, if the evidence warrants it, a verdict may be had against him as either a principal in the second degree or an accessory before the fact. In some of the states the common law has been changed by statute so as to abolish these distinctions, and accessories before the fact are considered as principals. 1 Wharton, *Crim. Law* (11th Ed.) § 338, note 6. Especially should this distinction be ignored when the criminal act is the result of a conspiracy or confederacy, for every person entering into a conspiracy or common design is deemed in law a party to all acts done by any of the other parties in furtherance of the common design. All are equally guilty where the separate acts of each contributed to produce the criminal act, although personal knowledge or participation in every act of each is not necessary, provided they all tend to the consummation of the same criminal act. The facts in the present case, in my opinion, prove the existence of a conspiracy between the physician, the putative father, and the plaintiff in error, Jenkins, the owner of the house where the criminal abortion was performed. While this may be true, the statute of this state, which still preserves the common-law distinction, characterizes these offenses differently, though punished alike. Whitehead, the physician, who actually performed the physical act of causing the abortion, was the principal perpetrator, and Gullatt, who hired the physician to produce the abortion, and the accused, who rented the room and bed to Gullatt for the purpose, were accessories before the fact. Assuming the truth of the allegations, there can be no doubt as to the guilt of Whitehead and Gullatt as charged.

The majority of the court think that the

evidence does not show such participation in the common criminal design by the accused as to warrant his conviction. In coming to this conclusion they construe the general words of the definition, "procure, counsel, and command" the commission of the criminal act, necessary to make an accessory before the fact, as meaning to "incite," "encourage," "cause." The words "counsel and command" have no application to the facts; but in my opinion the word "procure," used in the definition, is broad enough to embrace the acts and conduct of the accused. I am strengthened in this view by the definition contained in Penal Code 1910, § 44. "An accessory is one who is not the chief actor in the offense, nor present at its performance, but in some way concerned therein either before or after the act committed." This definition is certainly broad enough to include the acts and conduct of the accused, if its meaning is not restricted by the section following, which defines an accessory before the fact as one who, being absent at the time of the crime committed, "doth yet procure, counsel, or command another to commit a crime." The two sections should be construed together, and, so construed, one who aids and abets the commission of a crime by knowingly contributing to its commission would seem to "procure" its commission in the meaning of the statute. There is evidence that the accused, with knowledge that a criminal abortion was to be produced, rented a room and a bed for the purpose and hired a nurse to be present and attend to the woman before, at, and after the commission of the crime. It is probable that, if the accused had been in his house when the crime was committed, for the purpose of being so near as to render any necessary assistance or to prevent any possible interruption, he would have been a principal in the second degree, being constructively present; but as to this the evidence is silent. In renting the room, furnishing the bed and nurse, and taking care of the woman before the crime was committed, he contributed in a very substantial manner to its commission, and, in my opinion, these acts made him an accessory before the fact. In *Reg. v. Hollis and Blakeman*, 12 Cox's Crim. Cas. 463, a case of criminal abortion, a conviction of Blakeman as an accessory before the fact was upheld; the only evidence against him being the furnishing of a room with knowledge that an abortion was to be caused by Hollis, the principal. Bovill, C. J., saying: "Hollis found the drug and Blakeman the room where the prosecutrix was taken to, and in a short time the effect intended was produced." In that case the statute defining an accessory before the fact was identical with the one in our Penal Code. In *Commonwealth v. Follanshee*, 155 Mass. 274, 29 N. E. 471, a case of criminal abortion, it was held that one was not an accessory before the fact

because she procured ether for the accused, which he administered to a pregnant woman for the purpose of procuring an abortion; the evidence not showing that "she knew the purpose for which it was to be used." The two cases relied upon by Judge Pottle are distinguishable on the facts from the two cases above cited, as well as from the instant case. In *R. v. Fretwell*, L. & C. 161, although the accused gave to the pregnant woman at her request the drug after her threat to take it to cause a miscarriage, the court held that he was not guilty of being an accessory, because "he was unwilling that she should use it, and did not administer it to her nor cause her to take it." In *R. v. Taylor*, 2 Cr. Cas. Res. 147, the court held that: "A stakeholder who takes no part in the arrangements for a prize fight, and does nothing more than hold the stakes and pay them over to the winner, is not an accessory before the fact to the manslaughter of one of the combatants." The essential factors of guilt, to wit, knowledge that a crime was to be perpetrated, and aiding and abetting its commission, were lacking in these cases. Here the accused knew that a criminal abortion was to be committed, and furnished for hire a secret, private, convenient place for that purpose. For these reasons, while the question is not free from doubt, I think the evidence authorized the verdict.

Judgment reversed.

RUSSELL, J. (concurring specially). I agree to the reversal of the judgment of the lower court, upon the ground that the verdict was contrary to the evidence; but I am further of the opinion that the indictment was demurrable. One charged as an accessory, in common with all who are accused of crime, has the right to be definitely informed as to the precise nature of the transaction as to which he is called on to defend.

HILL, C. J., dissents.

BROWN v. HAWKINS. (No. 4,994.)
(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 999*)—NEW TRIAL (§ 69*)—FINDINGS OF JURY.

The Court of Appeals is without jurisdiction to consider assignments of error addressed solely to the finding of the jury upon issuable facts. There is no complaint that any error of law was committed, the evidence authorized the verdict rendered, and, though the testimony in behalf of the losing party would have warranted a different verdict, the trial judge did not err in refusing a new trial, for the credibility of the witnesses is a matter exclusively for the jury. *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999; New Trial, Cent. Dig. § 141; Dec. Dig. § 69.*]

Error from City Court of Hall County; F. A. Irwin, Judge.

Action by J. W. Brown against J. D. Hawkins. From the judgment, Brown brings error. Affirmed.

Adams & Quillian, of Gainesville, for plaintiff in error. Howard Thompson, of Gainesville, for defendant in error.

RUSSELL, J. Judgment affirmed.

PROVIDENCE-WASHINGTON INS. CO. v. SPENCE. (No. 5,029.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. ACTION ON POLICY.

The insurer admitted liability, but claimed the loss was less than the amount stipulated in the policy, and admitted that, if the plaintiff was entitled to recover attorney's fees, 10 per cent. would be reasonable.

2. NEW TRIAL (§ 70*)—GROUNDS.

Under a ruling invoked by the defendant, the only issues submitted to the jury were the value of the automobile, the amount of the loss, and whether the delay in the payment of the policy was due to bad faith. The finding of the jury upon these issues of fact is supported by evidence, and there is no complaint that any error of law was committed. Consequently the trial judge properly overruled the motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

Error from City Court of Camilla; R. D. Bush, Judge.

Action by J. M. Spence against the Providence-Washington Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Leonard Haas, of Atlanta, and Peacock & Gardner, of Camilla, for plaintiff in error. E. M. Davis, of Camilla, for defendant in error.

RUSSELL, J. Judgment affirmed.

WESTERN & A. R. CO. v. SWANSON.

(No. 4,774.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 419*)—KILLING DOG ON TRACK—RECOVERY OF DAMAGES.

Damages are not recoverable for the negligent killing of a dog by the running of the locomotive and cars of a railroad company. Gaddis v. Southern Ry. Co., 9 Ga. App. 272, 71 S. E. 7. In the present case there was no evidence that the killing of the dog was caused by the wilful, wanton, or malicious act of the agents of the railroad company, and therefore the verdict against the company was unauthorized by law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1489-1500; Dec. Dig. § 419.*]

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by J. H. Swanson against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Maddox, McCamy & Shumate, of Dalton, and Tye, Peebles & Jordan, of Atlanta, for plaintiff in error.

HILL, C. J. Judgment reversed.

MOBLEY v. CITIZENS' BANK OF VALDOSTA. (No. 4,906.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 935*)—REVIEW—PRESUMPTIONS—INSUFFICIENT RECORD.

None of the questions which it is sought to raise by the affidavit of illegality in this case can be determined without a consideration of the judgments and records, the validity and construction of which are brought in question by the affidavit. No copy of such judgments being attached to the affidavit of illegality or set out therein, it must be presumed that in passing upon the case the trial judge correctly determined these questions, or else that he was unable to determine them by reason of the indefinite and uncertain averments of the affidavit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3783-3786; Dec. Dig. § 935.*]

Error from Superior Court, Clinch County; Melvin Meeks, Judge pro hac.

Trial of illegality between W. H. Mobley against the Citizens' Bank of Valdosta. From the judgment, W. H. Mobley brings error. Affirmed.

Franklin & Langdale, of Valdosta, for plaintiff in error. R. G. Dickerson, of Homer, and S. C. Townsend, of St. Marys, for defendant in error.

POTTLE, J. Judgment affirmed.

PARKER v. G. O. LOVING & CO.

(No. 4,889.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 518*)—REVIEW—REFUSAL OF AMENDMENT—RECORD.

An amendment which is rejected is no part of the record, and an assignment of error upon its refusal cannot be considered, unless the amendment is set forth, either literally or in substance, in the bill of exceptions, or attached thereto as an exhibit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.*]

2. LIVERY STABLE KEEPERS (§ 11*)—DILIGENCE REQUIRED—"ORDINARY CARE."

Livery stable keepers, who let animals and vehicles for hire, are not common carriers of passengers, and as such bound to exercise extraordinary diligence for the safety of their passengers. They are bound only to exercise

"ordinary care" and diligence, which is such care and skill as prudent and cautious men experienced in the business are accustomed to use under similar circumstances. Under the Code of this state bailors for hire warrant "that the thing bailed is free from any secret fault rendering it unfit for the purposes for which it is hired."

[Ed. Note.—For other cases, see *Livery Stable Keepers*, Cent. Dig. § 12; Dec. Dig. § 11.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

3. LIVERY STABLE KEEPERS (§ 11*)—LIABILITY—HIRING VEHICLE—CARE REQUIRED.

Where one hires for the use of himself and family a vehicle which is ordinarily used for the carriage of several persons, the owner owes to each member of the family who uses the vehicle the same degree of care as is owing to the person to whom the vehicle is let; and this is true, without reference to whether the owner has actual notice that the vehicle is to be employed for the carriage of any other person than he to whom it is let.

[Ed. Note.—For other cases, see *Livery Stable Keepers*, Cent. Dig. § 12; Dec. Dig. § 11.*]

Error from City Court of Americus; R. L. Greer, Judge.

Action by R. E. Parker, guardian, against G. O. Loving & Co. Judgment for defendants, and plaintiff brings error. Reversed.

W. P. Wallis and L. J. Blalock, both of Americus, for plaintiff in error. Shipp & Sheppard, of Americus, for defendants in error.

POTTLE, J. Parker brought suit, as guardian for an insane person, to recover damages for injuries to his ward, received by being thrown from a vehicle in which she was riding and which had been let by the defendants to the guardian. It is alleged that the defendants furnished defective harness which had been broken, and which was tied together with a cotton string; that while driving along the road in a usual and ordinary manner, and without fault on the part of the plaintiff, the string broke and the tongue of the vehicle dropped to the ground, and the horses became frightened and ran away. It is alleged in the petition that the plaintiff's ward was a member of his family, being his sister, and that he hired the vehicle for the purpose of taking his family, including his ward, on a visit to his wife's mother, a distance of some eight or nine miles. The trial judge rejected a proffered amendment to the petition, and sustained a demurrer upon the ground that the petition failed to show any duty owing by the defendants to the plaintiff's ward, and that it also appeared from the petition that the plaintiff could have known of the defects in the harness complained of, and by the exercise of ordinary care could have avoided the consequences of the defendant's negligence. The plaintiff has excepted to the rejection of the amendment to his petition, and also to the dismissal of the original petition.

[1] 1. The rejected amendment was no part of the record, and could not be specified and be brought to this court as such. The amendment is not set out in the bill of exceptions, either literally or in substance, nor attached thereto as an exhibit. Consequently this court cannot consider what purports to be a copy of the amendment embraced in the transcript of the record, and cannot determine the assignment of error upon the refusal to allow the amendment. *Taylor v. McLaughlin*, 120 Ga. 703, 48 S. E. 203.

[2] 2. A livery stable keeper, who lets horses and vehicles for hire, is not a common carrier of passengers, and, as such, bound to exercise extraordinary diligence for the safety of his passengers. The relation between the hirer of the vehicle and the owner is that of bailee and bailor; and the liability of the owner is governed by the rules applicable to such a contract of bailment. He is but a private carrier for hire, and required to exercise due care and diligence in performance of the duty imposed upon him by the contract; that is to say, such care and skill as prudent and cautious men experienced in the business are accustomed to use under similar circumstances. See 25 Cyc. 1513; *Erickson v. Barber Bros.*, 83 Iowa, 367, 49 N. W. 838; *Payne v. Halstead*, 44 Ill. App. 97; *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699; *Stanely v. Steele*, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561, 2 Ann. Cas. 342; *McGregor v. Gill*, 114 Tenn. 524, 86 S. W. 318, 108 Am. St. Rep. 919. Under the Code of this state the obligation of a bailor for hire, amongst other things, is "to keep the thing in suitable order and repair for the purposes of the bailment, to warrant the right to possession, and that the thing bailed is free from any secret fault rendering it unfitted for the purposes for which it is hired." Civil Code, § 3479. Here, therefore, is a statutory declaration that due care on the part of the bailor requires him to examine the thing bailed, for the purpose of seeing that it has no hidden defects which would render it unsuitable for the purposes for which it was hired. What would be ordinary care depends upon the particular business in hand, the circumstances surrounding the particular transaction, and the situation of the parties.

Under our statute the bailor warrants the soundness and suitability of the thing bailed, and is liable for any injury or damage which may result from a latent defect of which the bailee has no knowledge and the consequences of which he could not avoid by the exercise of ordinary care. Much more is it the duty of the bailor to see that the thing bailed is free from patent defects which render it unfit for the purposes for which it was hired. If the hirer knows of the defect, or in the exercise of ordinary care ought to have discovered it, and, notwith-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

standing this actual or implied knowledge, he uses the thing, and injury results on account of the defect, he will be held to have waived his right to claim damages, since by the exercise of ordinary care he could have avoided the consequences of the bailor's neglect. But what would amount to the care the hirer ought to use to discover the defect is a question of fact for the jury. It cannot be said as a matter of law that, simply because a piece of harness was tied with a string, the hirer is guilty of such negligence in using it as would defeat his right to recover damages of which the defective harness was the proximate cause. The question whether, in the exercise of ordinary care, he ought to have discovered the defect, and whether, if he had discovered it, and that the harness had been repaired by means of a string, he was still guilty of negligence in using it in this condition, were both questions of fact, neither of which could be resolved against the plaintiff as a matter of law.

[3] 3. Since the relation between the parties arose solely from contract, the right of the plaintiff's ward to recover must depend upon whether she sustained any contractual relation with the defendants, either express or implied, so as to raise a duty on their part to use ordinary care and diligence for her care and protection. It is alleged in the petition that the plaintiff's ward was a member of his family, and that he hired the vehicle for the purpose of transporting his family; but it is nowhere alleged that the defendants knew that the plaintiff's ward was a member of his family, or that he intended to convey her in the vehicle which he hired. It is not even distinctly alleged that the defendants knew that the plaintiff intended to transport his family, though this may be inferred from the allegations. All this is, however, immaterial. The fact that a vehicle capable of conveying several persons was hired was itself enough to put the hirer on notice that the person to whom it was let intended to convey therein persons other than himself. In such a case there was an implied agreement on the part of the hirer that the vehicle might be used for the conveyance of any person whom the person to whom it was let might invite to accompany him, or at least for the carriage of members of his family, for whom he was obliged to provide necessary means of travel.

The plaintiff was a member of the family, under the protection of her brother, who hired the vehicle, and the implied agreement that she might be transported in the vehicle raised a duty on the part of the hirer to use the same measure of diligence for her protection as for the person to whom the vehicle was let. The court erred in sustaining the demurrer.

Judgment reversed.

BEARDEN v. STATE. (No. 4,772.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 274, 909*)—NEW TRIAL—PLEA OF GUILTY—WITHDRAWAL.

The trial judge did not err in refusing to entertain a motion for a new trial. One who has filed a plea of guilty in a criminal case cannot move for a new trial. Where one accused of crime voluntarily pleads guilty to the charge, a new trial cannot be granted, for there was no verdict. A plea of guilty may, as a matter of right, be withdrawn before sentence; and after sentence the judge may permit it to be withdrawn upon meritorious grounds, addressed to his discretion. But neither before nor after sentence can a motion for a new trial be employed as a means of withdrawing a plea of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633, 2131; Dec. Dig. §§ 274, 909.*]

2. CRIMINAL LAW (§ 269*)—PLEA OF GUILTY.

At common law a personal plea was necessary on one's arraignment for trial in a criminal case; but under the provisions of section 971 of the Penal Code of 1910 of Georgia (as under the Codes of Criminal Procedure of most of the states), the plea of the defendant may be made by his attorney. One of the chief purposes of the requirement that a defendant be present at every stage of his trial is to enable him to consult with his counsel, and by the presence of the accused to properly hold him bound by his own acts, and to the acts of his counsel in his presence, to which he interposes no objection. As to the latter, the attorney generally stands in the shoes of his client, and if the client assents, or fails to object, he is bound thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 621-623, 629, 630; Dec. Dig. § 269.*]

Error from Superior Court, Fulton County; W. E. Thomas, Judge.

A. Bearden was convicted of violation of the prohibitory law, and brings error. Affirmed.

R. R. Jackson, of Atlanta, Homer A. Legg, of Blue Ridge, and Myer I. Goldberg, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., of Atlanta, for the State.

RUSSELL, J. Bearden was arraigned in the superior court of Fulton county, charged with the unlawful sale of alcoholic, spirituous, malt, and intoxicating liquors. The state introduced testimony which would have authorized the conviction of the accused, though it would not have demanded a verdict of guilty. When the state rested its case, the defendant, through his attorney, withdrew the plea of not guilty which had been filed upon arraignment, and filed a plea of guilty, and thereupon the court sentenced the defendant to serve 12 months at hard labor upon the public works.

On the following day (and after the court had imposed sentence) the defendant tendered a so-called motion for a new trial. There are only two grounds in the motion: (1) Because the verdict is without evidence to support it;

and (2) because the verdict is decidedly against the weight of evidence and contrary to the evidence and the law applicable in the case. As ancillary, as we suppose, to the above-stated motion, the defendant attached to it an affidavit, in which it is averred that the plea of guilty was entered without his consent and against his wishes, that he is not guilty of the offense charged in the indictment, and that he makes the affidavit in order that the court may permit the filing of a motion for a new trial. The trial judge passed an order declining to entertain the motion, for the reason that the plea of guilty was entered by the attorney of record of the defendant after the state had introduced evidence authorizing a verdict of guilty, and that this motion was not presented until after the sentence had been imposed. The defendant excepts to this judgment.

[1] We think the court properly refused to entertain a motion for a new trial. It would seem to be elemental that one who has voluntarily filed a plea of guilty in a criminal case could not thereafter, in the same case, file a motion for a new trial. The profession generally seems to have considered the point so well settled that we have been unable to find an adjudication upon the subject in Georgia. A motion for a new trial cannot be made upon a plea of guilty for the reason (if for no other) that there is no verdict where there is a plea of guilty, and the only object of the motion for a new trial is to set aside a verdict which has been rendered, so that upon another trial a different verdict may be obtained. The purpose of the motion for a new trial is to obtain another trial. Where a plea of guilty is filed, the judgment does not rest upon the results of a trial, but upon the plea, which is nothing more than a confession in judicio. The verdict is the point of attack to which a motion for a new trial and everything it contains is directed. If there is no verdict, a motion has no *raison d'être*.

The law provides a different means for avoiding the consequences of a plea of guilty. The defendant may withdraw his plea of guilty, as a matter of right, before sentence is imposed, and he may withdraw his plea after sentence has been imposed for any meritorious reason which addresses itself to the sound discretion of the trial court. If there is any valid and sufficient reason why the defendant should be permitted to withdraw his plea after sentence, in order to prevent injustice, the failure of the court to exercise this discretion in favor of the withdrawal of the plea is an abuse of discretion. *Griffin v. State*, 12 Ga. App. 615, 77 S. E. 1080. If there cannot be a motion for a new trial in a case in which no verdict has been rendered, certainly a motion for a new trial is not a proper mode of withdrawing a plea of guilty.

[2] 2. At common law a personal plea was

necessary on one's arraignment for trial in a criminal case, but under the provisions of section 971 of the Penal Code of Georgia (as under the Codes of Criminal Procedure of most of the states), the plea of the defendant may be made by his attorney. One of the chief purposes of the requirement that a defendant be present at every stage of his trial is to enable the accused to consult with his counsel, and by the presence of the defendant properly hold him bound by his own acts, and to the acts of his counsel in his presence, to which he interposes no objection. As to the latter the attorney generally stands in the shoes of his client, and if the client assents, or fails to object, he is bound thereby. *Allyn v. State*, 21 Neb. 593, 33 N. W. 212; *State v. Greene*, 68 Iowa, 12, 23 N. W. 154; *State v. Jones*, 70 Iowa, 503, 30 N. W. 750; *Bateman v. State*, 64 Miss. 233, 1 South. 172; *State v. Blake*, 5 Wyo. 107, 38 Pac. 354; *State v. Richardson*, 98 Mo. 564, 12 S. W. 245; *Conway v. State*, 5 Wyo. 107, 38 Pac. 354.

In *State v. Richardson*, *supra*, the defendant pleaded not guilty to an indictment for larceny. Thereafter he withdrew his plea, and pleaded guilty, and was sentenced for two years. The next day he moved to have the judgment set aside, and asked leave to plead not guilty, alleging in an affidavit that he was not guilty, and that his plea was made under a mistake as to the statements made at the time by the officers of the court. This motion was denied by the trial judge, and the judgment was affirmed by the Supreme Court of Missouri. The facts which might call for intervention in behalf of the accused were much stronger in the *Richardson* Case than in the case at bar. *Richardson* was not represented by counsel at the time he filed his plea of guilty, and he pleaded guilty upon representations of some officers of the court that another case pending against him would be dismissed. There was also evidence as to a conversation with the deputy sheriff, when the accused was being taken back to jail, from which it might be inferred that he did not understand the full purport and effect of his plea.

In the present case *Bearden* was represented by counsel, and he filed the plea in his behalf after the testimony for the state had been introduced. *Bearden* interposed no objection when this attorney, in his presence, stated to the court that his plea of not guilty would be withdrawn, and that a plea of guilty would be filed. He did not assert his innocence when sentence was imposed (as was the case in *Conway v. State*, *supra*). As we have already said, the provisions of our Code in regard to the plea of a defendant upon arraignment differ from the rule of the common law upon that subject. In our state the attorney stands in the client's shoes. The client has the right to direct the conduct of his case, and in the event of

irreconcilable conflict between his views and those entertained by his counsel he has the right to discharge his counsel. Even if the motion made by the defendant in this case had been one to withdraw the plea, we do not think it would have been any abuse of discretion to have denied it.

Judgment affirmed.

PAYTON v. WHEELER et al. (No. 5,032.)
(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

ATTORNEY AND CLIENT (§ 189*)—ATTORNEY'S LIEN.

The attorney for the defendant had a lien upon the defendant's interest in the pending suit for his contingent fee, which could not be defeated by any settlement, made without his consent, after the suit was filed. The lien of an attorney at law upon the subject-matter of a suit which he has been employed to prosecute or to defend cannot be rendered ineffective by a contract of his client. Civ. Code 1910, § 3364, par. 2.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407-411; Dec. Dig. § 189.*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by A. J. Payton against J. O. Wheeler and others. Judgment for plaintiff. From an order giving an attorney of defendants a lien on the money in question, plaintiff brings error. Affirmed.

Griffith & Matthews, of Buchanan, for plaintiff in error. W. P. Robinson, of Buchanan, for defendants in error.

RUSSELL, J. It appears from the record that Wheeler had been accused of taking certain money from the person of Payton. Parker, the sheriff, arrested Wheeler, and found some money upon his person, and took possession of it. Payton brought an action against Wheeler and the sheriff for money had and received. After judgment by the magistrate in favor of Payton, and on appeal, Wheeler, by his attorney, perfected his plea by alleging that the money which had been taken from him by the sheriff was the property of his wife, placed in his hands by her instructions, to pay certain demands against her. The sheriff answered that he had the fund in dispute in his hands, but was merely holding it as trustee for whomever it might rightly belong to, and was ready to pay it over to the person whom the courts might adjudge to be the owner. At the trial on the appeal a written agreement, signed by the defendant Wheeler and his wife, to the effect that the plaintiff, Payton, should have the money which was in the hands of the sheriff, and that no further claim to the same would be made by them, was put in evidence; and Payton's counsel testified that one Johnson got Wheeler and

his wife to sign the agreement, and brought it to him, and that the money was thereafter paid over to him, as attorney for the plaintiff, by the sheriff, under this agreement of Wheeler and Mrs. Wheeler. He further testified that he told Johnson he would not agree to assist Wheeler, who had been convicted of larceny, unless Payton consented, because he had represented Payton in the prosecution of Wheeler, and that he asked Johnson to see Wheeler's attorney, Robinson, and advise him as to the proposed agreement with Wheeler and his wife. It does not appear that Johnson ever saw Robinson. However, in a conversation between Griffith, as attorney for Payton, and Robinson, as attorney for Wheeler, Robinson stated, in effect, that his fee in the case was contingent, and that he was to have a half of the money if the Wheelers won the case. The settlement between Payton and the Wheelers had been agreed upon at that time. Robinson's statement on the trial of the appeal was that he had been employed by Wheeler and Mrs. Wheeler to represent them in the pending case, and was to have a half of the money sued for, for representing them, provided they won the case; that his fee was contingent, and that he knew nothing about the settlement until E. S. Griffith (Payton's attorney) mentioned it to him. This statement of the attorney for Wheeler and Mrs. Wheeler was undisputed by anything in the evidence, and under it he had the right to proceed with the case for the purpose of collecting his fee, and upon the evidence adduced a finding in favor of his client, in order to satisfy his lien for a half of the fund, was demanded; for the only evidence before the jury as to the ownership of the money compelled the legal conclusion that Wheeler was the owner thereof. The only evidence of Payton's title which was before the jury was that he derived it through his agreement with Wheeler and his wife. It may be that Payton could have shown otherwise that it was his money, but he did not do so. He relied upon the agreement which was introduced, and under the terms of which the Wheelers simply consented to let him have the money and make no further claim for it.

Under the provisions of section 3364 of the Code of 1910, attorneys have a lien upon suits, judgments, and decrees, superior to all liens but tax liens, and no person shall be at liberty to satisfy a suit, judgment, or decree until the lien or claim of the attorney for his fee is fully satisfied, and, for the purpose of enforcing his lien, the attorney at law has the same right over a suit as his client had for the amount originally due thereon. It is very plain that Payton's attorney sought to act in the utmost good faith with the attorney for Wheeler; but this has no effect, one way or the other, upon the rights of the latter. Robinson, as attorney for Wheeler, had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
79 S.E.—6

a lien upon the subject-matter of the pending suit, contingent upon recovery. This right was fixed as soon as the suit was filed, and could not be divested by any settlement or contract, it matters not by whom the settlement may have been made or attempted. The case is fully controlled by the ruling of this court in *Georgia Railway & Electric Company v. Crosby*, 78 S. E. 612, and the rule is as fully applicable to counsel for attorneys representing the defendant as to the plaintiff's counsel. The facts of the present case illustrate the necessity for the application of the rule to counsel for defendant and plaintiff alike, and many similar instances might be suggested. A case which frequently arises is where the defendant's claim, by way of recoupment or set-off, may justly far exceed the original demand of the plaintiff.

Upon the hearing of the certiorari in the superior court the judge correctly held that the agreement of the defendants to settle the case, which would probably have resulted in rendering the lien of the attorney for his fee wholly worthless, should not be permitted to defeat the lien provided by law. An agreement or contract of a client cannot render ineffective the lien of an attorney upon the subject-matter of a suit which he has been employed to prosecute or to defend.

Judgment affirmed.

MODLIN v. SMITH et al. (No. 4,630.)
(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 671*)—DISMISSAL—JURISDICTION.

When a motion to dismiss a bill of exceptions depends upon the adjudication of an issue of fact dehors the record, the motion will be overruled, for the Court of Appeals is not a court of original jurisdiction, and as a court of review it has no other jurisdiction than "the correction of errors in law and equity."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

2. GARNISHMENT (§ 42*)—PROPERTY SUBJECT—"CONTINGENT FEE" OF ATTORNEY.

A debt due by an attorney cannot be collected by process of garnishment served upon a debtor of one of his clients, although the attorney may, as a result of his services, have a contingent interest in the debt to the client. A "contingent fee" of an attorney, which is a proportionate part of a judgment recovered by him for his client, cannot be impounded and subjected to an indebtedness of the attorney by garnishing the judgment debtor. The debtor of the client does not become the debtor of the client's attorney by virtue of the fact that under the terms of his employment the lawyer will be entitled to retain a stipulated portion of the recovery as his fee when or after the fund as a whole has been collected.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 83-88; Dec. Dig. § 42.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by O. J. Modlin, administratrix, against Burton Smith and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. A. James, of Atlanta, for plaintiff in error. Moore & Branch, of Atlanta, for defendants in error.

RUSSELL, J. [1] A motion was made to dismiss the writ of error in the present case. The plaintiff's bill of exceptions was prepared and presented by W. A. James, Esq., who signed it as attorney for the plaintiff in error. The plaintiff in error, through other counsel, now asks that the writ of error be dismissed, upon the ground that it was brought to this court without her authority, and avers that, on the contrary, she specifically directed Mr. James not to file a bill of exceptions, and that after the judgment in the lower court she discharged him. The statements in this motion are verified by her oath, but they are unequivocally denied in the sworn answer, or objections, of the attorney who signed the bill of exceptions. There are other affidavits bearing upon this issue between Mrs. Modlin and the attorney. The motion to dismiss the bill of exceptions must be overruled. This court is a tribunal for the review and correction of errors, and is not a court of original jurisdiction, and for this reason we cannot undertake to decide any question the determination of which depends upon an issue as to facts dehors the record and entirely disconnected from the questions sought to be presented therein. We will say, in passing, that an attorney shown to have been once employed in a case is presumed to continue in that relation, in the absence of positive evidence of his discharge, and that the scriptural dictum, "The laborer is worthy of his hire," is as much applicable to lawyers as to others. Evidence of an attorney's discharge without any recompense for services already rendered should not be viewed with special favor.

[2] 2. It appears from the record that Smith, as an attorney representing a Mrs. Randolph in an action against the Seaboard Air Line Railway for damages for personal injuries, under the terms of his employment was to receive, as a fee for his services, a proportionate part of whatever amount might be recovered by her. There is some dispute as to whether Smith's fee was to be a third or a half of the recovery, but this is immaterial. Mrs. Randolph recovered a verdict against the Seaboard Air Line Railway for \$9,826.31, with interest from the date of the verdict, which was affirmed by the Supreme Court upon the fifth appearance of the case before that tribunal. Seaboard Air Line Railway v. Randolph, 136 Ga. 505, 71 S. E. 887. The judgment was affirmed May 11, 1911, and June 16, 1911, Mrs. Modlin, the plaintiff in error here, as administratrix de

bonis non cum testamento annexo of Wiley Rice, sued out a garnishment, and caused summons of garnishment to be served upon an agent of the Seaboard Air Line Railway. In the affidavit upon which the garnishment was predicated, the administratrix swore that Smith owed the estate of Wiley Rice \$1,655 as principal and interest upon a judgment rendered by the city court of Atlanta on June 23, 1903, and that she had reason to apprehend the loss of that sum, or some part thereof, unless process of garnishment issued. On July 3, 1911, the Seaboard Air Line Railway filed an answer, in which it denied having in its hands any property or effects belonging to Smith, but stating the facts above recited with reference to the rendition of the judgment against it, and that it was informed that Smith was the owner of and entitled to $33\frac{1}{3}$ per cent. of the judgment in favor of Mrs. Randolph against the railway company as his fee for services as an attorney in obtaining the judgment, and asking a speedy determination of the issue, so that the railway company might be saved further interest. On July 4, 1911, Smith gave a bond conditioned to pay the judgment rendered on the garnishment, and on July 6, 1911, the Seaboard Air Line Railway issued a voucher for \$10,535.17, payable to the order of Smith and his associate counsel, as attorneys of record for Mrs. Randolph, which voucher was indorsed by them and paid on July 11th. On September 2, 1911, the defendant Smith excepted or demurred to the garnishee's answer, and also traversed the answer of the railway company, and averred that it owed him nothing, and on October 9, 1911, the railway company amended its answer by stating the facts with reference to the issuance and payment of the voucher in settlement of the judgment in favor of Mrs. Randolph. The plaintiff in error, by her attorney, on January 1, 1912, demurred to the traverse and exceptions filed by Smith, upon the ground that no person except the plaintiff or a claimant of the funds in the garnishee's hands can except to the garnishee's answer or traverse it, and that Smith could not except to or traverse the answer of the garnishee, because he himself said that the garnishee owed him nothing. The plaintiff, on January 25, 1912, traversed the garnishee's answer as to the proportionate interest of Smith in the judgment in favor of Mrs. Randolph, and set up that Smith's interest was a half of Mrs. Randolph's recovery, instead of $33\frac{1}{3}$ per cent. The defendant Smith and his surety on the garnishment bond moved the court to enter a judgment discharging the bond and releasing the surety thereon from all liability, and declaring that no money or other property subject to garnishment was impounded by the garnishment proceedings. On November 5, 1912, the court rendered a judgment to this effect.

It is not necessary to deal with the question whether a defendant, who denies that

the garnishee owes him anything, and denies that the garnishee has any of his money or effects in possession, can except to the answer of the garnishee or traverse it. This point is raised by one of the demurrers filed by counsel for the plaintiff in error, but a ruling upon the exceptions and traverse filed by the defendant Smith is unnecessary, in view of the fact that the trial judge very properly held that the controlling question in the case was whether the contingent interest of an attorney in a debt due by a third person to one of the attorney's clients can be impounded by a proceeding in garnishment at the instance of one who is a creditor of the attorney, but who is not a creditor of the particular client of his in whose favor the judgment was rendered. We think the trial judge correctly held that the summons of garnishment was ineffectual to impound Mr. Smith's interest in the judgment against the Seaboard Air Line Railway and in favor of Mrs. Randolph, whatever that interest might be, so that the amount represented by this interest could by appropriate judgment against the garnishee be applied in payment of the judgment in favor of Wiley Rice's estate. If this be so, it is immaterial what steps were taken as to the giving of a bond to dissolve the garnishment; nor would it make any difference to whom the Seaboard Air Line Railway may have paid the money.

Counsel for the plaintiff in error insists that the whole matter should have been submitted to a jury. Even if the contention of counsel for plaintiff in error, to the effect that the defendant had no right to file either exceptions or traverse, is correct, there was nothing to submit to a jury. Certainly it cannot be questioned that the plaintiff had the right to traverse the answer of the Seaboard Air Line Railway, and she attempted to do so; but, after all, she did not deny any statement of the answer of the railway company, except as to the proportion of Mr. Smith's alleged interest in Mrs. Randolph's recovery. The fact that the verdict rendered against the railway company was in favor of Mrs. Randolph, and not in favor of Mr. Smith, was absolutely undisputed. The first question presented to the court, therefore, was whether the judgment debt owed by the railway company to one person could be impounded for the purpose of being applied upon an outstanding debt of another person, conceding that the latter person had an undivided interest in the judgment debt. The case is stronger where the latter person's interest (undisclosed in the judgment) in the debt due by the railway company arose by virtue of the fact that it was his fee as an attorney for services rendered in the case than if this interest depended upon other and different circumstances. As a general rule, the interest of a partner cannot be reached by a garnishment served on a debtor of the partnership of which he is a member.

Branch, Scott & Co. v. Adam, 51 Ga. 114. The Code provides that the interest of a partner in a partnership may be reached by garnishing the partnership; but there is no provision in the law of garnishment, so far as we are aware, for reaching the interest of a partner in the partnership assets by garnishing the debts due to the firm. The effect of such a course would apparently be tantamount in its ultimate effect to subjecting, by sale, tangible assets of the partnership to the payment of the debts of one of the partners without first garnishing the partnership, or without garnishing the partnership at all. It may be that any interest of a partner in the assets of a firm can be reached by appropriate proceedings in equity, but the first question the court had to decide was purely one of law, and the city court of Atlanta is without jurisdiction to afford affirmative equitable relief.

Conceding that there was a joint ownership by Mrs. Randolph and Smith, as client and attorney, in the fund recovered against the railway company, we do not think that garnishment would be the proper remedy to reach the interest of Smith as a joint owner of this money. 20 Cyc. 1030. A garnishing creditor stands in no better position as against the garnishee than the debtor himself does. *Singer Sewing Machine Co. v. Southern Grocery Co.*, 2 Ga. App. 545, 59 S. E. 473. So while Smith, as an attorney at law, might collect for his client the amount of the judgment against the Seaboard Air Line Railway, Smith as an individual—not an attorney at law—could not, by the judgment in favor of Mrs. Randolph, enforce the payment of his interest in that judgment, no matter what his interest might be. Conceding the utmost contention of counsel for the plaintiff in error, to wit, that Smith had a joint undivided interest amounting to half the debt due by the railway company, the lower court rightly decided that this interest could not be reached by garnishment. A debt due jointly to the defendant and another cannot be reached by garnishment in an action against the main defendant. *Badger Lumber Company v. Stern*, 123 Wis. 618, 101 N. W. 1093, 3 Ann. Cas. 802, and note.

But, aside from this view, the judgment of the lower court was right, because an attorney at law, where his fee as attorney for the plaintiff is payable by special contract out of the proceeds of the suit, has merely an inchoate lien. *Twiggs v. Chambers*, 56 Ga. 279; *Coleman v. Ryan*, 58 Ga. 135; *Rodgers v. Furse*, 83 Ga. 123, 9 S. E. 669; *Swift v. Register*, 97 Ga. 448, 25 S. E. 315. The attorney's lien is inchoate as soon as the action is commenced. *Rodgers v. Furse*, supra. That it is essential to show the right of the plaintiff to recover, before the lien can be perfected or established, is pointed out in the *Swift Case*, supra. Even

after judgment the attorney who recovered the judgment has only a lien. This lien cannot be disregarded by the debtor who has notice of the lien, either before or after judgment; but it is, after all, but a lien. Civil Code, § 3364.

Judgment affirmed.

FISHER v. BEACH, HINSON & CO. et al
(No. 4,460.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

TROVER AND CONVERSION (§ 16*)—EVIDENCE.

This was an action of trover for the recovery of a horse. The evidence demanded a finding that the defendant, while a member of a partnership which was succeeded by the plaintiffs, and which formerly owned the horse sued for, had exchanged the horse for another horse, which the partnership accepted and used as its own, and that when the plaintiffs came into possession of its assets the partnership had parted with the title to the horse sued for. The evidence demanded a verdict in favor of the defendant. The mortgage introduced in evidence, and in which the horse sued for was described, was irrelevant, because the contradicted evidence showed that the exchange of horses was not made until after the mortgage was executed.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 119-147; Dec. Dig. § 16.*]

Error from City Court of Douglas; John C. McDonald, Judge.

Action by Beach, Hinson & Co. and others against A. B. Fisher. Judgment for plaintiffs, and defendant brings error. Reversed.

Rogers & Heath and J. W. Quincey, all of Douglas, for plaintiff in error. V. E. Padgett, of Baxley, and M. D. Dickerson, of Douglas, for defendants in error.

RUSSELL, J. Judgment reversed.

ATKINSON et al. v. KENNEDY. (No. 4,833.)
(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

CARRIERS (§§ 320, 347*)—INJURIES TO PASSENGER—QUESTIONS FOR JURY.

Where a train stops short of the station after the name of the station has been called, and a passenger, believing that the station has been reached, gets off in the darkness, and is injured by falling into a ditch or deep cut, whether the railroad company was negligent in not warning the passenger that the station had not been reached, and whether the passenger was negligent in alighting at the place where the train had stopped without assuring himself that the station had been reached, or that the place was safe, are questions of fact that should be submitted to the jury. *Miller v. East Tenn., Va. & Ga. Ry. Co.*, 93 Ga. 630, 21 S. E. 158; *Baltimore & Ohio Southwestern R. Co. v. Mulen*, 217 Ill. 203, 75 N. E. 474, 2 L. R. A. (N. S.) 115, 3 Ann. Cas. 1015. A petition alleging

in substance the foregoing facts was not subject to demurrer.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1128, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1316, 1325, 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. §§ 320, 347.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by C. J. Kennedy against H. M. Atkinson and another, receivers. Judgment for plaintiff, and defendants bring error. Affirmed.

Rosser & Brandon, of Atlanta, and J. H. Merrill, of Thomasville, for plaintiffs in error. Theodore Titus, of Thomasville, for defendant in error.

HILL, C. J. Judgment affirmed.

HOLTON v. HEBARD CYPRESS CO.
(No. 4,831.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(*Syllabus by the Court.*)

MASTER AND SERVANT (§ 155*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

This case is controlled by the decision of this court in *Elliott v. Tifton Mill & Gin Co.*, 12 Ga. App. 493, 77 S. E. 667, and the decision of the Supreme Court in *Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 299. An adult servant was injured by coming in contact with a revolving shaft upon which was a set screw, which caught in the servant's clothing. *Held*, that the danger of coming into proximity to the shafting was obvious to a person of the servant's age and experience, and it was not incumbent upon the master to give him warning with respect thereto. A nonsuit was properly awarded.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 310; Dec. Dig. § 155.*]

Error from City Court of Waycross; John C. McDonald, Judge.

Action by J. S. Holton against the Hebard Cypress Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error. Wilson, Bennett & Lambdin, of Waycross, for defendant in error.

POTTLE, J. Judgment affirmed.

VERNON v. STATE. (No. 4,836.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1129*)—APPEAL—ASSIGNMENTS OF ERROR.

Not merely the validity, but the very existence, of an assignment of error, depends upon its approval and verification by the trial judge. The assignment of error with reference to the return of the jury into court, and the additional instructions or recharge alleged to have been given, as qualified by the explanation of the trial judge, affords no ground for exception, and no reason why the judgment rendered should be set aside.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Jefferson; G. A. Johns, Judge.

Ben Vernon was convicted of crime, and brings error. Affirmed.

Ray & Ray, of Jefferson, for plaintiff in error. P. Cooley, Sol., of Jefferson, for the State.

RUSSELL, J. Judgment affirmed.

HOLLIS v. STATE. (No. 4,970.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(*Syllabus by the Court.*)

1. INDICTMENT AND INFORMATION (§ 189*)—OFFENSE CHARGED—CONVICTION OF LESSER OFFENSE.

One accused of stabbing can lawfully be convicted of assault and battery, in a case where there is evidence of an assault and battery independently of the stabbing. *Whilden v. State*, 25 Ga. 396, 71 Am. Dec. 181; *Rives v. State*, 74 Ga. 375; *Sessions v. State*, 115 Ga. 22, 41 S. E. 259. In the present case the fact that the accused struck the prosecutor was established by his own statement, as well as by the testimony of the prosecutor. According to the defendant's statement, he struck the prosecutor with his fist; according to the prosecutor, the blow was struck with the jaws of a knifehandle; and in either event the lawfulness of the attack depended upon the justification of the accused in delivering the blow. Upon this point the jury found adversely to the accused.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 582-595; Dec. Dig. § 189.*]

2. CRIMINAL LAW (§ 825*)—INSTRUCTIONS.

When the charge of the court is considered as a whole, it is manifest that the excerpts to which exception is taken could not have harmed the defendant, and were not expressive of any intimation or opinion on the part of the court as to what had been proved in the case. Each of the legal propositions stated by the court is correct in the abstract, and applicable to the evidence, and if fuller or additional instructions were desired they should have been requested.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2005; Dec. Dig. § 825.*]

3. ASSAULT AND BATTERY (§ 95*)—EJECTION OF TRESPASSER.

Even a trespasser, where he is rightfully ordered to leave a building by one having the premises in charge, is entitled to be allowed such a period of time as is necessary to enable him to make his exit from the room or building he is ordered to vacate. The amount of time reasonably necessary to enable such a trespasser to effect his departure may be varied by circumstance, and is a question of fact for determination by the jury, and the trial judge did not err in so charging the jury.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 141; Dec. Dig. § 95.*]

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Pat Hollis was convicted of assault, and brings error. Affirmed.

Worley & Nail, of Elberton, for plaintiff in error. Boozer Payne, Sol., of Elberton, for the State.

RUSSELL, J. Judgment affirmed.

GEORGIA & F. RY. CO. v. NORMAN.
(No. 4,870.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 441*) — KILLING STOCK — PRESUMPTION OF NEGLIGENCE.

The statutory presumption of negligence, which arose on proof that the cattle were killed by the running of the locomotive and cars of the defendant railroad company, not having been rebutted by the evidence, a verdict based alone on the presumption was authorized by law, and the judgment refusing a new trial must be affirmed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by Susie Norman against the Georgia & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Way, of Moultrie, for plaintiff in error. Shipp & Kline, of Moultrie, for defendant in error.

HILL, C. J. Judgment affirmed.

WILSON v. CLARK. (No. 4,928.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE—SECOND TRIAL.

When this case was before this court at a previous term, it was held that a verdict in favor of the claimant was demanded by the evidence. *Wilson v. Clark*, 11 Ga. App. 348, 75 S. E. 334. The decision then rendered is the law of the case. The evidence in the present record differs in no material respect from that introduced on the former trial, and under that decision a verdict in favor of the claimant should have been directed. The jury having returned a verdict in favor of the plaintiff in attachment, it was error to overrule the claimant's motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4685; Dec. Dig. § 1195.*]

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action between J. M. Wilson and J. W. Clark. From the judgment, Wilson brings error. Reversed.

W. H. Payne, of Chattanooga, Tenn., and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. W. E. Mann, of Dalton, for defendant in error.

POTTLE, J. Judgment reversed.

DEAN v. REYNOLDS HOME MIXTURE
GUANO CO. (No. 4,565.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 979*)—REFUSAL OF NEW TRIAL—CONFLICTING EVIDENCE.

The conflict between the parties as to the only two material issues in the case was acute. These two points were fairly submitted to the jury by the presiding judge. The verdict rendered is supported by evidence, and for this reason the discretion of the trial court, in refusing a new trial, cannot be controlled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action by the Reynolds Home Mixture Guano Company against Mrs. S. E. Dean. Judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Bull & Son, of Oglethorpe, for plaintiff in error. Jere M. Moore, of Montezuma, for defendant in error.

RUSSELL, J. The Reynolds Home Mixture Guano Company sued Mrs. S. E. Dean upon a promissory note, which stated that its consideration was 90 bags of commercial fertilizer purchased by the defendant. The defendant filed a plea of non est factum, and also defended upon the ground that she had never purchased the fertilizer from the plaintiff, and that the debt, if due, was her husband's debt. The jury found for the plaintiff. The defendant adduced evidence fully supporting her defenses, and therefore, necessarily, the inquiry arises as to whether sufficient testimony was adduced in behalf of the plaintiff to authorize the jury's finding. The defendant testified that she never signed the note in question, and had never authorized any one to sign it in her behalf. The agent of the plaintiff testified that the note was signed in the defendant's presence and at her express request and direction. It was for the jury to determine which witness swore truly. Likewise, while the defendant testified that the guano was purchased by her husband for himself, and that she had nothing to do with the transaction (and other evidence to this effect was introduced in her behalf), we think that, if the jury believed that she authorized the execution of her signature to the note, the jury would be authorized to infer, not only from the fact that she freely gave the note, but from the fact that she had been accustomed in preceding years to purchase fertilizer from the plaintiff, and from the admission that she owned the land upon which the guano was used, and from the fact that she authorized a letter "to hold the matter up for a few days and I [she] will be down and arrange it," that the debt evidenced by the note was her debt, and not that of her husband.

Exception is taken to the admission of the testimony as to the contents of a letter, upon the ground that the loss of the writing was not sufficiently accounted for; but an examination of the record shows that this objection is without merit. The plaintiff's attorney testified that he had received by due course of mail a letter, signed in the name of the defendant, and that on a previous trial of the case he had the letter in his possession. He carried the letter to his office, and it had been lost. He testified that he made an "extraordinary search" in trying to find it. Upon this proof the court did not err in admitting secondary evidence as to the contents of the letter. Furthermore, there was no testimony admitted as to the contents of the lost letter, except the admissions of the defendant upon that point.

The court correctly charged the jury, after fully stating the contention of the defendant, that "when the plaintiff comes into court and introduces its note in evidence, nothing else appearing, it is entitled to recover a verdict against the defendant, because that is making out what the law calls a prima facie case in favor of the plaintiff, and if nothing else appears they are entitled to recover." Immediately following this excerpt the court proceeded very correctly to instruct the jury as to the defendant's plea of non est factum, and her defense that the debt was that of her husband. It is true that the trial judge did not in express terms charge the jury, as ruled in *Stanton v. Burge*, 34 Ga. 435, that the burden of proof is on the plaintiff to prove the execution of the note when a plea of non est factum is interposed. But it is not necessarily error to fail to instruct the jury as to where the burden of proof lies, in the absence of a timely and appropriate request for instruction upon that point.

The case presents nothing but an issue of fact, which has been adjudicated by the jury within the scope of their prerogative, and the court did not err in refusing a new trial.

Judgment affirmed.

COOK v. STATE. (No. 4,985.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REASONABLE DOUBT.

In the absence of an appropriate and timely request that the meaning of the term "reasonable doubt" be defined for the jury, it is not error for the trial judge to confine his instructions upon this subject to the statement that "the guilt of the accused must be proved beyond a reasonable doubt," and that "the testimony which the state is required to produce to remove the presumption of innocence must be of such a character and carry such weight as to remove from your minds any reasonable doubt of the defendant's guilt." The instruction given in the present case upon the subject of reasonable doubt is approved. "To give a specific

meaning to the word 'reasonable,' when applied to 'reasonable doubt,' is trying to count what is not numbered and to measure what is not space." See *Barker v. State*, 1 Ga. App. 288, 57 S. E. 990, and citations.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

2. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—LIMITATIONS.

Though the fact that the offense was committed was denied, there was no testimony whatever to dispute that the offense, if committed at all, was committed within the period of two years. Consequently the omission of the trial judge to instruct the jury that the evidence must show that the offense was committed within the statute of limitations was not harmful to the accused. *Allen v. State*, 8 Ga. App. 284, 68 S. E. 1009.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985; Dec. Dig. § 814.*]

3. CRIMINAL LAW (§ 553*)—CREDIBILITY—QUESTION FOR JURY.

The evidence authorized the verdict of guilty. It is the privilege of the jury to believe the testimony of a single witness in preference to that of any number of witnesses whose testimony may contradict him, and even though testimony be adduced which would suffice to successfully impeach the witness, if this impeaching testimony were accepted by the jury. *Jolly v. State*, 5 Ga. App. 454, 63 S. E. 520; *Hudgins v. State*, 7 Ga. App. 785, 68 S. E. 336; *Chatman v. State*, 8 Ga. App. 843, 70 S. E. 188; *Holloway v. State*, 10 Ga. App. 50, 72 S. E. 512.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 553.*]

Error from City Court of Miller County; *W. I. Geer*, Judge.

Jim Cook was convicted of crime, and brings error. Affirmed.

Bush & Stapleton, of Colquitt, for plaintiff in error. P. D. Rich, Sol., of Colquitt, for the State.

RUSSELL, J. Judgment affirmed.

BUTTS v. STATE. (No. 4,845.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 922*)—NEW TRIAL—INSTRUCTIONS—PRESUMPTION OF INNOCENCE.

The failure of a trial judge in a criminal case to charge the jury to the effect that the defendant enters upon his trial with a presumption of innocence in his favor, and that this presumption remains with him, in the nature of evidence, until rebutted by proof satisfying the jury of his guilt to the exclusion of reasonable doubt, is error requiring the grant of a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

2. CRIMINAL LAW (§§ 308, 561*)—INSTRUCTIONS—"PRESUMPTION OF INNOCENCE"—"REASONABLE DOUBT."

The presumption of innocence is affirmative proof in behalf of one accused of crime, and places upon the prosecution the burden of

rebutting it by proof which shall satisfy the jury of the defendant's guilt beyond any reasonable doubt. The term "presumption of innocence" is not synonymous with that of "reasonable doubt." The presumption refers to a substantive right, which is in the nature of evidence; and the phrase "reasonable doubt" applies to the degree of proof necessary to produce mental conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 731, 1267; Dec. Dig. §§ 308, 561.*]

For other definitions, see Words and Phrases, vol. 6, p. 5539; vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

3. INSTRUCTIONS.

The court correctly charged the jury the principles of law relating to accomplices and the weight to be given the testimony of an accomplice, and the court did not err in the admission of the testimony to which exception is taken.

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Tom Butts was convicted of crime, and brings error. Reversed.

John A. Sibley, of Milledgeville, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, for the State.

RUSSELL, J. [1] 1. We shall not discuss the testimony in the case, since we are constrained to grant a new trial upon the assignment of error in which complaint is made that the trial judge failed to instruct the jury that the defendant entered upon his trial with the presumption of innocence in his favor, and that this presumption remains with him throughout the trial, until it is rebutted by proof satisfying the jury of the defendant's guilt to the exclusion of any reasonable doubt. The precise point was ruled by this court in *Reddick v. State*, 11 Ga. App. 150 (4), 74 S. E. 901.

[2] 2. As well pointed out by Mr. Justice (now Chief Justice) White, in *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, the legal presumption of innocence is to be regarded by the jury, in every case, as a matter of evidence. To use the language of Justice White: "The presumption of innocence is a conclusion drawn by law in favor of the citizen, by virtue whereof, when brought to trial on a criminal charge, he must be acquitted, unless proven guilty. In other words, this presumption is an instrument of proof created by law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. * * * 'Reasonable doubt' * * * is, of necessity, the condition of mind produced by proof resulting from evidence in the cause. It is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises. Thus, one is a cause; the other, an effect." Numerous cases are cited by the learned jurist clearly illustrating the

proposition that the presumption of innocence is not synonymous with reasonable doubt. A perusal of the opinion of Justice White in the case just cited will delight any one with a taste for history and literature as well as students of the law.

[3] 3. We find no error in the rulings of the court upon the admissibility of testimony; nor is the complaint which is addressed to the instructions of the court on the subject of accomplices well founded. The plaintiff in error is entitled to another trial, because he was deprived of a substantial right. The failure of the judge to present to the consideration of the jury the presumption of innocence, which was a shield in the nature of evidence in his favor, placed upon the state a lighter burden than that imposed upon it by law, and took from the defendant an important accessory of the trial, which might of itself have raised a reasonable doubt.

Judgment reversed.

SMITH v. D. ROTHSCCHILD & CO.

(No. 4,915.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. EXECUTION (§ 194*)—LEVY—CLAIM OF THIRD PERSON—EVIDENCE.

There was sufficient evidence to authorize the finding that title to the property levied on was in the defendant in execution at the date of the levy.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 571-574; Dec. Dig. § 194.*]

2. EXECUTION (§ 199*)—CLAIM OF THIRD PERSON—JUDGMENT AGAINST CLAIMANT—DAMAGES.

Where property is levied on as that of a husband, and his wife files a claim, and, under the evidence, the main issue is as to whether the wife's claim is collusive and fraudulent, and the jury are authorized to find that it is, they have the right, if they find for the plaintiff, to assess damages on the ground that the claim was filed for delay.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 579; Dec. Dig. § 199.*]

3. APPEAL AND ERROR (§ 1066*)—INSTRUCTIONS—HARMLESS ERROR.

The instruction that, if the husband made a sale of a stock of merchandise in bulk to his wife, the sale would be void unless the provisions of the sales in bulk act had been complied with, even if not applicable to any issue raised by the evidence, was nevertheless harmless to the claimant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

4. APPEAL AND ERROR (§ 1074*)—HARMLESS ERROR.

While, after the filing of a claim and after a return of the papers to court, the sheriff has no right, without permission of the court, to amend his return of levy, still, if he does so, and on objection during the trial the return is treated as if the addition had not been made, and the claimant is accorded all the rights he would have had under the return as first made, a verdict in favor of the plaintiff will not be set aside, merely because the court did not pass an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

order striking from the return the words so added.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248-4252; Dec. Dig. § 1074.*]

5. EXECUTION (§ 195*)—CLAIM BY THIRD PERSONS—HEARING—RIGHT TO OPEN AND CLOSE.

Where, in the trial of a claim case, the claimant denies that the defendant in execution was in possession at the date of the levy, it is not error to award to the plaintiff in *fi. fa.* the opening and conclusion.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 575; Dec. Dig. § 195.*]

6. NEW TRIAL (§ 29*)—MISCONDUCT OF COUNSEL.

Counsel for the plaintiff having remarked in the hearing and presence of the jury, while the claimant was on the stand as a witness, that if the claimant "were let alone she would impeach herself," and counsel for the claimant having promptly moved for a mistrial on account of this remark, and the court having declined either to award a mistrial or to rebuke counsel, a new trial should have been granted upon this ground of the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 43, 44; Dec. Dig. § 29.*]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by D. Rothschild & Co. against W. J. M. Smith. Judgment for plaintiff. On levy of execution, Annie M. Smith, wife of defendant, interposed a claim. Judgment for plaintiff, and claimant brings error. Reversed.

G. G. Bower, of Bainbridge, for plaintiff in error. P. D. Rich, of Colquitt, for defendant in error.

POTTLE, J. An execution issuing from the city court of Bainbridge in favor of Rothschild & Co., against W. J. M. Smith was, on August 9, 1910, levied by the sheriff upon a stock of goods in a storehouse in the village of Eldorado. Annie M. Smith, the wife of the defendant in *fi. fa.*, interposed a claim. Upon the trial the jury found in favor of the plaintiff, and also assessed damages against the claimant for delay. Her motion for a new trial was overruled, and she excepts.

[1] It is insisted that the verdict in favor of the claimant was demanded by the evidence. Both the claimant and her husband testified, in substance, that during September, October, and a part of November, 1909, the husband conducted a small mercantile business in the storehouse in which the goods were located at the time they were levied on; that in the latter part of November the stock had run down until there was in the storehouse only \$15 or \$20 worth of goods; that these goods were moved out of the storeroom by the husband, either upstairs in the building, where he and his wife resided, or to his farm, located some distance from Eldorado; that after this was done the wife, with her own money,

which she had obtained from insurance upon her father's life, bought the stock of goods which was in the storehouse in the latter part of November, 1909, and thereafter conducted the business in her own name. Both the husband and the wife testified positively that at the time the levy was made the husband did not own any portion of the goods levied on. The plaintiff's theory of the case was that the merchandise belonged to the husband, and that when he became indebted he abandoned the business and put his wife in control, either by selling her the goods in bulk or by making to her a gift of the merchandise. In support of this theory the plaintiff introduced a witness by the name of Williams, who testified that he resided in Eldorado, which was a small place containing only three stores; that he himself was a merchant, conducting a business within 60 feet from that of Smith; that the stock of merchandise in the storehouse with the Smiths did not run down as claimed by them in November, 1909, and that Smith simply abandoned the business and put his wife in charge. This witness swore positively that no goods were carried off and none brought in. He further testified that Smith had told him that he had sold the stock of merchandise to his wife, and that he (the witness) could swear of his own knowledge that the wife began business with the same stock of merchandise with which Smith had been conducting the business, and that the stock had not noticeably run down as claimed by the Smiths. Other witnesses testified that they lived in the vicinity, and had an opportunity to observe the store from time to time; that, if any goods had been moved out and replaced with new stock, they would have known it; and that they had never seen such an occurrence take place.

We think the evidence raised an issue of fact in reference to the ownership of the property, which was properly submitted to the jury for their determination. Even in ordinary cases, slight evidence of fraud may be sufficient to carry a case to the jury on this issue. Civil Code, § 4626. In transactions between husband and wife, the rule ought to be applied with even more strictness. Civil Code, § 3011. The evidence of the declarations of the defendant in *fi. fa.*, unfavorable to the claimant's theory, was not objected to. Admissions or declarations of a defendant in *fi. fa.*, made while the defendant is in possession, are generally admissible against the claimant, but not if made after the defendant has parted with possession. *Banks v. McCandless*, 119 Ga. 793, 47 S. E. 332; *Ozmore v. Hood*, 53 Ga. 114. The bona fides of the wife's claim of title rested upon the claim of both the husband and the wife that his stock of merchandise had run down, and that what remained had been moved out

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and replaced with goods bought by the wife. Witnesses who were in a position to know testified positively that no such substitution of stocks had taken place, but that, on the contrary, the husband simply went out and the wife went in, and took possession of the same stock with which the husband had been conducting the business. The jury had a right to accept this testimony, and, if so, they had the further right to disbelieve the testimony of both the husband and wife that she had replenished the stock with her own money. Especially so, in view of the husband's statement that he had sold out to his wife.

[2] 2. The jury having reached the conclusion that the claimant and her husband had colluded to defeat the plaintiff's demand, they were also authorized to find that the claim was instituted in bad faith, and hence merely for delay. See Civil Code, § 5169. This is not like a case where a claimant in good faith tests a doubtful question of law (*Clark v. Lee*, 51 Ga. 284); nor a case where one not a party to fraudulent collusion, and without notice of the fraud, in good faith files a claim in order to test the question whether the property was sold him to hinder, delay and defraud creditors (*Planters' Bank v. Cotton Mills*, 60 Ga. 169).

[3] 3. The charge of the court on the subject of sales of goods in bulk was probably not applicable, but it did the claimant no harm. Its effect was that, even if the jury should believe the husband had in good faith sold the stock of goods in bulk to his wife, the sale would be void, under the sales in bulk act. Civil Code, § 3228 et seq. If the evidence authorized the charge, it was properly given; if not, it was harmless, and did not prejudice the claimant in reference to the real issue in the case, which was whether her claim of title was bona fide and well founded, or whether it was fraudulent.

[4] 4. After the levy by the deputy sheriff, the sheriff added to the return the words, "same in the possession of W. J. M. Smith." Claimant's counsel moved to strike these words from the levy, upon the ground that they had been made without authority. The claim having been filed and the papers returned into court, the sheriff had no authority to amend his return without permission of the court. But the only advantage which the claimant could obtain from having his motion sustained was to prevent the plaintiff from making out a prima facie case upon the sheriff's untraversed return. As the plaintiff took the burden, the claimant accomplished all she sought, and it was not prejudicial that the court did not formally strike from the return the words added by the sheriff.

[5] 5. The position assumed by the claimant in denying that the defendant was in possession was inconsistent with her claim to the opening and conclusion, and the court

did not err in holding that the plaintiff was entitled to open and conclude.

[6] 6. A new trial is granted in this case solely because of the remark made by counsel for the plaintiff set forth in the sixth headnote. The counsel states in his brief that the remark was really made to counsel for the claimant, and in a colloquy between the attorneys, and was not intended for the jury. We must, however, take the record as it is. From the motion for a new trial it appears that the remark was made before the jury and in their hearing. In making the remark, counsel went beyond his right to comment upon the evidence and the witnesses in argument to the jury. If the testimony of a witness authorizes the conclusion, an attorney may properly argue that the witness has shown himself to be unworthy of credit on account of the unreasonable and contradictory statements appearing in the testimony; but this is quite a different thing from telling the jury, while the witness is on the stand, that if he is let alone he will impeach himself. In harmful effect, this may be equivalent to testimony that the witness is of bad character and not worthy of credit; and a witness is impeachable only by legal evidence. In the case of a popular and influential attorney, such as was the counsel who made the remark in this case, an expression of his opinion as to the character of the witness is likely to have weight with the jury and prejudice the adversary's case. And especially is this true where the presiding judge, upon his attention being called to it, fails to rebuke counsel, and by his silence, in the minds of the jury, puts the stamp of his approval upon the remark so made. The court has several times indicated its disposition to require counsel and litigants to adhere to the rules of correct practice, that the trial may be orderly, and free from unfair and prejudicial matter, either of evidence or of argument. The object of all legal investigations is the discovery of the truth; but truth must be discovered by the application of rules of law to competent and relevant evidence, and after a trial in accordance with orderly procedure. The remark made by counsel in the present case was doubtless inadvertent, and not intended to prejudice the adversary's case. But its harmful effect was not removed, either by a withdrawal of the improper remark and explanation by the counsel, or by a rebuke by the court; and as counsel for the claimant, by moving for a mistrial, promptly invoked a ruling from the court, we feel constrained to reverse the judgment overruling the motion for a new trial on this ground. *Martin v. State*, 10 Ga. App. 798, 74 S. E. 306; *Clarke v. State*, 5 Ga. App. 93, 62 S. E. 663; *Pelham R. Co. v. Elliott*, 11 Ga. App. 621, 75 S. E. 1062.

Judgment reversed.

JOHNSON v. SEABOARD AIR LINE RY.
(No. 4,923.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 247*)—PASSENGER TAKING WRONG TRAIN.

One who, after having purchased a railway ticket, takes the wrong train by mistake, is to be regarded as a passenger while riding thereon, and until he has safely alighted therefrom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*]

2. CARRIERS (§§ 264, 303, 319*)—MISTAKE OF PASSENGER—DUTY OF CARRIERS.

If the mistake was not caused by any negligence on the part of the carrier or its servants, the carrier is not bound to return the passenger to the point where the mistake was made, but is under a duty to afford him a safe place to alight from the train. For injuries resulting from requiring the passenger to disembark at an unsafe place, the carrier would be liable, but not for mental and physical suffering occasioned solely by the mistake in taking the wrong train, or in making an effort to return to a place of safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1087-1089, 1216, 1218, 1224, 1226-1232, 1234-1240, 1245, 1338-1345; Dec. Dig. §§ 264, 303, 319.*]

3. CARRIERS (§ 264*)—ACTION BY PASSENGER—PETITION—DEMURRER.

The failure of a railway ticket agent to inform a passenger upon which of two nearby tracks his train will come cannot be made the basis of a recovery for taking the wrong train, in the absence of a request from the passenger for information upon the subject, or of something to indicate to the agent that the passenger is likely to take the wrong train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1087-1089; Dec. Dig. § 264.*]

4. CARRIERS (§ 275*)—TAKING WRONG TRAIN—ACTION—PETITION.

There was no error in sustaining the demurrer to the plaintiff's petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1076, 1077; Dec. Dig. § 275.*]

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by Mrs. Neely Johnson against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff brings error. Affirmed.

I. F. Mundy, of Rockmart, and W. W. Mundy, of Cedartown, for plaintiff in error. Brown & Randolph, of Atlanta, and Ault & Wright, of Cedartown, for defendant in error.

POTTLE, J. The plaintiff's petition was dismissed on demurrer. Her action was predicated upon the following allegations: Plaintiff desired to go to Taylorsville, on the line of the defendant's railway. She came from her home in Curryville to Rockmart, to take the train for Taylorsville, being a stranger in Rockmart. At this point the defendant has a main line leading to and from Atlanta, and a branch line leading to Taylorsville. Plaintiff bought a ticket to the latter point, and upon inquiry from the

ticket agent was informed by him that the train would arrive in 40 minutes. At the expiration of this time one of the defendant's trains approached on the main line, and plaintiff, without making further inquiry, boarded the train and took a seat. Shortly after its departure, and when the train had gotten between one and two miles from Rockmart, the conductor came through taking up tickets, and informed plaintiff that she was aboard the train going to Atlanta. Thereupon the train was stopped, and she got off. It is alleged that she was ordered to get off by the conductor, but it is not averred that she requested him to take her on to the next station. Plaintiff was a weak, feeble woman, of delicate health and 54 years of age. She was put off near the woods beyond a high trestle, on top of a high embankment. In alighting she fell to the ground and was greatly embarrassed by the fall, as several passengers were observing her. She was forced to stand on the narrow and high embankment until the train moved away, in consequence of which she became frightened and nervous, and was in no condition to take the long walk back to Rockmart. The conductor told her it was only a few steps back, and if she would run she would catch her train. She did not know this was untrue, and started back in a run or fast walk, and when she reached Rockmart was completely exhausted, and suffering from the nervous strain and fatigue of the walk. When she boarded the train, the conductor did not inform her she was on the wrong train, but she "passed the agent, and he saw her board said train, and he knew she was going to Taylorsville, and misled petitioner by not explaining to her that her train left from the rear of the depot."

[1] Although the plaintiff boarded the wrong train by mistake, she was, while riding thereon, so far a passenger as to entitle her to protection against the company's negligence; and if, while such a passenger, she had been injured as a result of the failure of the company's employes to exercise due care, the defendant would have been liable. *Cincinnati Railroad Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; *Columbus Railway Co. v. Powell*, 40 Ind. 37; *I. & G. N. Ry. Co. v. Gilbert*, 64 Tex. 536; *Arnold v. Penn. Railroad Co.*, 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542.

[2] But, whether a passenger or a trespasser, the defendant's servants were bound to afford her a safe place to alight. It is not alleged that the plaintiff sustained any damage in consequence of having been forced to alight at an unsafe place. It is alleged merely that she was embarrassed by reason of falling; and, so far as appears, the fall was not due to any negligence upon the part of

any agent or servant of the defendant. The entire injury suffered by the plaintiff was due to the fact that she was compelled to walk back to Rockmart, a distance of about two miles, and to the excitement and nervousness caused by having boarded the wrong train. Her right to recover must therefore depend upon whether her act in taking the wrong train was occasioned by any act of omission or commission on the part of the defendant's agents which would amount to negligence; for, if the mistake was due to the company's fault, it was bound to take her back to the point where the mistake was made, and would be liable for any injuries sustained by her as a result of her effort to reach a place of safety. *I. & G. N. Ry. Co. v. Gilbert*, 64 Tex. 536. On the other hand, if the mistake in taking the wrong train was not due to the company's default, it was bound only to provide her a safe place to disembark after the mistake was discovered, and when she had thus alighted the relation of carrier and passenger ceased, and the company was no longer under a duty to her as a passenger. *Cincinnati Railroad Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144. If the plaintiff took the wrong train in consequence of negligence on the part of the ticket agent, the conductor would have had no right to put her off at the place where she alighted, whether he knew of the agent's negligence or not. *Head v. Ga. Pacific Ry. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434.

[3] The agent correctly gave the plaintiff all the information she sought. In the absence of something to suggest the contrary, the agent was not bound to assume that the plaintiff did not know which train to take. Both tracks were in plain view, and, if the plaintiff was in doubt, she could easily have inquired of the agent, or of the conductor when she boarded the train. It is no part of the ticket agent's duty to follow passengers up to see that they do not get on the wrong train. His business is in the ticket office, and his duty, so far as passengers are concerned, is ended when he furnishes the means of transportation and gives such information in connection with its use as is necessary to enable the passenger to properly use the ticket. If he is applied to for information in reference to schedules, or as to the particular train which the passenger ought to take, it is his duty to give the necessary information; but it is not his duty to volunteer information in reference to these matters to all passengers who apply for tickets, in the absence of some intimation that the information is desired. The statement that the train would be due in 40 minutes was not misleading, at least in the absence of some allegation that it was untrue, and that the only train due about that time was the one which plaintiff mistakenly

boarded. The allegation that plaintiff passed the agent, and he saw her board the train, is not sufficient to show negligence on his part; for it was no part of his duty to be on the lookout to see that she did not take the wrong train, and unless he purposely stood by, and knowingly and intentionally permitted her to make the mistake, the company would not be to blame. The allegations do not show that he did this.

[4] It is clear from the petition that the plaintiff's mistake was due to her own failure to exercise ordinary care, and not to any negligence on the part of the defendant. The demurrer was properly sustained. Judgment affirmed.

McKINNEY et al. v. BATTLE BROS.
(No. 4,560.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. SALES (§ 467*)—CONDITIONAL SALES.

Where a promissory note given for the purchase of a horse reserves to the seller the title to the property until it is paid for, loss in case of death without fault on the part of the buyer will fall upon the seller as owner of the property, in the absence of a stipulation to the contrary. It is within the power of the contracting parties, under the provisions of section 4123 of the Civil Code of 1910, to agree that the purchaser shall bear the risk of the loss.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1354, 1358-1364; Dec. Dig. § 467.*]

2. SALES (§ 467*)—CONTRACT—CONSTRUCTION.

In a contract of sale, with reservation of title to the seller, as above referred to, a stipulation to the effect that it is expressly understood that the seller does not insure the health, life, soundness, or work of the horse, but, "in case of loss or damage to said property, the same shall be the loss of the buyers," when construed as a whole, includes loss by death.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1354, 1358-1364; Dec. Dig. § 467.*]

Error from City Court of Albany; D. F. Grosland, Judge.

Action by Battle Bros. against Thomas McKinney and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

R. J. Bacon, R. H. Ferrell, and D. H. Redfearn, all of Albany, for plaintiffs in error. Mann & Milner, of Albany, for defendants in error.

RUSSELL, J. The action was against Thomas McKinney, individually and as administrator of his wife, upon a promissory note given by them to Battle Bros., the plaintiffs, for the purchase price of a mare. In the note Battle Bros. reserved title to the mare until payment of the note, with a stipulation, however, that in case of loss or damage to the property the same should be the loss of the buyers, and this stipulation is coupled with the express condition that the sellers do not insure the health, life, sound-

ness, or work of the said mare. Two pleas were filed—one setting up fraud on the part of the sellers, and the other the death of the horse, and the insistence of the defendants upon a rescission of the contract, and that the loss occasioned by death should be the loss of the plaintiffs. The trial judge, upon an inspection of the contract of sale, declined to submit to the jury the issue that the loss due to the death of the mare should fall upon the sellers. The issue of fraud was fairly submitted by the court, and upon this issue the jury found in favor of the plaintiffs. The contention that the defendants should be discharged from liability upon the ground of fraud is abandoned in the brief, and the only question presented by the record is whether the court erred in refusing to present the defendants' contention, that the death of the mare was the loss of the sellers, and that there should be a rescission.

[1] We think that the judge correctly held that the death of the mare was the loss of the buyers, and not of the sellers. Under the provisions of Civil Code, § 4123, the principle stated by counsel for the plaintiffs in error, and which it is insisted the court erred in not presenting to the jury—that where property is sold and delivered, and title is not to pass until payment in full of the purchase money, and the property is destroyed or dies, all without fault of the vendee, the loss must fall on the vendor—is a correct general rule. However, an exception to this rule may be created in any case by an express contract under which the buyer, and not the seller, assumes the risk of loss. In our opinion that is precisely what occurred in this case. The Code section expressly provides for exceptions by contract. Section 4123 of the Civil Code declares: "Where property is sold and delivered, but title is not to pass until payment in full of the purchase money, and the property is lost, damaged, or destroyed without the vendee's fault, he is entitled to rescission of the contract or to an abatement in the price, *unless it is otherwise agreed in the contract of sale.*" Learned counsel for the plaintiffs in error do not insist that an exception cannot be made by which the loss shall be that of the buyer. They contend that under the terms of the contract here involved the contingency of the death of the mare was not provided for in the exception attempted to be made, and for that reason that the defendants should be relieved under the general rule embodied in section 4123. The contention in the present case is that the words "loss or damage," used in referring to the mare, do not include *death*.

[2] Since each word employed in a contract must be considered and weighed in connection with other words and phrases referring to the same object, or included within the same subject-matter, we cannot concur in this

view. The writing under consideration, after describing the mare, which the instrument avers is brought after a full inspection and without warranty, either expressed or implied, states that "it is expressly understood that Battle Bros. do not insure the health, life, soundness, or work of said mare; * * * but, in case of loss or damage to said property, same shall be the loss of the buyers." In our opinion the verbiage of the contract above quoted, when construed all together, is amply sufficient to constitute a stipulation that the loss shall fall on the buyers in the event the property is lost, damaged, or destroyed, and includes loss by death. The word "loss" in this contract relates back to "life" in the previous clause; and loss of life is nothing more nor less than death.

The ruling in *Smith v. Culpepper*, 108 Ga. 750, 33 S. E. 49, cited by counsel for the plaintiffs in error, is not in point, because in that case, as appears from an examination of the record, there was no attempt to make an exception to the general rule laid down in Code section 4123. Of course, as insisted by counsel for the plaintiffs in error, the contract should be construed most strongly against the plaintiffs, because they prepared it; but in our view no other reasonable construction can be placed upon the contract than that given by the trial judge. For this reason the distinction very learnedly drawn between subjective and objective loss is inapplicable to the present case.

Judgment affirmed.

BARLOW v. STATE. (No. 4,957.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTION—STRIKING PLEA IN ABATEMENT.

As appears from the record, the plea in abatement was filed after arraignment and the joinder of issue. "In order for the striking of a plea in abatement to furnish a ground for reversal, it must affirmatively appear that such plea was filed before arraignment; otherwise, it will be presumed that the judgment of the court was right, and that the plea was filed after arraignment." *Moseley v. State*, 74 Ga. 404; *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478; *State v. Sharp*, 110 N. J. C. 604, 14 S. E. 504; *State v. Rickey*, 10 N. J. Law, 83; *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54; *U. S. v. White*, 5 Cranch, C. C. 457, Fed. Cas. No. 16,879.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 278*)—PLEA IN ABATEMENT—OBJECTIONS.

"The only objections which can be taken to a grand juror by plea in abatement must be such as would disqualify the juror to serve in any case. * * * All other objections affecting the incompetency of the juror must be taken by challenge, if at all, and will not be heard after the time for challenging is past. Thus, it is not a good plea to an indictment for murder

that a member of the grand jury which found the indictment was a nephew of the person who was murdered." *Thompson & Merriam on Juries*, § 535.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 638-642; Dec. Dig. § 278.*]

3. LARCENY (§ 55*)—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

Although the evidence is circumstantial, and barely sufficient to exclude every other reasonable hypothesis save that of the defendant's guilt, no reasonable supposition can be drawn from the evidence which will connect any other person with the disappearance of the watch, which was proven to have been in a room of the prosecutor's house at the time that the accused entered it, and the loss of which appears to have been concurrent with the departure of the accused. *Sheffield v. State*, 1 Ga. App. 135, 57 S. E. 969.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.*]

Error from Superior Court, Fayette County; R. T. Daniel, Judge.

Bill Barlow was convicted of larceny, and brings error. Affirmed.

J. W. Culpepper, of Fayetteville, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, and J. W. Wise, of Fayetteville, for the State.

RUSSELL, J. Judgment affirmed.

COSPER v. STATE. (No. 4,932.)
(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1030*)—CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS—NECESSITY—CERTIFICATION TO SUPREME COURT.

The question whether a statute is for any reason unconstitutional will not be certified to the Supreme Court, when a determination of the issues involved can be reached without a decision of that question. Nor will a reviewing court pass upon the constitutionality of a statute, unless it appears that the question was made in the court below and passed upon by the trial judge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2619-2621, 2632, 2653; Dec. Dig. § 1030.* *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

2. WEAPONS (§ 3*)—CARRYING WEAPONS.

"The act approved August 12, 1910 (Acts 1910, p. 134), entitled 'An act to prohibit any person from having or carrying about his person * * * any pistol or revolver without first having obtained a license from the ordinary,' etc., should receive a reasonable construction, in accord with the purpose of the Legislature in enacting it." *Jackson v. State*, 12 Ga. App. 427, 77 S. E. 371; *Strickland v. State*, 137 Ga. 1, 72 S. E. 260, 36 L. R. A. (N. S.) 115, Ann. Cas. 1913B, 323; *Id.*, 137 Ga. 115, 72 S. E. 922.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. CRIMINAL LAW (§§ 20, 738*)—EVIDENCE—QUESTION OF INTENT.

A criminal intent is an essential ingredient of crime, and while it may be presumed, as a matter of law, that one anticipates the natural, ultimate consequences of his act, the question

of intention rests ultimately with the jury, and is not for the court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 21, 24, 25, 1705, 1707; Dec. Dig. §§ 20, 738.*]

4. WEAPONS (§ 13*)—CARRYING WEAPONS—EVIDENCE.

One who finds a pistol on a public road, and carries it to his home solely for the purpose of safekeeping until the pistol is called for by its owner, is not guilty of a violation of the act prohibiting the carrying of pistols without a license; and it is error to instruct the jury that under such a state of facts they should convict the accused.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Henry Cosper was convicted of carrying a weapon, and brings error. Reversed.

S. Holderness, of Carrollton, for plaintiff in error. J. R. Terrell, Sol. Gen., of Greenville, for the State.

RUSSELL, J. The facts are very brief. The state's witness saw the defendant carrying a pistol on a public road, going toward the defendant's home. He had it in his hand, openly and not concealed. The defendant had no license authorizing him to carry a pistol. The defendant (who was a boy 18 years of age) stated that on the day he met the witness (who was on his way from the home of the defendant's father) he saw a pistol in the middle of the road. He picked it up and carried it to his father's house, and did not know who was the owner of the pistol. A day or two later Sam Cavender, who had lost a pistol, came to the defendant's house and identified it, and the defendant delivered the pistol to Cavender. The defendant stated that he did not himself own any pistol, and had no intention of violating the law, but merely picked it up and preserved it for the owner.

[1] 1. Counsel for plaintiff in error seeks to question the constitutionality of the act of 1910 (Acts 1910, p. 134). In our opinion the point which the learned counsel for plaintiff in error seeks to raise was settled by the ruling of the Supreme Court in *Strickland v. State*, 137 Ga. 1, 72 S. E. 260, 36 L. R. A. (N. S.) 115, Ann. Cas. 1913B, 323. But in any event we shall not deal with the question of the constitutionality of the act as affecting the plaintiff in error. The question as to whether a statute is for any reason constitutional will not be certified to the Supreme Court, when a determination of the issues involved can be reached without a decision involving the constitutionality of the law in question. *Wimberly v. Georgia Southern & Florida R. Co.*, 5 Ga. App. 263, 63 S. E. 29. Nor will a reviewing court pass upon the constitutionality of a statute, unless it appears that the question was made in the

court below and passed upon by the trial judge. *Griggs v. State*, 130 Ga. 16, 60 S. E. 103.

[2] 2. The court charged the jury that, if they believed it to be true that the defendant picked the pistol up on the public highway and carried it on his person to his home (it being conceded that the defendant had no license), he would be guilty under the law. As was said by Judge Lumpkin, in delivering the opinion of the court in the *Strickland Case*, supra: "The act forbidding the carrying of pistols without a license should receive a reasonable construction." Following this ruling, in *Jackson v. State*, 12 Ga. App. 427, 77 S. E. 371, this court held that the statute was not intended to prevent the manual possession of a pistol for such a length of time as was necessary to examine it with a view to its purchase, nor to penalize the act of one who, having a pistol in his hand for no other purpose than that of examination, might be temporarily called aside by some one who wished to speak to him. In the present case, if there had been no evidence but that in behalf of the state, the jury would have been warranted in convicting the accused. But the defendant made a statement, and it was the right of the jury, if they saw fit, to believe that statement. If they believed it, it was the right and duty of the jury to apply the rule of reason and the test of reasonableness to the circumstances under which the accused had the pistol in his possession, as well as to ascertain whether or not there was in fact any intent to commit a crime. The charge of the trial judge practically eliminated the defendant's statement from the case, and was a holding that, as a matter of law, one has no right to pick up a pistol lying in the public road, no matter what may be his purpose in so doing.

Under the charge of the learned trial judge, the jury was obliged to convict the accused, even if they believed the defendant's statement. The opinion of the judge who presided in this case is entitled to great consideration, because he is not only an upright magistrate, without fear and without reproach, but he is also a most erudite jurist; but still we cannot concur in the view of the statute as presented in the instruction above quoted. As has been several times pointed out by this court (and the fact is also referred to by Justice Lumpkin in the *Strickland Case*, supra), the sale of pistols in this state is not unlawful. There was a time when it was illegal to sell pistols in Georgia, but that law was repealed. It must be assumed that the Legislature was cognizant of the history of prior legislation upon this subject at the time the act of 1910 (Acts 1910, p. 134) was passed. In the opinion of the majority of the Supreme Court, the Legislature did not intend to prevent the carriage or delivery of a pistol from the place of sale to the home of the purchaser. The

purpose of the carrying must be taken into consideration, and there must be some indication that the carrying is more or less habitual. *Jackson v. State*, supra. Of course, it would never do to hold otherwise than that evidence of carrying on one occasion would be sufficient to authorize the conclusion that the accused habitually carried the pistol identified by proof as having been carried on that occasion, without a license. But we are not prepared to hold that, if in any case it should plainly appear that the carrying was a mere temporary incident, due to an emergency of some kind, or absolutely necessary for the transportation of the property and its preservation, or to prevent a breach of the peace—perhaps a homicide—one who could show a good reason for not taking out a license, in the fact that he had never owned a pistol, should be subjected to punishment for failure to take out a license.

[3] 3. In the offense of carrying a pistol without taking out the license required by law, as in every other act denounced by law as criminal, the culpability of the accused must be determined by the intent with which the act was done. True, as a general rule, the law supplies proof of intent by the presumption that every person intends the legitimate consequences of his act; but this presumption may be rebutted, either by the evidence in the case or the defendant's statement, if the jury see proper to believe it. To constitute a crime, not only must an act be done which is forbidden by law, but there must be operating in addition to this and in the act itself an intention to violate the law, or criminal negligence. It is elementary that there must be "a union or joint operation of act and intention, or criminal negligence," to constitute a crime. Having proved the commission of an act forbidden by law, the legal presumption that the apparent violation of the law was willful and intentional fortifies the prosecution, and completes the case in behalf of the state. But this does not preclude the possibility of the defendant's showing that he had no intention of violating the law. Especially is this true in those cases where the gravamen of the offense consists in the particular intention with which the act was done. In all such cases the question of the intention is one wholly for the jury.

We are of the opinion that the same rule should be applied in a case such as this, where the gravamen of the offense is the failure to obtain permission to do the act which, if the legal requirements had been complied with, would have been permissible. In other words, if the defendant in the present case, being over 18 years of age, had applied for a license and had complied with the other statutory requirements, he could have obtained one. Had he obtained the license, his carrying the pistol would not have been illegal. Can it be said that, if

the jury are satisfied from the circumstances that there was no reason why he should have taken out a license to carry a pistol, he should be punished, forsooth, because he had not obtained a license? In forbidding persons, other than those excepted from the operation of the act, to carry pistols without first obtaining a license, it must be assumed that the Legislature had in mind one who intended to carry a pistol. If one intends to carry a pistol, and does carry it, without obtaining a license, he is guilty of a violation of the law now in question; but if one who has not obtained a license, for the reason that he has never intended to carry a pistol, is forced by some exigency (the stress of which the jury is to consider as illustrative of his intention) to remove a pistol from an unsafe to a safe place, or to prevent its unlawful use, the accused should not be convicted. It is in every case for the jury, from the circumstances of the case, to determine whether the accused intended to carry a pistol without obtaining a license. Of course, if nothing more appeared than that he had carried a pistol and had not obtained a license, or if it appeared that the exigency was not such as satisfactorily to negative the assumption that the pistol carrier intended to violate the law, the accused would properly be convicted. But if, on the other hand, the defendant, either by proof or by his statement, if credible, rebuts the presumption of criminal intention arising from proof that he carried the pistol, an acquittal would be authorized.

[4] 4. One who finds a pistol on a public road and carries it to his home, solely for the purpose of safekeeping, until the pistol is called for by its owner, is not guilty of a violation of the act prohibiting the carrying of pistols without a license, and it is error to instruct the jury that under such a state of facts they should convict the accused. And for this reason, in our opinion, it was error to tell the jury they were by law required to convict the accused, regardless of his statement. Of course, it can never be known whether or not the jury would have believed the defendant's statement; but they *might* have believed it, and if it is the truth

of the case, the defendant was not guilty, although he had not paid the license required by law, because there never was a time when he had carried or intended to carry a pistol within the true meaning and reasonable intentment of the act of 1910.

The word "carry" sometimes involves the idea of habitude, and as pointed out in the Jackson Case, *supra*, there must be more than a mere temporary handling of the pistol to constitute the offense defined in the act of 1910. When we consider the intention of the Legislature in passing this statute, as well as the ruling of the Supreme Court in *Modesette v. State*, 115 Ga. 582, 41 S. E. 992, in which it was held that one who comes into possession of a pistol at a public gathering is not guilty of carrying the weapon to the gathering (which ruling was followed in *Culberson v. State*, 119 Ga. 805, 47 S. E. 173, and *Amorous v. State*, 1 Ga. App. 313, 57 S. E. 999), and bear in mind the reasoning in the *Strickland Case*, *supra*, and the authorities therein cited, especially *Hill v. State*, 53 Ga. 472, it is apparent that the right to carry arms guaranteed by the Constitution (the exercise of which may be regulated, but cannot be prohibited) is one of habitude. That this is true has been universally admitted in those rulings in which it was held that the proof of concealment of a pistol for but a moment was sufficient to authorize conviction, because it was necessary that one who carried a pistol should have the habit of carrying it openly and fully exposed to view, so that one having his person in view would at all times know that the pistol carrier was armed. Certainly the grant of a license for a designated term involves the thought that the applicant for the license intends to obtain the right to carry a pistol (though openly) as often as he desires during the life of his license and to legalize the habit (if he has the habit) of carrying the pistol. For this reason, the statement of the accused that he did not own a pistol, and did not intend to violate the law, if credible to the jury, was of such legal significance that the jury should have been permitted to at least consider it.

Judgment reversed.

Ex parte MASSEE.

STATE v. MASSEE.

(Supreme Court of South Carolina. May 24, 1913. Rehearing Denied Aug. 25, 1913.)

1. HABEAS CORPUS (§ 92*)—SCOPE OF INQUIRY.

Legislation as to extradition being within the power of Congress, its statutes are paramount to state Constitutions and statutes, and all that a state court can do under habeas corpus by one held under an extradition warrant is to determine whether the conditions of the federal Constitution and statutes have been complied with.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92; * Extradition, Cent. Dig. § 45.]

2. HABEAS CORPUS (§ 110*)—BAIL PENDING FINAL HEARING.

Ordinarily bail may be granted pending a final hearing in habeas corpus proceedings; but, where the prisoner is held for extradition, bail should not be allowed, if the federal law has been complied with, as it must be presumed the state extraditing will accord the prisoner all his legal rights, though, if the law has not been complied with, the prisoner may be released absolutely or on bail.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 99; Dec. Dig. § 110.*]

3. HABEAS CORPUS (§ 92*)—SCOPE OF INQUIRY—EXTRADITION PROCEEDINGS.

In habeas corpus proceedings the court may determine whether the prisoner is subject to extradition under the federal statute, as whether he is the person charged, whether he is a fugitive from justice, whether he was in the demanding state when the offense was committed, and whether the act charged was a crime in the demanding state; but the court cannot inquire into the motive of the extradition or the merits of the case.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92; * Extradition, Cent. Dig. § 45.]

4. EXTRADITION (§ 39*)—VALIDITY OF REQUISITION—PRESUMPTION.

When extradition papers are regular on their face, every intendment is in favor of their validity, and the burden is on the prisoner to show that the statutes have not been complied with.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 45, 46; Dec. Dig. § 39.*]

5. HABEAS CORPUS (§ 110*)—SCOPE OF INQUIRY—EXTRADITION.

That the prisoner was held for extradition for a crime, but was guilty of no moral wrong, and the prosecution was a hardship, and instituted to collect a debt, and the Governor of another state had refused extradition, did not show that the statutes had not been complied with, and, the extradition papers being regular on their face, the court erred in admitting the prisoner to bail pending hearing in habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 99; Dec. Dig. § 110.*]

6. HABEAS CORPUS (§ 85*)—EVIDENCE—EXTRADITION PROCEEDINGS.

It was error to admit as evidence in a habeas corpus proceeding an affidavit of a private individual stating that the Governor told him that an extradition requisition bearing the Governor's official signature and the great seal of the state had not been signed by the Governor.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

7. HABEAS CORPUS (§ 85*)—EVIDENCE—EXTRADITION PAPERS.

Telegrams in relation to extradition proceedings between the Governors of the two states, indicating withdrawal of the requisition, which were considered on the preliminary hearing in habeas corpus without objection, were properly considered on the final hearing.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

8. HABEAS CORPUS (§ 110*)—RELEASE ON BAIL—FAILURE OF PRISONER TO APPEAR AT FINAL HEARING.

If, pending final hearing in habeas corpus proceedings, the prisoner is released on bail, and he fails to appear, his bail will be forfeited, and the inquiry into the legality of the arrest be deemed abandoned, unless he can give a legal excuse, the acceptance of which is in the discretion of the court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 99; Dec. Dig. § 110.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Thos. S. Sease, Judge.

Proceedings in habeas corpus by W. J. Massee. From an order discharging him from custody, the State appeals. Reversed, with directions.

Attorney General Frierson, H. S. Stokes, of Nashville, Tenn., and Nicholls, & Nicholls, of Spartanburg, for the State. Sanders & De Pass, C. C. Wyche, and John Gary Evans, all of Spartanburg, for respondent.

WOODS, J. The petitioner, W. J. Massee, was arrested by sheriff of Spartanburg county under the mandate of his excellency Cole L. Blease, Governor of South Carolina, issued on the 25th day of July, 1912, in accordance with a requisition from his excellency Ben W. Hooper, Governor of Tennessee. On the same day, upon the application of Massee, Hon. T. S. Sease, circuit judge, issued a writ of habeas corpus returnable in the afternoon of that day. The sheriff made return to the writ: "That W. J. Massee is held in my custody, under telegram from Governor Cole L. Blease and warrant issued by Magistrate A. H. Kirby, charged with making threats and using duress to induce Robert Williams to dismiss an action in United States Court." The record contains this statement of the proceedings before Judge Sease: "Counsel for the petitioner then moved that the petitioner be admitted to bail pending the hearing of the foregoing writ. Counsel for the state objected on the ground that the statutory four days' notice had not been given. This objection was overruled, and his honor passed the following order admitting Massee to bail, his honor ruling and holding that appellant was entitled to four days' notice, but that he would admit the petitioner to bail in the meantime." Accordingly, an order was made that Massee be discharged from custody on giving bond in the sum of \$10,000, conditioned for his appearance before Judge Sease on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

27th day of July, 1912. The bond was made, and Massee was discharged. In the meantime, on the 26th of July, Governor Blease, having received a telegram signed by Governor Hooper stating that the requisition had been signed by mistake and was revoked, requested Judge Sease to continue the hearing until Governor Hooper's telegram could be authenticated under the seal of the state of Tennessee. An order was accordingly made postponing the hearing until the 7th of August, and requiring Massee to appear in person before Judge Sease on the 7th of August at 10:30 in the forenoon, and continuing the bond in force until that time. In passing this order, Judge Sease considered, without objection of counsel, the telegram of Governor Blease to him, the telegram of Governor Hooper to Governor Blease, and a telegram from James B. Cox, Esq., of Knoxville, to Massee stating that Governor Hooper had promised to revoke the requisition.

Massee did not appear on the 7th of August, pleading illness as an excuse, and his counsel presented a paper, purporting to be signed by Massee, waiving his right to be present at the habeas corpus proceedings. Counsel for the state of Tennessee objected to the hearing in the absence of the petitioner on the grounds "(a) that the bond was conditioned upon the personal appearance of the petitioner, W. J. Massee, before his honor, and, upon the failure of the petitioner to enter his appearance in person, the condition of the bond was broken; (b) that in a habeas corpus proceeding in which *ex vi termini* and, as the law directs, the body of the petitioner must be brought into court, the personal appearance of the petitioner was a duty and not a personal right which could be waived." Overruling these objections, Judge Sease proceeded with the hearing, and admitted for his consideration in the matter the telegram from Governor Hooper to Governor Blease purporting to revoke the requisition, the telegram from James B. Cox, Esq., to Massee stating that Governor Hooper had promised to revoke the requisition, and an affidavit of W. D. McNeil to the effect that, in a conversation with him, Governor Hooper gave his reasons for reinstating the requisition, and stated that he did not previously sign the requisition.

In overruling the objection to all these documents made on the ground that they were mere hearsay, and that the formal requisition of the Governor of a state was not subject to collateral attack in this manner, and that counsel were taken by surprise, and had no opportunity to meet the statements of the affidavits of McNeil, Judge Sease held "that, as such had been introduced before him, and considered by him when he passed the order extending the time for the hearing, they were already in, and would be considered by him, as they were referred to in an order previously passed by him in this matter." Counsel for the prosecution then produced a telegram

from Governor Hooper to Governor Blease, dated July 26, 1912, withdrawing the message of the day before purporting to revoke the requisition.

Upon this showing, after argument, Judge Sease made the following findings and judgment: "(1) That the requisition is irregular on its face, and not in conformity with the act of Congress relating thereto, in that no copy of the indictment found by the courts of Tennessee, as required by law, was produced; (2) I find, as a matter of fact, that the requisition was not authorized by the Governor of Tennessee, but the same was issued without authority, and is therefore null and void. It is therefore ordered and adjudged that the prisoner, W. J. Massee, be discharged from the custody of the sheriff, and his recognizance canceled of record, and that he be allowed to go hence without delay."

The validity of the requisition from the Governor of Tennessee depends on whether the papers transmitted by him to Governor Blease were made out as required by the federal statute, and we think that Judge Sease was clearly in error in holding that they were on their face irregular and defective. The statute provides: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any state or territory, charging the person demanded of having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." Revised Statutes of United States, § 5278. The objection sustained was that no copy of the indictment found by the courts of Tennessee was produced. The record before us shows that the copy of an indictment charging a crime under the laws of the state of Tennessee was attached to the requisition, and certified therein by Governor Hooper to be authentic. The objection that the certificate of the clerk of the circuit court stated that the paper purporting to be an indictment was a copy of the minutes of the court, and not of the indictment, has no foundation. Even under the strictest verbal test, the certificate can bear no other construction than that the indictment appears in the minute book, and that the indictment itself, not the minute book, was on file in the clerk's office. There can be no doubt that

the requisition papers were on their face regular in every respect.

[1] The assigned error next in sequence is the admission of the petitioner to bail pending the hearing, without notice to the attorneys representing the prosecution. The question made is not now a practical one, for the bail bond was taken, and the petitioner released, and it would be impossible for this court to restore the status existing before the bond was taken. But since the point is important, we may state our views of it. Legislation in respect to extradition of fugitives from one state to another being within the power of Congress, the regulations fixed by federal statutes are paramount to state Constitutions and statutes, and all that a state court can do under habeas corpus proceedings is to determine whether the conditions prescribed by the federal Constitution and statutes have been complied with. If they have not, the court may release absolutely or on bail, according to its discretion.

[2] The general rule in habeas corpus proceedings is well established, that pending a final hearing the judge or court may admit to bail. *Barth v. Cilse*, 79 U. S. 400, 20 L. Ed. 393; *In re Kaine*, 14 How. 134, 14 L. Ed. 345. But extradition laws are enacted on the presumption that the state making the demand will accord to the fugitive his right to bail and all other legal rights, and, when it is remembered that the power of the court or judge under habeas corpus is necessarily limited to the inquiry, whether the conditions of the federal laws have been met, it seems obvious that bail should not be allowed pending the hearing, unless some departure from the federal law has been made to appear. On this point the reasoning of the Supreme Court of the United States on the subject of international extradition applies with equal force to state extradition. In *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948, Chief Justice Fuller said: "The demanding government, when it has done all that the treaty and the law requires it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligations to make the surrender—an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand, and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination." *Ex parte Wall*, 84 Miss. 783, 38 South. 628; *Ex parte Hobbs*, 32 Tex. Cr. R. 312, 22 S. W. 1035, 40 Am. St. Rep. 782; *In re Foye*, 21 Wash. 250, 57 Pac. 825; 19 Cyc. 96.

[3] But under habeas corpus proceedings the courts may inquire whether the prisoner really falls under the conditions of the fed-

eral statute, that is, whether he is subject to extradition. For example, they may ascertain whether the prisoner is the person charged, whether he is a fugitive from justice, whether the papers show that he was in the demanding state at the time the offense was committed, and whether the act charged was a crime against the laws of the demanding state; but judicial inquiry cannot extend to the motive of the proceedings. The Supreme Court of the United States, in *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542, declared the power of the state courts to inquire under the writ of habeas corpus whether the statutes of the United States have been complied with, using this language: "What we decide—and the present case requires nothing more—is that, so far as the Constitution and laws of the United States are concerned, it is competent for the courts of the state of California, or for any of her judges having power under her laws to issue writs of habeas corpus, to determine, upon writ of habeas corpus, whether the warrant of arrest and the delivery of the fugitive to the agent of the state of Oregon where in conformity with the statutes of the United States, if so, to remand him to the custody of the agent of the state of Oregon."

In *Pearce v. Texas*, 155 U. S. 311, 15 Sup. Ct. 116, 39 L. Ed. 164, the court approved of the action of the courts of the asylum state in leaving to the courts of the demanding state the protection of the prisoner in his constitutional rights.

In *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, it was held that the court might discharge the prisoner when it appeared on the face of the extradition papers that he was not in the demanding state at the time the crime was committed; but, in *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 515, the court said: "But the court will not discharge a defendant arrested under the Governor's warrant, where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

The court held, in *Pettibone v. Nichols*, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047, that the inquiry in habeas corpus whether the prisoner was a fugitive from justice could not extend to an inquiry into his guilt or innocence, saying that: The constitutional and statutory provisions referred to were based upon the theory that, as between the states, the proper place for the inquiry into the question of the guilt or innocence of an alleged fugitive from justice is in the courts of the state where the offense is charged to have been committed."

In *Pierce v. Orecy*, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113, Mr. Justice Moody

lays down the limitation of the judicial power of inquiry in habeas corpus in this language: "This court in the cases already cited has said, somewhat vaguely, but with as much precision as the subject admits, that the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required, it would impose upon courts, in the trial of writs of habeas corpus, the duty of a critical examination of the laws of states with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the states and fruitful of miscarriages of justice. The duty ought not to be assumed, unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance."

These statements of the principle involved by the tribunal to whose authority, in questions of this kind, all other courts must yield, none made clear the principle that the authority of the courts, in extradition proceedings, does not extend to inquiry into the motive, or into the merits of the case in any respect. The Supreme Court of this state and other state courts of high authority have explicitly laid down the same limitation.

In *Ex parte Swearingen*, 13 S. C. 74, Mr. Justice McIver, with his usual force and clearness, thus states the rule: "It seems to us that the true rule is that when a requisition comes to the Governor of this state for any person found in this state, which shows upon its face that all the requirements of the act of Congress have been complied with, it is the duty of the proper authorities of this state to recognize the statements of fact made therein as true, and to surrender to the agent of the state making the demand the person demanded, in the fullest confidence that he will receive ample justice at the hands of the authorities of such state. The very fact that there is no mode of enforcing the performance of the duty imposed upon the Governor of the state upon which the demand is made, by mandamus or otherwise (*Kentucky v. Dennison*, supra [24 How. 66, 16 L. Ed. 717]), makes it all the more obligatory that he should be scrupulously exact and prompt in the performance of such duty, and that the courts should not lend their aid to defeat the provisions of the Constitution so essential to the preservation of that good will which ought always to exist between sister states, by demanding more than is required by the act of Congress." In *re Sultan*, 115 N. C. 57, 20 S. E. 375, 28 L. R. A. 294, 44 Am. St. Rep. 433; *Barranger v. Raum*, 103 Ga. 465, 30 S. E. 524, 68 Am.

St. Rep. 113; *Singleton v. State*, 42 South. 231; *Ex parte Edwards*, 91 Miss. 621, 44 South. 827; *Bruyneel v. Wies*, 153 Iowa, 565, 133 N. W. 1057. See, also, extended note 57 Am. Dec. 395; 21 Cyc. 329.

[4] Another established and obvious principle is that, when the extradition papers are regular on their face, every intendment is to be indulged in favor of their validity, and the burden is on the prisoner to show that some one of the conditions of extradition prescribed by the statutes, as above indicated, have not been met. *Marbles v. Creecy*, 215 U. S. 63, 30 Sup. Ct. 32, 54 L. Ed. 92. When the prisoner has made that prima facie showing, the court or judge issuing the writ may admit him to bail pending the final hearing on the writ.

[5] Applying these settled rules, it is perfectly clear that the circuit judge erred in admitting the prisoner to bail pending the final hearing. When the application was made, the showing before the judge consisted of the requisition papers of the Governor of Tennessee, and the mandate of the Governor of South Carolina, all made out in accordance with the statute and the verified petition of the prisoner. This petition contained nothing but statements that he intended to show that, while the prisoner had violated the criminal laws of Tennessee, he was guilty of no moral wrong, that the prosecution was a hardship on him, that it was instituted to collect a debt, and that the Governor of Georgia had refused to issue a requisition. All this had no tendency to show that the extradition statute had not been complied with, and therefore, under the principles just stated and the authorities sustaining it, furnished no ground whatever for the discharge of the prisoner on bail. This being so, the law required that the petitioner should be remanded to the custody of the sheriff to be thereafter surrendered to the state of Tennessee, according to the mandate of the Governor of the state of South Carolina, unless, at the future hearing, ordered for 27th of July, a successful attack should be made on the regularity of the proceedings.

It was further contended, on appeal, that the circuit judge erred in admitting the petitioner to bail without four days' notice to the counsel representing the prosecution. The state statute provided: "When it appears, from the return of the writ or otherwise, that the party is imprisoned on a criminal accusation, he shall not be discharged until sufficient notice has been given to the Attorney General, or circuit solicitor, or other attorney acting for the state, that he may appear and object to such discharge, if he think fit." We are not now concerned with the question whether a judge may not grant bail in cases of emergency, when the prisoner

¹ Reported in full in the Southern Reporter, reported as a memorandum decision without opinion in 149 Ala. 673.

is entitled to bail, under the Constitution, as a matter of course; the only question being as to the amount. Here, as we have seen, he was not entitled to bail, as a matter of course, but only when a prima facie showing of noncompliance with the requisition statute should be made, and in such a case, while the statute does not prescribe the time, its clear import is that counsel shall have sufficient notice to enable them to resist the application for bail. The time is in the discretion of the circuit judge; but we think that there is strong reason for the position that it was error of law for the circuit judge to grant bail to a prisoner held on extradition proceedings, against the objection of counsel for the prosecution, on a few hours' notice. As the court is not unanimous now even on that point, and its decision is not necessary in this case, it is left undecided. We hold that the circuit judge was in error when he granted bail, because, on the showing before him, the petitioner was not entitled to bail.

[6] The circuit judge erred, also, in admitting as evidence to impeach the requisition of the Governor of Tennessee, solemnly made over his official signature and under the great seal of the state, mere affidavits of outside persons, to the effect that the Governor of Tennessee had told them that he had not signed the requisition. No argument or authority need be adduced to show that such a method of impeaching an official document is not only contrary to the rules of evidence, but would be an intolerable impugning by the judiciary of the most solemn communications between the highest executives of sovereign states.

[7] On the other hand, the circuit judge was clearly right in considering the telegram from Governor Blease, and that from Governor Hooper to Governor Blease indicating a withdrawal of the requisition. But even these telegrams were not sufficient authority to warrant the circuit judge's holding that the requisition had been revoked. They were of value only as justifying a continuation of the hearing to a future day, so as to give Governor Hooper an opportunity to withdraw his requisition by a formal communication to Governor Blease to that import. Governor Blease expressed accurately the force to be given to them when he requested Judge Sease to continue the habeas corpus proceedings until he could get the substance of the telegrams authenticated under the seal of the state of Tennessee. This was no doubt the view of the circuit judge also, who had before him, in addition to the documents above referred to, a communication from Governor Hooper to Governor Blease withdrawing the message of revocation, for he does not rest his order of discharge on the ground that the requisition had been withdrawn.

[8] The final question is whether there was error in considering and adjudicating the

petition, and discharging the petitioner in his absence. The petitioner did not appear according to the terms of the bond, but submitted a physician's affidavit to the effect that he was too sick to leave his home in the city of Macon. Whether this affidavit was sufficient to warrant a further continuance would have been in the discretion of the circuit judge, if the petitioner had been properly discharged; but the principle is well settled in this state that, when an accused person gives bail for his appearance at a future time for the adjudication of the question whether his body shall be held in custody or released, he cannot have his right to discharge adjudicated, unless he is actually in the presence of the court or in the custody of an officer subject to the court's order. If he fails to appear without legal excuse, his bail will be forfeited, and his application for the inquiry as to the legality of his arrest and detention will be considered abandoned. If he offers sufficient excuse for not appearing, then the cause must be continued until it is possible for him to appear. In habeas corpus proceedings, the whole matter before the judicial officer is whether the accused shall be released or remanded to custody. Unless he is present in person or subject to the order of the court, it is manifest the court cannot make effective its judgment against the person. A preliminary hearing demanded by the prisoner falls under the same principle. In considering the point, as applied to a preliminary hearing, the court said, in *State v. Rabens*, 79 S. C. 542, 60 S. E. 442, 1110, 14 Ann. Cas. 968: "A preliminary examination must have one of three results, dependent on the decision of the magistrate: The discharge of the defendant; the taking of bail for his appearance to answer the indictment; or his imprisonment. It may be the magistrate, in the absence of the defendant, could adjudge his discharge; but to take bail from the defendant or commit him to jail, it was manifestly necessary for him to be present in person. The defendant could not demand that the magistrate go through the empty form of conducting an examination which could have no efficient result. By failing to appear in person, he had forfeited the recognizance (*State v. Minton*, 19 S. C. 280), and he waived his preliminary examination when, by voluntary absence, he made it impossible for the magistrate to enforce his judgment."

The judgment of this court is that the order of Judge Sease be reversed, and that the petitioner be required to appear in person before Judge Sease on a day to be designated by him, and that he then be remanded to the custody of the sheriff of Spartanburg county to be surrendered to the proper officer of the state of Tennessee, unless it shall officially appear that the requisition of the Governor of

Tennessee or the mandate of the Governor of the state of South Carolina has been revoked. Reversed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

SIMPSON v. COX et al.

(Supreme Court of South Carolina. Aug. 16, 1918.)

1. USURY (§ 127*)—RIGHTS OF PARTIES NOT PRIVY TO USURY—WHO ARE PRIVY TO THE USURY.

The payee of a note, secured by mortgage, discounted it at the bank. The note was subsequently renewed by the bank at a usurious interest, the original payee indorsing it, but not receiving any benefit from the usury. The note was again renewed, discount at 8 per cent. being added to the principal, and indorsed and discounted by the original payee at another bank. The original payee paid the last note, and brought action to foreclose the mortgage. *Held*, that while the original payee could not recover the usury in the last note, as he would secure benefit therefrom, the usury in the first renewal note was no defense as it was an executed transaction, with which the original payee had nothing to do.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 365-379; Dec. Dig. § 127.*]

2. REFERENCE (§ 100*)—REPORTS—EXCEPTIONS—SUFFICIENCY OF.

An exception to a referee's report, alleging error in allowing plaintiff a certain sum, on the ground that so much was not due, was too general, as it did not apprise the court and opposing counsel of any specific error, and was insufficient to raise the question whether a particular note should have been allowed in the amount found to be due plaintiff.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-168; Dec. Dig. § 100.*]

3. APPEAL AND ERROR (§ 722*)—ASSIGNMENT OF ERRORS—FORM OF IN GENERAL.

Each assignment of error relied on should be clearly and concisely stated in separate exceptions, or under proper subdivisions, and be free from repetition and argument, though the ground on which the assignment of error is predicated may be stated when not otherwise apparent, but only one exception should be made for the same error, though it occur at different steps in the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.*]

Appeal from Common Pleas Circuit Court of Anderson County; George E. Prince, Judge.

Action by W. A. Simpson against J. F. Cox and others, for foreclosure of a mortgage. From a judgment for plaintiff, the defendant named appeals. Affirmed.

Martin, Greene & Earle, of Anderson, for appellant. Bonham, Watkins & Allen, of Anderson, for respondent.

HYDRICK, J. [1] On July 31, 1908, the defendant Cox gave plaintiff his note for \$2,300, payable six months after date, and secured same by mortgage. Plaintiff discounted the note at the Farmers' Bank of

Williamston. Defendant made several payments on the note at the bank, and on April 24, 1909, renewed it for \$1,341.09, due six months thereafter, plaintiff indorsing the renewal. On November 15, 1909, the Farmers' Bank of Williamston demanded payment. Defendant having failed to pay it, plaintiff agreed that if the bank would have defendant execute a renewal note for the amount due, he would indorse it and get the Bank of Piedmont to discount it. At that time Cox owed the Farmers' Bank of Williamston another note for \$75, which was, by consent of the parties, included in the renewal note, which was discounted by the Bank of Piedmont. Defendant having failed to pay this last note at maturity, plaintiff paid it to the bank, and brought this action for foreclosure.

The answer set up the following defenses: A general denial, partial failure of consideration, usury, and a counterclaim for usurious interest paid. The referee found against all the defenses, and reported the amount due as alleged in the complaint. On exceptions to the report, only two questions were argued to the court, to wit, that the referee erred (1) in not sustaining the plea of usury, and (2) in including the \$75 note in the mortgage debt. The court held that the last note was usurious, because discount at the rate of 8 per cent. per annum was added to its face, when by its terms it was to bear only straight interest at that rate, and decreed accordingly. But with regard to defendant's contention that the first renewal note was also usurious for the same reason, the court held that, as the transaction was entirely between the defendant and the Farmers' Bank of Williamston, the plaintiff getting none of the usurious interest charged by the bank on that renewal, and having nothing to do with it, except to indorse the renewal note, which was again voluntarily renewed by the defendant, the transaction was an executed one, and even though that renewal note was usurious, the plea of usury therein could not avail the defendant against the plaintiff. Upon this point, we agree with the circuit court. With regard to that renewal, the defendant is in the same position he would have been if he had paid the note at maturity. In that event he would have had no cause of action against the plaintiff, who did not receive any usurious interest, or any benefit thereof. On the other hand, if plaintiff had been allowed to recover in this action according to the face of the last renewal note, he would have received the benefit of usury therein.

[2] The court refused to consider the assignment of error in including the \$75 note in the mortgage debt, on the ground that none of defendant's exceptions properly raised that question, holding that defendant's fifth exception, which was alone relied upon for that purpose, was too general. That exception was as follows: "Error of said spe-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cial referee in finding as a matter of fact, and so reporting, the amount to be due plaintiff on said debt to be \$1,490 principal and \$149 interest, plus attorney's fee; it being shown by the preponderance of the testimony that the amount due plaintiff is not so much as that amount, and said special referee committed error in concluding that plaintiff is entitled to judgment of foreclosure against the defendant Cox for such amount." We agree with the circuit court in holding that this exception was too general. The office of an exception is to point out—specify—the error complained of. Turning to the exception, we find that it assigns error in finding \$1,490 principal, and \$149 interest, and attorney's fees to be due, on the ground that so much was not due. Now, how could the court or opposing counsel tell from the exception what the error complained of was? Was it in the principal, or in the interest, or in the attorney's fees? If the latter, whether the amount was too great, or whether the contention was that nothing at all was recoverable? Or, was it because of an error in calculation of interest, or because of the claim that one of the defenses set up should have been sustained; and, if the latter, which one? And why? For error of law or of fact? Any one or all of the matters mentioned could have been argued under the general language of the exception, as well as the point that the amount of the \$75 note could not have been legally found to be a part of the debt secured by the mortgage, which shows conclusively that the exception did not *specify* the error complained of, which it is always easy to do, in a few words and without repetition, when one has clearly outlined in his own mind the assignment of error which he desires to bring to the attention of the court. In this case, it would have been sufficient to say that the referee erred "in including in the amount found to be due on the mortgage debt the amount of defendant's note for \$75 to the Farmers' Bank of Williamston." The rule that exceptions must specify the errors complained of is simple and easy to comply with. It was intended to let the court and opposing counsel see at a glance what points of law or fact the appellant desires the court to review, and it is not fair, either to the court or opposing counsel, to allow an appellant, by the generality of the language of his exceptions, to so mask the questions which he will ask the court to review that they can be ascertained only by the aid of his own explanation of the purpose concealed in the generality of his lan-

guage, thereby perhaps also allowing them to serve as a cover for an afterthought.

[3] Keeping in mind the purpose of exceptions, it is clear that it is rarely, if ever, necessary for them to be long or involved. They should contain no repetition or argument. They may properly contain the ground or reason upon which the assignment of error is predicated, when it is not clearly shown or necessarily implied in the assignment itself, but argument should be reserved for the briefs of counsel. Each assignment of error relied upon should be clearly and concisely stated in a separate exception, so that no exception should embrace more than one specification of error, unless it is under proper subdivisions. On the other hand, only one exception should be taken to bring up the same assignment of error. It is scarcely worth while to waste the time and tax the patience of the court with a point that is so attenuated that it requires to be stated in many ways to be seen and understood. Again, counsel sometimes file separate exceptions on the ground that the court erred in refusing a nonsuit, the direction of a verdict, and a motion for a new trial—all on the same ground. One exception should cover them all. We recently heard a personal injury case in which there were 39 pages of exceptions. Every point made could have been fully and clearly stated within the limits of three or four pages at most. To classify and analyze the exceptions in such a case, in order that they may be intelligently disposed of, is an unnecessary and vexatious strain upon the court and opposing counsel, and the court would have been warranted in dismissing the appeal because the exceptions were not taken in the manner prescribed by its rules. Besides, there is great danger that a single grain of wheat may be effectually concealed in so much chaff.

We take this occasion to make these observations and suggestions in the hope that, in future, exceptions both to the circuit court and to this court will be short, clear, and concise, specifying the errors complained of without circumlocution, argumentation, or repetition, and that only one exception will be taken to raise the same point. Counsel may act upon these suggestions with the assurance that all objections which their exceptions specify will receive the consideration of the court.

Judgment affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

ROYAL EXCHANGE ASSURANCE OF LONDON et al. v. BENNETTSVILLE & C. R. CO.

SYRACUSE INS. CO. et al. v. SAME.

(Supreme Court of South Carolina. Aug. 12, 1913.)

1. TIME (§ 10*)—SERVICE—STATUTES — LAST DAY SUNDAY—DEPOSIT IN MAIL.

Code Civ. Proc. 1912, § 180, provides that, within 20 days after demand for a copy of the complaint, it must be served at the place specified. Section 445 provides that in computing time the first day shall be excluded and the last day included, unless it falls on Sunday, and by section 448 service may be made by mail. *Held*, that where the twentieth day after demand for a copy of the complaint was mailed fell on Sunday, and the copy was mailed on Monday and received the next day, as the service dated from the mailing of the copy, an order setting aside the service was improper.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10.*]

2. PLEADING (§ 336*)—SERVICE—BY MAIL—STATUTES—COMPLAINT IS NOT "PROCESS."

Code Civ. Proc. 1912, § 458, provides that the provisions of the chapter of which section 448, authorizing service by mail, is a part shall not apply to service of process. *Held*, that a complaint could be served by mail, as "process" is a writ, summons, or order issued in a judicial proceeding to acquire jurisdiction of a person or his property, to expedite the cause or enforce the judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1017-1021, 1024; Dec. Dig. § 336.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5643-5651; vol. 8, p. 7766.]

Watts, J., dissenting.

Appeals from Common Pleas Circuit Court of Marlboro County; S. W. G. Shipp, Judge.

Actions by the Royal Exchange Assurance of London and others, and by the Syracuse Insurance Company and others, against the Bennettsville & Cheraw Railroad Company. From a judgment for defendant in both cases, the plaintiffs appeal. Reversed.

John T. Seibels, of Columbia, and James K. Owens, of Bennettsville, for appellants. Knox Livingston, Townsend & Rogers, and Stevenson, Stevenson & Prince, all of Bennettsville, for respondent.

GARY, C. J. These cases were heard together by consent, as they involve the same question.

[1] The appeal is from an order of his honor, the circuit judge, setting aside the service of the summons, on the ground that the complaint, which was not served with the summons, was not served upon the defendant's attorneys within the time required by the statute, after they had demanded that a copy be served upon them. The summons stated that the complaint would be filed in the office of the clerk of the court of common pleas.

The record contains the following statement of facts: "Each of the summons was served by the sheriff of Marlboro county on

the agent of the defendant corporation on the 24th day of January, 1911. On February 13, 1911, counsel for defendant gave notice of appearance and demand that copy of the complaint in each case be served on them at the office of Stevenson, Stevenson & Prince, in Planters' National Bank Building, Bennettsville, S. C., the service of which was accepted by J. K. Owens on said date, and on the 14th day of February, 1911, the said John T. Seibels received through the mail an envelope postmarked 'Bennettsville, February 13, 7:30 p. m.' containing in each case a notice of appearance, and demand for service upon them for a copy of the complaint, signed by Messrs. Stevenson, Stevenson & Prince, defendant's attorneys, at their office, Planters' National Bank Building, Bennettsville, S. C. On Monday, the 6th day of March, 1911, the twenty-first day after the said 13th day of February, 1911, the complaint in each case was prepared by the said John T. Seibels, plaintiffs' attorney, and was deposited in the post office by his clerk and stenographer in the city of Columbia, in an envelope sealed and addressed to 'Messrs. Stevenson, Stevenson & Prince, Planters National Bank Building, Bennettsville, S. C.,' with sufficient postage prepaid. On Tuesday, March 7, 1911, defendant's counsel received by mail a copy of the complaint inclosed in an envelope postmarked 'Columbia, S. C., March 6, 1911, 9:30 p. m.'"

It will be observed, that the last day upon which the plaintiffs had the right to serve a copy of the complaint was Sunday.

Section 180 of the Code is as follows: "A copy of the complaint need not be served with the summons. In such case, the summons must state where the complaint is or will be filed, and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and, in person or by attorney, demands in writing, a copy of the complaint, specifying the place within the state where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly; and, after said service, the defendant has twenty days to answer."

Section 445 of the Code provides that: "The time within which an act is to be done, * * * shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

Section 448 provides, that: "Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail."

Section 454 of the Code is as follows: "The summons and the several pleadings in an action shall be filed with the clerk within ten days after the service thereof respectively, or the adverse party, on proof of the omission, shall be entitled without notice to an order from a judge that the same be filed

within a time to be specified in the order, or be deemed abandoned."

Section 456 of the Code provides that: "The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt."

The chapter just mentioned embraces sections 448 and 454 of the Code.

In *Salley v. Railway*, 76 S. C. 173, 56 S. E. 782, the court thus states the rule as to the computation of time within which an act is to be done, when the last day is Sunday: "The general rule laid down in this country is that where an act is required to be done in a certain number of days exceeding a week, Sunday is not excluded in the computation; but if the number of days is less than seven, Sunday is not counted." But the court further says: "It has been held, however, that Sunday must always be counted when the time is prescribed by statute"—thus recognizing the principle that the rule is inapplicable when the statute prescribes the manner in which the computation shall be made. And, as section 445 of the Code provides that Sunday shall be excluded if it be the last day within which an act is to be done, the rule in cases where the number of days is less than a week has no application.

[2] It is also contended by the appellants' attorneys that section 448 of the Code is inapplicable for the reason that the service of a copy of the complaint, under the circumstances herein mentioned, must be regarded as process; section 456 of the Code providing that the provisions of the chapter embracing said section should not apply to the service of a summons, or other process.

In *Walters v. Laurens Cotton Mills*, 53 S. C. 155, 31 S. E. 1, it was held that a notice of appeal, deposited in the post office on the tenth day, properly addressed and postage prepaid, was served in accordance with the statute. See, also, *Craig v. Insurance Co.*, 80 S. C. 151, 61 S. E. 423, 18 L. R. A. (N. S.) 106, 128 Am. St. Rep. 877, 15 Ann. Cas. 216, and *State v. Gandy*, 87 S. C. 523, 70 S. E. 163.

Section 454 of the Code recognizes the distinction between the summons and the pleadings, the latter of which—pleadings—embraces the complaint.

The word "process" has been variously defined, for the reason that the context generally plays an important part in its construction. "The term 'process' comprehends all mandates of a court issued to its officer, commanding him to prepare certain service within his official cognizance, and embraces every writ that may be necessary to institute or carry on an action or suit and to execute the judgment of the court." 23 Enc. of Law, 160. Process, in the sense in which it is employed in the present title, means the writ, or other formal writing issued by authority of law, for the purpose of bringing defendant into a court of law to answer plaintiffs' de-

mands in a civil action, although in a more technical and limited sense the term is frequently applied only to those writs or writings which issued out of a court. 32 Cyc. 419-421. In its general acceptance it means a writ, a summons, or order issued in a judicial proceeding to acquire jurisdiction of a person or his property, to expedite the hearing of the cause to a final determination, or to enforce the judgment of the court. A complaint is a mere pleading, and does not partake of these characteristics.

It is the judgment of this court that the order of the circuit court be reversed.

HYDRICK and FRASER, JJ., concur.

WATTS, J. (dissenting). These cases were heard together on the appeal, and the facts involved and questions raised are identical. The summons in each case was served upon the defendant by the sheriff of Marlboro county, on January 24, 1911. The complaints were not served with the summons. The summons stated that the complaint "will be filed in the office of the clerk of the court for common pleas for said county," and required the answer to the complaint to be served on John T. Seibels, No. 5 Clark Building, Columbia, S. C., within 20 days after service, exclusive of the day of service. The summons was subscribed by John T. Seibels and J. K. Owens, plaintiffs' attorneys. Seibels lives at Columbia, S. C., and Owens at Bennettsville, S. C. On February 13, 1911, counsel for defendant gave notice of appearance, and demanded that copy of complaint in each case be served on them at the office of Stevenson, Stevenson & Prince, in the Planters' National Bank Building, Bennettsville, S. C. The service of this notice was accepted by Mr. Owens on that date, and on February 14, 1911, Mr. Seibels received this notice, by mail, at Columbia, S. C. On March 6, 1911, 21 days after February 13, 1911, the complaints in each case were prepared and mailed with postage prepaid, to the defendant's counsel at Bennettsville, S. C., as demanded by the notice of appearance. The defendant's counsel received the complaints so mailed next day, March 7, 1911, and forthwith returned the same to plaintiff's attorneys, as not having been served within the time prescribed by law. The complaints were not filed in the clerk of court's office for Marlboro county, until March 22, 1911. On March 20, 1911, the defendant's counsel served notice that they appeared solely for the purpose of said motion, and would move on the 24th day of March, 1911, before his honor, Judge Shipp, "for an order setting aside the service of summons dismissing this case for failure to file the complaint in time, and also for failure to serve the same in time under the statutes of this state." After hearing the motion, his honor passed an order setting aside the serving of the complaints in each case, on the ground that it appeared that the com-

plaints in each of the actions were not served within 20 days, in accordance with the notice, and demand of copy thereof, or pursuant to the statute in such cases made and provided, nor were the complaints filed in the office of the clerk within 20 days, as stated would be done in the summons in said actions. Upon announcing the judgment of the court a motion was made for leave to serve the complaints at that time on the ground of surprise, the court denied this motion, as no notice was given the other side that any such motion would be made, but without prejudice to plaintiffs' applying to any proper authority for any relief they may be entitled to under any section of the Code. The appellants appeal, and challenge the correctness of his honor's order.

We think the appeal should be dismissed; and, while we can find no ruling in this state directly on the points at issue, we find the identical language in our Code, as in the New York Code: "A copy of the complaint need not be served with the summons, in such case the summons must state where the complaint is, or will be filed; and if the defendant within twenty days thereafter causes notice of appearance to be given, and in person, or by attorney, demands in writing a copy of the complaint, specifying a place within the state where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly," etc.

"In ordinary cases 20 days are allowed after demand for service of copy of complaint, where defendant's attorney served notice of retainer, and demanded complaint at two different times for several defendants, and after 20 days from the first service, but not the last, moved to dismiss the complaint for want of service, held that the defendant might move on the proof of service of the first notice, and demand without waiting for the expiration of 20 days from the last service." *Luce v. Trempert*, 9 How. Prac. (N. Y.) 212.

"An order giving the plaintiff further time to serve his complaint, cannot be granted ex parte, after the time for serving it (the complaint) has expired. Notice" must be given, "or an order to show cause." *Stephens v. Moore*, 6 N. Y. Super. Ct. 674.

"Where the complaining party should file his pleading within a specified time, or where either party has placed his adversary in such position as to make it a duty to plead, it is requisite that, unless further time be granted, the required act should be fully performed within the time limited, whether that time be prescribed by statute, general rules of court, or rule or order to declare or plead." *Ency. of Pleading and Practice*, vol. 21, page 699.

Reference to footnotes made from South Carolina cases sustain this doctrine. *McBride v. Floyd*, 2 Bailey, 209; *Stephen v. Thayer*, 2 Bay, 272; *Kennedy v. Smith*, 1

Brev. 208; *Murphy v. Sumner*, 1 Hill, 216; *Higginbottom v. Wright*, 1 Nott & McC., p. 8; *Perry v. Aiken*, 3 Rich. 60; *State Bank v. Torre*, 2 Speers, 501.

I think judgment should be affirmed, however, without prejudice to the right of the plaintiffs. Appellants to apply to the circuit court for leave to serve the complaint nunc pro tunc upon such terms as the court may impose as provided for in Judge Shipp's order.

STATE v. WADE et al.

(Supreme Court of South Carolina. Aug. 26, 1913.)

1. FORNICATION (§ 9*)—EVIDENCE—SUFFICIENCY.

On the trial of a man and a woman for fornication, evidence held insufficient to support a conviction as to the man.

[Ed. Note.—For other cases, see *Fornication*, Cent. Dig. § 7; Dec. Dig. § 9.*]

2. CRIMINAL LAW (§ 424*)—EVIDENCE—ADMISSIONS OF CODEFENDANT.

On the trial of a man and a woman for fornication, the woman's admissions to the deputy sheriff when arrested could not be considered as evidence against the man.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1002–1010; Dec. Dig. § 424.*]

3. CRIMINAL LAW (§ 552*)—EVIDENCE—DEGREE OF PROOF REQUIRED.

Where the facts and circumstances in evidence, even if true, are not inconsistent with accused's innocence, they do not warrant a conviction, as they must point so conclusively to guilt as to exclude every other reasonable hypothesis.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1257, 1259–1262; Dec. Dig. § 552.*]

4. INDICTMENT AND INFORMATION (§ 124*)—JOINER OF PARTIES—EFFECT.

An indictment against two persons although joint in form is in legal effect joint and several, and hence one of the defendants may be convicted and the other acquitted.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 327–333; Dec. Dig. § 124.*]

5. CRIMINAL LAW (§ 622*)—TRIAL.

The nature of the offense does not prevent a severance in the trial of the parties to a single act of fornication.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1380–1383, 1385, 1386, 1388–1390; Dec. Dig. § 622.*]

6. CRIMINAL LAW (§ 877*)—TRIAL.

On the trial of a man and a woman for fornication with each other, one may be acquitted and the other convicted, since, while it takes two to commit the crime, one may be insane or participate on account of force, fear, or fraud, and may therefore have no criminal intent, or there may be evidence by admission or confession against one and none against the other.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2096, 2097; Dec. Dig. § 877.*]

Appeal from General Sessions Circuit Court of Greenville County; J. W. De Vore, Judge.

B. G. Wade and another were convicted of fornication, and they appeal. Reversed.

John C. Henry and J. Robert Martin, both of Greenville, for appellants. P. A. Bonham, of Greenville, for the State.

HYDRICK, J. [1] The appellants were tried, in their absence, for fornication. With the exception of certain admissions of the defendant Meta Wade, proved by the deputy sheriff who executed the warrant of arrest, the evidence was wholly circumstantial. Stated most strongly against the defendants, the substance of it was that B. G. Wade was a widower whose family consisted of a son and two daughters. At the time of the trial, the son was 19, and the daughters were 13 and 14 years old, respectively. He had also an older son, who was the husband of the defendant Meta. Some years ago—possibly from three to five, though the testimony does not disclose the date even approximately—Meta and her husband moved into the home of B. G. Wade, and lived with him, as members of his family. Some time after that (another period not fixed by the evidence) Meta's husband died, and she continued to live in the house of her father-in-law, as a member of his family. After the death of her husband she gave birth to two children. One died shortly after its birth. The other was about two years old at the time of the trial. Meta's statement to the deputy sheriff was to the effect that for several years she had been wanting to leave B. G. Wade, and go back to her father's, but that she could not do so, because he would not let her go, and that if he (the officer) would keep Wade off her, until she could get away, she would leave him and go to her father's. She admitted that she had slept in the bed with her codefendant, and said she knew the officer had a warrant for them for living in adultery. She showed him a bleeding cancer on her breast, and told him that Wade had come home drunk, and beat her nearly to death, and stamped her in the breast.

The court instructed the jury that, if they could not come to any other reasonable conclusion, from the facts and circumstances in evidence, than that the defendants were guilty, they would be justified in so finding, but that, if they could just as reasonably conclude that they were innocent as that they were guilty, they would not be warranted in convicting them; that they were entitled to the benefit of every reasonable doubt; that the admissions of Meta could

not be considered as evidence against B. G. Wade; and that they must acquit or convict both; that, under the indictment, they could not acquit one and convict the other.

[2, 3] It appears clearly that there was no competent evidence to support the conviction of B. G. Wade. Meta's admission cannot be taken against him. The other facts and circumstances are not inconsistent with his innocence. In other words, all of them may be true, and still he may be innocent. Therefore they do not come up to the standard required by the law to warrant a conviction, which is that they must point so conclusively to guilt as to exclude every other reasonable hypothesis. Therefore the court erred in refusing to set aside the verdict.

[4] The court erred also in charging that, under the indictment, one of the defendants could not be acquitted and the other convicted. If that ruling was based upon the reasoning that, because the indictment charged the defendant jointly, only a joint verdict could be found, it was erroneous, because, while the indictment was joint in form, in legal effect it was joint and several.

[5, 6] Nor does the nature of the offense forbid a severance either in the trial of the parties charged, or in the verdict, when they are jointly tried. While it is true that it takes two to commit the crime, as it also does the crime of adultery, so far as the physical act is concerned, it does not necessarily follow that both engage in it with criminal intent. One may be insane, or may participate in the act on account of force, fear or fraud. In such a case the law would neither allow the guilty party to escape, nor would it punish the innocent one. If B. G. Wade compelled Meta to submit to him through force or fear, she should be pitied and protected rather than condemned and punished. Again, it may happen on the trial of such a charge that, though both the defendants may be guilty, there may be no evidence at all against one, while there may be ample evidence by admission or confession against the other. This question was involved in *State v. Carroll*, 30 S. C. 90, 8 S. E. 433, 14 Am. St. Rep. 883, where it was decided contrary to the instructions given in this case. See, also, *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

The other grounds are overruled.
Reversed.

GARY, C. J., and WATTS and FRASER JJ., concur.

STATE v. STONE.

(Supreme Court of South Carolina. July 25, 1913. On Petition for Rehearing Sept. 1, 1913.)

1. FALSE PRETENSES (§ 7*)—ELEMENTS—NATURE OF PRETENSE.

Under Cr. Code 1912, § 220, providing that any person who shall by any false pretense or representation obtain from any other person any money, chattel, or other property, with intent to cheat and defraud any person of the same, shall be guilty of a misdemeanor, an indictment charging that accused falsely pretended that a certain horse was sound in every respect, which pretense he knew to be false, whereby he obtained another horse, the property of such witness, with intent to cheat and defraud him, stated facts constituting a crime; the representation that the horse was sound in every respect being the statement of a material fact and not of an opinion.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. § 7.*]

2. FALSE PRETENSES (§ 49*)—EVIDENCE—SUFFICIENCY.

In a prosecution for falsely pretending, in connection with a horse trade, that the horse traded by accused was sound in every respect, evidence as to the representations made by him and as to his knowledge of their falsity *held* sufficient to support a conviction.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

Watts, J., dissenting.

Appeal from General Sessions Circuit Court of Laurens County; R. W. Memminger, Judge.

Frank Stone was convicted of obtaining goods under false pretenses, and he appeals. Affirmed.

Richey & Richey, of Laurens, for appellant. R. A. Cooper, of Laurens, for the State.

GARY, O. J. The defendant was tried before a jury, and convicted of obtaining goods under false pretenses. The indictment charged him with falsely pretending that a certain bay horse was sound in every respect, which pretense he then and there knew to be false, whereby he obtained from Lander H. Willis one roan horse, the property of the said Lander H. Willis, of the value of \$150 with intent to cheat and defraud the said Lander H. Willis.

[1] The first question that will be considered is whether his honor, the presiding judge, erred in refusing the motion to quash the indictment, on the ground that it did not state facts sufficient to constitute a crime. Section 220 of the Criminal Code (1912) provides that: "Any person who shall, by any false pretense or representation, * * * obtain from any other person any chattel, money, * * * or other property * * * with intent to cheat and defraud any person of the same, shall be guilty of a misdemeanor." The allegation in the indictment that the defendant represented that the bay horse was sound in every respect was not only the statement of a fact and not of an opinion, but of a material fact sufficient to render

him liable for damages in a civil action, if the statement was untrue. The indictment charged that the defendant made this representation, knowing it to be false, with intent to cheat and defraud the prosecutor, and thereby obtained from him one roan horse of the value therein alleged.

The case of *State v. Hicks*, 77 S. C. 289, 57 S. E. 842, shows that the motion to quash the indictment was properly refused. In construing the statute, the court in that case said: "It is perfectly manifest from the express terms of the statute that an intent to cheat and defraud is an essential element of the statutory crime, and it is elementary that every essential element of the crime must be alleged and proven. This principle was well understood by the prosecuting officer, for the indictment not only alleges that the pretenses were known to be false, but that the defendant thereby intended to cheat and defraud."

Turning to the appellant's authorities, we find that he quotes the following language from Bishop on Criminal Law, vol. 2, § 454 (7th Ed.), under the head of false pretenses: "If we look to the reason of the law, and especially to its words, we shall see that its aim is to prevent cheating, and the specific cheat denounced is the one affected by a false pretense. Now a mere opinion is not false pretense; but any statement of a present or past fact is, if false. When two men are negotiating a bargain, they may express opinions about their wares to any extent they will, answering, if they lie about the opinions, only to God, and to the civil department of the law of the country. But when the thing concerns fact, as distinguished from opinion, his words in reason amount to a false pretense." The words of the indictment constitute the false statement of an existing fact at the time of the exchange of horses. While there are many cases as to the soundness of a horse, in which there can be no certain knowledge, still there are also numerous cases in which the fact of unsoundness may be as certain as in any other instance. When the fact of unsoundness is certain, and the party making a statement in regard to it has knowledge of such fact, and nevertheless makes a false representation, with intent to cheat and defraud, it would be against public policy to allow him to escape punishment under the criminal law. The language hereinbefore quoted from Bishop on Criminal Law sustains our conclusion as to the sufficiency of the indictment.

The appellant's attorneys also rely upon the case of *State v. Delyon*, 1 Bay, 353. The report of that case is very short, and is as follows: "The defendant in this case was indicted under the swindling act for selling a blind horse as and for a sound horse, excepting a blemish in one eye, when the defendant had been told he was a blind horse before

the sale. The Attorney General contended that this was an act of swindling, under the law for preventing such deceitful practices. The court (present, Waties, J., and Bay, J.), after hearing counsel in reply, were of the opinion that this was not such a fraud as was indictable either at common law or under the act of assembly; that it had the appearance of a breach of contract, or rather a concealment of a blemish (if the defendant knew it), for which he was answerable in damages in a civil suit; that to encourage a prosecution of this kind would have a tendency to bring almost every civil injury into the jurisdiction of the court of sessions, which might be extremely injurious in its consequences to the community."

There are material differences in the two cases. In the first place, it does not appear that the defendant in the Delyon Case knew that the horse was unsound, and, in the second place, even if the defendant knew of the defect, it was regarded as rather a concealment of a blemish, which is passive or negative, and not a false pretense, knowingly made with intent to cheat and defraud, which is active and positive in its nature. But, be that as it may, if that decision must be construed as holding that a false representation of the soundness of a horse, made with knowledge of the fact that the horse was unsound, with intent to cheat and defraud, then it will not be longer regarded as authority for that proposition; such a doctrine would tend to encourage fraud and swindling, and is against the canons of morality.

[2] The next question for consideration is whether there was error in refusal to direct a verdict, on the ground that there was no testimony tending to prove that the defendant made any false representation, or that he had any intention to cheat and defraud.

Lander H. Willis, the prosecutor, testified in substance as follows: "The defendant and one W. N. Myers came to Gray Court in a buggy, driving a bay mare and leading a roan mare. The bay mare belonged to the defendant, and the roan mare belonged to W. N. Myers. Willis' roan horse matched Myers' roan mare, and the defendant wanted the pair for a prospective buyer. In the afternoon the defendant offered to trade his bay mare for prosecutor's roan horse, and asked \$25 to boot. The defendant hitched his mare and Myers' mare to prosecutor's buggy, for him to see the mare work, and after driving around awhile the prosecutor offered to trade even, but no trade was then made. Thereafter the defendant offered to trade for \$10 to boot. Prosecutor would not agree to give \$10, but said he would stick to his offer to trade even. The defendant said, 'Well, I will just make you trade anyway.' Prosecutor said, 'Now remember, you guarantee the horse to be sound, straight, and work anywhere.' Defendant said, 'Yes.' Prosecutor then turned to Mr. Owens and Mr. Stevens and said, 'I

call you all as witnesses to that.' Then the defendant said, 'Now, I have only had the horse 10 days; I will guarantee it, as far as I know.' The prosecutor then told the defendant, 'If he had had the horse 10 days, he had had it long enough to know whether it was sound or not.' Defendant then said to the prosecutor, 'Well, don't you want to try it?' Prosecutor then said, 'Well, we will have to go over into the field to change; we can drive it over there, and I can let the negro plough it, to see how it ploughs.' The prosecutor and defendant went to the field, and the negro ploughed the mare; she ploughed all right, and the trade was made. The next morning the prosecutor discovered that the mare was blind in one eye, and could not see much out of the other, and wrote the defendant that he had put a blind horse off on the prosecutor. Not hearing from the defendant, the prosecutor swore out a warrant for the defendant."

Arthur Stevens, a witness for the state, testified in substance as follows: "That he and the prosecutor were in the store playing checkers; that defendant came in and said something about a horse swap. Prosecutor said he would stick to what he had said. Defendant said something about taking less. Prosecutor said he would not do anything more than what he had said. Defendant said, 'Well, I will just consider it a swap.' Prosecutor said, 'You have to guarantee the horse to be sound and all right in every respect.' Defendant said he would, so far as he knew. Prosecutor turned to Mr. Owens and myself, and called us as witnesses to it. Defendant said he would guarantee it, so far as he knows, and that is about all I heard of it. Defendant said he had only had the horse about 10 days."

The agreement on the part of the defendant that he would guarantee the horse to be sound, as far as he knew, was sufficient to render him liable in a civil action, whether the facts were such as to make him amenable to the criminal law or not. In order, however, to constitute the offense of obtaining goods under false pretenses, there must be not only a false pretense or misrepresentation, but it must be made to cheat and defraud. The agreement to guarantee the soundness of the horse, so far as the defendant knew, when considered in connection with the other testimony, was susceptible of the inference that he intended his words as a representation that if the horse was unsound he did not know it. Therefore, his knowledge of the unsoundness of the horse was a material fact in the case. In the synopsis of the defendant's testimony the following appears: "Defendant knew that the mare had defective eyes; knew her eyes were weak; did not know that one eye was entirely gone; did not know that the mare would likely go blind." In the synopsis of G. H. Moore's testimony we find the following: "While witness was examining defend-

ant's horse, he, the witness, struck at the horse's eye to see if it was blind. Defendant told witness not to do that, because Mrs. Willis was out there, and further said that witness would have the horse blind in both eyes—something like that—in a joking way. Witness examined the horse's eyes, and one looked like it was blind; the other eye looked fairly well." Pearly Moore, a witness for the defendant, testified in substance as follows: "Witness knows Frank Stone; saw him at Gray Court the day he traded horses with Lander H. Willis; saw defendant's blaze-face mare; noticed her eyes. One eye looked like it was out, the other eye looked like it might be all right. A person of ordinary intelligence could see that there was something wrong with one of the mare's eyes." It seems that the defendant was a horse trader and that the prosecutor, Willis, rather relied upon the defendant's representation that upon his own judgment as to the soundness of the mare.

The foregoing testimony amply sustains the verdict of the jury.

Judgment affirmed.

HYDRICK and FRASER, JJ., concur.

WATTS, J. I dissent from the opinion of the Chief Justice, herein, and think the motion to quash the indictment should have been granted, as it did not state any criminal offense. The allegation that the defendant represented that the bay horse was sound could not be any more than in the opinion of the party making the statement he was. If he made a false statement knowingly that he was, might be sufficient to render him liable for damages in a civil action. Parties trading horses are allowed latitude in expressing the opinion of their horses, and trade generally with intent each to get the better of the others, and under the evidence in the case the trial judge should have directed a verdict of acquittal, as the evidence of prosecutor, himself, showed that the defect in the horse, complained of, was patent, not latent, and by the exercise of the slightest care, by examining and using his eyes, he could have ascertained that the horse's eyes were defective, and under the evidence and the case of *State v. Delyon*, 1 Bay, 353, quoted by the Chief Justice, the motion of defendant to direct a verdict should have been granted. That state has succeeded in convicting the defendant on testimony, which in my opinion it is doubtful if the prosecutor would win in a civil suit for damages against defendant where he could recover if he make out his case, by a preponderance of the evidence only. For these reasons I dissent.

On Petition for Rehearing.

PER CURIAM. After careful consideration of the petition herein, the court is sat-

isfied that the opinion practically disposes of every question presented by the exceptions.

It is therefore ordered that the petition be dismissed and that the order heretofore granted staying the remittitur be revoked.

POTTS v. CITY OF ATLANTA.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 238*)—APPEAL BY CITY—PROCEDURE—BONDS.

Where a municipality seeks to condemn an easement for the construction of a sewer, and desires to appeal from the assessors' award, under Civil Code 1910, § 5228, the appeal is duly entered upon the city's filing with the clerk of the superior court, within the statutory time, a bond for the eventual condemnation money, containing a recital of the proceedings and the result thereof, and of a desire to appeal from the award to the superior court.

(a) Such a bond may be executed and the appeal entered by the attorney at law of the city.

(b) Corporate municipal action is not necessary to authorize the appeal.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 614, 619, 658-660, 666, 668, 669, 671, 673, 674, 687; Dec. Dig. § 238.*]

2. NEW TRIAL (§ 79*)—GROUNDS—JUDGMENT NOT FOLLOWING VERDICT.

That a judgment does not follow, or is not authorized by, the verdict upon which it is entered, is not a good ground of a motion for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 165½; Dec. Dig. § 79.*]

3. EMINENT DOMAIN (§ 136*)—COMPENSATION—DAMAGES.

Where it is sought to condemn an easement of sewer on private property for public use, the landowner is entitled to recover damages for the property actually taken, and, in addition thereto, such damages to the remainder of the lot as flow from the construction of the sewer. The excerpts from the charge to which exception is taken, when considered in their relation to the whole charge, did not encroach or narrow this legal principle.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 363-366; Dec. Dig. § 136.*]

4. REVIEW OF INSTRUCTIONS.

Other grounds of the motion are without merit.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Condemnation by the City of Atlanta against Henry Potts. From the assessment, the City appealed, and on verdict rendered for a less amount, defendant moved for new trial, and on refusal brings error. Affirmed.

Walter R. Brown, of Atlanta, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

EVANS, P. J. The city of Atlanta proposed to construct a trunk sewer across the rear of the property of Mrs. Henry Potts, a distance of 404 feet. Being unable to agree upon the amount of damages resulting from

its construction, the city proceeded under the statute to condemn the property. The majority of the assessors awarded to Mrs. Potts the sum of \$1,500 as the value of the easement upon the land actually used in the construction of the sewer, and \$3,000 as consequential damages to the balance of the property. One of the assessors dissented. An appeal was taken to the superior court by the city, and on the trial of the case a verdict was returned against the city for the sum of \$262.50. Mrs. Potts moved for a new trial, which was refused.

[1] 1. A motion was made to dismiss the appeal, on the grounds that no exceptions were filed to the award by the city and no demand for an appeal; that the bond was signed by the assistant city attorney, who was without authority to sign it; and that no appeal could be taken by the city without corporate action. In the matter of an appeal from the award of assessors in a condemnation proceeding, the statute provides that "in case either party, or representative of either party, is dissatisfied, he or they shall have the right, within ten days from the time the award is filed, to enter in writing an appeal from the award to the superior court of the county where the award is filed." Civil Code, § 5228. No particular form of entering an appeal is prescribed by the statute. The general provisions applicable to appeals from inferior courts to the superior court provide that an appeal may be entered by the plaintiff or his attorney; but the appellant shall, previously to obtaining such appeal, pay all costs which may have accrued, and give bond and security for the eventual condemnation money. Civil Code, §§ 5002, 5003. The statute does not require that the entry of an appeal be made by a separate writing. An appeal to the superior court is duly entered where a party within the time prescribed by the statute pays the costs and executes and files a bond in terms of the statute, containing the recital of the judgment and a desire to appeal therefrom to the superior court. Ordinarily an affidavit of the appellant's inability to pay costs and give bond is a legal excuse for not paying the cost and giving the bond; but such affidavit in forma pauperis must be filed within the time for entering an appeal.

In the case at bar, within ten days from the filing of the award of the assessors, the city paid the accrued costs and filed an appeal bond, duly approved by the deputy clerk, conditioned to pay the eventual condemnation money. This bond containing the recital that the city undertook to condemn an easement for the construction of a sewer over a described lot of land belonging to Mrs. Potts, and that the majority of the assessors made an award that Mrs. Potts would be damaged in the sum of \$4,500 by the construction and maintenance of the sewer, with which award the city was dissatisfied, and desired to ap-

peal therefrom as provided by law to the superior court. The filing of this bond within ten days from the time the award was filed was a sufficient entry of an appeal. The bond was signed by the city's attorney. The statute expressly authorizes an attorney at law to enter an appeal, and also sign the name of his principal to the bond. We know of no law which requires a corporation to take corporate action with reference to each step in a lawsuit to which such corporation is a party. A corporation who duly appears by an attorney impliedly authorizes such attorney to take all necessary steps to conduct the litigation to a conclusion.

[2] 2. One ground of the motion was that the decree in the case did not follow the verdict. There was no direct exception complaining of any variance between the verdict and decree. A motion for new trial reaches the errors in the finding of the jury, or such errors of the court as may lead to the finding, but is not the proper method of correcting errors in a decree or judgment. *First State Bank v. Carver*, 111 Ga. 876 (2), 36 S. E. 960.

[3] 3. There was evidence that there was a spring on or near the property sought to be occupied by the construction of the sewer, and that the taking of the particular strip of land would destroy or materially injure the spring, which would result in consequential damage to the remainder of the property. The movant carves out two excerpts from the charge, which are not in juxtaposition, as follows: "If you find that there is a spring on that property through which the easement goes, you would have the right to consider that in connection with the value of the property; but you do not determine what the spring is worth and give any damage to Mrs. Potts for the value of the spring. The question is: What is the land worth, the 6 feet of land, or any other number of feet which the city seeks to obtain? What is the value of that land, with the spring on it, or anything that is on it, and what damage does the city do by constructing a sewer through there—the easement that the city undertakes to establish by putting a sewer through that strip of land? The damage to that strip of land by the easement is the thing that she has a right to recover." And: "If the spring is not on the strip of land through which the easement goes but is on the other land adjacent thereto, belonging to Mrs. Potts, then Mrs. Potts could recover, not the mere damage to the spring, but any damage to the market value of the property on account of the sewer and whatever the sewer did, whatever the construction of the sewer accomplished. If it has affected the market value of the balance of the land, or lessened it, she is entitled to recover. If it has not lessened it, she is not entitled to recover. But, as I stated to you before, if the spring is on the strip through which the city seeks an ease-

ment, you look to the value of that strip as it was, and you determine what is the damage to that strip by reason of putting the sewer through, and that damage Mrs. Potts would have the right to recover, without any set-off; so that, to make it a little plainer, gentlemen, it is a question of damage without any set-off on the question of easement, but on the question of damage to the balance of the land it is a question as to whether its market value has been affected, and, if so, whether it is detrimental, and how much it is detrimental to the market value."

It is complained that these excerpts limited a consideration of the value of the spring, if located on the land actually taken, as affecting the land actually taken, or, if located on the land not taken, as affecting the land not taken, and were too restrictive in scope, inasmuch as they excluded from the computation of damages the value of the spring if located on the land actually taken in its relation to the value of the whole property. In other places in the charge the court instructed the jury that the landowner was entitled to be compensated for the value of the land actually used for the construction and maintenance of the sewer, without any deduction, and that in addition thereto the landowner was entitled to be reimbursed for any consequential damage to the remainder of the property resulting from the construction of the sewer. When the charge is taken as a whole, we do not think that the court could have been understood by the jury as instructing them that, if the spring was located on the land actually taken up by the sewer, the effect of its destruction or material injury could not be considered in arriving at the consequential damage to the remainder of the property.

[4] 4. The instructions on the subject of the preponderance of evidence, and on the form of the verdict given to the jury, are not open to the criticism made of them. There was evidence sufficient to uphold the verdict, which has the approval of the trial judge.

Judgment affirmed. All the Justices concur.

HOWARD v. SAVANNAH ELECTRIC CO.
(Supreme Court of Georgia. Aug. 13, 1913.)

(*Syllabus by the Court.*)

STREET RAILROADS (§ 117*)—INJURY TO PEDESTRIANS—QUESTIONS FOR JURY—PLEADING.

In a suit by a widow to recover damages for the homicide of her husband by a street railroad, the question of the defendant's negligence, and of the diligence of the plaintiff's husband in avoiding the consequences of the alleged negligence of the defendant by the exercise of ordinary care, and to what extent the deceased contributed to his injury by his neglect, if any, were questions for the jury.

(a) Where in such a case the petition alleged

that immediately preceding the injury the plaintiff's husband looked in the direction from which the car was coming before attempting to cross the tracks at a regular street crossing, and that at that time the car was far enough away to have enabled him to cross in safety, but that, owing to the high and unlawful rate of speed at which the car was running, it overtook, struck, and injured him, and this allegation was denied by the answer, and neither the petition alleged nor the evidence showed that the deceased ever saw the car or heard the gong before being struck, it was error for the court to direct a verdict for the defendant.

(b) In such a case it was a question for the jury to decide, under the evidence, whether the defendant was negligent, or whether the plaintiff's husband exercised ordinary care in going upon the tracks of the defendant company, or to what extent he contributed to his injury by his neglect, if any.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Belle S. Howard against the Savannah Electric Company. Judgment for defendant, and plaintiff brings error. Reversed.

Mrs. Belle Strong Howard instituted an action against the Savannah Electric Company to recover damages for the alleged wrongful killing of her husband, Charles M. Howard, by the running of its cars. The petition alleged, in substance, that as Howard was proceeding east on the south side of Bolton street, in the city of Savannah, and was proceeding across Whitaker street, and across the tracks of the defendant company, which are about the middle of the street, a car of the defendant struck and killed him; that the defendant was negligent in running the car at a high, dangerous, and unlawful rate of speed, to wit, in excess of 10 miles an hour, in violation of the Code of the city of Savannah; that there was an electric light at the corner of Whitaker and Bolton streets, which illuminated the streets; and that Howard was in full view of the motorman, had he been looking, while Howard was crossing the tracks, and the motorman could have avoided striking him, if the car had been going at a moderate rate of speed and he had had it under control, and if he had been properly experienced, which it was alleged he was not, but was an inexperienced youth.

The eighth paragraph of the petition is as follows: "Your petitioner shows that her said husband cautiously crossed said tracks; that he looked in the direction from which the car came before going on the tracks, and that at that time the car was far enough away to have enabled him to cross in safety; but that owing to the high and unlawful rate of speed at which the car was running it overtook the said Howard just as he was stepping from the eastern rail, and struck his right kneecap, breaking it. The car ran about 150 feet before coming to a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stop." It was alleged that Howard was 62 years old, and was in the exercise of ordinary care and caution for his own safety; that he had the right to cross the tracks at a regular street crossing; that at the time he started across the car was a safe distance away, and he would have crossed in safety, had not the car been run at a high and dangerous rate of speed by a boy who was inexperienced; that Howard did not contribute or assent to his injuries; that, even if his act in crossing the street amounted to contributory negligence, the defendant was so grossly negligent (and without this negligence deceased would not have been injured) that the plaintiff will not be barred a recovery, but that her recovery will be diminished under the law applicable to such cases, etc.

The answer denied each and every material allegation contained in the petition, including the eighth paragraph quoted above. After the introduction of evidence had closed, the defendant moved the court to direct a verdict in its favor, on the ground that the allegations of the petition and the evidence thereunder, and particularly the eighth paragraph of the petition, showed as a matter of law that the plaintiff was not entitled to recover, because the deceased did not exercise ordinary care for his own safety, when by the exercise of such care he could have avoided injury to himself. The court directed a verdict for the defendant, and the plaintiff excepted.

Twiggs & Gazan, of Savannah, for plaintiff in error. Osborne & Lawrence, of Savannah, for defendant in error.

HILL, J. (after stating the facts as above). The decision in the case of *Thomas v. Central Ry. Co.*, 121 Ga. 38, 48 S. E. 683, is relied upon by the defendant as controlling in this case. This court there held: "One who deliberately goes upon a railroad track in front of an approaching train, thinking that she can cross before the train reaches her, and miscalculating its speed because she is in front of it, cannot recover for injuries resulting from being run down by the train, although the company's servants may have been negligent in running at a high rate of speed at that point, and also in failing to check the speed of the train at a public road which crossed the track between the place where the train was when first seen by the plaintiff and the point at which the injury occurred. The above facts being set out in a declaration, a demurrer thereto was properly sustained; for it is clear, from the allegations made, that the plaintiff, by the exercise of ordinary care, could have avoided the injury." That case is distinguishable from the instant one. That case involved a steam railroad, on which the rate of speed and the danger is much greater than in the case of a street railroad, where cars

stop usually at every street crossing, and the speed is regulated by city ordinance. In the present case the speed was not to exceed 10 miles an hour. The public have the right to the use of the street car tracks for the purpose of crossing and recrossing, without being regarded as trespassers. At street crossings, owing to the low rate of speed and the light construction and equipment of the cars, the public have the right to expect that they will be under control. The public has never surrendered the entire use of the streets. In the *Thomas Case*, supra, the deceased had deliberately gone upon the tracks of a steam railroad, knowing of the approach of a train, and miscalculating its speed, and her ability to cross in safety, took the chances and was injured. In such a case, of course, there could be no recovery. The deceased in that case was guilty of such contributory negligence as to bar a recovery.

In the present case, the deceased was an old man, 62 years old, and deaf. He was in a public street, attempting to cross. He was not a trespasser, but had a right to the use of the tracks. It is true that in the petition it is alleged that the plaintiff's husband looked in the direction from which the car was coming before going on the tracks, and that at the time the car was far enough away to have enabled him to cross in safety, but that, owing to the high and unlawful rate of speed at which the car was running, it overtook him just as he was stepping from the car track, and struck his right kneecap, breaking it, from the effects of which he died. But all these allegations were denied by the answer, including, of course, the allegation that the deceased looked in the direction the car was coming. But the petition did not allege, nor did the evidence show, that the deceased ever saw the approaching car before he stepped upon the track where he was struck. Indeed, the evidence of the motorman tended to show that he did not see the deceased until he was within 15 or 20 feet of him, when he sounded the gong, applied the brakes, and endeavored to stop the car, but could not until the deceased was struck. He was in as good position to see the deceased as the deceased was to see the car.

The issue as to the speed of the car, the negligence of the defendant's agents, and the diligence of the plaintiff's husband were thus in issue. The evidence for the plaintiff tended to show that immediately before the car struck the deceased the high speed of the car attracted the attention of some of the passengers. The conductor was asked why he was running so fast, and whether that was his last trip. He replied that he had another trip to make. The witness "had hardly gotten the words out of" his mouth when the deceased was hit by the car. The car was going 18 or 20 miles an hour. The car rolled 30 or 40 feet after it struck the deceased. The evidence for the defendant tended to

show that he had about 2 years' experience as a motorman, and was 22 years old. The car was going not more than 6 or 8 miles an hour, and he based that estimate of the speed of the car on the fact that "we were going to make schedule." The motorman noticed the deceased just as he stepped off the curbstone on the west side of Whitaker street. He was ringing his gong continuously all the way out there. When the deceased stepped off the curbing he was in a position of safety. From the curbing to the western rail is about 7 feet. When the motorman saw the deceased step off the curb he rang the gong especially for him and "hallooed" at him. He did not stop, but walked across the track very rapidly. When the motorman saw that the deceased did not heed the warning, he tried to stop by applying the brakes and reversing the current. The car went 12 feet after striking the deceased. Although the petition alleged that the plaintiff's husband looked in the direction the car was coming, it does not appear from the petition or the evidence that the deceased ever saw the approaching car, or that he heard the gong or shout of the motorman.

Under these circumstances, we cannot say, as a matter of law, that the effort of the plaintiff's husband to cross the track ahead of the car at a public crossing in a city was such an act of contributory negligence on his part as to amount to a failure to exercise ordinary care. Whether it was or not, under the circumstances of this case, was a question of fact which should have been left to the jury to determine. It was a question for the jury to decide whether the defendant was or was not negligent in the running of its cars at the time of the injury as alleged in the petition; and it was also a question for them, under the evidence, whether the plaintiff's husband was guilty of such a want of ordinary care or contributory negligence as would bar a recovery. *Lavie v. Central R.*, 71 Ga. 222 (3); *Harrison v. Georgia Ry. & Co.*, 134 Ga. 718, 720, 68 S. E. 505; *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 713, 39 S. E. 306, 54 L. R. A. 802; *Williams v. So. Ry. Co.*, 126 Ga. 712, 55 S. E. 948; *Western & Atlantic R. Co. v. York*, 128 Ga. 689 (4), 58 S. E. 183. The direction of the verdict for the defendant was error.

Judgment reversed. All the Justices concur.

LOUISVILLE & N. R. CO. v. MARTIN.
(Supreme Court of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

GRANTING NEW TRIAL.

There was no abuse of discretion in granting a first new trial in this case.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action between W. P. Martin and the Louisville & Nashville Railroad Company. From the judgment, the Railroad Company brings error. Affirmed.

O. N. Starr, of Calhoun, and D. W. Blair, of Marietta, for plaintiff in error. Maddox, McCamy & Shumate, of Dalton, and T. W. Skelly, of Calhoun, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

KNOX v. TOCCOA FURNITURE CO.
(Supreme Court of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. DENIAL OF NEW TRIAL—MISCONDUCT OF PARTY.

There was no evidence whatever submitted to the court on the hearing of the motion for a new trial to support that ground thereof relative to misconduct upon the part of the president of the plaintiff corporation in improperly approaching members of the jury and attempting to influence them "by showing them personal favors and special courtesies."

2. DENIAL OF NEW TRIAL—INSTRUCTIONS—VERDICT.

There is no merit in the exception to that part of the charge of the court set forth in the motion for a new trial; and there was sufficient evidence to support the verdict.

Error from Superior Court, Stephens County; J. B. Jones, Judge.

Action by the Toccoa Furniture Company against T. R. Knox. Judgment for plaintiff, and defendant brings error. Affirmed.

Fermor Barrett, of Toccoa, for plaintiff in error. A. G. & Julian McCurry, of Hartwell, and Claude Bond, of Toccoa, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

JONES v. STATE.
(Supreme Court of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 823*)—INSTRUCTIONS — REASONABLE DOUBT—CURE OF ERRORS.

On the trial the evidence tended to show that the homicide was murder, without any mitigating circumstances, but the accused in his statement claimed that it was an accidental killing. The judge defined reasonable doubt, and otherwise fully charged the jury on that subject. Immediately following such charge, he also instructed the jury on the law of accidental killing, thus: "The law says no person shall be convicted of any crime or misdemeanor that is the result of an accident or misfortune; and in this case the court charges you that if you are satisfied from the evidence in this case that the person alleged to have been killed, if he was killed, and you are satisfied that it was an accidental killing, and that there was no evil desire or intention or criminal negligence you would not be authorized to find the defendant guilty." After giving the instruction just quoted, he proceeded to charge the law in regard to

the prisoner's statement, after which he concluded with the charge: "If you are not satisfied to a moral certainty and beyond a reasonable doubt of the material allegations in the bill of indictment, or if you have any reasonable doubt in this case, it would be your duty to give the benefit of that doubt to the defendant and acquit him." *Held*, that the charge in regard to homicide by accident was not error, on the ground that it destroyed the effect of the charge on the law of reasonable doubt. Pen. Code 1910, § 40.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

2. CRIMINAL LAW (§ 945*)—NEW TRIAL—EVIDENCE.

The evidence alleged to have been newly discovered was not of such character as would be likely to produce a different result on another trial. *Srochi v. Ventrees*, 78 S. E. 1003 (July 18, 1913).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

3. CRIMINAL LAW (§ 1156*)—APPEAL—DENIAL OF NEW TRIAL.

The evidence authorized the verdict, and the discretion of the trial judge in refusing to grant a new trial will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Willie Jones was convicted of murder, and brings error. Affirmed.

J. M. Merritt, of Madison, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, and Q. S. Felder, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

HENRY v. ROBERTS.

(Supreme Court of Georgia. Aug. 12, 1913.)

(*Syllabus by the Court.*)

1. EJECTMENT (§ 9*)—TRIAL (§ 165*)—MOTION FOR NONSUIT—TITLE—EVIDENCE.

While the plaintiff in an action for land must recover on the strength of his own title, yet, in passing on a motion for nonsuit upon the conclusion of the evidence submitted in behalf of the plaintiff, such evidence should be construed most favorably to him, and if, so construed, a prima facie case for the plaintiff is made out, a nonsuit should be refused.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.* Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. ADVERSE POSSESSION (§ 115*)—TITLE—NONSUIT—EVIDENCE.

Construing the evidence for the plaintiff upon the trial most favorably in his behalf, the jury would have been authorized to find that he and those under whom he claimed had actual and adverse possession of the land for which the action was brought for more than 20 years prior to the date when the defendant entered into possession thereof. It follows that the court erred in granting a nonsuit.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.*]

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by J. A. Henry against J. D. Roberts. Judgment for defendant, and plaintiff brings error. Reversed.

I. H. Sutton, of Clarkesville, for plaintiff in error. J. C. Edwards, of Clarkesville, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

ZACHRY v. ZACHRY.

(Supreme Court of Georgia. Aug. 12, 1913.)

(*Syllabus by the Court.*)

DIVORCE (§ 289*)—CUSTODY OF CHILDREN—RES JUDICATA.

Where a motion, based on pending libel for divorce, is made to the judge under Civil Code 1910, § 2980, for temporary alimony and the custody of children of the marriage pending the litigation, the judge, in determining the custody of the children, is not bound by a previous judgment in habeas corpus between the same parties, but, after hearing all the facts and circumstances, should exercise a sound discretion in awarding the custody of the children. Civil Code 1910, §§ 2971 and 2980, being in *pari materia*, must be construed together.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 773; Dec. Dig. § 289.*]

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action by Mary W. Zachry against Julian J. Zachry. Judgment for defendant, and plaintiff brings error. Reversed.

C. E. Dunbar, of Augusta, for plaintiff in error. C. H. & R. S. Cohen, and Hamilton Phinizy, all of Augusta, for defendant in error.

EVANS, P. J. Julian J. Zachry and Mary W. Zachry were married on November 12, 1909. During May, 1913, the husband instituted a habeas corpus proceeding against his wife, before the ordinary of Richmond county, to recover the custody of their two minor daughters, both under the age of three years, and on May 12, 1913, the custody of the children was awarded to the husband by the ordinary. Three or four days thereafter the wife filed in Columbia county a petition for divorce against her husband, who was a resident of that county; and she made an application for the support and custody of her children under Civil Code, § 2980, based upon her pending libel for divorce. On the hearing the court allowed attorney's fees and temporary alimony to the wife, but refused her the custody of her children, holding that the judgment in the habeas corpus proceeding conclusively adjudicated the right of the husband to their custody; there being no contention that there was any change in the status of the parties other than the

filing of the petition for divorce. The wife excepts to this judgment.

The case is governed by Civil Code, §§ 2971, 2980. The last named of these sections provides for an interlocutory hearing before the judge, on a motion made pending a divorce proceeding, to determine who shall be entitled to the care and custody of the children pending the litigation, as if the same were before him on a writ of habeas corpus. If nothing more appeared in the statute, we would be constrained to follow the analogy of a proceeding of this kind to that of a habeas corpus, and to apply the rule that a judgment on habeas corpus in a contest between parents over the custody of minor children is conclusive in a subsequent application, unless some new fact has occurred which has altered the state of the case or the relative claims of the parents in some material respect. *Kirkland v. Canty*, 122 Ga. 261, 50 S. E. 90. But the cognate section (2971) is to be construed in connection with it. That section declares: "In all cases of divorce granted, the party not in default shall be entitled to the custody of the minor children of the marriage. The court, however, in the exercise of a sound discretion, may look into all the circumstances, and, after hearing both parties, make a different disposition of the children, withdrawing them from the custody of either or both parties, and placing them, if necessary, in possession of guardians appointed by the ordinary. The court may exercise a similar discretion pending the libel for divorce." In cases of final divorce the custody of the children will be awarded to the party not in default (if approved by the presiding judge), notwithstanding their custody may have been given to the other party in a former habeas corpus proceeding. The statutory design seems to be that on the final verdict for divorce the court shall not be hampered by any former decree or judgment in a habeas corpus case, but that the court will be at full liberty in providing for the welfare of the children. And there is much reason that the court should not be fettered by any former judgment rendered on habeas corpus, because the issues are not altogether the same.

In a contest by habeas corpus between parents for the possession of children, the contending parties are pressing their private claims, and the welfare of the children is made a subsidiary matter by the striving parents; whereas, in the case of divorce granted, the marital bonds are dissolved, and henceforth the parents are no longer in domestic relation. In such a case the welfare of the children appeals most strongly to the humanity and conscience of the judge, and it is wise that he be left untrammelled by any former judgment on habeas corpus in making provision for the children's future. The statute confers on the judge a supervisory

control, with respect to the custody of the children, over the whole divorce proceeding, and in the exercise of a wise discretion he may award their custody to the parent in fault, or even to strangers, in case of divorce granted. The statute further declares that "the court may exercise a similar discretion pending the libel for divorce." What meaning are we to give to these words? If we confine their meaning to an exercise of discretion with respect to matters transpiring subsequently to a judgment rendered in a habeas corpus proceeding, we not only write such restriction into the statute, but we do violence to the legislative fiat that the court shall have and exercise a discretion similar to that given him in cases of divorce granted, which is unfettered by any previous adjudication on habeas corpus. We think the legislative purpose was to take a proceeding under section 2980, to determine the custody of children pending divorce litigation, from without the operation of any former judgment on habeas corpus, and to confer upon the judge plenary power for the exercise of a sound discretion in awarding the custody of the children of the parties to the divorce libel. We reverse the judgment, that the court may hear all the facts and exercise a sound discretion in awarding the custody of the children.

Judgment reversed. All the Justices concur.

EVANS v. CALLAWAY, Deputy Sheriff, et al.
(Supreme Court of Georgia. Aug. 14, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 519*)—COLLATERAL ATTACK—ACTION ON FORTHCOMING BOND.

Certain justice court executions in favor of the Arnold Grocery Company against J. R. Evans were levied on described goods as the property of the defendant in *fi. fa.* Affidavits of illegality were interposed, and in order to get possession of the property the defendant executed and delivered to the levying officer bonds conditioned to deliver the property "at the time and place for sale," in the event that the illegalities "should be dismissed by the court or withdrawn." The property was then delivered to the defendant, who afterwards sold or otherwise disposed of it, so that he could not produce it in terms of the bonds. In the superior court the levying officer, for the use of the plaintiff in *fi. fa.*, instituted suit on the bonds for the amount due on the *fi. fa.*, which was less than the value of the property levied on. The defendant (the principal in the bonds) interposed a plea which, as amended, admitted what has just been stated, and set up, in substance, the following: "The ground of illegality was that the defendant had not been served in the suits in the justice court. While the illegality cases were pending on appeal in the superior court, and before the term convened, the defendant and the attorney of plaintiff agreed upon a settlement of the cases. Under the agreement the defendant 'was to pay cash \$100,' and the attorney 'was to stop all further costs, and was to accept rent notes for the balance, and upon this was to mark the said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case settled." The defendant paid the \$100, and the attorney "agreed to carry out the other terms of the contract," and, relying on such promise, defendant did not attend court; but, "instead of carrying out this contract, said plaintiff by its attorney dismissed" the affidavits of illegality, and "refused to accept rent notes or abide said contract." The defendant alleges that it "is inequitable not to enforce said agreement," and it is prayed that the "agreement be enforced, and said cases be reinstated in the court," and the issue tried, and that in the meantime that the suit on the bonds be enjoined. *Held*, construed in its entirety and in the light of the prayers, the object of this portion of the plea was to set aside the judgment of the superior court dismissing the illegality cases, and to reinstate them for trial, and to enjoin the suit on the forthcoming bonds.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 963; Dec. Dig. § 519.*]

2. JUDGMENT (§ 519*)—ACTION ON FORTHCOMING BOND—CONSTRUCTION OF PLEA—COLLATERAL ATTACK ON JUDGMENT.

The attack made upon the judgment dismissing the illegality cases, in the plea of the defendant in the suit by the levying officer on the forthcoming bond, was merely a collateral attack, and would not suffice as a basis for setting aside the judgments or the grant of the injunction. *Porter v. Rountree*, 111 Ga. 369, 36 S. E. 761; *Alabama Great Southern R. Co. v. Hill*, 139 Ga. 224, 76 S. E. 1003.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 963; Dec. Dig. § 519.*]

3. JUDGMENT (§ 519*)—ACTION ON FORTHCOMING BOND—PLEA.

There was no error in striking the plea.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 963; Dec. Dig. § 519.*]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by J. W. Callaway, Jr., Deputy Sheriff, for use, etc., and others, against J. R. Evans. Judgment for plaintiffs, and defendant brings error. Affirmed.

Colley & Colley, of Washington, for plaintiff in error. I. T. Irvin, Jr., of Washington, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

HARDEE v. TIETJEN.

(Supreme Court of Georgia. Aug. 14, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On the trial of a suit brought by the receiver of a corporation to recover the price of stock alleged to have been subscribed by a stockholder, whose defense was that he subscribed for a certain number of shares, for which he had paid according to contract, but that the number of shares set opposite his name on the subscription list was raised to a larger number by some one not authorized by him, the price of which excess number of shares the suit was brought to recover, it was not error requiring a new trial, under the facts of this case, for the court to decline to allow in evidence, when offered by the plaintiff, the stockbook of the corporation, containing a blank stock certificate, signed by the defendant as president of the corporation, and the stub

attached thereto, which read "Certificate No. 54 for 25 shares issued to" the defendant, the number of shares named being in excess of the number the defendant had conceded to have subscribed, where he, as a witness in his own behalf, gave evidence showing the existence and contents of the stub and certificate as contended by the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

2. CORPORATIONS (§ 90*)—ACTION ON STOCK SUBSCRIPTION—ADMISSION OF EVIDENCE.

It was not error to allow the introduction in evidence of the receipt set out in the second division of the opinion, for the reason there stated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.*]

3. CORPORATIONS (§ 90*)—NOTICE TO AGENT—ACTION ON STOCK SUBSCRIPTION—QUESTION OF FACT.

Under the facts of this case, it was not error for the court to decline to give the following instruction to the jury: "If you find from the evidence that the treasurer of the Savannah Sand Lime Brick Company had its subscription list, and that subscription list had on it the name of John F. Tietjen, with 50 shares written thereafter, and the treasurer was charged by the corporation with the duty of collecting such subscription, then, at the time the treasurer of the corporation ascertained that such subscription was 50 shares, the treasurer knew it, and John F. Tietjen, when he became president of the corporation, would be chargeable with knowledge."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by W. P. Hardee, receiver, against J. F. Tietjen. Judgment for defendant, and plaintiff brings error. Affirmed.

E. S. Elliott, of Savannah, for plaintiff in error. Adams & Adams, of Savannah, for defendant in error.

HILL, J. W. P. Hardee, as receiver of the Savannah Sand Lime Brick Company, brought his action for an alleged unpaid subscription to the capital stock of that company against John F. Tietjen. The petition alleged that the defendant subscribed for 50 shares of the capital stock of the company, of the par value of \$100 per share, to wit, the sum of \$5,000, and had paid only \$2,000, leaving \$3,000 still due by him to the company. A demurrer to the petition as amended was overruled. The defendant filed an answer, denying that he subscribed for 50 shares of stock, but averring that he subscribed for 20 shares, to be paid for in 200 acres of land, and that he had paid for his stock in the manner provided for in the contract of subscription, and had obtained a certificate covering these 20 shares. The jury returned a verdict for the defendant. A motion for a new trial was overruled, and the plaintiff excepted.

There was abundant evidence to sustain

the verdict. Numerous grounds of error were assigned on the admission of evidence, refusal to admit evidence, excerpts from the charge of the court, and a failure to charge as requested. We have examined each ground of the motion carefully, and have come to the conclusion that none of these assignments possess sufficient merit to require the grant of a new trial.

[1] 1. One ground of error assigned is that the court declined to allow in evidence, when offered by the plaintiff, the stockbook of the Savannah Sand Lime Brick Company, containing certificate No. 54, which consisted of a stub and certificate. The stub read (omitting the immaterial parts): "Certificate No. 54 for 25 shares issued to J. F. Tietjen." Stock certificate No. 54 itself, attached to the stub, was in blank, signed: "John F. Tietjen, President." The stub and certificate were offered as tending to show that there were 25 shares of stock issued to J. F. Tietjen. The stock certificate was in blank form, signed by Mr. Tietjen, which signature was proved. Exception is taken to the refusal of the court to allow the stub and certificate in evidence, for the reason that, as the certificate was signed by Mr. Tietjen, and his signature was not denied, but was proved, the weight of the offered evidence was for the jury, and not the court. Even if the stub and certificate were admissible in evidence, it was not harmful error under the facts of this case, requiring a new trial, to exclude them, as the defendant Tietjen, as a witness, gave evidence tending to show that, while he signed the certificate in blank, both the stub and certificate were filled out by some one other than himself, without his knowledge or consent. His testimony tended to show the existence of the stub and certificate as contended; but it also explained that he did not insert or authorize to be inserted the words "25 shares of stock" in the stub. There was no conflict in the evidence, which tended to show that the defendant signed the stock certificate in blank, that he did not have possession of the stockbook containing the certificate and stub attached thereto after the certificate was signed by him in blank, that the stub was filled out by another without the defendant's knowledge or consent, and that it was in the possession of another official of the corporation, and the defendant did not know of the contents of the stub and certificate while they were in the possession of the other officer.

[2] 2. Error was assigned because the court allowed the defendant to put in evidence, over the objection of the plaintiff, a certain receipt, as follows: "Office of G. B. Whatley, Attorney and Counselor at Law, Room 18, Provident Building. Telephone 1177. Savannah, Ga., Jan'y. 26, 1905. This is to certify that John F. Tietjen has signed his name to the Sand Lime Brick Company for \$2,000, to be paid for in 200 acres of land containing the sand from which the bricks

are to be made, situated at Eden, Georgia. [Signed] W. G. Paschall. [Signed] G. B. Whatley." The objection urged to the introduction of the receipt as evidence was "that the company never authorized or accepted the contract; also, that the original subscription of Mr. Tietjen, being the subscription sued on, was before the court, and that the plea filed was not a plea of non est factum, and the contract did not appear to be complete in reference to the subscription to which Mr. Tietjen had signed his name, and that the name of the company was the Sand Lime Brick Company, and not the Savannah Sand Lime Brick Company. The evidence of G. B. Whatley, whose name appears signed to the receipt (the other signer being dead), tended to show that he wrote out and signed it, and at the time was representing the promoters of the company, and that Mr. Tietjen subscribed and paid for only 20 shares of stock. The minutes of the company, which were put in evidence, showed that it was sometimes called Sand Lime Brick Company, and sometimes Savannah Sand Lime Brick Company. We think the evidence was admissible, and that the court did not err in so ruling. See *Howard v. Glenn*, 85 Ga. 239 (9), 11 S. E. 610, 21 Am. St. Rep. 156.

[3] 3. The refusal to give the following instruction to the jury is assigned as error: "If you find from the evidence that the treasurer of the Savannah Sand Lime Brick Company had its subscription list, and that subscription list had on it the signature of John F. Tietjen, with 50 shares written thereafter, and the treasurer was charged by the corporation with the duty of collecting such subscription, then, at the time the treasurer of the corporation ascertained that such subscription was 50 shares, the treasurer knew it, and John F. Tietjen, when he became president of the corporation, would be chargeable with such knowledge." It is insisted that the defendant knew his subscription was for 50 shares of stock; that even if the subscription was originally for 20 shares, and had been raised to 50 shares, as he contended, the treasurer of the corporation knew the list showed it was for 50 shares, and this was also notice to the defendant, who was president of the corporation; and that if he took no steps to repudiate it, he will be considered in laches, and as being estopped from setting up any defense to the suit filed thereon. As to the first proposition, it is a question of fact as to whether the defendant knew the subscription list was for 50 shares as being subscribed by him. On this question the evidence was conflicting, and the jury found with the defendant, and under the evidence was authorized so to do.

We next consider the contention that the list showed that the defendant's name was on the list for 50 shares, and the treasurer of the corporation had the list and knew this, and that notice of that fact to the treasurer was notice to the president, who was

John F. Tietjen, the defendant. There was evidence tending to show that the treasurer of the corporation had in his possession the list of subscribers to the capital stock, and that this list showed that opposite the name of J. F. Tietjen, were the words "50 shares." The evidence for the defendant tended to show that he subscribed for only 20 shares of the stock, which were to be paid for with 200 acres of land, and this was done. It also tended to show that the defendant did not see the list, with the words "50 shares" opposite his name, or knew of it, and had no knowledge of his subscription having been raised from 20 to 50 shares. In view of the evidence in the case, and the general charge of the court, we think the court did not err in declining to give the requested instruction to the jury. While, as a general rule, notice to an agent of a corporation, acting for it in connection with its business and within the scope of his agency, is notice to his principal (Wade on Notice [2d Ed.] § 872), we do not think that notice to one agent of a corporation that the stock subscription of another agent has been raised is notice to the other agent of the same corporation as a private stockholder, so as to charge him with notice that his stock subscription has been raised from the amount which he subscribed to a higher amount. See *Georgia Milk Producers' Ass'n v. Crane*, 137 Ga. 50, 72 S. E. 414; 31 Cyc. 1587 (4).

The principle here ruled applies to the other assignments of error, which raise substantially the same question in varying forms as the question here decided. The charge of the court as a whole covered the issues in the case, and was as favorable to the plaintiff as he was entitled to. The other assignments of error are without merit.

Judgment affirmed. All the Justices concur.

CONNALLY et al. v. MORRISON et al.
(Supreme Court of Georgia. Aug. 13, 1913.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—
TAX ELECTION—LEVY.

Civil Code 1910, § 1535, provides for the holding of elections in school districts to determine whether a local tax shall be levied for the purpose of supplementing the funds received from the state for public schools in the district, and it is declared that "two-thirds of those voting shall be necessary to carry the election for local taxation for public schools." Where such an election has been held, and the requisite majority is obtained, it is the duty of the ordinary to declare the result, and thereafter a tax will be levied as provided for in Civil Code 1910, § 1537.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—
TAX ELECTION—LEVY.

Where the law for levying a local tax for supplementing the funds in a school district

has been put into effect by an election in a district as mentioned in the preceding note, it will continue until changed by law.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—
LEVY OF TAXES—EFFECT OF ELECTION.

Civ. Code 1910, § 1536, deals with the matter of repeal of the local tax law in a given school district in so far as it is applicable to such district. Properly construed, the statute reflects the legislative design that local application of the law could be repealed in the district, if, at an election called after the law had been in effect in such district three years, two-thirds of those voting at the election should favor the repeal. It does not contemplate a repeal by the result of an election called "to pass upon the question of local taxation for schools" in the district, at which 60 votes were cast "for local taxation for schools" in the district, and 34 votes were cast against it.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.*]

4. SCHOOL TAX—INJUNCTION.

The application to enjoin the levy of the tax was properly refused.

Error from Superior Court, Dade County;
A. W. Fite, Judge.

Action by Leon Connally and others against W. G. Morrison and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Leon Connally and several other persons, as citizens and taxpayers of the 960th district of Dade county, instituted an action against W. G. Morrison, John L. Case, and S. J. Hale, as district trustees, and others, alleging that more than three years before the institution of the suit an election was held in the district, as provided by law, for the purpose of assessing a local school tax upon the taxpayers of the district, and that the election resulted in favor of local taxation, and the law authorizing such taxation remained in force "until the three years limited by law had expired." After "the limit had expired, a sufficient number of taxpayers petitioned the ordinary to call an election to pass on the question of local taxation for schools in the district." The call for the election was advertised, as provided by law, and the election was held, "which resulted in 60 votes for local taxation for schools in said district and 34 votes against local taxation." It was further alleged that "local taxation did not carry," for the reason that "there was not the requisite two-thirds majority voting for such taxation"; it being urged that under the Constitution (Civil Code, § 6579), and the laws in pursuance thereof (Civil Code, §§ 1534, 1535, 1536), "a two-thirds majority vote was requisite" to place the burden of taxation for such purpose upon the inhabitants of the school district. There were allegations suggestive of improper conduct upon the part of the managers of the election, which need not be stated. The ordinary has publicly declared that at

the election local taxation for school purposes was carried, and in view of such announcement the school commissioners will assess and levy a school tax, which action, it is contended, would be contrary to law. The prayers were that the defendants be enjoined from assessing and levying any tax whatever for school purposes in the district; that no accounting or reckoning be taken of it until ordered by the court under a decree framed in conformity with the law; that the tax collector be enjoined from collecting any tax for school purposes; that such other and further relief be granted "as may be just, equitable, and lawful"; and that process issue, etc. The petition was sworn to by one of the plaintiffs, who made an affidavit that the facts, when stated of deponent's own knowledge, were true, and, when stated upon information, he believed them to be true. When the petition was presented to the judge at chambers, he did not issue a rule nisi, but passed an order denying the injunction, on the ground that the provisions of Civil Code, § 1536, if constitutional, were not intended to authorize a small minority to repeal the local tax law after it has been lawfully put into effect in a school district. The plaintiffs excepted to this order, and the case came to the Supreme Court on a fast bill of exceptions under the provisions of Civil Code, § 6153.

W. U. Jacoway, of Trenton, and H. P. Lumpkin, of La Fayette, for plaintiffs in error. W. H. Payne, of Chattanooga, Tenn., for defendants in error.

ATKINSON, J. The record discloses that upon mere inspection of the petition the judge refused the injunction, on the ground that he considered that the petition was clearly without equity. That he could do so has been decided. *Remshart v. Savannah & C. R. Co.*, 54 Ga. 579; *Brown v. Wilson*, 56 Ga. 534. Whether there was any equity in the petition would depend on the right of the officers to levy the tax, which, under the allegations of the petition, was merely a question of law. It was conceded that the law authorizing the school tax in the district had been effective by virtue of an election previously held for that purpose, and the only ground upon which it was contended that there was no authority at the time suit was filed for the levy of such a tax was that the law authorizing the levy of the tax was no longer effective in the district.

[1] By article 8, § 4, of the Constitution of this state (Civil Code, § 8579), it is declared: "Authority may be granted to counties, militia districts, school districts, and to municipal corporations, upon the recommendation of the corporate authority, to establish and maintain public schools in their respective limits by local taxation; but no such laws shall take effect until the same shall have been submitted to a vote of the qualified

voters in each county, militia district, school district, or municipal corporation and approved by two-thirds majority of persons voting at such election, and the General Assembly may prescribe who shall vote on such questions."

In pursuance of this provision of the Constitution there are statutory provisions of law now embodied in the Civil Code, as follows:

"Sec. 1535. Whenever the citizens of any school district wish to supplement the funds received from the state public school fund by levying a tax for educational purposes, they shall present a petition from one fourth of the qualified voters of the district to the ordinary, who shall order the election not earlier than twenty days, nor later than sixty days, after the petition is received: Provided, that notice of the same shall be posted in at least three conspicuous places in the district ten days prior to the election. The election shall be held at a time and place prescribed by the proper authorities, and under rules governing ordinary elections. Those favoring local taxation for public schools shall vote 'For local taxation for public schools.' Those opposed shall vote 'Against local taxation for public schools.' The returns of said election shall be made to the ordinary of the county, who shall declare the result, and two-thirds of those voting shall be necessary to carry the election for local taxation for public schools. No person shall vote in said election except the regularly qualified voters residing in the district six months prior to the election. An election for the same purpose shall not be held oftener than every twelve months."

"Sec. 1536. An election for repealing the local tax law provided for in this article, when the same has been established for over three years, shall be called as in first instance. And if abolished by vote under similar regulations as in first instance, no new election for re-creating the same shall be called within one year. If not abolished by vote, no election for the same purpose shall be called within one year."

"Sec. 1544. All elections held under the provisions of this article shall be governed as to registration and qualification of voters as the general law governing special elections provides."

"Sec. 1537. In those districts which levy a local tax for educational purposes, the board of trustees shall make all rules and regulations to govern the schools of the districts, and build and equip school houses under the approval of the county board of education. They shall have the right to fix the rate of tuition for nonresident pupils, and to fix the salaries of the teachers. They shall receive from the county board of education the share of public school funds apportioned to the district by the county board of education. They shall determine the amount necessary

to be raised by local tax on all the property of the district. The secretary of the board of trustees of said district, with the aid of the county school commissioners of said county, shall ascertain from the tax returns made to the tax receiver, and from the returns made to the comptroller general, the total value of all the property in said district subject to taxation for county purposes, and a regular digest of all such property in said school district shall be made by said secretary in a book furnished by the board of trustees and kept for that purpose. At or before the time of fixing the rate of taxation for said county, the secretary of each local board of trustees, with the aid of the county school commissioner, shall levy such rate on the property thus found as will raise the total amount to be collected: Provided, that such rate shall not exceed one half of one per cent. The county school commissioner of each county, at or before the time for fixing the rate of said county by the ordinary thereof, or the county board of commissioners, as the case may be, shall certify to the said ordinary, or said board of commissioners, as the case may be, and to the comptroller general of the state the rate of taxation fixed for each school district in the county, and said taxing authority of said county shall levy such special tax at the same time and in the same manner as is now prescribed for levying taxes for county purposes. A copy of the special tax digest of said local tax district shall be furnished by the secretary of the local board of trustees to the tax collector of the county."

[2] The foregoing provision of the Constitution and the statutory provisions of law authorize taxation in school districts for the purpose of supplementing the school funds received from the state in such districts, whenever, at an election held for such purpose in the school district, a two-thirds majority of persons voting at such election vote in favor of local taxation, and the result of the election is declared. The law is not of its own force applicable in all school districts of a county, but it is a general law and becomes applicable in any given district when it is declared so as the result of an election held in accordance with the statute. There is no suggestion anywhere that after the law, by virtue of an election, becomes effective in a given district, it would cease to be so by mere lapse of time. It does not, as alleged in the petition, "expire" after it has been in effect three years. The words at the conclusion of section 1535, "an election for the same purpose shall not be held oftener than every twelve months," manifestly refer to the holding of elections to determine whether the law shall become effective in the district, and have no reference to rendering the law ineffectual after it has once been declared applicable in the district. The provision was intended to restrict the frequency of such elections which would likely occur if the re-

sult were not in favor of local taxation in the first instance. If the law did not expire by mere lapse of time, then by what means did it become inoperative in the district?

[3] It is urged that it did so by virtue of the election held after the law had been in effect three years. In support of this it is insisted that the election was held under Civil Code, § 1536, at which 60 votes favored taxation and 34 opposed it; and that this caused the repeal of the law in so far as it related to that district. The judge doubted the constitutionality of Civil Code, § 1536; but no constitutional question was raised, and none is now for consideration. The judge differed with counsel for plaintiffs in the construction of the statute, and held that the election did not repeal the local application of the law. In this we agree with the judge. The error into which counsel for plaintiffs have fallen commences by assuming that the election under section 1536 was for the same purpose as that provided for in 1535, whereas it was not; the purpose of the election under 1535 being to determine whether the general law for levying a tax in school districts should become applicable in that district while the purpose of the election under 1536 was to determine, after the law had been made applicable, whether its application to the district should be repealed. In the one instance the proposition is to apply the law, and in the other to repeal. In each instance it requires affirmative action to bring about the change of condition for which the election is called to accomplish. In section 1535 provision is made for holding the election; and it is declared, in effect, that, in order to carry the election or bring about the change of condition, it is essential that a two-thirds majority of those voting should favor the change. On this subject section 1536 uses different language, but manifestly it was intended to mean the same thing. Instead of setting out at length provisions for calling the election, it merely recites that it shall be called "as in the first instance," intending thereby that the election shall be called with the same formalities as set forth more particularly in the preceding section; and instead of setting out at length provisions for holding the election, and qualifications of voters and for returns of the managers and declaring the vote necessary to carry the election, or to bring about the change in the law which was sought to be produced, it merely recites that if the law be "abolished by vote under similar regulations as in first instance, no new election for re-creating the same shall be called within one year," thereby intending that the election would carry, or that the change of condition should result, if the election were held and returns made according to the formalities more fully set out in the preceding section, and the proposition to make the change should receive the majority necessary to carry the election, as is more fully set out in the preceding section. In ef-

fect, relative to these matters, it adopts a part of the provisions of the preceding section. If any other interpretation be placed on this part of section 1536, it would be necessary to say either that the Legislature, while providing the machinery for this election and giving it effect, omitted altogether to say what vote should be necessary to carry the election, or that it was intended that it might be carried, and the existing law repealed, by any minority vote equal to or exceeding one-third of the votes cast. This result would be both unusual and inconsistent with the language actually employed, and manifestly not in accord with the legislative intent.

[4] Under this construction of Civil Code, § 1536, the election described in the petition "to pass on the question of local taxation for schools in the district," at which 60 persons voted for local taxation and 34 persons voted against it, did not affect the existing local application of the law. It was the duty of the officers to levy and collect the tax, and there was no equity in the petition to become the basis of the relief sought.

Judgment affirmed. All the Justices concur.

STONE v. KING-HODGSON CO. et al.
(Supreme Court of Georgia. Aug. 13, 1913.)

(Syllabus by the Court.)

1. INJUNCTION (§ 111*)—VENUE—WAIVER.

"All petitions for equitable relief shall be filed in the county of the residence of one of the defendants against whom a substantial relief is prayed, except in cases of injunctions to stay pending proceedings, when the petition may be filed in the county where the proceedings are pending: Provided, no relief is prayed as to matters not included in such litigation."

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 195, 196; Dec. Dig. § 111.*]

2. INJUNCTION (§ 107*)—PARTIES—ACTIONS.

The general rule is that an action at law will not be enjoined at the instance of one not a party thereto.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 181-183; Dec. Dig. § 107.*]

3. INJUNCTION (§ 32*)—PARTIES—SUBJECTS OF RELIEF.

"An injunction will not be granted to restrain an official in the exercise of his official functions. The writ lies only against suitors in the proceedings before him."

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 69; Dec. Dig. § 32.*]

4. INJUNCTION (§ 111*)—VENUE—WAIVER.

This was a petition to enjoin a pending proceeding, where the plaintiffs in such proceeding resided in a county other than that in which it was pending, and where the petition was brought, and the relief prayed for was as to matters not included in the proceeding sought to be enjoined; and the petitioner was not a party to the pending proceeding.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 195, 196; Dec. Dig. § 111.*]

5. INJUNCTION (§ 111*)—VENUE—WAIVER.

The demurrer to the petition was properly sustained.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 195, 196; Dec. Dig. § 111.*]

Error from Superior Court, Jackson County; B. F. Walker, Judge.

Action by E. B. Stone against the King-Hodgson Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

In December, 1911, Mrs. Eva B. Stone brought an action in the superior court of Jackson county against King-Hodgson Company, a partnership, all the members of which resided in Clarke county, and J. O. Stapler, C. E. Fleeman, J. P. Johnson, and J. J. Pace, residents of Jackson county; the substance of the petition being as follows: Petitioner is the owner of a described parcel of land, upon which she resides and has resided for more than 15 years. About four years ago she was indebted to King-Hodgson Company in amounts aggregating less than \$1,000, some of the amounts really representing indebtedness of her husband, E. A. Stone. One of the firm of King-Hodgson Company, together with their lawyer, came to her home to get her to sign what they told her was a mortgage deed to her land to secure said debt. The same was not read over to her, but as soon as her signature was obtained they immediately went away. They had been getting her to sign some mortgages the same year, or the year before, on her crops to pay her debts and those of her husband, and she was informed and thought this one was just like she had been signing. Her land at that time was worth more than \$3,000. Her husband had been cultivating it for her, and her crops were all gathered and brought to her home, except such as were sold. During the year 1911 she heard that King-Hodgson Company claimed to hold a deed to her land. King-Hodgson Company, alleging themselves to be the landlord of her husband, have sued out a possessory warrant against him, issued by J. O. Stapler, notary public and ex officio justice of the peace, by virtue of which the crops of petitioner have been seized by C. E. Fleeman, constable. Immediately after such seizure she went before Stapler and offered to file her claim to the crops, with bond in double their value, which she was willing and ready to give; but Stapler, acting under the instructions of counsel for King-Hodgson Company, refused to permit her to do this, whereupon she "then went before the justice in her own district, to wit, 1704th Dist. G M., said county, and took out a distress warrant, and has had this distress warrant levied upon the same property in the field and ungathered, as well as some of the crops gathered, that was levied upon and seized by said C. E. Fleeman, L. C., as aforesaid,

from said 253d Dist. G. M., said county, under said possessory warrant proceeding issued by said King-Hodgson Company against said E. A. Stone [her husband], and the constable of the 1704th Dist. G. M., said county, under said distress warrant has the same property levied upon, and both claim they are entitled to hold the same or take bond for same. The said constable from the 253d Dist. G. M., said county, is seeking to take the said property outside of said district, and while the constable of the 1704th will not turn it over except by giving a forthcoming bond for it, forthcoming at his court at the time and place of sale, and there is a conflict of authority between these two officers, that cannot be reconciled and adjusted outside of a court of equity, and there is and will be a multiplicity of suits growing out of said situation." "At the time said supposed mortgage was given by her to said King-Hodgson Company, [petitioner] is informed that they also included, all her stock, mules, and horses, and wagons, and farming implements, to the value of \$500, in said instrument, and she is informed that said King-Hodgson Company claim they also have a title to said personal property; but the same is your petitioner's property, incumbered only with a lien upon the same for whatever she herself might have been indebted to said King-Hodgson Company, and that all her said property, both real and personal, [is] worth more than \$3,500, she has never received either in payments of debts that she owed and money, more than \$1,000, if that much on the same." She "is informed and believes, and so charges, that said King-Hodgson Company have put in and included in said mortgage deed that they obtained as aforesaid more than \$1,000 worth of indebtedness that her said husband owed, but that she has only recently found this out; that she learned this some time during the summer of 1911; that said King-Hodgson Company, knowing that the land was hers, and all the said personal property was hers, deliberately planned to deceive your petitioner as to the amount she owed them, and to get her said property for her said husband's debts, and that, even if she was liable for her husband's debts, which she is not under the law, and which said King-Hodgson Company knew, the said property they claim to have a mortgage deed on is worth more than \$1,000, more than all said debts." She "is informed, and so charges, that said King-Hodgson Company claim to have a straight deed from her to all said real and personal property, and they claim that is the basis upon which they are seeking to proceed with their said possessory warrant proceedings, when in truth they have no such deed; and if they have, petitioner was deceived by them in getting the same by misrepresentations, and by getting her to sign something that was represented to her as a mortgage, and conveying her property

to pay her husband's debts, and in signing which she would not be absolutely deeding away her property, but simply for the purpose of securing what she might at the time have owed said King-Hodgson Company. She is further informed and charges that said King-Hodgson Company put in the paper she signed, which was not read to her, more than \$1,000 of debts they held against her said husband, or debts that they bought up against him, and knowing at the time that your petitioner was not liable for said debts and that her property was not subject to said debts." She "further says that she has been informed, and so charges, that the said King-Hodgson Company have threatened to try to evict her from her said land, and claim that they will try to put her off said land after January 1, 1912, when they have no right to do so."

The prayers of the petition are that further proceeding of both the possessory warrant and the distress warrant be enjoined; that the justices of the peace who respectively issued them, and the constables who respectively seized and levied upon the crops, all be enjoined "from any further action on said cases"; "that said King-Hodgson Company, as well as petitioner, be enjoined from prosecuting their several said cases in said justices' courts heretofore referred to; that there be an accounting between said King-Hodgson Company and petitioner, and that any mortgage deed or other deed or conveyance they hold against petitioner, purporting to be signed by her to secure her indebtedness to them, be decreed by this court to be only a lien on said property to secure only what she was indebted to said King-Hodgson Company when the same was signed, and that for all other purposes it be canceled as null and void; that said King-Hodgson Company be enjoined and restrained from interfering with the crops raised on said premises for the year 1911, and from interfering with her possession of the same for 1912, as she stands ready and willing to give a reasonable bond for what would be reasonable rent of said premises for 1912." There were also prayers for a temporary restraining order, for process, and for second original for Clarke county, to be there served upon King-Hodgson Company. An amendment to the petition was allowed, alleging that the petitioner holds the land under a deed from her father, who was in possession of the land for 20 years before he conveyed it as a gift to her. King-Hodgson Company demurred to the petition generally and specially. One of the grounds of demurrer was that it appeared from the petition that the demurrants resided in Clarke county, that no substantial relief was prayed against any of the defendants in Jackson county, and that therefore the superior court of that county had no jurisdiction of the case. The demurrer as a whole was sustained, and the petitioner excepted.

W. W. Stark, of Commerce, for plaintiff in error. John B. Gamble, of Athens, for defendants in error.

FISH, C. J. (after stating the facts as above). [1] The Constitution of this state declares: "Equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed." Civil Code, § 6540. An exception is made by Civil Code, § 5527, as to "cases of injunctions to stay pending proceedings, when the petition may be filed in the county where the proceedings are pending: Provided, no relief is prayed as to matters not included in such litigation." This exception is upheld only on the theory of waiver; that is, that where a party institutes a proceeding in a court of a county other than that of his residence, against a person residing in such county, he submits himself, to the extent of such suit, to the equity jurisdiction of the county wherein the suit is brought. *Crawley v. Barge*, 132 Ga. 96, 63 S. E. 819. This waiver, however, extends only to matters included in the pending litigation against which injunction is sought; for, as was held in the case just cited, the defendant in the pending proceeding cannot go beyond the matters therein included and convert it into a general suit in equity against the original plaintiff. As the defendant cannot do this, certainly one not a party to the pending proceeding cannot.

[2] Indeed, the general rule is that an action will not be enjoined at the instance of one not a party thereto, particularly where the judgment in the action will not conclude the rights of such person. 22 Cyc. 787. In the case at bar, the possessory warrant sued out by King-Hodgson Company was a pending proceeding (*Ellis v. Stewart*, 123 Ga. 242, 51 S. E. 321); but Mrs. Stone was not a party to it, and of course would not be bound by any judgment therein rendered. Granting, however, that she had rights as to the crops—the subject-matter of the possessory warrant—which might in some way be adversely affected, should the possession of the crops by the judgment of the court be given to King-Hodgson Company, the scope of her petition and the prayers thereof, as will readily be seen by reference to the statement of facts preceding this opinion, go far beyond the matters which could be included in any issues which could be properly made in the possessory warrant proceedings. It necessarily follows, therefore, that the petition for injunction did not come within the exception provided by Civil Code, § 5527, and that the superior court of Jackson county had no jurisdiction as to King-Hodgson Company, as all the members of that firm resided in the county of Clarke.

[3] Injunction to stay proceedings in courts of law is not directed against the court itself, but against the parties to the proceeding. *Hood v. Hood*, 132 Ga. 778 (2), 64 S. E. 1074.

Therefore injunction did not lie against the two justices of the peace who resided in Jackson county. Nor was any substantial relief prayed against the constables who resided in Jackson county, there being no allegations of misconduct against them.

[4, 5] It follows from what has been said that the court properly sustained the demurrer on the ground that it appeared from the petition that the superior court of Jackson county had no jurisdiction of the defendant King-Hodgson Company, and no substantial relief was prayed against the other defendants.

Judgment affirmed. All the Justices concur.

GRAYSON et al. v. GERMANIA BANK et al.
(Supreme Court of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. POWERS (§ 33*)—EXECUTION OF POWER—INTENT.

Where a donee of a power to apportion property and appoint from a class certain persons, who are to hold the apportionment made by the donee, under the terms, conditions, and limitations imposed by the donor in his will creating the power, executes a will devising the specific property in parcels to appointees selected from the proper class, such will is to be regarded as an act indicative of the donee's intention to execute the power.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. §§ 110-120; Dec. Dig. § 33.*]

2. POWERS (§§ 34, 38*)—WILLS (§ 693*)—CONSTRUCTION—EXECUTION.

A testator made specific devises of property to his children and issue of deceased children, with certain conditions and limitations. He devised certain property to his wife for life, with power in the wife by will to dispose of the property devised to her, the same to be devised by her to such of the testator's children or issue of deceased children as the wife may desire, and such devise to be upon the same terms, conditions, and limitations as the devises which were made to them under the will. The wife made a will, which contained no reference to the power, but in which she devised the property, without limitation or condition, to two children and two grandchildren of the testator.
Held:

(a) That the power to the wife extended only to the nomination of certain persons from a class, and the apportionment of property among her appointees, who would take under the donor's will, subject to the terms, conditions, and limitations therein imposed upon each appointee.

(b) Where the quantity of interest to be taken by an appointee is expressly limited by the instrument creating the power, and the donee is only authorized to appoint the property over which the estate is to ride, an appointment by the donee of an interest exceeding that intended to be given to the appointee is tantamount to an exercise of the power of appointment to the extent of the power.

(c) The donee's will was a good execution of the power.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. §§ 121-127, 151; Dec. Dig. §§ 34, 38,* *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Germania Bank and others against William L. Grayson and others. From the judgment, certain defendants bring error. Affirmed.

Alfred M. Martin died on the 13th of May, 1910, leaving a will. The first item was as follows:

"I give and devise to my beloved wife, Elizabeth M. Martin, the homestead plantation, being the place on which I now reside, with my summer place included, together with all the lands connected with the same; also all the horses, mules, cattle, household furniture, and everything else upon or connected with said plantation; also the sum of seventy-five thousand dollars to consist of such bonds and stocks as she may elect to take out of the assets of my estate. To have and to hold the above-mentioned real estate and personal property for and during the period of her natural life, with full control over and enjoyment of the rents, issues, profits, dividends and interest thereof, to be used and disposed of by her as she may deem proper; and I do hereby authorize and empower my said wife to dispose of the property hereby bequeathed to her, by her 'will,' the same to be devised by her to such of my children or the issue of any of my children as she may desire, the children of my deceased daughter, Alice Tyler Marshall, as well as others; but the bequests so made by my said wife must be upon the same terms, conditions, and limitations, as the bequests hereinafter made by me to my children and my grandchildren. But in case my said wife shall die, leaving no will, then and in that case the property hereby devised to her shall be equally divided among my children and the issue of any deceased child or children per stirpes, the issue of my deceased child taking the share that his, her, or their parent would have been entitled to if living; the title to such share to vest in the trustees or guardians hereinafter provided for, or their successors appointed according to the terms of this will, and subject to the same terms, conditions and limitations as hereinafter provided, as to bequests hereby made. I do further direct that in the event that my said wife should elect to take any other property belonging to my estate in lieu of the real estate hereby devised to her, she may make such election to the value of sixteen thousand dollars, the valuation placed on said above-described real estate, and shall hold such property elected by her to be taken, upon the same terms, conditions, and limitations as hereinbefore provided."

In item 3 he declared that it was his desire to make his children as nearly equal in the division of his estate as practicable. He thereupon devised specific property to each of his five living children and to two grandchildren, sons of a deceased child. The de-

vise to each of his children and two grandchildren was upon certain trusts, terms, and limitations. His wife elected to take 694 shares of the capital stock of the Southwestern Railroad Company, of the value of \$75,000, and the certificate for the 694 shares of this stock was issued to her as a life tenant under her husband's will; and she elected to keep the real estate and tract of land consisting of 1,300 acres in Hampton county, S. C. She exercised her right of election prior to the execution by her of her last will. She owned no stock in the Southwestern Railroad Company, and had no interest in any stock of this corporation, except the right or power of appointment over the 694 shares obtained under her husband's will. The real estate that she elected to take is the same real estate which she disposed of under her will, and she exercised the right of life tenant over this property up to the time of her death.

On January 17, 1911, Mrs. Elizabeth M. Martin made her last will and testament. Items 1 and 2 related to the manner of her burial, and the direction to her executors as to the payment of her just debts, should there be any. The remainder of her will was as follows:

"Item 3. I give, bequeath, and devise unto my daughter, Bessie E. Cozart, three hundred (300) shares of the capital stock of the Southwestern Railroad Company.

"Item 4. I give, bequeath, and devise unto my grandson, Alfred M. Marshall, ninety-seven (97) shares of the capital stock of the Southwestern Railroad Company; and I give, bequeath, and devise unto my grandson, Samuel F. Marshall, ninety-seven (97) shares of the capital stock of the Southwestern Railroad Company. I give, bequeath, and devise unto the said Alfred M. and Samuel F. Marshall and Elise M. Jones, to share and share alike, all of that tract of land situate, lying and being in the state of South Carolina, in the county of Hampton, adjoining 'Woodstock,' and more particularly described as all that tract of land bounded north by Woodstock, east by Woodside, south by the lands of Elliott and Solomons, and on the west by the Savannah river.

"Item 5. I give, bequeath, and devise unto my daughter, Elise M. Jones, two hundred (200) shares of the capital stock of the Southwestern Railroad Company; and I also give, bequeath, and devise unto my said daughter, Elise M. Jones, all of that tract of land situate, lying and being in the state of South Carolina in the county of Hampton, formerly known as the 'Homestead,' and now known as 'Woodstock'; said tract of land containing thirty-five hundred (3,500) acres more or less, and being bounded on the southwest by the Savannah river, northwest by the lands now or formerly belonging to Joseph M. Bostick, northeast by the lands now or formerly belonging to John Lawton and E. G. Solo-

mons, east by the lands now or formerly belonging to D. Ramsey and A. M. Martin. I also give, bequeath, and devise unto my said daughter, Elise M. Jones, the dwelling house situate on the above described plantation, together with all the outhouses, farming implements, growing crops, and all and singular the rights, members, hereditaments, and appurtenances to the said tract of land being, belonging, or in any wise incident or appertaining. The said tract of land, herein intended to be devised and bequeathed, is the same property formerly belonging to Edmund Martin, and is the property conveyed to Elizabeth M. Martin by Abram M. Martin and John Marshall, executors of the last will and testament of Edmund Martin, as will more fully appear from the description of said tract of land in Book of Mesne Conveyances, 7 D's, page 305, on the records of Beaufort county, South Carolina. All of the bequests in the foregoing items are made after mature deliberation, and with full appreciation of my duty toward my other children and heirs at law, and with undiminished love and affection for each of my children and all of my beloved grandchildren. The difference made between Bessie E. Cozart and Elise M. Jones is made in recognition of the many sacrifices made by the said Elise M. Jones for me, she having unselfishly devoted the best years of her life ministering to my comfort and happiness; and it is therefore my earnest desire that she possess and enjoy Woodstock plantation, with all of its appurtenances, as fully and completely as I have in my lifetime.

"Item 6. I hereby nominate, constitute, and appoint the said Elise M. Jones the sole executrix of this my last will and testament; and I hereby expressly confer upon her full and complete power, as such, to administer my estate, expressly relieving her from giving bond or making any inventory, or having any appraisalment of my estate, and also from making any returns to the probate court of Hampton county, South Carolina, or any other court of said state. And I do hereby expressly authorize and empower her, as my executrix, without the order or permission of any court, and without any notice or advertisement of any kind, to sell at public or private sale any part of my estate, and execute all conveyances, transfers, and assignments she may deem necessary to carry out the provisions of this my last will and testament."

The railroad stock of the Southwestern Railroad Company and the land referred to in item 4 was the property devised to her by her husband for life, and the subject-matter upon which the power of appointment was to operate under the first item of her husband's will. The plantation called "Woodstock" and referred to in item 5 was her individual property. Shortly after the making of the will Mrs. Martin died,

and her will was duly admitted to probate. The executors of Alfred M. Martin, who were also trustees and testamentary guardians under his last will and codicil, brought their petition to the superior court of Chat-ham county against the legatees of Alfred M. Martin, the executrix of Elizabeth M. Martin, and others, alleging the foregoing facts, and stating that they were advised by counsel that two possible constructions could be placed upon the will of Elizabeth M. Martin, in so far as the same relates to the railroad stock and the land which was devised to her by her husband's will with power of appointment; one construction being that the bequests, being to the respective parties in their own right and not under the terms of the will of Alfred M. Martin, are void, which would result in the property held by the life tenant passing, under the first item of the will of Alfred M. Martin, to all the different shares; the other construction being that Elizabeth M. Martin having devised property which had been devised to her in her husband's will for life, and selecting as devisees the children and grandchildren of Alfred M. Martin, her will should be so upheld and construed as to carry out the intention of both wills, so that the devises under the will of Elizabeth M. Martin should be added to the respective shares under the will of Alfred M. Martin, and that the executors of the will of Alfred M. Martin, who were also named as trustees therein, could not safely administer their trusts without a determination of the question whether the will of Elizabeth M. Martin was an execution of the power of appointment conferred upon her by item 1 of the will of Alfred M. Martin.

The facts being admitted, the case was referred to the judge without a jury. He held that the will of Elizabeth M. Martin was a due execution of the power of appointment under item 1 of the will of Alfred M. Martin, and decreed agreeably to this holding. The minor children of William E. Martin, a deceased son of Alfred M. Martin, and their guardian ad litem, excepted to the decree.

Adams & Adams, of Savannah, for plaintiffs in error. Geo. W. Owens, Garrard & Gazan, and Lawton & Cunningham, all of Savannah, and Archibald Blackshear, of Augusta, for defendants in error.

EVANS, P. J. (after stating the facts as above). Perhaps upon no subject of the law have there been employed so many legal refinements, or such technical disquisition, as in the construction of powers and their mode of execution. In the greatest number of instances which have come under our observation the courts have been concerned with the determination of the validity and execution of powers which have been created in wills. The cardinal principle of in-

terpretation of wills is to give effect to the testator's intention, where it can be ascertained from the will, and where such intention is not incompatible with established rules of law and equity. We have before us two wills, that of Mr. Martin, which gave to his wife the power of appointment by will of property devised to her for life, and that of his wife, as being in execution of that power. In reaching the ultimate points for decision, and in a consideration of the reasons which impel us to our conclusion, we shall keep constantly before us this fundamental principle of testamentary construction. The case before us may be said to rest in its main characteristics upon two questions: (1) Is the will of Mrs. Martin to be construed as an act done in pursuance of the execution of the power given her by her husband in his will in relation to the status and title of the property after her death, which was devised to her for life? (2) Is her will a good execution of the power?

[1] 1. With respect to the first question, our own decisions go to the extent of holding that, in the execution of a power, a direct reference to the power is not necessary, and if it be apparent that the act of the donee of the power is not fairly or reasonably susceptible of any other interpretation than as indicating an intention to execute the power, such act will be construed to be an execution of the power. *Terry v. Rodahan*, 79 Ga. 286, 5 S. E. 38, 11 Am. St. Rep. 420; *Middlebrooks v. Ferguson*, 126 Ga. 232, 55 S. E. 34; *Mahoney v. Manning*, 133 Ga. 784, 66 S. E. 1082; *Nort v. Healy*, 136 Ga. 287, 71 S. E. 471. These cases rest the doctrine upon the argument that by doing a thing which, independently of the power, would be nugatory, the donee of the power evinces an intention to execute the power. Thus in *Middlebrooks v. Ferguson*, supra, it was ruled that "where the donee of a power of sale, who individually has no interest in its subject, executes, without referring to the power or the instrument creating it, a fee-simple deed to land covered by it," etc. Mrs. Martin individually owned a plantation described in her will as "Woodstock." Her will purported to operate and only operated, upon three items of property, viz: (1) Stock of the Southwestern Railroad Company; (2) the plantation devised to her for life by her husband; and (3) Woodstock plantation, its crops, farming implements, etc., thereon. The two first items of property were given to her for life, with power of appointment by will, and the third item was hers individually. She recognized the difference between the property in which she had only a power of appointment, and that which she owned in fee simple, in the devise disposing of "Woodstock." In explaining the liberality of her devise to her daughter Elise, the testatrix said that it was done "in recognition of the many sacrifices made by the said Elise M. Jones for me,

she having unselfishly devoted the best years of her life ministering to my comfort and happiness, and it is therefore my earnest desire that she possess and enjoy Woodstock plantation * * * as fully and completely as I have in my lifetime." Now, she devised to her daughter Mrs. Bessie Cozart 300 shares of railroad stock, and to her grandsons Alfred and Samuel Marshall each 97 shares of railroad stock, and to her daughter Mrs. Elise M. Jones 200 shares of railroad stock, and to her grandsons Alfred and Samuel Marshall and Mrs. Elise M. Jones she devised the land which was given to her for life by her husband. Thus it will be seen that she was careful to state that her gratitude to Mrs. Jones was compensated for out of the testatrix's individual property, and that she was not using the property which was devised to her by her husband in rewarding her daughter for her unselfish devotion of many years. We think the power conferred by Mrs. Martin on her executors to sell any part of her estate to carry out her will is referable to the devise of her individual property. Mrs. Martin devised the property over which she was given a power of appointment to the persons to whom she was empowered to do so, under her husband's will. Her interest in this property would cease upon her death, and she could not devise it as her own property. Unless we consider her devise of the specific property, in which she had no interest after her death, but with respect to which she did have a power of appointment to such of the children and grandchildren of herself and husband as she might select, as done in pursuance of the execution of the power, then her will as to these items of property would be absolutely senseless and nugatory. Therefore we conclude that Mrs. Martin's will, with respect to the property devised to her for life, with power of appointment under her husband's will, was in pursuance of that power.

[2] 2. We come now to the question whether Mrs. Martin's will was a good execution of the power. As a preliminary to its solution, it is well to consider the testamentary plan of Mr. Martin. His will discloses that he was a man of ample fortune, and his elaborate scheme of trusts, life estates, and remainders evinces an unmistakable purpose to keep his property among his descendants almost, if not quite, to the limit of time permissible under the rule against perpetuities. He made to his children and representatives of children specific devises, with trusts, life estates, and remainders. He intended equality among his children at the time of the making of his will, and expressly said so in the third item. He anticipated that his wife would survive him, and that circumstances might change after his death, and he gave to her the right to exercise an absolute and unrestrained discretion as to which of their children and grandchildren should

share in the property devised to the wife for life. In making the selection the wife was not given the power to change the trusts, terms, conditions, and limitations which he impressed on the property. If the wife executed the power conferred upon her, the persons selected by her took the property appointed to each upon the same terms, conditions, and limitations which he created in his will. If she failed to execute the power, then, upon the falling in of her life estate, the property was to be divided among his children and the issue of deceased children upon the terms, conditions, and limitations of his will. It would therefore seem to have been the testator's intention to confer upon his wife a power of selecting from among his children, and the issue of deceased children, such of them as she deemed proper to share in the remainder estate of the property devised to her for life, and to name them and the proportions or amount each was to take in such property by her last will; the tenure of their title to be as fixed in the testator's will. Her power extended only to the nomination of certain persons from a class, and the division of the property among her appointees, who took it subject to the terms, conditions, and limitations imposed upon each appointee in the testator's will. The quantity of interest to be taken by the appointee is expressly limited by the will of Mr. Martin, and Mrs. Martin was only authorized to divide the property, and appoint the several portions of it to the appointees. In such cases it has been considered that, even at law, where the quantity of interest to be taken by the appointee is expressly limited by the instrument creating the power, and the donee is only authorized to appoint the lands over which the estate is to ride, an appointment by the donee of an interest exceeding that intended to be given to the appointee is tantamount to a regular exercise of the power of appointment. 2 Sugden on Powers, § 79.

We are cited by the plaintiffs in error to the Canadian case of *Scane v. Hartwick*, 11 Upper Canada Q. B. 550, as maintaining a different rule. In that case the testator devised to his wife all of his property "as long as she, my said wife, shall exist; at her decease the said property to be at her sole disposal, unto any one or other of my descendants, so as the said property and land shall be entailed in the family, from one generation to another." The wife devised to a grandson in fee, and it was held that her devise was an excessive execution of the power, and was void. This case differs from the one in hand in this important fact: There the power was to the donee to create an estate tail, which she might have done either as an estate tail general or special, male or female. The donor did not create any estate to pass to the appointee. But in the case

at bar the donor created the estate and imposed the terms, conditions, and limitations thereon, and the donee was only given the power to apportion the estate in remainder, and appoint such of his children or issue of deceased children to the allotment of her selection. At common law the rule was very rigid as to the execution of powers, and the common-law courts rejected all attempted executions as void where the donee, being given the power to appoint a particular estate, appointed one greater than that authorized by the power. The strictness of the common-law rule was modified by the English equity courts about the middle of the eighteenth century. In the leading case of *Alexander v. Alexander*, 2 Ves. Sr. 640, the rule was announced that where a person, purporting to execute a power, has done something outside the power, then, if the things are distinguishable, the execution within the power is good, and the excess void; but if the boundaries between the excess and execution are not distinguishable, the execution will be void in toto. In that case the power was to appoint among children, and was exercised by appointment to children, and grandchildren, and it was held that the appointment was good as to the former and bad as to the latter. Likewise it was held that a power to charge a particular sum will be executed by a charge of a larger sum, and the excess only will be void. *Parker v. Parker*, 11 B. Eq. 168. The equitable rule in this regard obtains in this state, and finds support in Civil Code, § 4583, which declares: "Accident or mistake in the execution of a power, or causing the defective execution of the power, will be remedied in equity." As we have seen, the power granted to Mrs. Martin was not to create a particular estate to the donee's appointees, but to apportion property and to nominate the persons from a designated class to take such estates therein as the donor had himself created. In her will Mrs. Martin used language similar to that employed by her husband. With reference to the property in which she had only a life estate, with power of appointment, she said: "I give, bequeath, and devise" to persons from the class from which her husband gave her the power of appointment. Of course, she could not technically devise property which was not hers, and we will not give the language such a technical meaning as to thwart her plain purpose of appointment. And any strained technical implication of an attempt to create a fee-simple estate will be considered a harmless effort in excess of her power. We therefore conclude that Mrs. Martin executed the power given to her in her husband's will.

Judgment affirmed. All the Justices concur.

PENDERGRASS v. DUKE.

DUKE v. PENDERGRASS.

(Supreme Court of Georgia. Aug. 14, 1918.)

(Syllabus by the Court.)

NEW TRIAL (§§ 114, 132, 155*)—JURISDICTION OF APPLICATION—BRIEF OF EVIDENCE.

Under the facts of this case, the court erred in not dismissing the motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 234-236, 273-276, 315; Dec. Dig. §§ 114, 132, 155.*]

Error from Superior Court, Jackson County; J. B. Jones, Judge.

Action by Mrs. M. J. Duke against F. L. Pendergrass. Judgment for plaintiff, and defendant brings error, and plaintiff files cross-bill. Reversed on cross-bill, and main bill dismissed.

The case of Duke v. Pendergrass was tried at the February term, 1912, of the superior court of Jackson county, which term continued longer than one week. Judge J. B. Jones, of the Northeastern circuit, presided the first week of the term, in the absence of Judge Brand, the judge of the Western circuit, of which Jackson county constitutes a part. The case was tried and submitted to the jury during the first week. At the close of that week, the jury still having the case under consideration and not having returned a verdict, it was agreed by counsel for both parties that the jury should return a sealed verdict on Monday of the second week of the court. Judge Walker, of the Toombs circuit, presided during the second week. The jury rendered a verdict for the plaintiff on Monday of the second week, which was February 10th, and a decree was entered thereon, signed by Judge Walker. On February 12th, while Judge Walker was presiding, the defendant presented to Judge Jones, who was then presiding in the superior court of Stephens county, in his own circuit, a motion for a new trial on the general grounds that the verdict was contrary to the evidence, etc. On the last-mentioned date Judge Jones granted a rule nisi calling upon the plaintiff to show cause before him on April 29th following, at Gainesville, why a new trial should not be granted. This order provided: "If for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term or thereafter. It is further ordered that the movant have until the hearing, whenever it may be, to prepare and present for approval a brief of evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation; and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office before the date of the hearing, said brief may be filed in the clerk's of-

fice at any time within ten days after the motion is heard and determined." The order directed that the plaintiff be served with copy of the motion and order. The motion, together with the order granting the rule nisi, was filed in the office of the clerk of the superior court of Jackson county on February 14, 1912, and on the same day counsel for the plaintiff acknowledged due and legal service of the motion and order, and waived time, copy, and all other and further service. No brief of evidence accompanied the motion when it was presented to Judge Jones, or when it was filed with the clerk. When the hearing of the motion for a new trial came on before Judge Jones at Gainesville, April 29, 1912, and before the motion was heard, counsel for the respondent moved to dismiss it on the following grounds: "(1) Because the order requiring respondent to show cause why a new trial should not be granted did not issue from the superior court of Jackson county. (2) Because said order was not signed by the judge presiding over said court at the time the record in said case was closed. (3) Because the order requiring respondent to show cause why a new trial should not be granted was not signed by the judge presiding over Jackson superior court at the time the application for a new trial was made." Judge Jones, after hearing argument, took the matter under consideration, and on May 28, 1912, he overruled the motion to dismiss the motion for a new trial, and refused to grant a new trial. The brief of evidence was filed May 30, 1912. Pendergrass excepted to the overruling of his motion for a new trial, and Mrs. Duke filed a cross-bill excepting to the overruling of her motion to dismiss.

Ray & Ray and P. Cooley, all of Jefferson, for plaintiff in error. John J. Strickland and F. C. Shackelford, both of Athens, and J. A. B. Mahaffey, of Jefferson, for defendant in error.

FISH, C. J. (after stating the facts as above). The question that is controlling, as to both the main and cross bills, is whether Judge Jones, at the time he rendered the judgments respectively complained of in the main and cross bills of exceptions, had jurisdiction to render the judgments. It is true that a motion for a new trial had been filed during the term at which the trial was had, but no brief of evidence—which is an essential part of a valid motion—accompanied it; nor, as will hereinafter appear, had any valid order been granted extending the time for preparing and filing such brief. While a judge of a superior court has power to hear and determine a motion for new trial in vacation as well as in term time, without an order passed in term time (Civil Code, § 4852), when upon the application of either party the judge has fixed a time for the hearing, and 10 days' notice thereof has been given

the opposite party (Civil Code, § 4852), such power can be exercised only where there is a valid motion for new trial pending. When the motion for a new trial in the present case was filed, Judge Walker was presiding. Judge Jones, at the end of the previous week of the term, had severed his connection with the court in which the trial was had; and therefore he had no more power to grant an order relating to the motion for new trial, or authority to hear and determine it, than any other judge of the superior courts of the state who had not presided in the court during the term at which the trial of the case was had. Of course, Judge Walker, who was presiding when the motion was filed, could have granted a rule on the motion for new trial returnable before Judge Jones, to be heard and determined by him; but as this was not done, we are of the opinion that Judge Jones was without jurisdiction to entertain the motion for a new trial and to pass upon its merits, and therefore that he should have dismissed it on motion.

The judgment on the cross-bill of exceptions is therefore reversed; and as this ruling disposes of the whole case, the main bill of exceptions is dismissed. All the Justices concur.

THOMAS v. GEORGIA GRANITE CO. et al.
(Supreme Court of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 107*)—INJURY TO SERVANT—DANGEROUS WORK.

The general rule of law declaring the duty of a master in regard to furnishing a servant a safe place to work is usually applied to a permanent place, or one which is quasi permanent. It does not apply to such places as are constantly shifting and being transformed as a direct result of the servant's labor, and where the work in its progress necessarily changes the character for safety of the place in which it is performed as it progresses.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

2. MASTER AND SERVANT (§§ 206, 229*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 674, 683; Dec. Dig. §§ 206, 229.*]

3. DEMURRER TO PETITION.

There was no error in dismissing the petition on general demurrer.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Jennie Thomas against the Georgia Granite Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jennie Thomas instituted an action against the Georgia Granite Company and E. B. Respass, to recover damages for the homicide of

Scott Thomas, the plaintiff's husband. Relatively to the manner in which Thomas was injured, the petition alleged the following in substance: In January, 1912, the defendants, under a contract with the city of Atlanta, were engaged in constructing a sewer along Barnett street. Thomas was working for them as a laborer. Preparatory to laying the sewer, the defendants were opening a ditch, and had opened it a part of the way along Barnett street, and at the point where Thomas was killed it was about 10 or 12 feet deep and 2 or 3 feet wide. Under instructions from defendants, who had a foreman present, Thomas was working in the bottom of the ditch, engaged in throwing out dirt. While so engaged, a large amount of dirt caved in, mashing and injuring him to such an extent that he died. Other allegations were that the dirt caved in because the sides of the ditch were not braced or propped, and had nothing to support the dirt and prevent it from caving for a distance of 20 feet or more along the street. Ordinary care upon the part of the defendants would have required braces or props to support the sides of the ditch every 5 or 6 feet; but the defendants negligently failed to have any props or braces for 20 or 30 feet from where Thomas was working. The defendants knew, or ought to have known, that the place was unsafe; and Thomas was free from fault, and by the exercise of ordinary care could not have prevented the injury. On general demurrer the petition was dismissed, and the plaintiff excepted.

Moore & Branch, of Atlanta, for plaintiff in error. Jas. L. Key and Tindall & Silverman, all of Atlanta, for defendants in error.

ATKINSON, J. [1] 1. On demurrer this petition is to be construed most strongly against the plaintiff. The allegations that the defendant knew, or ought to have known, that the place was unsafe, amount to no more than a charge of implied notice that the place was unsafe. Babcock Lumber Co. v. Johnson, 120 Ga. 1030 (6), 48 S. E. 438; Fraser v. Smith & Kelly Co., 136 Ga. 18, 70 S. E. 792. The general charge that the plaintiff's husband was free from fault, and by the exercise of ordinary care could not have prevented the injury to himself, when considered in connection with the other allegations of the petition in regard to the work which he was doing, and his opportunity to see and know the dangers of the place, are mere conclusions of the pleader, and add nothing to the special facts alleged, upon which the court is to pass in determining whether the husband was free from fault, and whether by the exercise of ordinary care he could have prevented the injury to himself. There being no allegations to the contrary, it must be assumed that he was of ordinary intelligence and skilled in the busi-

ness in which he was engaged, and that he was laboring under no physical defect or disability which rendered him incapable of appreciating the situation and knowing the danger incident to his employment. The sides of the ditch caved in at the very place where he was working. He was engaged in throwing out dirt from the bottom of the ditch. It is inferable that the work which he was doing tended directly to undermine the walls and to render the place unsafe. Such would be the natural result, and there was no allegation that it did not do so, and that his work did not cause the walls of the ditch to cave. The facts bring the case within the principle of *Holland v. Durham Coal & Coke Co.*, 131 Ga. 715, 63 S. E. 290, where it was held: "The general rule of law declaring the duty of a master in regard to furnishing a servant a safe place to work is usually applied to a permanent place, or one which is quasi permanent. It does not apply to such places as are constantly shifting and being transformed as a direct result of the servant's labor, and where the work in its progress necessarily changes the character for safety of the place in which it is performed, as it progresses." This principle was overlooked in the decision of the case of *Southern Bauxite Mining Co. v. Fuller*, 116 Ga. 695, 43 S. E. 64, which was not rendered by an entire bench of six Justices. The *Holland Case* was decided by six Justices, and is controlling. See, also, *Donato Citrone v. O'Rourke Engineering Con. Co.*, 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340, and note 3e on page 358.

The basis of the suit was that the defendants had failed to provide the servant with a safe place at which to work. It appearing from the allegations that, on account of the character of the work in which the servant was employed, the master was not under any duty to furnish him a safe place, the court properly sustained the demurrer.

[2] 2. The case involves the further principle of assumption by the servant of the ordinary risks of the employment, against the dangers of which he is bound to exercise his own skill and diligence to prevent injury to himself. The plaintiff's husband was employed to make a ditch. This involved the creation of the danger from which he suffered injury. He was bound to know that under natural laws there would be more or less danger of the sides caving in as the work of deepening the ditch progressed. It was not alleged that there was anything unusual about the soil, which the master knew, which the servant did not know, and by the exercise of ordinary care could not ascertain, and which caused the sides of the ditch to cave in; but the complaint is that the sides caved in because they were not braced at the proper interval, and the only ground of negligence charged against the master consisted in allegations of failure to cause the braces to be erected at closer

intervals. From these allegations it appears that the injury was received from a danger that would ordinarily and naturally exist in doing the work which the servant was employed to perform. But this is not all. The servant could not have engaged in the work without knowing and seeing the braces and the intervals at which they were placed, or, in other words, without seeing the identical condition which, as grounds of negligence, it is alleged that the master allowed to exist.

The case of *Ludd v. Wilkins*, 118 Ga. 529, 45 S. E. 429, did not refer to an injury received in excavating a ditch; but the principle of the case is applicable. In that case the defendant was engaged as a contractor in constructing in the city of Atlanta what is known as the "Whitehall Street viaduct." The servant was engaged at work upon the viaduct, and at the time of receiving the injury which resulted in his death was engaged in putting in place a piece of iron, and standing on or near iron brackets which received these iron pieces. Planks had been placed, extending from one bracket to the other, for employes to stand upon while engaged at work. These planks were apt to slip off the brackets. There was evidence that this slipping could have been prevented by nailing pieces under each end of the plank, or by putting a bolt through each end of a ten-penny nail, or by tying the plank to the bracket. None of these methods were adopted. The plank was laid loosely upon the brackets. There was no evidence that there were any defects in any of the planks. The plank upon which the servant was standing had slipped to a point where walking upon it would cause one end to leave the bracket; and this precipitated him to the street below, and he died as a consequence of this fall. It was alleged that the defendant negligently failed to have the plank so braced or secured as to prevent the same from slipping, and that it was the defendant's duty to furnish the deceased with a safe place to work, and to do this it was incumbent upon him to have the plank securely fastened. The court granted a nonsuit. In affirming the judgment this court held: "This being an action against a master to recover damages for the homicide of a servant, and it appearing from the evidence that, even if the servant did not know of the fact which is charged as negligence against the master, he had equal means with the master of knowing it, and by the exercise of ordinary care could have discovered the same, there was no error in granting a nonsuit."

A somewhat similar case is that of *Sou. Ry. Co. v. Taylor*, 137 Ga. 704, 73 S. E. 1055, where the rule in regard to the assumption by the servant of the ordinary risks of his employment was applied. Some of the cases in other states which apply the doctrine of assumption of risks, where the persons injured were engaged in the work of excavating

trenches and the like, are: *Brown v. Electric Ry. Co.*, 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666; *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318; *Swanson v. Great Northern R. Co.*, 68 Minn. 184, 70 N. W. 978; *Pederson v. City of Rushford*, 41 Minn. 289, 42 N. W. 1063; *Regan v. Palo*, 62 N. J. Law, 30, 41 Atl. 364; *Carlson v. Sioux Falls Water Co.*, 8 S. D. 47, 65 N. W. 419; *Zelgenmeyer v. Goetz Lime & Cement Co.*, 113 Mo. App. 330, 88 S. W. 139; *Batty v. Niagara Falls Hyd. Power Co.*, 79 App. Div. 466, 79 N. Y. Supp. 734; *Hughes v. Malden & Melrose Gas Light Co.*, 168 Mass. 395, 47 S. E. 125. See *Bayley on Personal Injuries* (2d Ed.) 1230.

[3] 3. There was no error in dismissing the petition on general demurrer.

Judgment affirmed. All the Justices concur.

REYNOLDS BANKING CO. v. SOUTHERN PACIFIC GUANO CO. et al.

(Supreme Court of Georgia. Aug. 13, 1913.)

(Syllabus by the Court.)

1. EXECUTION (§§ 204, 207, 210*)—CLAIM BY THIRD PERSON—FORTHCOMING BOND—BREACH—READVERTISEMENT.

A claimant who obtains possession of the property levied upon by means of a forthcoming bond, and who appropriates the property to his own use by a sale of it, cannot file a second claim after the dismissal of the first. Nor is it necessary in such case to readvertise the property for sale, as a condition precedent to an action on the forthcoming bond. An action on the bond will not be enjoined because the claimant, after disposing of the property, cannot assert his title in a second claim, and because the property was not readvertised for sale. Having elected his remedy by claim, he is bound by the consequences of his election.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 585-587, 589-591, 595-598; Dec. Dig. §§ 204, 207, 210.*]

2. INJUNCTION (§ 26*)—GROUNDS—ACTION AT LAW.

Equity will not enjoin the prosecution of an action at law because of certain matters which, if defensive to the right asserted in the action at law, are as much available as a defense in that action as in the equitable action.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.*]

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Action by the Reynolds Banking Company against the Southern Pacific Guano Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jere M. Moore, of Montezuma, C. B. Marshall, of Reynolds, and Allen & Pottle, of Milledgeville, for plaintiff in error. W. F. Weaver, of Reynolds, and Perry, Foy & Monk, of Sylvester, for defendants in error.

EVANS, P. J. A *fi. fa.* in favor of the Southern Pacific Guano Company against E. C. English was levied upon certain cotton, to which the Reynolds Banking Company in-

terposed a claim. The property levied upon was delivered to the claimant by the sheriff, upon the execution of a forthcoming bond. The proceedings were returned to the superior court for trial, and the claim was dismissed because of a defect in the affidavit. Thereafter the sheriff, suing for the use of the plaintiff in *fi. fa.*, instituted suit upon the forthcoming bond, alleging, amongst other things, that after the judgment dismissing the claim, and ordering the *fi. fa.* to proceed, he demanded of the claimant the possession of the property so levied upon, which demand was refused, and that prior to the institution of the suit the claimant had appropriated the cotton levied upon, and thus put it out of the claimant's power to deliver it to the sheriff. The claimant filed an answer and a plea in abatement at the appearance term, and at the same time prepared another claim, together with a forthcoming bond, and tendered the same to the sheriff, who refused to receive them. Subsequently the Reynolds Banking Company filed a petition to enjoin the prosecution of the suit, on the grounds that there was no such person, firm, or corporation as the Southern Pacific Guano Company, the alleged plaintiff in the judgment upon which the execution issued; that the Southern Pacific Guano Company was a trade-name used during the year 1879 and prior thereto by J. T. Moody and G. S. Brewster, of the county of Fulton; that Moody and Brewster and all of their assets were placed in the hands of a receiver and trustee in bankruptcy, and all of their assets were taken possession of and administered under that litigation; that the receiver had been discharged; that Moody is dead; that Brewster has moved to Indianapolis, Ind.; that the *fi. fa.* was based on a note which had never been transferred; that there is now no authority in any one to proceed with the collection of the *fi. fa.*, or to authorize the suit upon the bond; that the issue made by the claim case was not tried upon its merits; and that the refusal of the sheriff to accept a second claim deprives the claimant of the right to establish its title to the property. The sheriff and certain persons purporting to act for the Southern Pacific Guano Company were made parties defendant. The prayer of the petition was to enjoin the suit upon the forthcoming bond, and for a decree that the property levied upon was the property of the Reynolds Banking Company. The petition was dismissed on general demurrer.

[1] 1. The remedy by claim is cumulative. It is an expeditious method provided by statute for determining the right of the plaintiff to have satisfaction from the property levied upon, the ownership of which is claimed by a stranger to the *fi. fa.* In claim cases, where there is a legal affidavit of claim and also a legal claim bond, a forthcoming bond

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is not necessary to the hearing of the claim. The forthcoming bond is a privilege to the claimant, but not a requisite with which he must comply. Without it the property, pending the litigation, remains in the possession of the sheriff; by it he has a right to the possession of the property until the sale. *Bonner v. Little*, 29 Ga. 538. When a claimant gives a forthcoming bond, thereafter he acknowledges that he holds the property for the sheriff, and his failure to deliver the property to the sheriff at the time and place of sale is a breach of the bond. *Roebuck v. Thornton*, 19 Ga. 151. If the claimant still retains the property in his possession, after a dismissal or withdrawal of the claim, the sheriff must readvertise the property. But if, after taking possession of the property, the claimant disposes of it, the sheriff is not required to readvertise the property, but may sue upon the bond as for a condition broken. *Aycock v. Austin*, 87 Ga. 566, 18 S. E. 582. The claimant, after disposing of the property, is not entitled to file a second claim thereto, upon the original claim being withdrawn or dismissed (*Oatts v. Wilkins*, 110 Ga. 319, 35 S. E. 345); and in a suit upon the forthcoming bond it is no defense that, because the property was not readvertised for sale, he had no opportunity of renewing his claim.

As was very pertinently said by Bleckley, C. J., in *Anderson v. Banks*, 92 Ga. 121, 122, 18 S. E. 364: "If it be said that he had no opportunity of renewing because the property was not readvertised for sale, the answer is that it did not have to be readvertised, for it was disposed of either by the claimant or his surety, so that they could not produce it. Advertising it would be a useless ceremony and needlessly expensive, if the proposed sale would be impossible in consequence of the property having been put out of reach and beyond the control of the makers of the bond. Had it been desired to interpose a second claim, the property should have been kept under their control until they had so done. It is not allowable for a claimant to defeat a sale by interposing a claim and then appropriate the property to his own use, or suffer it to be appropriated by his surety on the claim bond, and then contest, not in the claim case—the very case appointed by law for the purpose—but in a suit on the bond, the right of the plaintiff in execution to sell the property. To allow this would be to overlook and disregard the object of the claim laws, that object being to facilitate the trial of the rights of property seized under execution, by a sort of intervention on the part of strangers to the execution, instead of leaving them to assert their rights in some separate and independent action. If claims are used merely to get or retain possession of property, and not for the trial of rights to it, they cease to be substitutes for other ac-

tions, and only give ground or occasion for some other action, which is the very thing the claim laws are designed to prevent. It would be a perversion of these laws not to hold the claimant and his surety estopped by dismissing the claim; the present action being for a breach of a bond to produce the property, and the question of breach not in any way involving the title but only the forthcoming of the property at the time and place of sale."

It follows from these decisions that the claimants had no right in an equitable petition to set up their title to the property levied upon, after having elected to try that title by the remedy of claim. It may be said that the claimants are precluded from ever contesting with their adversary the title to the property as being subject to the *fi. fa.* To this we reply that they should have left the property in the possession of the sheriff, or, if they took possession of it under a forthcoming bond, they should have retained the property until the final disposition of the claim case. They were allowed by the statute, if the property was in their possession, or in the possession of the sheriff, to have filed a second claim after the dismissal or withdrawal of a first claim. Their inability to file a second claim, or contest with the plaintiff in *fi. fa.* the title to the property, comes, not from any defect in the law, but from a failure on their part to observe the law, in that they appropriated the property to their own use before the litigation was ended.

[2] 2. The defense that the plaintiffs in the judgment were adjudicated bankrupts, and their property administered in the bankrupt court, or that there are no parties plaintiff for whom the sheriff could recover for their use, even if a good defense (and as to that we express no opinion), could be set up in the suit on the bond; and there is no reason for the intervention of equity to enjoin that suit. *McCall v. Fry*, 120 Ga. 661, 48 S. E. 200.

Judgment affirmed. All the Justices concur.

HEYWARD-WILLIAMS CO. v. McCALL.
(Supreme Court of Georgia. Aug. 13, 1918.)

(Syllabus by the Court.)

DEEDS (§ 129*)—TRUSTS (§§ 21, 124*)—VALIDITY—CONSTRUCTION OF DEED—ESTATE CONVEYED—DESCENT AND DISTRIBUTION.

A grantor conveyed land to F., "trustee for her children." The deed contained a covenant denying to the trustee the power to sell or encumber the property, and declaring that the land shall not be subject for any liabilities of the trustee or her successors, either in her or their individual or trust capacity. Power was given to the trustee to use the land for the ordinary purposes of farming. It was further provided: "And should the said [F.], trustee as aforesaid, have no children living at the

time of her death, then she may, of her own will and choice, give such land and premises to such person or persons as she may desire." The deed further recited that the grantor and the trustee (who was his daughter) agreed that the land was to be accounted for as an advancement to the daughter in the final distribution of the grantor's estate. At the time of the execution of the deed F. had no children, but subsequently a child was born unto her, who survived her. F. died, leaving a husband and the child. *Held*, that F. left no inheritable estate in the land which descended to her husband as heir, but that her surviving child under the deed took a fee-simple estate in the land on the death of his mother.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 351, 360–365, 416–430, 434, 435; Dec. Dig. § 129; Trusts, Cent. Dig. §§ 29, 30, 167; Dec. Dig. §§ 21, 124.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by H. F. McCall, by next friend, against the Heyward-Williams Company. Judgment for plaintiff, and defendant brings error. *Affirmed*.

W. R. Hewlett, of Savannah, for plaintiff in error. E. K. Overstreet, of Sylvania, and F. T. Saussy, of Savannah, for defendant in error.

EVANS, P. J. This case comes to us on exception to the grant of an interlocutory injunction, the propriety and correctness of which depends upon the construction of the deed from B. F. Beard to Frances A. McCall, trustee, which is in terms as follows "State of Georgia, Screven County. This indenture, made and entered into this 26th day of April, 1892, between B. F. Beard, of the county aforesaid, and state aforesaid, of the first part, and Frances A. McCall, trustee for her children, of the same place, of the second part, witnesseth: That the said B. F. Beard, for and in consideration of the natural love and affection which he has for his daughter, the said Frances A. McCall, trustee as aforesaid, has given, granted, and delivered, and by these presents does give, grant, and deliver, unto the said Frances A. McCall, trustee as aforesaid, and to her successors in the trust [a described tract of land], to have and to hold the said tract of land and premises unto the said Frances A. McCall, trustee as aforesaid, and to her successors in the trust, for the sole and separate use, benefit, and behoof of the aforesaid beneficiaries of said trust, forever. But said trustee shall not have the right, power, or authority to sell or dispose of said lands or premises in any manner, or to mortgage, pawn, or pledge the same in any manner; nor shall said land be subject or liable to or for the debts, contracts, or liabilities of said trustee or any successors in the trust, either in her or their individual or trust capacity; but said land shall forever remain exempt from any and all such obligations. Such trustee, however, shall have full right, liberty, and power to

use said land for the ordinary purposes of farming, either by planting it herself or by renting or leasing it from year to year to other persons for the same purposes. And should the said Frances A. McCall, trustee as aforesaid, have no children living at the time of her death, then she may, of her own will and choice, give said land and premises to such person or persons as she may desire. It is also agreed between the parties of the first and second parts that the aforesaid lands and premises shall be and the same are hereby considered as constituting a part of the said Frances A. McCall share in the estate of the said B. F. Beard, at the final distribution of said estate, so that each child shall receive an equal share. It is further agreed that the schoolhouse on said land, together with one acre of land immediately around said house, shall be and the same is hereby set apart for such purposes, so long as it shall be used for teaching white children; otherwise, to revert to the said Frances A. McCall, trustee as aforesaid. And, lastly, the said B. F. Beard does hereby warrant the said tract of land and premises unto the said Frances A. McCall, trustee as aforesaid, and to her successors in the trust, against himself, his heirs, executors, administrators, and assigns, and against all persons whomsoever." It was admitted that Frances A. McCall had no children at the date of the execution and delivery of the deed, but that subsequently there was born unto her a child, Harry F. McCall. She died in 1897, leaving as her sole heirs at law her son, Harry F. McCall, and her husband, E. C. McCall.

The insistence of the plaintiff in error is that, because there was no child of Frances A. McCall in esse at the time of the delivery of the deed, she took a fee-simple estate, and that her after-born child took nothing under the deed. This is said to result from the application of the rule in *Wild's Case*, recognized as a rule of construction by the courts of this state. The doctrine of *Wild's Case*, as stated by Downs, C. J., in *Ball & Beatty*, 459, is as follows: "Where the devise is in terms immediate, and so intended by the testator, and the description of the persons to take is general, then none that do not fall within the description at the time of the testator's death can take; therefore the after-born must be excluded. But where the enjoyment of the thing devised is, by the testator's expressed intent, not to be immediate by those among whom it is finally to be divided, but is postponed to a particular period, or until a particular event shall happen, then those who answer the general description at that period, or when the event happens on which the distribution is to be made, are entitled to take." The rule in *Wild's Case* is wholly inapplicable to the case sub judice. If a present estate had been conveyed to Frances A. McCall and her children, she hav-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing no children in esse at the time, a fee-simple title would have passed to her. *Baird v. Brooklyn*, 86 Ga. 709, 12 S. E. 981, 12 L. R. A. 157; *Hollis v. Lawton*, 107 Ga. 102, 32 S. E. 846, 73 Am. St. Rep. 114.

But the grantor did not convey the land to his daughter individually, nor did he manifest any intention to convey a present estate to her and her children. At the time of the execution of the deed the daughter had no children, and the grantor was well aware of this fact. At the same time the grantor's deed shows that he appreciated the possibility, or even probability, that she might subsequently have children, and reflects his intention to make her after-born children the beneficiaries of his bounty, in the event they survived their mother. To effectuate this intent he conveyed the property to his daughter in trust, and carefully defined the nature and limitations of the trust. The legal estate was conveyed to Frances A. McCall, not individually, but to her as trustee, for the purpose of executing a specific trust. The trust declared was that the trustee was to use the land for the ordinary purposes of farming, either by planting it herself or by renting or leasing it from year to year to other persons for the same purpose. Whether the grantor intended that the trustee should have the annual profits of the land, or accumulate and hold the same for the benefit of children surviving her, is not a question in the present case. But it is clear that the grantor's intent was to place the title to the land in Frances A. McCall, to hold the same in trust for the benefit of her children living at her death. In the event of the daughter's death without surviving children, and only in that event, she is given the power to dispose of the land. Upon her death leaving a surviving child, such child was the cestui que trust, and became vested with the title to the land.

The point is made that, inasmuch as no cestui que trust were in existence at the time the deed was executed, and it could not be known during the life of the daughter who they might be, and that as she was to have the use of the land during her life, she must be considered as having an interest in the land incompatible with a mere trusteeship, and that therefore she took all of the estate in fee. An important element in the premise for this deduction is that the daughter was given the income of the estate during her life. In the decision of this case it is not essential to determine whether the power given to the trustee to use the land as a farm conveyed to her the right to appropriate the income to her individual use, or whether this power was intended as a means of accumulating a fund to be held by her in trust for such of her children as survived her. In testing the correctness of the proposition that the daughter took a fee in the land, we may admit, for the sake of the argument, that the deed conveyed to the daugh-

ter the income of the land during her life. Even with this admission, we cannot agree with counsel for plaintiff in error that the daughter took a fee in the whole estate. Such a result cannot come from the statute of uses, for the reason that there was no cestui que trust in being when the deed was executed, and by the terms of the deed it is clear that the title to the land was conveyed to the daughter in trust for such children as might survive her. Possession and use of the land was given to the daughter as trustee, in order to effectually administer the trust. If it be conceded that this virtually created a life estate in the daughter, then her surviving children would take by way of remainder. On the other hand, if the grant of the possession and use of the land be construed as a part of the trust created for such children as may survive the daughter, and that the grant is to the daughter in trust for accumulation for such of her children as may survive her, such a trust has been held to be good. 1 *Perry on Trusts*, § 66; *Salem Capital Flour Mills Co. v. Stayton Water Ditch & Canal Co.* (C. C.) 33 Fed. 146; *Levin on Trusts* (12th Ed.) 95.

It is no objection to the validity of the trust created by such deed that the cestui que trust cannot be definitely known until the death of the daughter. It is sufficient if they come into being during the life of the trustee and be distinguished at her death. "It is certainly not necessary to the creation of a trust estate," says Kennedy, J., in *Ashurst v. Given*, 5 *Watts & S.* (Pa.) 323, 328, "that a cestui que use in being should be named, nor is it requisite that the cestui que use should be known as such before the death of the trustee for life. It is sufficient if the person designated as the cestui que use be in existence, and can be distinguished at the death of the trustee." In all essential respects the trust in that case was similar to that declared by the grantor in the deed we are construing.

In *Hollis v. Lawton*, *supra*, the conveyance was to a trustee for "his wife and the children issue of their marriage." There were children in life at the time of the execution of the deed, and others were born thereafter. It was said that the vital question in the case was whether the trust included only children that were in life when the deed was executed, or whether it also included after-born children. The court construed the deed to include only children in esse, as that was the intent of the grantor expressed in the deed, and stated the rule of construction as follows: "The rule, then, governing the construction of such words in a deed or will, is that the intention of the maker of the instrument will be construed to refer only to such persons as are in life, unless there are some words or expressions in the instrument indicating a contrary intention, and showing that the maker also had in mind a certain

person, or class of persons, that might thereafter be born." Keeping in mind this rule of construction, we are clear that the grantor's intention was to create a trust for beneficiaries who should come into being, and who were ascertainable at the death of the trustee.

In *Davis v. Hollingsworth*, 113 Ga. 210, 38 S. E. 827, 84 Am. St. Rep. 233, a deed was made by a father to a married daughter "and her children or child, should any be born to her" (she having no child at that time). In holding that after-born children would not take under that deed, Lewis, J., after reviewing the authorities, was of the opinion that it would have been otherwise, had the conveyance been made to a trustee for after-born children.

The deed as a whole clearly indicates the grantor's intention to convey the land to his daughter in trust for such children as should survive her; and it is permissible to create a trust for a cestui que trust who is not in existence at the time the trust is created, but who can come into being and be distinguished at the death of the trustee. Applying this principle, we hold that upon Frances A. McCall dying, with a child surviving, her husband acquired no interest in the land as her heir at law.

Judgment affirmed. All the Justices concur.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. GLAWSON et al.
(Supreme Court of Georgia. Aug. 13, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1097*)—SECOND APPEAL—LAW OF THE CASE.

Where a petition has been dismissed in the trial court upon general demurrer, and that judgment has been reviewed by the Court of Appeals, and reversed in a decision holding that the petition sets forth a cause of action, and, subsequently to the rendition of such decision by the Court of Appeals, the Supreme Court renders a decision in another case, the effect of which is to show that the decision of the Court of Appeals is erroneous, and, after the rendition of such decision by the Supreme Court, the case first mentioned again comes before the Court of Appeals upon writ of error, assigning error upon the judgment overruling a motion for new trial filed by the defendant, the Court of Appeals, upon a consideration of the second writ of error, is bound by its own decision in the former case, and should not in that case follow and apply the contrary decision of the Supreme Court, though it should do so in other cases.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

2. COURTS (§ 90*)—REVERSAL OF FORMER DECISION.

This court declines to overrule the decisions in *Chapman v. Western Union Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, *Giddens v. Western Union Telegraph Co.*, 111 Ga. 824, 35 S. E. 638, *Seifert v. Western Union Telegraph Co.*, 129 Ga.

181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210, and *Southern Bell Telephone & Telegraph Co. v. Reynolds*, 139 Ga. 385, 77 S. E. 888, and they should be followed by the Court of Appeals as precedents.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 813-821, 351; Dec. Dig. § 90.*]

Action by J. L. Glawson and others against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiffs, and defendant brings error to the Court of Appeals, which certifies certain questions to the Supreme Court. Questions answered.

The Court of Appeals certified the following questions:

"Where a petition is dismissed in the trial court upon general demurrer, and that judgment has been reviewed by the Court of Appeals, and reversed, in a decision holding that the petition sets forth a cause of action, and, subsequently to the rendition of such decision by the Court of Appeals, the Supreme Court renders a decision in another case, the effect of which is to show that the decision of the Court of Appeals is erroneous, and, after the rendition of such decision by the Supreme Court, the case first mentioned again comes before the Court of Appeals upon writ of error, assigning error upon the judgment overruling a motion for new trial filed by the defendant, is the Court of Appeals, upon a consideration of the second writ of error, bound by its own decision in the former case, or should it follow and apply the contrary decision of the Supreme Court?"

"In the above-stated case, counsel have attacked the soundness of the following decisions of the Supreme Court, and have asked that this court request the Supreme Court to review and overrule the decisions in these cases: *Chapman v. Western Union Telegraph Co.*, 88 Ga. 763 [15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183], *Seifert v. Western Union Telegraph Co.*, 129 Ga. 181 [58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210], *Giddens v. Western Union Telegraph Co.*, 111 Ga. 824 [35 S. E. 638], and *Southern Bell Telephone & Telegraph Co. v. Reynolds* [77 S. E. 888] decided February 11, 1913."

H. E. W. Palmer, B. J. Clay, and McDaniel & Black, all of Atlanta, and W. P. Wallis, of Americus, for plaintiff in error. Robt. L. Berner, of Macon, and J. A. Hixon, of Americus, for defendants in error.

LUMPKIN, J. [1] 1. The first question propounded by the Court of Appeals raises an interesting question of practice. It involves what is commonly called the doctrine of "the law of the case." This doctrine is thus stated in 26 Am. & Eng. Enc. L. (2d Ed.) 184: "The doctrine of 'the law of the case' may be stated thus: A matter decided on one appeal cannot be re-examined on a second appeal in the same case; for the decision of an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellate court, whether right or wrong, in a case before it, is conclusive upon the points presented throughout all the subsequent proceedings in the case, both upon the appellate court itself and upon the trial court. Concisely, it is said that the decision on appeal becomes "the law of the case." In this court the rule is well settled. In *Western & Atlantic R. Co. v. Third National Bank of Atlanta*, 125 Ga. 489, 54 S. E. 621, it was held: "A decision by the Supreme Court is controlling upon the judge of the trial court, as well as upon the Supreme Court when the case reaches that court a second time. The principle in the decision may be reviewed and overruled in another case between different parties, but as between the parties the decision stands as the law of the case, even though the ruling has been disapproved by the Supreme Court in a case decided before the second appearance of the case in that court." See, also, *Gilmore v. Johnson*, 29 Ga. 67; *Ingram v. Trustees of Mercer University*, 102 Ga. 226, 29 S. E. 273, and citations; *Allen v. Schweigert*, 113 Ga. 71, 38 S. E. 397; *McLendon v. Macon, Dublin & Savannah R. Co.*, 123 Ga. 253, 51 S. E. 317.

Had the decision on the demurrer been rendered here, it would stand as the law of the case, although a different ruling might have been made in regard to the principle involved before the case reached this court for the second time. Does it alter the rule that the decision on the demurrer was made by the Court of Appeals, and that the case is in that court for the second time? We think not. It was argued that, as the Constitution declares that "the decisions of the Supreme Court shall bind the Court of Appeals as precedents," this abolished the "law of the case" rule under circumstances like those involved in the question now under consideration, and that the Court of Appeals was bound to follow the later decision of this court on the same principle in a different case, instead of its own former decision in the same case. To this contention there are two replies: The first is that, in the fallibility and imperfection which inheres in all human institutions, lawyers, and even judges, sometimes honestly differ as to the application of a precedent. The Court of Appeals is a court of last resort as to the cases within its jurisdiction (omitting reference to constitutional questions and certified questions). Its decisions, within its jurisdiction, are final. They cannot be treated as nullities. If by any chance the judgment in a particular case should be erroneous, it would still be binding. *Saffold v. Mangum*, 139 Ga. 119, 76 S. E. 858; *Buck v. Duval*, 139 Ga. 599, 77 S. E. 809. Any other rule would create utter confusion. It is the duty of the superior courts to follow the decisions of the Supreme Court as precedents. Suppose a superior court should make errors in the effort to do so, but no exception should be taken to the judgment, it could not be disregarded

as void. There must be somewhere an end of controversy, and that necessity is what Chief Justice Bleckley doubtless had in mind when in his opinion in *Broome v. Davis*, 87 Ga. 584, 13 S. E. 749, he humorously referred to "the fallibility which is inherent in all courts except those of last resort."

Again, the declaration that the decisions of the Supreme Court shall be binding on the Court of Appeals as precedents is only a part of a paragraph of the Constitution. The same paragraph also declares that the laws relating to the Supreme Court as to practice and procedure, and in all other respects, except as otherwise provided by the Constitution, shall apply to the Court of Appeals until otherwise provided by law. Civil Code 1910, § 6506. While we cannot agree with counsel for the defendant in error that, relatively to the Court of Appeals, this provision crystallizes into an absolute rule of constitutional law every rule of practice of the Supreme Court, and that, as to the Court of Appeals, it can only be changed by the Legislature, although the Supreme Court may change the rule for itself, yet it does analogize the practice in that court to the practice in this. And, as we have seen, what is known as the doctrine of "the law of the case," arising from a decision therein, is a settled rule in this court.

Counsel for the plaintiff in error relied strongly on the decision in *Messenger v. Anderson*, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152. But the statement there made, that the phrase "the law of the case" expresses the practice of the courts generally to refuse to open what has been decided, rather than a limit on their power, does not alter the fact that in courts of last resort the rule is generally followed. We need not distinguish between the propriety of the federal Court of Appeals following a construction of a will by the highest court in the state where it was executed and a court of last resort following its decision in the same case. *Illinois v. Illinois Central R. Co.*, 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440; *United States v. Camou*, 184 U. S. 572, 574, 22 Sup. Ct. 505, 46 L. Ed. 694; *Great Western Telegraph Co. v. Burnham*, 162 U. S. 343, 344, 16 Sup. Ct. 850, 40 L. Ed. 991.

To the first question propounded we accordingly answer that the former decision of the Court of Appeals has settled the law of the case to the extent to which the decision went; and it should be followed in this case, though in others the subsequent decision of the Supreme Court should be followed.

[2] 2. The next question is whether we will review and reverse the decisions in *Chapman v. Western Union Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, *Giddens v. Western Union Telegraph Co.*, 111 Ga. 824, 35 S. E. 638, *Seifert v. Western Union Telegraph Co.*, 129 Ga. 181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210, and *Southern Bell Telephone*

Co. v. Reynolds, 139 Ga. 385, 77 S. E. 888. As to the first two cases we are unanimously of the opinion that the decisions were right and should stand. As to the last two decisions, which were concurred in by the entire bench, our statute requires the concurrence of all of the Justices to reverse them. Civil Code 1910, § 6207. The entire bench does not concur in so doing, and they must remain of force.

It may be added that there are a number of authorities adverse to the decisions last cited, but the ruling does not stand unsupported. *Lebanon, Louisville, etc., Tel. Co. v. Lanham Lumber Co.*, 131 Ky. 718, 115 S. W. 824, 21 L. R. A. (N. S.) 115, 18 Ann. Cas. 1066; *Evans v. Cumberland Telephone & Telegraph Co.*, 135 Ky. 66, 121 S. W. 959, 135 Am. St. Rep. 444; *Southwestern Telegraph & Telephone Co. v. Solomon*, 54 Tex. Civ. App. 306, 117 S. W. 214; *Volquardsen v. Iowa Telephone Co.*, 148 Iowa, 77, 128 N. W. 928, 28 L. R. A. (N. S.) 554; *Robinson v. City of Evansville*, 87 Ind. 334, 44 Am. Rep. 770. All the Justices concur.

GROSS v. GLOBE & RUTGERS FIRE INS. CO.

(Supreme Court of Georgia. Aug. 14, 1913.)

(*Syllabus by the Court.*)

1. INSURANCE (§ 622*)—ACTION ON POLICY—TIME FOR BRINGING SUIT.

Where it was stipulated in a policy of fire insurance that no suit should be maintainable thereon "unless commenced within 12 months next after the fire," an action brought after the lapse of that period would be barred, although it purported on its face to be a renewal of a previous action, which was instituted in a city court having jurisdiction thereof, within the time limited, which was dismissed and subsequently renewed in the superior court, after the payment of all costs, within 6 months from such dismissal. *McDaniel v. German American Insurance Co.*, 134 Ga. 189, 67 S. E. 668, and citations.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1540, 1544-1550; Dec. Dig. § 622.*]

2. DISMISSAL OF ACTION.

There was no error in dismissing the petition on demurrer.

Error from Superior Court, Bibb County; *W. H. Felton*, Judge.

Action by *Emma Gross* against the *Globe & Rutgers Fire Insurance Company*. Judgment for defendant, and plaintiff brings error. Affirmed.

R. D. Feagin and *J. E. Hall*, both of *Macon*, for plaintiff in error. *Smith*, *Hammond* & *Smith*, of *Atlanta*, and *Hardeman*, *Jones*, *Park* & *Johnston*, of *Macon*, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

AUGUSTA LAND CO. v. AUGUSTA RY. & ELECTRIC CO. et al.

(Supreme Court of Georgia. Aug. 14, 1913.)

(*Syllabus by the Court.*)

1. DEEDS (§ 94*)—CONSTRUCTION—MERGER OF PREVIOUS AGREEMENT.

Where a written agreement was entered into between two corporations, whereby one was to execute a deed to the other upon certain conditions, and subsequently a deed in fee simple to the land referred to in the agreement was executed, reciting in the preamble thereof that whereas, by agreement between the parties, the grantor agreed to convey to the grantee certain land on "certain conditions, which have since been complied with," but the habendum clause of the deed contained no such conditions, the conditions of the agreement were merged in the conveyance, and the grantee in the deed held the land freed from the conditions contained in the agreement.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 266; Dec. Dig. § 94.*]

2. CORPORATIONS (§ 432*) — AUTHORITY TO CONVEY — OFFICER OF CORPORATION — PRESUMPTION.

Where a deed purports on its face to convey certain land from one corporation, as grantor, to another, and the corporate name is signed to the deed by the president thereof, with the corporate seal attached, the presumption is that the official or executive officer was authorized to execute the conveyance on behalf of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1718, 1724, 1728-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

3. DEEDS (§ 166*)—RIGHT OF ACTION.

It follows that a petition disclosing the facts set out in the preceding notes, seeking to recover the land on the ground of a breach of the condition subsequent contained in the agreement, filed by the grantor against the holder of the land under the deed, is subject to general demurrer.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 522-525; Dec. Dig. § 166.*]

Error from Superior Court, *Richmond County*; *H. C. Hammond*, Judge.

Action by the *Augusta Land Company* against the *Augusta Railway & Electric Company* and another. Judgment for defendants, and plaintiff brings error. Affirmed.

The *Augusta Land Company* brought its petition against the *Augusta Railway & Electric Company* and the *Augusta-Aiken Railway & Electric Corporation* to recover 10 acres of land known as "Lake View Park," with mesne profits. No equitable relief was prayed. The case came on to be heard before the court upon a general and special demurrer to the petition. The court below sustained the demurrer generally, and dismissed the suit. To this judgment the plaintiff excepted.

The petition alleges substantially:

The *Augusta Railway & Electric Company* and the *Augusta-Aiken Railway & Electric Corporation* (as the successor in title of the *Augusta Railway & Electric Company*) have been in possession of the land since July 17, 1896. On June 29, 1900, the *Augusta Land*

Company executed to the Augusta Railway & Electric Company a warranty deed conveying the 10 acres in controversy in fee simple, without any condition or restriction. An agreement was entered into on August 3, 1895, between these two companies, whereby the railway company agreed to "build, equip, and operate an electric line of street cars from its then terminus, in Harrisburg, out Broad street to High street, thence on High street to Greene street, thence on Greene street to either Milledge street or Crawford avenue, at the election of your petitioner, to Broad street, where it should connect with the street car line thus extended; * * * that cars should be operated on said line (thus to be constructed) at intervals not exceeding 30 minutes, unless prevented by strikes, break-downs, or unavoidable accidents." It was agreed between the parties that, upon completion of the work and commencement of the operation of the cars, the plaintiff would convey the 10 acres of land now in controversy. The agreement also provided that "the conditions in said deed shall be as follows: The said tract of 10 acres shall be conveyed to the party of the second part to be used as a public park for white persons only, and to this end the party of the second part may improve said land in any manner it sees fit by buildings, landscape gardening, etc., and shall have full and entire control over the land and all improvements. The party of the second part shall pay all taxes and assessments of whatever kind upon said property, payable after the delivery of the deed, and shall remain in full control thereof so long as it continues to use and operate the said line of cars as heretofore agreed, or until it ceases to use said tract for the purposes of a public park, in either of which events said land shall at once revert to the party of the first part, and all possession and control of the party of the second part shall cease at once, except that it shall have the right and privilege of entering the same within one year of such reversion for the purpose of removing any building which it may have erected while in possession—such removals to be without injury to the land, and the land to be left in as good condition as when first entered by the party of the second part."

The deed did not contain any of the conditions, but was a warranty, fee-simple deed, without condition. The deed does contain, however, the following reference to the agreement: "Whereas, by agreement between the Augusta Land Company and the Augusta Railway Company, dated August 3, 1895, recorded in the office of the clerk of the superior court of said county, in Book YYYY, folio 552, the Augusta Land Company agreed, upon certain conditions, which have since been complied with, to convey to the said Augusta Railway Company certain land in said agreement described; and whereas, by deed dated March 21, 1896, recorded in said

office in Book YYYY, folio 494, the said Augusta Railway Company transferred to Samuel M. Jarvis and Roland R. Conklin all its right, title, and interest in and to all the property mentioned in said agreement; and whereas, all the interest, right, and title of said Samuel M. Jarvis and Roland R. Conklin in and to all the ten lots mentioned in said agreement were duly transferred by Samuel M. Jarvis and Roland R. Conklin to D. B. Dyer, by instrument dated July 23, 1896, and recorded in said office in Book ———, folio ———; and whereas, to confirm and carry out said agreement, the Augusta Land Company issued a deed conveying the same ten lots to D. B. Dyer, dated February 4, 1899, recorded in Book MMMMM, folio 343; and whereas, all the rights, title, and interest of Samuel M. Jarvis and Roland R. Conklin in and to the ten acres of land mentioned in said agreement was duly transferred by said Samuel M. Jarvis and Roland R. Conklin to the Augusta Railway & Electric Company by instrument dated July 23, 1896, and recorded in said office in Book AAAAA, folio 305; and whereas, it is necessary for the said Augusta Land Company to issue a deed to the said Augusta Railway & Electric Company to confirm and perfect the title as aforesaid: Now, therefore, this indenture, made this 29th day of June, 1900, between the Augusta Land Company, a corporation of said county and state, as party of the first part, and the Augusta Railway & Electric Company, of said county and state, party of the second part," etc.

It is alleged in the petition that the railway company constructed the lines as agreed upon, and operated them until the spring of 1902, when, after the deeds had been executed, the railway company tore up the rails and cross-ties, etc., which had been built under the contract of August 3, 1895, and ceased and abandoned the operation of street cars along the line of the streets as stipulated, and no other railroad tracks have been placed or located on the streets, and no cars have been operated at intervals of 30 minutes, or otherwise; that on May 24, 1911, the Augusta Railway & Electric Company entered into a written agreement with the Augusta-Aiken Railway & Electric Corporation, whereby it sold and conveyed to the latter company all of its railroad property, and all of its other property, including the 10 acres of land in controversy; that the property was conveyed subject to all valid liens, debts, obligations and liabilities of the Augusta Railway & Electric Company of every kind; that the tearing up of the tracks, and the discontinuance of the operation of cars, was a breach of the conditions subsequent which under the agreement of 1895 were to be incorporated in the deed, and the failure to do so was a fraud on the part of the defendant against the plaintiff, and by reason of the breach of the conditions in

the agreement the land reverted to the plaintiff by the terms of the agreement.

The grounds of demurrer were that the petition does not set forth a cause of action, and that it appears on the face of the petition and exhibits attached thereto that the defendant and its predecessor in title have been in adverse possession of the land sued for under written evidence of title for over 7 years.

E. H. Callaway, of Augusta, for plaintiff in error. Boykin Wright, of Augusta, for defendants in error.

HILL, J. (after stating the facts as above).

[1] 1. The controlling question to be determined is whether the agreement of August 3, 1895, was merged in the deed of June 29, 1900, and became *functus officio* when the deed was executed, and the rights of the parties are based alone upon the deed. Mr. Devlin, in his work on Real Estate, says: "The rule applicable to all contracts, that prior stipulations are merged in the final and formal contract executed by the parties, applies, of course, to a deed based upon a contract to convey. When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties." 2 Devlin on Real Est. § 850a. In the case of *Slocum v. Bracy*, 55 Minn. 252, 58 N. W. 827, 43 Am. St. Rep. 499, 500, Mitchell, J., said: "No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed." The deed of June 29, 1900, purports to be the consummation of the agreement of August 3, 1895, and to convey the absolute title to the 10 acres of land in dispute, and the only reference to any conditions of the agreement is to "certain conditions, which have since been complied with." The deed then conveys the fee simple title to the land in dispute, without reference to any forfeiture or reversion. There is no recital in the deed that it was to be subject to whatever conditions the agreement provided should be incorporated in the deed. "After the execution of the deed, the grantee cannot, in the absence of actual fraud, recover for any misrepresentations relating to the title, not covered by the covenants of the deed, as the deed is considered to be a complete relinquishment of all conflicting claims in the preceding contract of sale." 2 Devlin on Real Estate, § 850a. In the case of *Dunbar v. Aldrich*, 79 Miss. 698, 31 South. 341, where a deed recited that it was the purpose of the grantor to give a life estate to the grantee, with remainder in fee to his children, but in the granting part of the deed a

conveyance is made to the grantee and his heirs in fee simple, it was held that the granting part of the deed controls, and the grantee took an estate in fee simple. The court, speaking through Terral, J., said: "And especially is it a rule of interpretation of a deed that an intention manifested in the recitals of a conveyance will be controlled by the terms of the granting part of the deed."

Where there is a discrepancy between the recitals and the operative part of a deed, the operative part, if clear and unambiguous, must be followed. Elphinstone on the Interpretation of Deeds, *129. In *St. Phillips Church v. Zion Church*, 23 S. C. 297, the plaintiff had a lease on certain land for 99 years, perpetually renewable, to be used for the purposes of a Presbyterian church, reserving the right to re-enter in case the land was used for any other purpose whatever than the erection of a Presbyterian church. The lessee assigned the lease to the Glebe Street Presbyterian Church. Afterwards this corporation contracted to sell the land to certain trustees of the African Methodist Episcopal Church, and to execute a conveyance thereof on the payment of the purchase money, and in pursuance of which contract the trustees were put into possession. The plaintiff commenced suit to recover the premises, or to enjoin the defendant from executing a conveyance to the African Methodist Episcopal Church contrary to the conditions upon which the defendants held the property. It was held that the lease was merged in the conveyance, and that the grantees held the property freed from the conditions in the lease. The court said: "The recital does not qualify the deed in any particular. Its office was only to trace the history of the transaction, and to describe the relation of the parties in regard to the property and to each other, leading up to the grant, which was absolute in its terms. Deeds are to be taken most strongly against the grantors, and if the form of the conveyance is absolute, as here, nothing is to be taken as intended that is not plainly expressed in the deed."

In *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222, the trustees of a city adopted a resolution providing that certain lands should be granted upon the condition that the lands should be occupied and improved within 6 months from the date of the certificate; and if within a year therefrom improvements of a certain amount were not made, the lands should revert to the city. The deed to the defendant's grantor recited a sale made to him that day on the conditions of the resolution, and an agreement on his part to make the improvements; but these recitals preceded the habendum, in consideration of the full receipt of the purchase money by the city, purported to vest in the grantee the full title of the city in fee simple, without condition. It was held that the grant was absolute. The

court said (83 Cal. 64, 23 Pac. 225): "It is true that in the deeds to Evans which were made on the day of the sale, there is a recital of a sale upon the conditions prescribed in the resolution, and also of an agreement by Evans to complete all improvements required by them; but the granting part and habendum of the deed, in consideration of the full receipt of the purchase money by the city, purports to vest in the grantee the full title of the city, in fee simple absolute, without condition precedent or subsequent. To create a condition in a grant, apt and appropriate words must be appended to the grant, which *ex vi termini* import that the vesting or continuance of the estate is to depend upon the condition. *Craig v. Wells*, 11 N. Y. 320; *Jackson v. McCallen*, 8 Cow. [N. Y.] 296. An estate upon condition cannot be created by deed, except when the terms of the grant will admit of no other reasonable interpretation." In *Webb v. Webb's Heirs*, 29 Ala. 588, 606, the court said: "The granting clause determines the interest intended to be conveyed, and prevails over the introductory statement. *Kershaw v. Boykin*, 1 Brev. [S. C.] 301. This is not intended to disturb the well-settled rule that, if two clauses in a deed are so repugnant that they cannot stand together, the first prevails over the last." See *Dickson v. Wildman*, 183 Fed. 398, 105 C. C. A. 618.

It is a well-settled rule of construction that a deed will not be construed to create an estate upon condition, unless the language of the deed, according to the rules of law, or *proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. *Thompson v. Hart*, 133 Ga. 540, 543, 66 S. E. 270; 2 *Devlin on Deeds*, § 848. In *Nelson v. Atlanta, &c., Ry. Co.*, 135 Ga. 572, 69 S. E. 1118, it was held: "A railroad company made to an owner of land lying near tracks used by it a written proposition to purchase a strip of such land 'on the following terms, covenants, and conditions,' setting out that the strip was to be used, in connection with other property, in a general plan for railroad terminals, and agreements as to erecting a wall, moving a public street, not using certain land for stated purposes, etc. It provided: 'The covenants and agreements herein stated to be incorporated in the deed to said property, so as to run with the land sold.' The proposition was accepted in writing. Later the purchaser assigned its rights to another company, and the seller on receipt of the purchase price made to such assignee a deed, in which were included the covenants and agreements of the contract. Held, that the contract was merged into the deed, and could not therefore be enforced against the original purchaser as containing personal covenants."

From the authorities, we conclude that the agreement of August 8, 1895, was merged in

the deed of June 29, 1900, and became *functus officio* when the deed was executed, and the rights of the parties are based alone upon the deed.

[2] 2. But it is insisted that the president of the Augusta Land Company was without any corporate authority, or corporate action on the part of the land company, to execute the deed. The petition alleges that on June 29, 1900, "the then president of your petitioner, in the name of your petitioner, executed to said Augusta Railway & Electric Company a deed conveying the said 10 acres of land," etc. A copy of the deed itself is attached to the petition, and it is recited in the deed that the party of the first part (Augusta Land Company) "has caused its corporate seal to be affixed hereto." In *Powell on Actions for Land*, pp. 273, 274, § 221, the author says: "Wherever a deed purports to have been executed on behalf of a corporation by an official or executive agent of the company, and the corporate seal is affixed, the presumption is that the official or executive agent was authorized to execute the conveyance on behalf of the corporation." To the same effect, see *Carr v. Ga. Loan &c. Co.*, 108 Ga. 757 (3), 33 S. E. 190; *Nelson v. Spence*, 129 Ga. 36 (5), 58 S. E. 697; *Taylor v. Hartsfield*, 134 Ga. 479, 68 S. E. 70. There was no effort on the part of the Augusta Land Company to repudiate the act of its president in signing the deed, so far as the record discloses, and the rule is that, if the principal has notice of an unauthorized act of another in his behalf, he must repudiate the act within a reasonable time, or he will be deemed to have ratified it. *Mechem on Agency*, § 153 et seq.; 31 *Cyc.* 1275; *Whitley v. James*, 121 Ga. 521, 49 S. E. 600. And the above rule applies to a case where the principal is a corporation, as well as to a case where the principal is an individual. *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Mechem on Agency*, § 158; 2 *Thompson on Corp.* (2d Ed.) § 2019.

The plaintiff allowed the defendant's predecessor to construct tracks and operate cars through the property, and to remain in possession of the property in dispute for a number of years, without any effort to repudiate the act of the plaintiff's agent in executing the deed, until the commencement of this suit, and received whatever benefits accrued to it by reason of the building and operation of the car lines as set out in the petition. The petition alleges no facts which would excuse the plaintiff for a failure to bring suit earlier. There is no explanation as to why the plaintiff did not know, or could not have known by the exercise of ordinary care, that the deed had been executed. With the deed signed by the president of the company outstanding, and with the defendant company building a line of railroad on and through the property of the plaintiff, it is hardly conceivable that the plaintiff did not

know of the existence of the deed and how it was signed. If the plaintiff had knowledge of the execution of the deed, and took no steps to repudiate it, although the defendant was in possession under it, it is bound by it; if it had no knowledge of the execution of it at the time, but since its execution it has by its acts ratified the execution of the deed, it is bound by its terms. The deed was absolute on its face, and no conditions in the agreement were incorporated in the deed; and this being true, there could be no right of reverter in a case of this kind. Whatever conditions were embraced in the agreement were merged in the absolute deed, which contained no conditions.

[3] It follows from what has been said, and from the authorities cited, that the defendant has a good title to the premises in dispute, and the court below did not err in sustaining the demurrer to the petition.

Judgment affirmed. All the Justices concur.

GEORGIA & F. RY. v. NEWTON.

(Supreme Court of Georgia. Aug. 12 1913.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 101*)—TRIAL (§ 253*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Where, on the trial of a suit against a railroad company, to recover damages for injuries alleged to have been tortiously committed by the company on the person and property of the plaintiff while crossing the railroad tracks of the former at a public street crossing, there was evidence tending to show that both the plaintiff and the defendant were negligent at the time of the injury, and where it further appears that the court in its general charge failed to instruct the jury relatively to the plaintiff's right to recover where his own negligence equals or exceeds that of the defendant, it was reversible error to refuse a written request to charge the jury as follows: "If, however, you believe that the railroad employés were negligent to some extent, and you also believe that the plaintiff was negligent to an equal or greater extent, the plaintiff cannot recover in this case, and your verdict should be for the defendant."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101; Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

2. TRIAL (§ 261*)—REFUSAL OF INSTRUCTIONS—ERRONEOUS REQUESTS.

It is not error to refuse a request to give to the jury a charge which does not accurately state a correct principle of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

3. APPEAL AND ERROR (§§ 170, 179*)—REFUSAL OF INSTRUCTIONS—PRESENTATION BELOW—CONSTITUTIONALITY OF STATUTE.

Grounds as to the unconstitutionality of an act of the Legislature, which are the basis of exceptions, must be urged upon the trial, and the court must pass upon them, before error can be assigned and the questions considered by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1035-1052, 1099, 1100, 1137-1140; Dec. Dig. §§ 170, 179.*]

4. APPEAL AND ERROR (§ 728*)—ASSIGNMENTS OF ERROR—ADMISSION OF EVIDENCE.

An assignment of error upon the admission of testimony, which does not state what objection was made thereto when it was offered, nor set out literally or in substance the evidence objected to, will not be considered by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012; Dec. Dig. § 728.*]

5. RAILROADS (§ 317*)—CROSSING ACCIDENT—RIGHT OF RECOVERY.

The petition was sufficient to withstand the demurrer filed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1009; Dec. Dig. § 317.*]

Error from Superior Court, Jenkins County; B. T. Rawlings, Judge.

Action by B. L. Newton against the Georgia & Florida Railway. Judgment for plaintiff, and defendant brings error. Reversed.

Dixon & Dixon, of Millen, F. H. Saffold, of Swainsboro, and W. H. Barrett, of Augusta, for plaintiff in error. E. K. Overstreet, of Sylvania, and A. S. Anderson, of Millen, for defendant in error.

HILL, J. The plaintiff in the court below brought suit against the defendant for damages resulting from injuries alleged to have been sustained by being struck by one of defendant's engines and cars while crossing the railroad tracks of the defendant at a public street crossing in the city of Millen. The petition alleged, among other things, substantially as follows: At and before crossing the railroad tracks of the defendant the plaintiff looked in the direction from which the train of defendant was coming, and could see no light or cars, nor did he hear the bell or whistle. He was riding on the rear of a two-horse wagon drawn by two mules and driven by a negro man. The train which passed the crossing at which the injury occurred was 20 minutes late on the day of the injury, and the plaintiff thought it had gone; but he looked in both directions before going on the track. It was about dark, and he could not see an object at any distance. The train was about a car length from him when he first saw it, and was running at a high rate of speed, which he estimated to be about 25 or 30 miles an hour, and in excess of the rate prescribed by the ordinance of the city of Millen, and it was impossible for him to have avoided being struck by the engine. The mules became frightened, and turned quickly up the track in the direction the train was going. The engine struck the wheels of the wagon and one of the mules. The rear of the wagon in which he was sitting was pulled towards the train, and plaintiff attempted to leap from it, but was jerked under the car behind the engine, which ran over his foot, necessitating its amputation.

The defendant filed an answer, denying the allegations of negligence on its part, and

averring that the alleged injury to the plaintiff was caused by his own negligence in attempting to cross the railroad track in front of a moving train, which he saw or heard, or by the exercise of ordinary care and diligence could have heard or seen, before attempting to cross. A demurrer to the petition was overruled, and to this ruling the defendant filed exceptions pendente lite. On the trial there was evidence tending to support the respective contentions of the parties. The jury found a verdict for the plaintiff, and, the defendant's motion for a new trial having been overruled, it excepted.

[1] 1. Error is assigned because the court refused a written request to give in charge to the jury the following: "If, however, you believe that the railroad employes were negligent to some extent, and you also believe that the plaintiff was negligent to an equal or greater extent, the plaintiff cannot recover in this case, and your verdict should be for the defendant." The court erred in not giving this instruction. There was evidence tending to show that the defendant was negligent in having no headlight, in not ringing the bell, and in running at a high rate of speed, etc. There was also evidence tending to show that the plaintiff, or his servant, who was driving, was guilty of contributory negligence at the time of the injury. There was nothing in the general charge of the court to cover the request as presented by the defendant. This court has held that, where the injury complained of was the result of mutual negligence by the plaintiff's servant and the defendant, there can be no recovery unless the servant was less in fault than the defendant. *Central Railroad Co. v. Newman*, 94 Ga. 564, 21 S. E. 219; *So. Ry. Co. v. Watson*, 104 Ga. 243, 247, 30 S. E. 818. This is the law in this state, as we understand it; and the request to charge being substantially a correct statement of the rule, and being authorized under the facts of this case, it was reversible error to decline to give it, where a proper request therefor had been made. See Civil Code, §§ 2781, 6084.

[2] 2. Complaint is made because of the refusal of the court to give the following instruction to the jury, duly requested in writing: "If you believe that the railroad employes were guilty of negligence caused the injury to plaintiff, and you believe that plaintiff could not have avoided the injury to himself by the exercise of ordinary diligence on his part, and you believe that plaintiff was not guilty of as great amount of diligence as were the employes of the railroad, but you also believe that plaintiff was guilty of some negligence, then it is your duty to decrease the amount of the recovery to which plaintiff in this case would be entitled to by an amount proportionate to the extent which plaintiff's negligence bears to the negligence of the employes of the rail-

road." We must treat this request as having been presented to the trial judge in the language above quoted, which is copied from the seventh ground of the motion for a new trial. The request is also set out in the brief for plaintiff in error, and there it is repeated: "And you also believe that plaintiff was not guilty of as great an amount of diligence," etc. It may be that counsel intended to use the word "negligence," instead of "diligence"; but there is no suggestion either in the record or the briefs of counsel that the charge as set forth in the motion for a new trial is not in the language requested. It is also confusing in other respects, and, as it stands, of course, does not accurately state a principle of law; and the court was justified in declining to give it in charge to the jury.

[3] 3. Complaint is also made because the court refused a written request to instruct the jury that section 2675 of the Civil Code (commonly known as the blow-post law) was unconstitutional; also, because he declined to instruct them: "I charge you further that the latter part of said section, to wit, 'and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing the track on said road,' is not the law of Georgia, and is invalid and not binding on said defendant, and that the same is unconstitutional." Several reasons were assigned in the motion for a new trial why the section in question, as a whole, and the portion above quoted, were repugnant to the clause of the federal Constitution giving to Congress the power to regulate commerce. It does not appear from the assignments of error, however, that at the time of tendering the requests to charge, or at any time during the progress of the trial, any reason was urged before the court why the law in question was unconstitutional, or what provision of the Constitution it was contended it was in violation of. The request was for the court to charge broadly that the law was unconstitutional, without giving or urging at the time any reason why it was so. Grounds as to the unconstitutionality of an act of the Legislature, which are the basis of exceptions, must be urged upon the trial, and the court must pass upon them, before error can be assigned and the question considered by the Supreme Court. *Brown v. State*, 114 Ga. 60 (2), 39 S. E. 873; *Griggs v. State*, 130 Ga. 16, 60 S. E. 103; *Anderson v. State*, 2 Ga. App. 1, 58 S. E. 401.

The ruling here made disposes of the tenth and eleventh grounds of the motion for new trial, which complain that the headlight law is not a valid law.

[4] 4. Complaint is made because the court refused "to rule out all of the evidence introduced in reference to an electric headlight or the failure to have an electric headlight on the locomotive." This court has

repeatedly ruled that an assignment of error upon the admission of testimony, which does not state what objection was made thereto when offered, nor set out literally or in substance the evidence referred to, is without merit and cannot be considered. *Wright v. Roberts*, 116 Ga. 194 (4), 42 S. E. 369; *Pearson v. Brown*, 105 Ga. 802, 31 S. E. 746; *Tompkins v. Compton*, 97 Ga. 375, 23 S. E. 839; *Willingham v. Sterling Cycle Works*, 113 Ga. 953, 39 S. E. 314; *Somers v. State*, 116 Ga. 535, 42 S. E. 779; 1 Mich. Dig. Ga. R. 636, 637; 13 Mich. Dig. Ga. R. 134 (11).

[5] 5. The court did not err in overruling the demurrer to the petition.

Judgment reversed. All the Justices concur.

ROWE v. SPENCER.

(Supreme Court of Georgia. Aug. 14, 1913.)

(Syllabus by the Court.)

SALES (§ 472*)—CONDITIONAL SALES—PURCHASE FROM BUYER—TITLE ACQUIRED.

Spencer and Humphrey entered into an agreement, by the terms of which Spencer was to sell to Humphrey a certain pair of mules at a given price, a specified part of which Humphrey was to pay in cash, and for the balance he was to give his two promissory notes, with his father as surety, to Spencer in equal amounts, maturing at designated times. The notes were to contain a stipulation that title to the mules was to remain in Spencer until the notes should be fully paid. The notes were prepared in accordance with the agreement; but as no official was present to attest their execution, and as Humphrey's father was not present, it was agreed that Humphrey should take them to the county where he said he resided, and there execute them, with his father as surety, in the presence of an officer, and return them by mail to Spencer. At the time of this transaction Humphrey made the cash payment and Spencer delivered to him the possession of the mules. Subsequently, and on the same day, Humphrey traded the mules to Rowe for a fair consideration, which he received from Rowe at the time, and delivered to him the mules. Rowe at the time had no notice of the agreement between Spencer and Humphrey. The notes were executed by Humphrey the next morning before a notary public, who officially attested them, and they were delivered to Spencer that day; Humphrey's father not having signed them. Three or four days thereafter Spencer informed Rowe of the agreement between Humphrey and Spencer, and of the latter's claim of title to the mules, and Rowe a short time afterwards disposed of them to his own use. The notes were recorded within less than 30 days after their execution. *Held*, that Rowe, as against Spencer, obtained no title to the mules.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*]

Lumpkin, J., dissenting.

Error from Superior Court, Gwinnett County; Robt. T. Daniel, Judge.

Action by E. A. Spencer against W. H. Rowe. Judgment for plaintiff, and defendant brings error. Affirmed.

Spencer brought trover against Rowe. There was a verdict for the plaintiff. The defendant was refused a new trial, and he excepted.

The testimony of the plaintiff was as follows: On June 19, 1906, he agreed to sell the mules in controversy to one Humphrey for the price of \$450, of which the sum of \$100 was to be paid cash, and for the balance Humphrey was to give Spencer two promissory notes, each for \$175, payable respectively September 1 and November 1, 1906. Title to the mules was to be retained by Spencer until the entire purchase price should be paid. This agreement was entered into at Flowery Branch, Hall county, this state. At that place and on the day of the agreement two promissory notes were written or filled out, embodying all the terms of the agreement, as to date, times of payment, and amounts to be paid; and each note contained the following stipulation: "This note having been given to said E. A. Spencer, as per contract, for two black mare mules, named Mame and Maud, it is hereby agreed that the ownership of title to said mules shall remain to said E. A. Spencer until this note is fully paid." Humphrey made the cash payment. The notes were written out in accordance with the agreement at Flowery Branch, where the plaintiff was engaged in business, and where the transaction took place. As no officer was there to witness Humphrey's signature to the notes, and as his father lived at Buford, Gwinnett county, where plaintiff was informed by Humphrey he also resided, it was agreed between plaintiff and Humphrey that the latter should take the notes to Buford, where he, and his father, as surety, would execute them in the presence of an officer, and that Humphrey would then return them by mail to plaintiff. In accordance with this agreement, the notes were given to Humphrey for the purpose just stated, and plaintiff also delivered to him the possession of the mules. Humphrey left Flowery Branch, with the notes and the mules in his possession, about noon on June 19, 1906. The next day plaintiff received the notes by mail, which appeared to have been signed by Humphrey in the presence of a notary public, but had not been signed by Humphrey's father. Within two or three days thereafter, the plaintiff went to Buford to investigate the matter, and ascertained that Humphrey had sold the mules to the defendant, Rowe. Plaintiff thereupon exhibited to the defendant Humphrey's notes, and at the same time informed the defendant that title to the mules was in him, the plaintiff. The notes were put in evidence by the plaintiff. They were dated June 19, 1906, and contained a reservation of title to the mules in Spencer. They appeared to have been executed by Humphrey in the presence of a notary public, and were filed for record and recorded in Gwinnett county

on July 14, 1906. They were not signed by Humphrey's father.

The notary testified that Humphrey signed the notes in his presence in Buford. He could not remember the date, but did remember that the notes were executed "late one evening or early one morning," as he recalled that he had to take them to the front of the store in order to get sufficient light to write his signature. He further testified: "Charlie Humphrey was driving a pair of gray ponies at the time. Mr. Rowe had previously had these ponies in his possession. * * * I had never seen Humphrey driving these ponies before this time."

The defendant admitted in his answer that he purchased the mules in controversy from Humphrey on June 19, 1906; and his testimony was to the following effect: He gave Humphrey, in exchange for the mules, a pair of ponies, a set of harness, a buggy pole, and \$100 in cash, all being of the value of \$425. He traded with Humphrey for the mules about 6:20 o'clock p. m., Eastern time, which was an hour, or an hour and a half, before sunset. At the time of this trade, he did not know from whom Humphrey had bought the mules, and had no notice of the contract of sale between Humphrey and Spencer. Humphrey never drove the ponies given him in exchange for the mules until the day following this trade. Witness sold the mules a short time after he learned that plaintiff claimed title to them, and before this action was brought.

J. A. Perry, of Lawrenceville, and J. V. Poole, of Atlanta, for plaintiff in error. L. L. Okes, of Lawrenceville, and E. O. Dobbs, of Buford, for defendant in error.

FISH, C. J. (after stating the facts as above). "Whenever personal property is sold and delivered with a condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid and may be enforced, whether evidenced in writing or not." Civil Code, § 3318. "Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages." Id. § 3319. Mortgages on personal property must be executed in the presence of, and attested by, or proved before, a notary public or judge of any court in this state, or a clerk of the superior court, and recorded. Id. § 3257. A mortgage on personal property must be recorded in

the county where the mortgagor resided at the time of its execution, if a resident of this state. Id. § 3259. According to the undisputed evidence, all the requirements of the above-quoted sections of the Code were complied with, relatively to the notes given by Humphrey to the plaintiff for the balance of the purchase price of the mules bought by Humphrey from the plaintiff, there being in the notes a condition that the title to the mules should remain in the plaintiff until the notes should be fully paid. The notes were, of course, in writing; they were executed in the presence of and attested by a notary public, and were recorded within less than 30 days from the date of their execution. There was, moreover, ample evidence to sustain a finding that the notes were recorded in the county where Humphrey resided at the time of their execution, which the jury necessarily found to be true in rendering a verdict for the plaintiff; the court having properly instructed them on this point. There were some circumstances testified to by the defendant himself, which seemingly might have authorized the jury to find that at the time he traded for the mules he had notice sufficient to excite attention, and to put him on inquiry as to Humphrey's title to them, or as to who had legal title, and that such inquiry would probably have developed the fact that the title was in the plaintiff; but in the view we take of the case we have not deemed it necessary to set forth such circumstances.

Aside from the matter just referred to, and considering the evidence from the viewpoint most favorable to the defendant, how stands the case? This way: Defendant traded with Humphrey for the mules on the same day the latter contracted to purchase them from the plaintiff, and within a few hours after that transaction. At the time of his trade with Humphrey the defendant had notice of the plaintiff's title to the mules, and the property given by defendant in exchange for them amounted to a fair price. The agreement between the plaintiff and Humphrey, or rather so much thereof as remained to be executed, had been reduced to writing, in the form of the two notes, which written agreement Humphrey had in his possession at the time he traded the mules to the defendant, which possession was for the purpose, and in pursuance of the agreement with the plaintiff, of executing them before an officer, and thereafter returning them by mail to the plaintiff. At the same time Humphrey had possession of the mules, also with the consent of the plaintiff, as Humphrey was taking the notes for the balance of the purchase price to Gwinnett county to be properly executed by him and his father as surety, and to be returned to the plaintiff. The notes were duly executed by Humphrey alone early the next morning after the trade between defendant and Humphrey, and were received that same day

by the plaintiff, and were recorded within less than 30 days after their execution.

Taking all this to be true, did the defendant obtain a valid title to the mules, or one superior to that of the plaintiff? The view of the case just presented does not show a case where a vendor sold and delivered personalty under an agreement, entered into at the time of the sale and delivery of the property, that the vendee would, at a time subsequent to the completion of the sale, execute and deliver to the vendor a note for the purchase price of the personalty with a condition that the title to the personalty should remain in the vendor until the note should be paid. In section 3318 of the Civil Code, where personalty is sold and delivered with a condition affixed to the sale that the title to the property is to remain in the vendor until the purchase price thereof shall have been paid, in order for the reservation of title to be valid against third parties it must be in writing and the contract executed and attested as the statute requires in cases of chattel mortgages, and recorded within 30 days after the date of the sale. This statute contemplates a sale and delivery of the property in pursuance thereof. The general rule is: "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." 1 Benjamin on Sales (6th Am. Ed.) § 366, p. 359.

This principle has been recognized by this court in several cases, wherein it was announced that "if personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer." *Bergan v. Magnus*, 98 Ga. 514, 516, 25 S. E. 570; *Wilson v. Comer*, 125 Ga. 500, 54 S. E. 355, 114 Am. St. Rep. 245; *Susong v. McKenna*, 126 Ga. 433, 55 S. E. 236; *Starnes v. Roberts*, 128 Ga. 718, 58 S. E. 348; *Walker v. O'Neill Mfg. Co.*, 128 Ga. 831, 58 S. E. 475. In these cases, however, the action was by the vendor against the vendee, and the interest of a third person was not involved, except in *Bergan v. Magnus*, where the contest was between the vendor and an attaching creditor of the vendee, it not appearing, however, that the vendee had obtained possession of the goods with the consent of the vendor, and in *Walker v. O'Neill Mfg. Co.*, where the contest was between two parties each claiming to have purchased the article in controversy from the same vendor. In *Wheeler & Wilson Mfg. Co. v. Bank*, 105 Ga. 57, 31 S. E. 48, it was held: "Where a purchaser agrees to pay for goods on delivery, either in cash at a named discount or by note due in six

months, the contract of sale is conditional, and the payment of the cash or the giving of the note is a condition precedent to the passing of title. Where, however, the goods are delivered by the seller and left for some time in the possession of the purchaser, no steps for their reclamation being taken by the seller, and the purchaser mortgages them to an innocent third party, such conduct may amount to a waiver of the condition and operate to pass the title to the goods into the purchaser." It was there further held: "Even if, in this case, the condition was not waived, still, under the provisions of our Code, the reservation of title was not valid as against a third party without notice; the conditional contract of sale having been neither executed and attested nor recorded as provided by law." In that case the contest was between the vendor and the subsequent innocent mortgagee. In the opinion it was said: "An absolute and unconditional delivery of the goods may waive the reservation of title, and a vendor cannot rely upon his reservation of title as against innocent third persons, where they have been injured by his waiting an unreasonable length of time, after breach of the condition precedent, before taking any steps to reclaim his goods."

It is obvious that the first ruling made in that case necessarily carries with it the implication that, had the vendor taken steps to reclaim his goods within a reasonable time after breach of the condition precedent, there would have been no waiver of his title, even as against an innocent mortgagee to whom the goods may have been mortgaged by the purchaser prior to any move taken by the seller for the reclamation of the goods. The second ruling expressly held that where a purchaser agrees to pay for goods on delivery, either in cash or by note maturing at a given time, such transaction falls within the provisions of Civil Code, § 3318, as to conditional sales. In *Penland v. Cathey*, 110 Ga. 431, 35 S. E. 659, it was said: "The evidence in the record makes a clear case of such a conditional sale of personal property as is contemplated in section 2776 [now 3318] of the Civil Code. The property sold and the price to be paid were ascertained and determined; there was no act of the vendee to be performed before the sale was completed; and the delivery was unconditional." The language, "there was no act of the vendee to be performed before the sale was completed," implies, of course, that, had there been some act of the vendee to be performed before, then the transaction would not have been such a conditional sale of personal property as is contemplated by the section of the Code referred to.

Even if none of the cases to which we have referred is in principle controlling, when applied to the facts of the case now in hand, under its own facts, the plaintiff's title was superior to any rights of the defendant ob-

tained by the trade he made with Humphrey. This is true, for the reason that at the time the defendant traded with Humphrey the contract between the plaintiff and Humphrey rested in fieri, as one of the essential acts to be done by Humphrey in order to complete the contract between him and the plaintiff remained unperformed; that is, the proper execution of his notes for the balance of the purchase price of the mules and the delivery of the notes to the plaintiff. According to the agreement between plaintiff and Humphrey, this most important act was to be done as a part of the contract for the purchase of the mules by Humphrey, before there should be a complete sale; and under the evidence it was clearly the intention of both Humphrey and the plaintiff that this act should be performed by Humphrey at once or presently. The only reason that it was not done at the time the notes were written, according to the undisputed evidence, was that there was no officer before whom the notes could be executed in accordance with the statute. Moreover, they were executed early the next morning and on the same date returned to the plaintiff. There was no delay in the execution and return of the notes, no laches on the part of the plaintiff, and we are decidedly confident that the defendant did not obtain a valid title to the mules by his trade with Humphrey, made during what we may call the making of the contract for the sale of the mules by the plaintiff to Humphrey, although the latter was in possession of the mules under the circumstances stated at the time he traded them to the defendant.

Counsel for plaintiff in error strongly relies upon the case of Harp v. Patapsco Guano Co., 99 Ga. 752, 27 S. E. 181. That case, however, is not binding authority for anything contrary to what we have here ruled, and for two reasons, namely: (1) Only two justices participated in the decision; and (2) whatever was said in the opinion contrary to our ruling here was purely obiter. Moreover, the facts of that case were essentially different from those in the case now in hand. The judgment there under review by this court was the overruling of a certiorari by the judge of the superior court; the case having been originally tried before a jury in a magistrate's court. We make the following quotations from the opinion in that case: "An execution in favor of the Patapsco Guano Company against Gouch, founded on a judgment rendered February 9, 1895, was, on October 15th of that year, levied upon the mule, which was claimed by Harp. * * * From the evidence as set forth in the magistrate's answer, it appears that Gouch bought the mule from Harp in January, 1895, under a parol contract, by the terms of which the title was to remain in Harp until the mule was paid for, and the mule was immediately delivered to Gouch in pursuance of this contract. So far as can be

gathered from the answer to the certiorari [which was not traversed] the trade between Harp and Gouch was complete when the delivery of the mule took place. It does appear, as an independent fact, that Gouch subsequently [May 23, 1895, some four months after his parol contract with Harp] executed and delivered to Harp a promissory note for the purchase money of the mule, reciting that Harp had reserved the title; * * * but the evidence, as reported by the magistrate, contains no intimation that the note and mortgage were given in pursuance of any agreement or stipulation made at the time of the sale, and therefore constituting a part of the original contract. The petition for certiorari does so allege; but, in this respect, it is not verified by the answer. * * * Under the facts set out in the magistrate's answer, which must control our decision in the case, it seems clear that the contract of sale between Harp and Gouch was * * * complete on the day the latter took the mule into his possession, without reference to the subsequent execution and delivery of the note and mortgage. In this view, it is obvious that the parol reservation of title in Harp amounted to nothing, as affecting the rights of third persons." Even on the theory set up in the petition, which was not verified by the answer of the magistrate, there was no written agreement at the time of the transaction between Harp and Gouch that the title to the mule should remain in Harp, and no such agreement was executed for some four months after such transaction, and it does not appear that it was attested by an officer and recorded. In the case at bar, the terms of the contract for sale were reduced to writing, in the form of the two notes, at the time the contract was entered into, and were made an essential part thereof, which notes were to be presently executed, as is necessarily inferable from the undisputed evidence of Spencer.

We have not overlooked the case of Schofield v. Woodward, 137 Ga. 65, 72 S. E. 509, wherein it was held: "Where one sells and delivers personalty to a contractor, and retains title thereto, but before the writing evidencing the contract retaining title in the seller is recorded or executed the contractor uses the personalty in the permanent improvement of the real estate of another, the seller cannot recover such personalty from the latter. This is true, though the contract between the owner of the real estate and the contractor for the improvement of the former's property has not been completed, and though the real estate owner has not paid the contractor the full contract price for the improvement of the property, at the time the contract retaining title to the property in the seller is recorded." This ruling rests upon the principle that the material sold to the contractor was evidently

intended by both parties to the sale to be used in the erection of a building, and, after being so used, it became a part of the realty, and could not be recovered as personalty.

This opinion sufficiently covers the grounds of the motion for new trial and renders it unnecessary to specifically deal with them.

Judgment affirmed. All the Justices concur, except

LUMPKIN, J. (dissenting). I am unable to concur in the decision in this case. By Civil Code, § 3318, it is required that, to render a reservation of title effectual against third persons, the contract must be in writing and properly attested. To hold that a delivery under a sale of personalty could be made by the seller to the purchaser, with an agreement on the part of the latter to go to another town and execute a note and obtain a surety thereon, and that a day's interval could elapse, and the seller could still retain title as against a third party acting in good faith and without notice, would be to destroy the very purpose of the statute. This is not the case of a seller who does not make a complete delivery. He made delivery, not for examination, or the like, or on any agreement that the buyer should hold as a bailee until execution of the written contract, but in pursuance of the contract of sale. The seller merely delivered the property to the purchaser and trusted to the latter to execute and return a proper written contract. If the decision should be rested on the theory of a parol agreement that title should not pass, it would be in the teeth of the statute. If it should be rested on the idea of allowing the purchaser a reasonable time to execute and return the note, what is a reasonable time? Does each case stand on its own facts? Suppose the desired security were out of the way, would the title be in suspense till his return, or a reasonable time to seek to procure his signature? Or if the purchaser should be taken sick, would he have a reasonable time to get well? And in the meantime would the public take the chance, in case of buying the property?

The fact that no security was in fact obtained in this case makes no difference. The purchaser was allowed time in which to endeavor to obtain one. Under the old law, title could be reserved by parol, though the property was delivered to the purchaser. The great frauds and dangers accruing against a purchaser from one clothed with the apparent title caused the enactment of the law embodied in the section of the Code above cited. To hold it subject to parol agreements, or the lapse of a reasonable time after delivery, would soon destroy the purpose of the law. The statute is clear, simple, and imperative. If, instead of following it, a seller delivers possession to

the purchaser and allows the latter to carry the property away, on a promise to execute and return a contract later, he takes the chances. His plain right is not to deliver the property until the statutory contract is executed. Whether the reasoning in *Harp v. Patapsco Guano Co.*, 99 Ga. 752, 27 S. E. 181, was absolutely necessary to the decision or not, it is strong, sound, and not easily answered. See, also, *Brundage v. Camp*, 21 Ill. 330.

The analogy sought to be drawn between this case and those involving sales for cash is not good. The present case rests on a mandatory statute. Where a statute requires a contract to be reduced to writing and executed in a certain way, a parol agreement to do it in that way is not a compliance with the statute. Without our statute, the decision of the majority of the court would be right. With such statute, I think the decision is wrong. An unexecuted writing is no compliance with the statute.

FLEMISTER v. CENTRAL GEORGIA POWER CO.

(Supreme Court of Georgia. Aug. 14, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 302*)—PRESENTATION BELOW—EXCLUSION OF EVIDENCE—MOTION FOR NEW TRIAL.

Under former rulings of this court, where a ground of a motion for a new trial complains that the court refused to allow a witness for the movant to answer a certain question, this does not raise a question which can be considered by the Supreme Court, unless it appears that counsel for the complaining party stated to the court what answer he expected to elicit from the witness; and it is not alone sufficient to state in the motion for a new trial that he in fact expected to prove certain things by the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

2. EVIDENCE (§ 543*)—COMPETENCY OF EXPERT.

Where proceedings were taken by a company for the purpose of condemning land for use as a reservoir in connection with the production and furnishing of electricity to the public, a witness was qualified to be examined as an expert, after testifying that he was in the electric lighting business, and was to some extent acquainted with the operation of an electric plant and the value of water powers, that he had been general manager of a company doing an electric lighting business, having its place of business located on the same river which flowed past the condemnee's land, that he formerly looked after the business, construction, and installation, and was afterward secretary and treasurer of the company, having been connected with it for seven years at the time of the trial, and that he had some familiarity with water powers on the river involved in the case, and had seen the shoals on the land of the condemnee sought to be condemned.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. EVIDENCE (§ 543*) — COMPETENCY OF EXPERT.

A witness who testified that he had charge of a city light and water plant, but that he was not familiar with the use of water power for electric purposes, that he had some idea of the method by which water power was utilized, but he knew very little about hydraulic engineering, and that he had never bought or sold a water power, or constructed a power plant or dam, did not thereby qualify himself to testify as an expert in regard to the value of an alleged water power on land sought to be condemned.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.*]

4. EMINENT DOMAIN (§ 202*) — CONDEMNATION PROCEEDINGS—EVIDENCE.

The question being as to what was the market value of the property sought to be condemned, including therein any value arising from a water power located upon it, there was no error in rejecting the evidence of a witness that, "assuming a market for that power within three miles of this place, a fair value of that undeveloped water power, with the privilege of raising the water five feet, it ought to pay interest on a valuation of \$5,000 or \$5,500."

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541; Dec. Dig. § 202.*]

5. EVIDENCE (§ 363*)—ADMISSIBILITY—BOOKS.

Books of science or art are not admissible in evidence to prove the opinions of experts announced in them.

(a) From the meager statements in the grounds of the motion for a new trial in regard to questions put to the witness on cross-examination touching matters contained in a book, it is not clear whether the rulings of the court are so erroneous and injurious as to require a new trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1516-1519; Dec. Dig. § 363.*]

6. EVIDENCE (§§ 142, 558*)—EXPERTS—CONDEMNATION—VALUE—OTHER PROPERTY.

On the trial of an appeal from the award of assessors, in determining the value of land sought to be condemned, it is competent to introduce evidence of sales of similar property to that in question, made at or near the time of the taking.

(a) Where, in such a case, a witness had testified that the land sought to be condemned was worth from \$100 to \$125 per acre, it was too general a question, on cross-examination, to ask him, without more: "You know where this [designated] place is that sold at \$4 an acre, right down there next to you?"

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423, 2377, 2379; Dec. Dig. §§ 142, 558.*]

7. EMINENT DOMAIN (§ 202*)—PROCEEDINGS—EXCLUSION OF EVIDENCE.

Where a notice of an intention to condemn certain property showed that it included the right to back water on land on which there was a shoal, and, on the trial in the superior court of the appeal from the award of assessors, the condemnor introduced evidence generally as to the value of the land sought to be condemned, but not referring specially to whether the shoal had any value for furnishing water power, and the condemnnee introduced evidence as to general value, and also for the purpose of proving that the shoal was valuable as an undeveloped water power, whereupon the condemnor in rebuttal offered evidence, by depositions previously taken, tending to prove that the shoal had no value for that purpose, there was no error in admitting such evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541; Dec. Dig. § 202.*]

8. TRIAL (§ 240*)—INSTRUCTIONS—REQUESTS.

The elements which are proper for consideration in determining the value of land condemned for use as a reservoir are discussed in *Central Georgia Power Co. v. Mays*, 137 Ga. 120, 72 S. E. 900, *Central Georgia Power Co. v. Preston*, 137 Ga. 348, 72 S. E. 505, and *Central Georgia Power Co. v. Stone*, 139 Ga. 416, 77 S. E. 535.

(a) A request to charge, though based upon a discussion in the opinion of a court of last resort, should not be argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.*]

9. EMINENT DOMAIN (§§ 96, 98, 222*) — INSTRUCTION—SPECIAL DAMAGES.

In a proceeding to condemn land for use as part of a reservoir, if there is evidence tending to show that the property taken would include much of the lowlands and valleys of the condemnnee's farm, and that this would destroy the general unity of the farm, and thus depreciate the market value of the part not taken, this would be a legitimate subject for consideration in determining the amount of consequential damages.

(a) Where there is evidence tending to show that the raising of the level of the water in the river alongside the place of the condemnnee will prevent the drainage of the part of the bottom lands of the condemnnee not taken, and will cause them to be filled with sand, and destroy their value, this furnishes a legitimate subject for consideration by the jury; and a proper requested instruction, based on such evidence, should be given in charge, where the charge as given refers only in general terms to consequential damages to the land not taken, without reference to such specific elements of damages.

(b) The trial court is not required, upon request, to substantially repeat general principles of law already given in charge.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 245-249, 252-255, 562-567; Dec. Dig. §§ 96, 98, 222.*]

10. EMINENT DOMAIN (§§ 95, 222*)—CONDEMNATION PROCEEDINGS—DAMAGES RECOVERABLE—INSTRUCTIONS.

In determining the consequential damages, if any, to parts of the property not taken, the jury are not confined to damages proximately caused by the mere taking; but they should consider any evidence, if there be such, tending to show whether the legitimate use of the property taken, for the purpose for which the condemnation is made, will cause damage to the remainder of the property, lessening its market value.

(a) The charge on the subject of consequential damages was too restricted.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 239-242, 244, 266-268, 273, 562-567; Dec. Dig. §§ 95, 222.*]

11. EMINENT DOMAIN (§ 224*)—NEW TRIAL—GROUND—INVITED ERROR.

In view of the requests to charge tendered by counsel for the condemnnee, including one to the effect that as to the property taken the actual cash market value should be allowed, the charge which the court gave on that subject furnishes no ground for a new trial.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 574-579; Dec. Dig. § 224.*]

12. EMINENT DOMAIN (§ 222*) — CONDEMNATION PROCEEDINGS—INSTRUCTIONS.

In the absence of evidence tending to show that the use of the land condemned and taken as a part of a pond would render the remainder of the land unhealthy and thereby decrease its market value, or of any claim to that effect made before the jury, it would have been better

to omit the precautionary charge given on that subject.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

13. MOTION FOR NEW TRIAL.

None of the other grounds of the motion for a new trial require a reversal.

Error from Superior Court, Newton County; Price Edwards, Judge.

Condemnation proceedings by the Central Georgia Power Company against E. O. Flemister. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster, Howell & Heyman, of Atlanta, for plaintiff in error. Hatcher & Smith, of Macon, and Greene F. Johnson, of Monticello, for defendant in error.

LUMPKIN, J. The Central Georgia Power Company instituted proceedings to condemn land of Mrs. Flemister. From the award of the assessors an appeal was taken. On the trial a verdict was rendered. A motion for a new trial was overruled, and the condemnee excepted.

[1] 1. Under the rulings in *Freeman & Turner News Co. v. Mencken*, 115 Ga. 1017, 42 S. E. 369, *Grant v. Noel*, 118 Ga. 258, 45 S. E. 279, and *Leverett v. Bullard*, 121 Ga. 535, 49 S. E. 591, the errors assigned in the grounds of the amended motion for a new trial, numbered 3 and 16, on the refusal to permit certain witnesses for the movant to answer stated questions, cannot be considered, because it does not appear that it was stated to the court what answers were expected to be given by the witnesses to the questions propounded. It is not improper, however, to say that the question whether a condemnee on appeal must file an answer or plea, denying a statement in the notice to condemn as to the number of acres contained in the entire tract of land which would be consequentially damaged, was not decided in *Central Georgia Power Co. v. Cornwell*, 139 Ga. 1, 76 S. E. 387. There a plea was filed alleging that the tract contained more than the notice stated. A motion was made to strike such allegation. The contention was that the only question which could be considered must relate to the land described in the notice of intention to condemn, and that it could not be set up that the tract contained more acres than such notice alleged. This court held that such contention was unsound.

[2] 2. The witness Flake testified that he was in the electric lighting business, and was to some extent acquainted with the operation of an electric plant and the value of the water powers; that he had been general manager of a company doing an electric lighting business, having its place of business located on the same river as that which flowed past the condemnee's land; that he formerly looked after the business, construction, and installation, and was afterward secretary and treasurer of the company, having been connected with

it for seven years at the time of the trial; and that he had some familiarity with water powers on the river involved in the case, and had seen the shoal on the land of condemnee; sought to be condemned in connection with the hydro-electric works of the condemnor. Under this evidence, he was qualified as an expert to give an opinion as to the availability and market value of the land for use for a water power, based on facts shown to be within his own knowledge, or on facts proved by others and hypothetically stated to him. His cross-examination went rather to his credit than to his competency. *Doster v. Brown*, 25 Ga. 25, 71 Am. Dec. 153; *White v. Clements*, 39 Ga. 232, 242; *Macon Ry. & Light Co. v. Mason*, 123 Ga. 773, 778, 51 S. E. 569.

[3] 3. The witness Harrison did not qualify as an expert in regard to water powers. He testified that he had charge of a city light and water plant, but that he was not familiar with the use of water power for electrical purposes; that he had some idea of the method by which water power was utilized, but he knew very little about hydraulic engineering; and that he never bought or sold water power, or constructed a power plant or dam. He had never seen the property involved in the controversy. He did not show himself to be expert so far as water powers were concerned, but showed that he was not so.

[4] 4. It was complained that a witness was not allowed to testify that, "assuming a market for that power within three miles of this place, a fair value for that undeveloped water power, with the privilege of raising the water five feet, it ought to pay interest on a valuation of \$5,000 or \$5,500." This was properly rejected. The question was not on what valuation the witness thought that, under a certain assumption, a water power should pay interest, but what was the market value of the property taken.

[5] 5. It has been held that books of science or art are not admissible in evidence to prove the opinions of experts announced in them. *Johnston v. Richmond & Danville R. Co.*, 95 Ga. 685, 22 S. E. 694; *Cook v. Coffey*, 103 Ga. 384, 30 S. E. 27; *Boswell v. State*, 114 Ga. 40, 43, 39 S. E. 397. How far a work of science may be used in cross-examining a witness as to the source of his knowledge on a given subject, and in determining whether, if he relies on a certain book as authority, he correctly states it, is not now before us. Certain tables, such as those of life expectancy, are admissible. We cannot be quite sure, from the meager statements of the grounds of the motion for a new trial in regard to this matter, whether or not the rulings of the court were erroneous and so injurious as to require a new trial.

[6] 6. On a question in regard to the value of land sought to be condemned, it is competent to introduce evidence of sales of proper-

ty similar to that in question, made at or near the time of the taking. The exact limit either of similarity or difference, or of nearness or remoteness in point of time, is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case. It is to be considered with reference to throwing light on the issue, and not as a mere method of raising a legal puzzle. 2 Lewis, Em. Dom. (3d Ed.) § 662; *City of Columbus v. McDaniel*, 117 Ga. 823, 45 S. E. 59. Where a witness had testified that the land sought to be condemned was worth \$100 to \$125 per acre, it was too general a question, though on cross-examination, to ask him: "You know where this *Lumus* place is that sold at \$4 an acre, right down there next to you?" This assumed the location and sale at a stated price, without regard to time, and left to the witness only to answer "Yes," if he knew the place. Had he testified that he never knew of any land in that vicinity being sold at such a price, or at less than a certain price, it would have been competent, on cross-examination, to inquire as to a particular sale in the neighborhood at a less price, or his knowledge of values could be tested by appropriate questions; but, as the case stood, the question allowed to be asked and answered was too sweeping even for cross-examination.

[7] 7. The notice of condemnation showed that it included the right to back water on certain land, on which there was a shoal. On the trial of the appeal, the condemnor introduced evidence as to the value of the land sought to be condemned, but which made no special reference to the question whether the shoal had any special value for furnishing water power. The condemnnee introduced evidence as to general value, and also tending to prove that the shoal was valuable as an undeveloped water power. In rebuttal, the condemnor offered evidence, by depositions previously taken, tending to show that the shoal had no value for that purpose. This was admitted over objection, based on the ground that the evidence should have been offered in chief and not in rebuttal. In this ruling there was no error. *Southern Railway Co. v. Clay*, 130 Ga. 563 (4), 61 S. E. 226. The statement of the presiding judge to the effect that he was inclined to sustain the objection, but, as he might be affected by a desire to get through, he thought it best to overrule the objection, was not a very good reason; but the ruling was not a very bad ruling, certainly not so bad as to furnish any ground for a reversal.

[8] 8. The elements which are for consideration in determining the value of land condemned have so recently been considered in *Central Georgia Power Co. v. Mays*, 137 Ga. 120, 72 S. E. 900, *Central Georgia Power Co. v. Preston*, 137 Ga. 348, 73 S. E. 505, and *Central Georgia Power Co. v. Stone*, 139 Ga. 416, 77 S. E. 565, that it would seem to be

unnecessary to repeat what was there said. See, also, *Harrison v. Young*, 9 Ga. 359. The request to charge embodied in the twenty-fifth ground was generally in the right direction, and was doubtless taken largely from *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. It is, however, argumentative in form, which may be meritorious in an opinion of a court of last resort, where a proposition is being supported by reason and authority, but is not desirable when a trial judge is charging a jury, and, under the practice in this state, may amount to a positive error.

[9] 9. The request to charge set out in the twenty-seventh ground of the motion for a new trial called attention to the fact that the condemnnee contended that the property taken would include much of the lowlands and valleys of her farm, and that this would destroy the general unity of the farm, and thus depreciate the market value of the part not taken. The request to charge set out in the twenty-eighth ground sought to call attention of the jury to the contention of the condemnnee that the raising of the water in the river alongside her place would prevent the drainage of the part of her bottom lands not taken, and would cause them to be filled with sand, and would destroy their value. These were legitimate subjects for the consideration of the jury, and the charge in general terms as to consequential damages to the lands not taken did not render the requests valueless. *Lewis, Em. Dom.* (3d Ed.) § 710; *Savannah, etc., Ry. Co. v. Williams*, 133 Ga. 679, 66 S. E. 942.

The requests embodied in the twenty-sixth and twenty-ninth grounds of the motion were substantial repetitions of general principles contained in the charge; and the law does not require emphasis by repetition, on request.

[10] 10. Where a part of a tract of land is condemned for use as a reservoir by a hydro-electric company, the owner is entitled to be paid the value of the land taken; and if there are consequential damages to the balance of the land, they should also be allowed. In determining the amount of the latter, they include, not only damages directly arising from the taking of a part of the land, but also from the legitimate use thereof for the purpose for which it is taken, if the evidence shows that such use will cause damage. Consequential benefits, if any, can be set up to reduce consequential damages, or to prevent their allowance. The charge on this subject was too restricted, in repeating several times that the consequential damages recoverable were only such as were proximately caused by the taking.

[11] 11. We cannot say that the charges complained of in the thirtieth, thirty-first, and thirty-second grounds of the motion furnish any ground for reversal. Counsel conceded in requests to charge that the

amount to be allowed for the market value of the property taken should be on a cash basis; and one court at least has declared that such is the law. *Brown v. Calumet River Ry. Co.*, 125 Ill. 600, 18 N. E. 283. The decision in *Cincinnati & Georgia Railroad v. Mims*, 71 Ga. 240 (3), did not hold that the market value to be determined is not on a cash basis, but simply dealt with the form of the question put to a witness.

[12] 12. As there was no evidence of sickness produced by the use of the land taken for a pond, and it does not appear that any claim was made before the jury for damages on that account, it would have been better not to make the precautionary charge referring to such sickness. If there had been evidence that the use of the land taken for a pond affected the rest of the place for a residence, and thus diminished its market value, that might have been a circumstance for consideration by the jury. Had there been such evidence, involving the rendering of the place unhealthy, and thus reducing its market value, the court might well have cautioned the jury that no recovery could be had on account of any particular sickness, but that the effect of the pond on the market value of the rest of the land, if any, could be considered.

[13] 13. None of the other grounds of the motion for a new trial show error for the reasons assigned in them; nor would they require a reversal.

Judgment reversed. All the Justices concur.

BROWN et al. v. SOUTHERN RY. CO. et al.
(Supreme Court of Georgia. Aug. 14, 1913.)

(Syllabus by the Court.)

1. ASSIGNMENTS (§ 50*)—EQUITABLE ASSIGNMENTS.

The following order was issued to cover the price of certain cross-ties furnished to the Wooley Tie Company, and by that company sold to the Southern Railway Company: "Atlanta, Ga., August 25, 1910. Southern Railway Company. Mr. W. F. H. Finke, Tie and Timber Agt., Southern Rwy. Co.—Dear Sir: Please prepare voucher favor Mr. M. J. Head, of Tallapoosa, Ga., for nine hundred thirty-six and 24/100 dollars, in payment following tie accounts, deducting the amount from amount you owe us for cross-ties. O. H. Brown, \$395.23; G. W. & J. C. Tumlin, \$419.61; Mandeville Mills, \$54.20; Kilgore, Sewell & Co., \$31.80; Sewell Bros., \$20.00; I. N. Mitnick, \$15.40—\$936.24, and oblige. Yours very truly, Wooley Tie Company, F. L. Wooley." At the time the order was delivered the Southern Railway Company owed the Wooley Tie Company for cross-ties an amount exceeding that specified in the order. M. J. Head was attorney at law for the persons named in the order as owners of the tie accounts. *Held*, while the written order in question was not an assignment of the legal title to that portion of the fund therein specified, it was an equitable assignment. *Fidelity Co. v. Exchange Bank*, 100 Ga. 619, 28 S. E. 393; *Rivers v. Wright*, 117 Ga. 81, 43

S. E. 499; *King v. Central Ry. Co.*, 135 Ga. 225, 69 S. E. 113, Ann. Cas. 1912A, 672; 2 Am. & Eng. Enc. Law, 1069-1070, and cases cited.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50.*]

2. ASSIGNMENTS (§ 50*)—EQUITABLE ASSIGNMENT—RIGHT TO ENFORCE.

In an equitable proceeding instituted by the Southern Railway Company against the persons in whose favor the order was issued, and numerous other persons, in which they were required to interplead for the purpose of determining their rights in the fund held by the Southern Railway Company as due to the Wooley Tie Company, the order was enforceable as an equitable assignment. *Rivers v. Wright*, supra.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50.*]

3. ASSIGNMENTS (§ 50*)—EQUITABLE ASSIGNMENTS.

On exception to the auditor's report, the judge erred in holding that the order was not an equitable assignment, and in directing a verdict against the auditor's report relative to this matter.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50.*]

Error from Superior Court, Gwinnett County; B. F. Walker, Judge.

Equitable action by the Southern Railway Company and others against O. H. Brown and others. Judgment for plaintiffs, and defendants bring error. Reversed.

M. J. Head, of Tallapoosa, for plaintiffs in error. John J. & Roy M. Strickland, of Athens, E. O. Dobbs, of Buford, D. M. Byrd, J. A. Perry, I. L. Oakes, and O. A. Nix, all of Lawrenceville, Ed. Quillian and Howard Thompson, both of Gainesville, W. W. Stark, of Commerce, and Oscar Brown, of Homer, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

FISH, O. J., and LUMPKIN, J. (concurring specially). The Southern Railway Company filed an equitable petition, which was substantially a bill of interpleader, except that it prayed a decree that it only owed its original creditor, and also prayed for general relief. The auditor found in favor of the plaintiffs in error. So far as the present record shows, no party filed exceptions to such report, except the Southern Railway Company, which admitted owing the indebtedness, and which had filed an equitable petition calling the various claimants in to contest over it. There is no brief of evidence in the record, and the exceptions of fact cannot be noticed. The exceptions of law merely state in general terms that the auditor erred in finding that there was an equitable assignment, and also in finding that the railway owed nobody but the original debtor. No specific reason is stated why the instrument set out in the headnotes by the majority of the court did not constitute an equitable assignment. The only reason urged before this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court was that it did not sufficiently identify the fund out of which payment was made to operate as such. We concur in holding that it did sufficiently describe or specify the fund, and that it was not amenable to that objection. Whether or not contestants for this fund might have had any valid grounds for exception to the auditor's report is immaterial. As against the Southern Railway Company, which owes the money, and after having called the various parties into equity to contest over the ownership of the fund, now attacks the instrument under which the plaintiffs in error claim as an equitable assignment, it is good.

We concur in the judgment of reversal for these reasons.

MACON, D. & S. R. CO. v. ANCHORS.
(Supreme Court of Georgia. Aug. 14, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 163*)—APPEAL AND ERROR (§§ 222, 270*)—PRESENTATION FOR REVIEW—PROCEEDINGS TO PROCURE NEW TRIAL—ORDERS.

Considering the order passed by the judge below in overruling the motion for a new trial, and the supplementary order or opinion filed with the record, it does not appear that the judge failed to exercise the discretion vested in him by law in passing upon the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330-332; Dec. Dig. § 163; * Appeal and Error, Cent. Dig. §§ 1153, 1156, 1333-1336, 1609, 1610, 1759, 1760, 1763; Dec. Dig. §§ 222, 270.*]

2. MASTER AND SERVANT (§ 270*)—TRIAL (§ 85*)—RECEPTION OF EVIDENCE—SUFFICIENCY OF EVIDENCE—INJURY TO RAILROAD EMPLOYEE.

A part of the testimony of each of the witnesses whose testimony was objected to on the ground of irrelevancy tended to some extent to illustrate the issue as to structural defects in the car which was derailed, and in the derailment of which the plaintiff's husband was killed, or in the track at the place where the derailment occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.* Trial, Cent. Dig. §§ 222, 223-225; Dec. Dig. § 85.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERRORS—INJURY TO EMPLOYEE.

In view of the entire charge, the inaccuracies in the excerpt complained of do not require the grant of a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

Error from Superior Court, Bibb County; N. E. Harris, Judge.

Action by Fanny Anchors against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Fanny Anchors brought suit against the railroad company for damages from the homicide of her husband, Samuel Anchors, who was a section foreman for the railroad. While in charge of a hand car carrying a gang

of workmen to their work on the 31st of January, 1911, the car was derailed, and Anchors received injuries which resulted in his death. Among other allegations of negligence, it was averred that the hand car was defective in certain specified particulars, and that the track was defective where the derailment occurred. The material allegations of the petition were denied in the answer. The trial resulted in a verdict for the plaintiff. The defendant's motion for a new trial was overruled, and exception was taken.

In one ground of the motion complaint is made of the admission of the following testimony of the witness W. S. Anchors: "I saw a hand car at Pike's Peak on Sunday, February 28th, where I went with Mr. Maynard and Mr. Defore, on information from Mr. Langston as to where the car was. I found a red lever car; lost motion and lateral motion; lateral motion three-quarters of an inch. I measured the car and distance between the wheel. The journal boxes had been bolted for some time underneath the beam. I measured on both sides of the car the distance from the center of the front and back. They did not measure the same. The journal boxes on that car are to hold the wheel, journal, and axles. I noticed lateral motion in the car. It would swing, and the wheels on the left hand were three-quarters of an inch closer than they were on the right. I noticed a beam broken on the right-hand side. The bolt was also out. It appeared to be an old break. The bolt was gone from the oil cellars. I saw no bolt on the car, no new hole bored in the journal boxes, no signs of new repairs, nor new iron in the car, nor in the journal boxes. The car was painted, and no paint rubbed off. If new holes had been bored for the journal boxes, I would have known it. I would have known if the journal boxes had been moved from one place to another. The purpose of the journal box was to hold the axle. The journal box was closer on the left than on the right; bolted together that way. The journal boxes had not been moved." This testimony was admitted, over the objection that it was irrelevant, as showing what was the condition of the car at the time of the injury.

The following testimony of the witness Walter Defore was admitted over a similar objection: "I went to Pike's Peak, some time about the first of the year, with Mr. Maynard and Mr. Anchors, and saw a hand car. I have been a machinist, having had 13 years' experience. I examined that car down there. We measured the distance from the axle with a small reed, and the axles at one end about five-eighths of an inch wider than the other. My recollection is the left side was the short side; I am not sure. It was an accurate measurement. Being shorter on one side than the other means the wheels don't tram. The journal boxes are small

cases of iron, boxed, inverted, and bolted under the beam of the sill, which has Babbitt metal, and the journal and the axles rotating on the boxes. These wheels and axles did not have an appearance of having been moved, as far as I saw. They were bolted when I saw them. They could not be brought closer together, except by striking a bolt, or bending the bolt, or a very great bend in the center of the axle. I mean, spring the axle; that answer is taking into consideration the amount of the wheels out of tram. If the axles were sprained five-eighths of an inch, I don't think the car would run, if it was sprung enough to throw the axle five-eighths of an inch out of tram. The hole is usually one-sixteenth of an inch larger than the bolt. The boxes had no appearance of having been moved on the sill; if not, necessarily they must have been bolted out of the tram. This car on a straight track, out of tram three-quarters of an inch, would cause the flanges to tend to mount the rail. If the car were going in this direction, and the rails come together like that, and the car ran over them, there would be more tendency to mount the rail in a joint of that character, if the mismatched rail was on the side of which the flange of the wheel was hugging the rail. If the flange mounted the rail, it would cause the car to run off the track."

Substantially the same objection was urged to the following testimony of the witness W. R. Goodyear: "I had occasion to go to Fitzpatrick, about March or April of last year, with Mr. Jones, Mr. Anchors, and Mr. Maynard, and examine the hand car, which we found out of tram three-quarters of an inch, and a half inch, and three-quarters lateral between the hub of the wheel and box, some of the bolts out of the oil cellars, and one of the beams broken. We examined the journal box, and I do not remember that there was any appearance of its having been recently moved. They were bolted on the frame of the car. The wheel was out of tram three-quarters of an inch. In reference to the bolting of the journal boxes, they were not put on in line. This car running on the track this side of Swift Creek three quarters of an inch out of tram, from four to six miles an hour, in reference to the flanges on the other side, would have the effect of running it to the rail. If there was a bad joint in the track, it would be more than apt to mount; more so than if it was not out of plumb. I was present at Swift Creek when Mr. Jones made the measurements."

Similar objection was urged to the testimony of B. Jones as follows: "My occupation is railroading as track foreman, of 21 years and 7 months experience with Southern, Central, A. B. & A., and A. & P. I have worked for the Macon, Dublin & Savannah Railroad, and I, with Mr. Anchors and Mr. Maynard, examined hand car on the 5th of March, 1911, at Fitzpatrick. I found the car to be out of line; a difference in the sides of

the measurement. One side of the wheels were not on the square on the frame. There was about three-quarters of an inch difference between the two sides, and something like three-quarters of an inch loose motion in the frame. It was a mighty shakelity car to be used. The speed wheel was loose on the axle; it didn't run true; the wheels on one side were nearer the gauge than the other side and lateral. The running gear doesn't come straight together; it is not square; and I found some bolts out on the seat of the car. There was a beam broken on the car. I saw no evidence of recent repairs on the car. The car is held in place by some small bolts and cups underneath, that come up through the frame. Where I was, we had to have cars run plumb. I could not look at that car and see the defect."

Like objection was urged to the following testimony of the same witness: "I saw the track where the car was derailed on the Macon, Dublin & Savannah Railroad, on the other side of a branch down by Fitzpatrick. I saw where a car ran off on the track. I have passed Swift Creek station several times. Cannot say how far this was from Swift Creek. Mr. Goodyear, Anchors, and yourself were with me. I saw where there had been a car off the cross-ties, and 45 or 50 feet west the track was out of gauge. Working standard track is 4½ feet, and that was 4 feet 9, because I measured it with a rule. It looked like the car struck the ground not very far from the place I saw a mismatched joint; that is, the rails were not evenly spaced. The southern rail went out. There was a high place on the rail that went over the trestle near there, which would throw one side of the car up and the other down. On other railroads where I have worked, it would have been considered unsafe to use a car in that condition."

In another ground of the motion the following charge of the court was complained of: "If you should believe in this case that the railroad company have not exercised that degree of diligence I have charged you, either in reference to the car furnished, or with reference to the condition of the track, and that that constitutes negligence upon their part, then the plaintiff would be entitled to recover, provided that he was not killed, and his death was not brought about by circumstances which he could have avoided, in which he could have avoided the consequences of the defendant's negligence." It was contended that this charge is error, "because it incorrectly stated the law and was inapplicable to the facts of the case, and because it was confusing by referring to the plaintiff as being not killed and to his death in the same sentence."

Minter Wimberly, Jesse Harris, and Chas. Akerman, all of Macon, for plaintiff in error. Napier, Maynard & Plunkett, of Macon, for defendant in error.

BECK, J. (after stating the facts as above).

[1] 1. In the brief of counsel for the plaintiff in error it is contended that the judge below "did not approve the finding of the jury, and failed to exercise the discretion which the law contemplates he should exercise in overruling a motion for a new trial, and that where a first application for a new trial is made on discretionary grounds, the trial judge must exercise his discretion in approval or disapproval of the verdict; that the order overruling the motion for a new trial in this case shows on its face that the judge did not exercise the discretion which the law vested in him." The failure of the judge below to exercise his discretion was not averred in the bill of exceptions, nor made the subject of a special exception, and is urged for the first time in the brief and argument of counsel before this court. But under the ruling made in the case of *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71, 1 Ann. Cas. 606, it is the duty of this court to pass upon the question thus raised.

Upon hearing the motion the judge passed the following order: "June 4, 1912. The within motion for new trial and the amended motion for new trial coming on to be heard, and the original and the amended motion are hereby overruled on all grounds therein stated. The motion was held up after argument till this day by the court. N. E. Harris, Judge S. C. M. C." Following the order just quoted, overruling the motion for a new trial, we find in the record the following: "*Anchors v. M. D. & S. R. R. Co.* Not having presided on the trial of this case, I have not felt that my discretion is quite as broad as that of the trial judge. I did not see the witnesses, nor hear the evidence delivered. While I think the verdict may be against the weight of the evidence to sustain it, the jury had the right to believe the plaintiff's evidence, and I refuse to disturb the verdict. N. E. Harris, J. S. C. M. C." Immediately following this last-recited part of the record appears the following entry: "Filed in office, June 13, 1912. R. F. Hunter, Dep. Clerk."

Premitting all discussion as to whether or not the supplementary order or opinion filed by the court below as a part of the record in a case should be considered as a part of the order of the judge overruling the motion for a new trial, we are of the opinion that, when that order and the original order are considered together, it does not appear that the judge failed to exercise the discretion vested in him by law in passing upon the motion for a new trial. A very similar question to the one presented here was considered and discussed in the case of *Martin v. Bank of Leesburg*, 137 Ga. 290, 73 S. E. 387.

[2] 2. The testimony of certain witnesses, and the objection raised thereby by the movant at the time of the trial, is set out in the

statement of facts. Where testimony is objected to in bulk, and upon examination it appears that a part of it was admissible, the order of the court overruling the objection will not be reversed, if any part of the evidence was not open to the objection made. In the testimony of each of the witnesses there is some evidence from which the jury might have found that there were structural defects in the car which was derailed, or in the track at the place where the derailment occurred; and such evidence tending to show these structural defects was admissible, though the witnesses did not see the car or the track until 30 days or more after the occurrence which it is alleged resulted in the death of the plaintiff's husband. *Southern Ry. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

[3] 3. While the excerpt from the charge which is excepted to by plaintiff in error was not entirely faultless and accurate, we do not think, after reading the entire charge, that it is cause for a new trial. In the first place, we do not think the jury would have been at all confused by "referring to the plaintiff as being not killed and to his death in the same sentence." The charge as a whole clearly and fully states the case, and there cannot be the slightest doubt that the jury distinctly understood that the plaintiff was the wife of the decedent, and was suing to recover damages for his death, alleged to have been caused by certain acts of negligence on the part of the defendant. And while in the excerpt from the charge quoted the law would have been more completely stated as applicable to the hypothesis contained in the first part of the excerpt, in reference to the negligence of the defendant company, if the court had added that before the plaintiff could recover it should appear that the death of the plaintiff's husband was caused by the negligence of the defendant, or it should be made to appear that the negligence was the proximate cause of the death of the plaintiff's husband, yet such an omission as this is not cause for a new trial, where it is disclosed that in a preceding part of the charge the court made the right of the plaintiff to recover dependent upon a showing that the death of her husband was the result of the negligence of the defendant, and had properly instructed them that the plaintiff could not recover if the decedent had been "killed by his own carelessness, amounting to a failure to exercise ordinary care," nor, although there was negligence upon the part of the defendant company, if the decedent could "by the exercise of ordinary care have avoided the consequences of the negligence of the defendant company."

Judgment affirmed. All the Justices concur.

WESTERN UNION TELEGRAPH CO. v. FITTS. (No. 4,877.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES (§ 54*)—CLAIM FOR DAMAGES—WAIVER OF CONDITIONS.

The evidence was sufficient to show a waiver of the condition of the contract, printed upon the telegraph blank, which required the claim for damages to be presented in writing. The testimony that the telegraph company received an oral demand, and, within a week after the message was sent, acted upon it and investigated the claim, is undisputed.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. § 54.*]

2. TELEGRAPHS AND TELEPHONES (§ 54*)—CLAIM FOR DAMAGES—WAIVER OF WRITTEN DEMAND.

"Where a rule of a foreign telegraph company doing business in Georgia required persons damaged by failure to properly transmit messages to present their claim for damage within 60 days thereafter to some agent of the company authorized to exercise its corporate powers in relation to the subject-matter of the claim, a presentation of such a claim to the resident agent who made the contract and transmitted the message was sufficient." *Western Union Telegraph Company v. Blanchard*, 68 Ga. 300 (4), 45 Am. Rep. 480. And though the agent is not bound to recognize an oral demand, if he does so, making no objection upon the ground that it is not in writing, a waiver of the written demand will result.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. § 54.*]

3. TRIAL (§ 136*)—WAIVER OF KNOWN RIGHT—QUESTION FOR JURY.

Whether a known right was or was not waived is a question of fact, to be determined by the jury on consideration of all of the proofs submitted upon that point.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. § 136.*]

4. TELEGRAPHS AND TELEPHONES (§ 54*)—CLAIM FOR DAMAGES—WAIVER OF WRITTEN DEMAND—EFFECT.

Where, within 60 days after a message was filed with a telegraph company for transmission, the sender presented to the company's agent, with whom the message was filed, an oral claim for damages because of its non-transmission or delay, and from the action of the company upon the oral demand a waiver of the requirement that the claim be presented in writing within 60 days must be implied, the company was not restored to its original right to insist upon a written claim for damages merely because, after the expiration of the 60 days, the sender's attorney transmitted to the telegraph company a claim in writing, in which the damages were specifically set forth and enumerated.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. § 54.*]

5. SUFFICIENCY OF EVIDENCE.

The evidence authorized the finding of the jury, and there was no error in overruling the certiorari.

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by J. W. Fitts against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

S. Holderness, of Carrollton, and Dorsey, Brewster, Howell & Heyman, of Atlanta, for plaintiff in error. C. E. Roop, of Carrollton, for defendant in error.

RUSSELL, J. Fitts sued the Western Union Telegraph Company in a justice's court for damages on account of the nondelivery of a message which he had delivered to the agent of that company at Carrollton, Ga., to be transmitted to one Cobb at Brookhaven, Miss. Upon the trial the jury returned a verdict in favor of the plaintiff. The defendant sued out a certiorari, which was overruled by the judge of the superior court. There are various assignments of error in relation to the judgment of the trial court, but all of them were abandoned upon the hearing in the superior court except two: (1) That the verdict is contrary to the evidence and without evidence to support it; and (2) that the verdict is contrary to evidence, in that it was not shown that within 60 days from the date when the message was filed for transmission the plaintiff had presented in writing his claim for damages.

We shall consider these propositions in reverse order, because unless the requisite notice of the claim was given in writing, or the requirement that the claim should be in writing was waived, the plaintiff would have had no right of action, and it would not be necessary to determine whether the verdict was authorized upon other grounds. A condition upon the blank, upon which the plaintiff's message was presented for transmission, is as follows: "(6) The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message was filed with the company for transmission." In *Hill v. Western Union Telegraph Company*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166, it was held that a like stipulation was both reasonable and obligatory, and that when the plaintiff used for his message the blank containing the stipulation he thereby agreed to it and it became a part of his contract. See, also, *Western Union Telegraph Company v. James*, 90 Ga. 254, 16 S. E. 83; *Stamey v. Western Union Telegraph Company*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *Western Union Telegraph Company v. Waxlebaum*, 113 Ga. 1017, 39 S. E. 443, 58 L. R. A. 741. It was admitted upon the trial that no written claim was presented within the 60 days stipulated in the contract. The only question is whether any agent of the company waived the requirement that the claim should be in writing, and, if so, whether the agent was authorized to bind the company by this waiver.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

[1-3] We do not concur in the views of the learned counsel for the plaintiff in error that it was held in the Hill Case, supra, that an agent of the telegraph company cannot waive the time and accept a notice of a claim for damages after the expiration of 60 days. On the contrary, we think that if the agent is authorized to waive at all, and to bind his principal by the waiver, the time within which the claim for damage may be presented can as well be waived as the mode of its presentation. There is nothing to the contrary in the ruling of Chief Justice Bleckley in the Hill Case. He was dealing with a case like the one now before us, in which the claim for damages, though presented within 60 days, was not in writing; but the question of a waiver of the time was not before the court, and the learned Chief Justice did not rule upon this point. In discussing the case he merely alludes (in confining his ruling to the proper limits) to the fact that a waiver of the time was not involved. After stating that the "telegraph company was entitled to have a claim for damages presented in writing within 60 days after the message was sent," he proceeded to say: "We think that right could be waived, and that the evidence in the record tended to prove that it was waived, not indeed as to the time, but as to the mode of making the demand."

The waiver insisted upon in the case at bar must, for the same reason, be confined to the "mode of making the demand," because there is in the record no evidence of a waiver of the condition that the demand should be presented within 60 days. The evidence shows that within a week after the message was filed for transmission Fitts orally presented his claim for damages to the operator of the company with whom he had filed the message. The operator accepted this as a sufficient demand for damages, and so treated it. Without requiring that the claim should be made in writing, he took the matter of adjusting the claim up with the superintendent of the company, and repeatedly informed Fitts that the claim was being investigated, and was only delayed on account of change of superintendents of the company. The first time that the plaintiff made a claim for damages, the agent of the company offered to return to the plaintiff the amount he had paid for sending the message; but, as he could not pay more than this, he stated that he would at once take the matter up with the superintendent. Upon several occasions, about every week thereafter, the plaintiff approached the agent of the telegraph company and inquired if he had received instructions from the superintendent. And while he was told that the agent as yet received no instructions, he was informed each time that the matter was up for investigation, and that as soon as the investigation was completed he would notify the plaintiff. According to the plaintiff's testimony, the agent several times informed

him that his claim was being investigated, and that the only cause of the delay was the change in superintendents. It appears from the record that the agent of the company had in fact informed the superintendent, by letter, of the plaintiff's claim for damages. We think that under this evidence the jury was clearly authorized to infer a waiver of the requirement that the claim for damages should be put in writing.

The local agent could waive the stipulation as to writing. The Supreme Court had ruled in *Western Union Telegraph Company v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, that the demand for damages could be made upon the agent of the company on duty at the place from which the telegram was sent; and this ruling was reiterated in *Hill v. Western Union Telegraph Co.*, supra. Chief Justice Bleckley, in the Hill Case, supra, said: "The agent was not bound to recognize an oral demand. But, if he did so, making no objection to it on the ground that it was not in writing, we think it was sufficient." Counsel for the plaintiff in error attempted to draw a distinction between the Hill Case and the case at bar, because in the Hill Case there was, after the investigation, a refusal to pay. The fact that the plaintiff in the present case was compelled to bring suit upon the claim for damages now before us would seem to indicate that there was in this case a refusal to pay. But whether there was or not is immaterial. If an agent upon whom the claim could properly be made recognized the oral demand as sufficient, and followed this up by informing his superintendent of the claim, so that the superintendent could or did make an investigation into the merits of the claim, with a full understanding of the nature of the claim upon which it was insisted that the company was liable, a waiver of the condition that the claim should be in writing might be implied. The officers properly charged with the settlement of claims had received notice of this particular claim, and all had been accomplished by the oral notice that could have obtained in case the claim had been put in writing.

The assumption that a waiver results only in case the company refuses to pay the claim is wholly foreign to the rule of reason upon which the waiver rests. The purpose of having the claim in writing is to bring notice to the proper officers of the company of the existence of the claim, so that they can investigate and determine whether they will pay the claim or resist its collection. Proof of a refusal to pay a claim is admissible as a circumstance from which knowledge of the claim may be implied; but if it appears aliunde in any case that a telegraph company accepted notice of a claim for damages which was not in writing, and (thereby waiving written notice) actually investigated the merits of the claim, the question of a re-

fusal to pay, or as to the company's reason for refusing the claim might be irrelevant. Proof that the telegraph company offered to pay a part of a particular claim would as much imply a waiver of the requirement that the claim should be presented in writing as would proof of refusal to pay at all; but even if such testimony should be objectionable, as being evidence of a compromise, still the fact that the company had investigated the claim after oral notice might authorize the inference that the stipulation that notice of the claim should be in writing had been waived. As was held in *Carter v. Southern Railway Company*, 3 Ga. App. 42, 59 S. E. 212: "The purpose of the written notice is to advise the carrier and inform him of the nature of the demand against him. Such a stipulation of the contract may be waived; and if the carrier's agent, without objection to the form of the notice, receives and acts upon an oral notice, a waiver as to the requirement of its being in writing results."

The facts of the present case distinguish it from those in *Postal Telegraph Cable Company v. Moss*, 5 Ga. App. 503, 63 S. E. 590, cited by counsel. In that case the claim for damages, if made at all, was in writing; but in the telegram sent by Moss & Co. for that purpose the statement was made that the senders of the message would later make claim for the loss occasioned them. Furthermore, there was evidence that the plaintiffs in that case daily transmitted numerous telegrams over the lines of the defendant company. The message, which the plaintiffs in that case later insisted was a claim for damages, itself referred to several transactions and to more than one message, which was not identified otherwise than as being the occasion of loss. It was impossible for the telegraph company to know upon which one of these messages the claim for damages was based. Upon such a state of facts this court held that the claim presented, whether in writing or orally (if the writing be waived), should not only identify the message, but should also set forth the nature and extent of the plaintiff's demand so clearly as to enable the telegraph company to ascertain whether it is liable and the extent of its liability. No point is made in the present case upon these features of the notice. So far as appears from the record, the plaintiff has never sent but one message; and it is not disputed that he stated to the agent the nature and amount of his claim just as fully as it is set forth in the declaration.

[4, 5] The other points raised in the record are ruled in the headnotes. The plaintiff established the amount of his damages as returned by the jury; and there was no error in overruling the certiorari. The insistence that under the terms of the contract no agent of the telegraph company could waive

the stipulation as to the written presentation of the claim for damages was not sufficiently specifically presented, in the assignments of error in the petition for certiorari, to call for an adjudication upon the point in the lower court, and therefore cannot be considered here.

Judgment affirmed.

LUMPKIN v. CITY OF ROME. (No. 4,894.)
(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 185*)—POLICE—AUTHORITY TO REMOVE.

By section 11 of the act approved August 11, 1908 (Acts 1908, p. 909), the mayor and council of Rome were given plenary authority over the police force of the city, with power to appoint policemen and to fix salaries and terms of office, and to remove at pleasure any policeman whose services were in their judgment no longer needed by the city. By virtue of the provisions of this act the mayor and council had authority to remove a policeman previously appointed for a fixed term by the board of police commissioners under authority of the act of August 20, 1906 (Acts 1906, p. 1022).

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 492-509; Dec. Dig. § 185.*]

2. MUNICIPAL CORPORATIONS (§ 184*)—POLICE—AUTHORITY TO REMOVE.

The amendatory act of 1908 (Acts 1908, p. 904) did not have the effect of reviving section 77 of the act of 1883 (Acts 1883, p. 443), creating a new charter for the city of Rome, because the broad provisions of the amendatory act are inconsistent with the limitation of power prescribed in section 77 of the original act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 482-486, 488-491; Dec. Dig. § 184.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by H. B. Lumpkin against the City of Rome. Judgment for defendant, and plaintiff brings error. Affirmed.

Maddox & Doyal, of Rome, for plaintiff in error. Max Meyerhardt, of Rome, for defendant in error.

POTTLE, J. This was an action against the city of Rome to recover a sum alleged to be due for salary of the plaintiff as a policeman for the year 1908. On April 14, 1908, the plaintiff and 14 others were elected by the board of police commissioners of Rome as policemen of that city, but the term of office was not fixed by the board. The salary of a policeman had been fixed by the mayor and council at \$720 per annum. The plaintiff entered upon the discharge of his duties on April 14, 1908, and served as policeman until August 7, 1908. On that date the mayor and council of the city met and adopted a resolution reducing the number of policemen from 15 to 11, and 11 policemen were elected. The plaintiff was not elected. On August 12, 1908, at another meeting of

the mayor and council, the action of August 7th was ratified and confirmed. The plaintiff sued for salary from September 1, 1908, to April 1, 1909, at \$60 per month. The trial judge sustained a motion for a nonsuit, and the plaintiff excepted.

[1] The evidence showed that no charges had been preferred against the plaintiff, and that he was not dismissed for inefficiency or misconduct after a trial in accordance with the rules of the board of police commissioners or otherwise. The question of the right of the mayor and council to dismiss the plaintiff summarily without cause depends upon the construction of the city's charter and certain amendments thereto. By section 77 of the act approved September 25, 1883, creating a new charter for the city of Rome, it was provided: "The police force of the city of Rome shall consist of as many officers and men as the mayor and council may determine, and shall be elected at the same time the clerk is elected. They shall take an oath to faithfully and impartially discharge the duties imposed upon them by the laws and the city ordinances. Their several terms of office shall be two years, or until their successors are elected and qualified, unless removed for cause to be judged by the mayor and council." By the act of August 20, 1906 (Acts 1906, p. 1014), the charter of Rome was amended. By the amendment a board of police commissioners was created. The authority of the board over the police of the city is set forth in section 24 of the amendment, which is as follows: "On the first Monday in April of each year, or as soon thereafter as practicable, the mayor and council of the city of Rome shall, by resolution or ordinance, fix the number of officers and men to compose the police force of the city of Rome for the ensuing twelve months, at the same time fixing their compensation, and shall transmit a certified copy of their action to said board of police commissioners. Upon receipt of the same, at their first regular meeting thereafter, the said board shall proceed to elect by viva voce vote the number of officers and men provided for by the mayor and council of Rome, all of whom shall be bona fide citizens of the city of Rome. All of said officers and men so elected shall, before entering upon the discharge of their duties, take the same oath now provided for the police of said city, and shall hold office for twelve months from the date of their qualification, unless sooner removed by said board." By an act approved August 11, 1908 (Acts 1908, p. 904), the charter of the city was again amended. By section 11 of the act of 1908, all of the sections of the act of 1906 relating to the board of police commissioners were repealed, "and the appointment and control of all policemen, marshals and deputies vested in the mayor and council of the city of Rome."

[2] If the effect of the amendment of 1908 was either to directly legislate the plaintiff out of office or to authorize the municipal authorities to discharge him without cause, the nonsuit was properly granted, since any office created under authority of a legislative enactment may be abolished at the will of the creator. *Butner v. Boifeuillet*, 100 Ga. 743, 28 S. E. 464; *Waters v. McDowell*, 126 Ga. 807, 56 S. E. 95; *Drake v. Beck*, 129 Ga. 466, 59 S. E. 306. If, on the other hand, the effect of the amendment was not to abolish the plaintiff's office, or to authorize his discharge without cause, the nonsuit should not have been granted. By the act of 1883 the term of office of a policeman was two years, "unless removed for cause to be judged by the mayor and council." The amendment of 1906 did not repeal the new charter granted by the act of 1883, but merely made certain changes and additions, leaving all of the provisions of the act of 1883 to stand, except those repealed expressly or by necessary implication. Section 77 of the act of 1883 was repealed by necessary implication, because it was wholly inconsistent with the amendment of 1906, vesting the appointment of policeman in a board of police commissioners and fixing their term of office at one year, "unless sooner removed by said board." Apparently this authorized the board of police commissioners to remove a policeman at any time, even without cause. We need not inquire whether section 77 of the act of 1883 would have been revived if the act of 1908 had merely, without more, repealed the amendatory act of 1906. On this subject see *Butner v. Boifeuillet*, 100 Ga. 743, 749, 28 S. E. 464. The act of 1908 does something more than merely repeal the portions of the act of 1906 therein referred to. Its language is broad. By it "the appointment and control of all policemen, marshals and deputies [are] vested in the mayor and council of the city of Rome."

Counsel for the plaintiff insists that this language must be construed in connection with section 77 of the act of 1883, and was designed merely to vest in the mayor and council authority to appoint policemen for a term of two years, and that when so appointed they could not be removed except for cause. We think, however, that under the broad language of the amendment of 1908 the mayor and council were vested with plenary power over the police force of the city, with authority to elect, to fix their terms of office and salaries, to prescribe their duties, and to remove them from office at pleasure. Under the act of 1883 the General Assembly undertook to prescribe what should be the term of office of policemen, and how they should be removed. Under the amendment of 1908 the whole matter was left to the local authorities, to be regulated by ordinance or resolution. It is not claimed that since the passage of the act of 1908 the city has, by ordinances or otherwise, entered into

a contract with the plaintiff for a fixed term. It is true the plaintiff was regularly and lawfully elected by the police commissioners for a term of 12 months; and while the act of 1908 did not in terms remove him from office, it did provide in effect that the mayor and council should have such plenary control over the matter of local police as to authorize them to abolish the office of any policeman whose services were, in their judgment, no longer needed. In this state no one has any property right in a public office, and the authority which creates it may abolish it at pleasure, unless in so doing some contract right is violated. The plaintiff had no vested right in the office which could not be taken away from him. The matter of continuing him in office was, under the act of 1908, wholly within the discretion of the mayor and council.

Judgment affirmed.

BROOKS v. TINSLEY et al. (No. 4,798.)
(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 503*)—COLLATERAL ATTACK—HOMESTEAD.

A judgment of the ordinary setting apart a homestead exemption allowed under the Constitution of 1877 cannot be attacked in a collateral proceeding for mere irregularities in the application for the homestead, which are amendable, and cured by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. § 503.*]

2. JUDGMENT (§ 506*)—COLLATERAL ATTACK—HOMESTEAD.

The wife and children for whose benefit a homestead was set apart, and who have enjoyed the benefit of the homestead for years, cannot, after the death of the husband and father, on whose application it was set apart, be heard to attack its validity because of merely formal defects in the application or in the judgment setting apart the homestead.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 949; Dec. Dig. § 506.*]

3. HOMESTEAD (§ 120*)—RIGHT TO SELL.

Where real estate has been set apart as a homestead exemption, it cannot be legally sold, except by an order of the superior court.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 215; Dec. Dig. § 120.*]

4. HOMESTEAD (§ 131*)—ACTION ON PURCHASE-MONEY NOTE—DEFENSE—EVIDENCE.

Where one buys real estate in ignorance of the fact that it has been set apart as a homestead exemption, and gives his note for the purchase money to the vendors, who are the beneficiaries of the homestead, and afterwards discovers that the real estate is a homestead, and no order of court had been obtained from the superior court for the sale thereof, he can set up these facts as a defense, when sued on the note by the payees; especially is this so when the homestead property is still in the possession of the vendors. No valid conveyance having been made, the note was without consideration.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 235-243; Dec. Dig. § 131.*]

Error from City Court of Newnan; W. A. Post, Judge.

Action by O. G. Tinsley and others against T. F. Brooks. Judgment for plaintiffs, and defendant brings error. Reversed.

A. H. Freeman, of Newnan, for plaintiff in error. H. A. Allen, of Senoia, and W. C. Wright, of Newnan, for defendants in error.

HILL, C. J. Tinsley and others brought suit against Brooks in the city court of Newnan as the maker of a promissory note alleged to have been given to the plaintiffs as the purchase price of certain described real estate. Brooks filed a plea alleging that the consideration of the note had entirely failed, because the land for which the note was given had been set apart to the father of the payees of the note as a homestead under the Constitution of 1877, and that no order of the superior court had been granted authorizing the sale of the property, and the plaintiffs therefore could not make to him a valid title to this real estate. The case was tried by the judge without the intervention of a jury and at the conclusion of the evidence he rendered a judgment in favor of the plaintiffs, to which the defendant excepted.

On the trial of the case the defendant offered in evidence a certified copy of proceedings of the court of ordinary, showing that the land for which the note was given had been set apart as a homestead as stated. This exemplification was objected to on the following grounds: That the application for homestead was addressed to the court of ordinary, and not to the ordinary, and the court of ordinary had no jurisdiction to entertain such an application, since, under the law, an application for homestead must be made to the ordinary, and the ordinary and the court of ordinary are different in law, and, as thus addressed, the petition did not give the ordinary any jurisdiction to set apart the homestead; that the ages of the beneficiaries were not set out in the petition for the homestead; that the applicant "prayed the court *not* to set up the homestead to him," the language as shown being that he "makes application to the court that by said court there may not be set up to said family a homestead out of petitioner's property"; that the petition made no reference to any schedule showing the names of the applicants' creditors; that the property out of which the homestead was desired was not sufficiently described in the application; that there was no evidence that the land had been surveyed; that a notice of the application for homestead was not published as required by law, in that it was published only one time; that the application was for a "pony" homestead, and the ordinary, therefore, had no authority to set apart the \$1,600 homestead under the Constitution; and for these reasons no valid homestead was set apart to the applicant as the head of the family. The court sus-

tained these objections, or some of them; it not appearing from the record which ones.

[1,4] We think the judge erred. These objections were all formal, and mere irregularities, and were amendable. Presumably they were amended before the judgment of the ordinary was finally rendered. We do not think the judgment of the ordinary setting aside the homestead is subject to collateral attack on account of these irregularities. In the case of *Dunagan v. Stadler*, 101 Ga. 480, 29 S. E. 442, it was held: "This application for homestead having been made to a court having original and exclusive jurisdiction of the person and subject-matter, the papers showing the service legally required, the judgment of the ordinary setting aside the homestead will be taken and accepted as regular and valid, and the plaintiff in execution will not be heard to attack it for any irregularity. It is not a void judgment, if it be voidable." If the judgment setting apart the homestead should for any reason be subsequently attacked by creditors of the applicant, the attack should be made in the court in which it was granted. The law favors the granting of homesteads, and attacks on the homestead for mere amendable irregularities should not be allowed. Illustrating this point, it is said in the case of *Redding v. Lennon*, 112 Ga. 493, 37 S. E. 712, that under the decisions of the Supreme Court these exemption laws must be construed liberally in favor of the applicant. "It would be a great hardship upon the family of a claimant if they were to be turned out of house and home because the original schedule, through the ignorance or mistake of the person making it, fails to describe the land definitely and exactly." What is here said applies forcibly to all the objections urged to the admission of the exemplification, showing the setting apart of the homestead in the present case.

[2] In the next place, it was admitted that the husband and father and the beneficiaries of the homestead had been in possession of and enjoying it and its exemptions for a period of 19 years. Having originally, through the head of the family, invoked a judgment of the court of ordinary setting apart this homestead, the beneficiaries should be estopped from objecting to its validity on any merely technical grounds. It does not appear in the present case that there were any creditors of the applicant who made any objection to the setting apart of the homestead, or that there were any creditors interested in the matter. The wife, who is still living, had notice of her husband's application for the homestead for her benefit and that of her minor children. She should not now be heard, after 19 years of possession of this homestead by herself and her family, to complain that the original proceedings for her and her children were void. If her husband were in life, after having acquired the homestead for himself and family,

and after his having enjoyed the benefit of the homestead which he had asked the ordinary to set apart, he certainly could not be heard to attack the validity of the homestead, and if he would be estopped, it would seem that his wife, who was privy with him in the application, should likewise be estopped. In *Dunagan v. Stadler*, supra, it is said: "Now, in the matter of homesteads, their allowance and disallowance, the ordinary has original and exclusive jurisdiction; an appeal from his decision is allowed. * * * We are bound as a matter of law to give to his judgment in these matters not only the force and effect to which the judgments of other courts of original jurisdiction are entitled, but the same incidents and presumptions." For the purposes of this case, these are that it cannot be set aside in a collateral proceeding, and though the existence of any jurisdictional fact may not be affirmed upon the record [as in the instant case the petition being addressed to the 'court of ordinary,' instead of the ordinary], it will be presumed upon a collateral attack that the court acted correctly, with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared." This decision would seem to cover every one of the objections made to the homestead in the present case. It goes to the extent of holding that all formal or amendable defects were cured by the judgment of the ordinary in setting apart the homestead. Civil Code 1910, § 5960; *Reid v. Hearn*, 127 Ga. 117, 56 S. E. 129.

But the Supreme Court has specifically held that some of the objections made to this homestead are entirely without merit. In *Roberts v. Cook*, 68 Ga. 324, it was held that failure to allege the ages of the children will not render the homestead void. In *McWilliams v. McWilliams*, 68 Ga. 459, it was held that failure to allege out of whose property the homestead was to be carved was not such a fatal defect as would render the proceedings void. In *Bartlett v. Russell*, 41 Ga. 196, it was said: "The schedule filed by the applicant for homestead and exemption should describe the personal property with reasonable certainty; but if the creditor failed to appear and object, on the ground that the schedule was insufficient, and it gives a general description of the property, * * * the creditor will not be permitted to attack the judgment of the ordinary setting it apart, collaterally, in a claim case, on the ground that the schedule was not sufficiently descriptive."

The objection made that the application made by the applicant originally was for a "pony" homestead under the Code, and not for the constitutional homestead of \$1,600, appears not to be well taken. The application for homestead very clearly shows that the applicant wanted a constitutional homestead of \$1,600, and this character of a

homestead was set apart by the ordinary. The citation of the Code section relating to a pony homestead in the application seems to have been merely a clerical mistake. But this is immaterial, in that the application as a whole shows beyond a doubt that the constitutional homestead was desired, and this character of a homestead was set apart to the applicant as the head of his family, and from that time until now seems to have been possessed and enjoyed by its beneficiaries. We think, therefore, that the judge erred in excluding from evidence the certified copy of the homestead exemption.

[3] The next question is: Could the widow of the applicant for homestead and his children make a valid sale of the property set aside as a homestead to them? It is admitted that no order of the superior court was granted authorizing the sale of the homestead property; and without such authority from the court no valid sale could have been made. *Hart v. Evans*, 80 Ga. 330, 5 S. E. 99; Constitution of Georgia, art. 9, § 3, par. 1; Civil Code 1910, § 6584. This being true, it follows that the note sued on was without consideration, and the setting apart of the homestead exemption in the property for which the note was given was properly set up as a defense to the payment of the note. See *McManus v. Cook*, 59 Ga. 485; *Sizemore v. Pinkston*, 51 Ga. 398.

Entertaining the foregoing views, any decision of the other questions made in the bill of exceptions is unnecessary. In our opinion the certified copy of the homestead exemption should not have been rejected for any of the reasons of the objectors, and after its admission, with the other evidence in the case, a finding should have been made by the court in favor of the defendant.

Judgment reversed.

THOMASVILLE LIVE STOCK CO. v. ATLANTIC COAST LINE R. CO.

(No. 4,867.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

CARRIERS (§ 177*)—CONNECTING CARRIERS—RIGHT OF ACTION.

The controlling questions of law made by the record in this case fall squarely within the rulings of this court in *Atlantic Coast Line R. Co. v. Hill*, 12 Ga. App. 392, 77 S. E. 316, and *Atlantic Coast Line R. Co. v. Thomasville Live Stock Co.* (No. 4,866, decided July, 1913) 13 Ga. App. —, 78 S. E. 1019. Under these decisions the allegations of the petition showed jurisdiction and a cause of action, and the judgment sustaining the demurrer and dismissing the petition was erroneous.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by the Thomasville Live Stock Com-

pany against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Fondren Mitchell, of Thomasville, for plaintiff in error. Bennet & Branch and Russell Snow, all of Quitman, and J. H. Merrill, of Thomasville, for defendant in error.

HILL, C. J. Judgment reversed.

GREAT SOUTHERN ACCIDENT & FIDELITY CO. v. GUTHRIE et al.

(No. 4,909.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 299*)—BILL OF EXCEPTIONS—DIRECTION OF VERDICT.

A direct bill of exceptions may be sued out from the direction of a verdict against the plaintiff in error.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 299.*]

2. APPEAL AND ERROR (§ 757*)—BRIEF OF EVIDENCE—SUFFICIENCY.

The record does not disclose such a flagrant disregard of the rule of practice in reference to briefing the evidence as to require the conclusion that no bona fide attempt has been made to comply with the rule.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3092; Dec. Dig. § 757.*]

3. MONEY RECEIVED (§ 14*)—JOINT LIABILITY.

In an action for money had and received, brought against several defendants, where it appears that the defendants received different amounts of the plaintiff's money, a verdict against one defendant for the aggregate amount paid to all is not authorized, unless the money was jointly received by all of the defendants or some of them as agents for the defendant against whom the verdict is rendered.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 41-43; Dec. Dig. § 14.*]

4. PRINCIPAL AND AGENT (§§ 103, 184*)—CORPORATE STOCK—AUTHORITY OF AGENT—LIABILITY FOR MONEY RECEIVED.

Payment to an authorized agent is in law payment to his principal, and if the money ought in equity and good conscience to be returned, an action for money had and received may be maintained, at the option of the owner of the money, either against the agent, or the principal, or both.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278-293, 353-359, 367, 701-703; Dec. Dig. §§ 103, 184.*]

5. PRINCIPAL AND AGENT (§ 184*)—LIABILITY OF PRINCIPAL TO THIRD PERSONS—SALE OF CORPORATE STOCK.

A. appointed an agent to sell for cash. The agent, without authority from A., employed B. to assist him. B. made a sale, collected the proceeds, deducted a portion for his services, and remitted the balance to the agent, who paid none of it to A. A. refused to deliver the property sold. *Held*, that the purchaser could recover from A. the amount received by his agent, but not the sum retained by B.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 701-703; Dec. Dig. § 184.*]

6. SPECIAL RULINGS.

Such of the special rulings as need to be passed upon are referred to in the opinion.

(Additional Syllabus by Editorial Staff.)

7. CORPORATIONS (§ 407*)—AUTHORITY OF OFFICERS—APPOINTMENT OF AGENTS.

That the agent of a corporation was vice president and afterwards president of the corporation did not authorize him to appoint other agents to sell corporate stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1615-1619; Dec. Dig. § 407.*]

8. TRIAL (§ 85*)—RECEPTION OF EVIDENCE—OBJECTION.

Where a part of a witness' testimony was clearly admissible, an objection to it in *solido* was properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222, 223-225; Dec. Dig. § 85.*]

9. PRINCIPAL AND AGENT (§ 21*)—EVIDENCE OF AGENCY.

While mere hearsay evidence of declarations of agency is inadmissible to establish agency, a person may testify that he acted as another's agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.*]

Error from City Court of Nashville; W. D. Buie, Judge.

Action by S. F. Guthrie against the Great Southern Accident & Fidelity Company and others. Judgment for plaintiff, and the defendant named brings error. Reversed.

Jones & Chambers, of Atlanta, and Hendricks & Christian, of Nashville, for plaintiff in error. Wm. R. Smith, of Nashville, and Chastain & Henson, of Douglas, for defendant in error.

POTTLE, J. This was an action in assumpsit for money had and received, brought against the Great Southern Accident & Fidelity Company, a corporation, and R. H. Cantrell, W. G. Chipley, and Lockridge & Tanner, a firm composed of J. D. Lockridge and E. L. Tanner. The corporation was alleged to have an agency and place of business in Berrien county, where the suit was brought. Cantrell and Chipley were alleged to be residents of Fulton county, and Lockridge and Tanner to be residents of Coffee county. Neither Cantrell nor Chipley was served or filed a defense. The other defendants pleaded to the merits, without demurring or objecting to the jurisdiction of the court. A verdict was directed against the corporation and in favor of Lockridge & Tanner. The corporation excepted to the direction of a verdict against it, and complains also of numerous rulings upon the admission of evidence.

[1] 1. A motion is made to dismiss the writ of error, upon the ground that the only remedy of the losing party was a motion for a new trial, and a direct bill of exceptions would not lie. This point of practice has been settled against the defendant in error. *Haskins v. Throne*, 101 Ga. 126, 28 S. E. 611.

[2] 2. It is also suggested that we ought not to review the evidence, because the brief thereof set out in the bill of exceptions is not a compliance with the rule of practice as announced in previous decisions of this court.

As to this point it is sufficient to say that, while the brief is not as succinct a compendium of the material facts as might have been prepared, it does not show such a flagrant disregard of the rule of practice as to justify the conclusion that the plaintiff in error has made no bona fide attempt to brief the evidence.

[3] 3. Cantrell and Chipley organized the defendant corporation and acted as its fiscal agents in disposing of its stock. In pursuance of the plan agreed on, these agents subscribed for all of the stock except 5 shares; but this was done to facilitate the same, and they were not expected to pay for the stock until they sold it. They were authorized to sell only for cash or its equivalent, which was understood to be a time interest-bearing certificate in some solvent bank or New York exchange. The fiscal agents were to pay for the stock as sold, at \$110 per share. The selling price was \$200 per share. The plaintiff subscribed for 5 shares through Lockridge & Tanner, who were representing Cantrell and Chipley in making the sale, and gave his note for \$1,000, payable to Lockridge & Tanner. The certificate of stock was issued and attached to the note, which was forwarded to a bank for collection. The note was not paid at maturity, and it and the stock were returned to the company. Thereupon the stock was canceled and the note returned to Lockridge & Tanner. Subsequently the plaintiff paid the amount to Lockridge & Tanner. After deducting the amount to which they were entitled under their contract for making the sale, the balance was forwarded to Cantrell and Chipley. None of the money was paid to the corporation; Cantrell and Chipley claiming that the company owed them more on other transactions than the sum which came into their hands from plaintiff's subscription. The company refused to reissue the stock, upon the ground that it had not been paid therefor, and the plaintiff contends that the corporation and Lockridge & Tanner are indebted to him jointly in the amount paid for the stock.

The action for money had and received lies against one who holds the money of another which he ought in equity and good conscience to refund. Where more than one person is sued, a joint recovery for the whole amount against all will not be authorized, unless it appears that all received the money jointly. If it was not so received, the plaintiff can only recover from each defendant separately the amount shown to have come into his hands. In such an action, where the tort is waived, conspiracy and fraud may be proved merely for the purpose of showing that those who received the money are not entitled to keep it, and not for the purpose of recovering from one of the conspirators the whole amount received by all, unless it actually came into his hands. All this is settled by

the Supreme Court in *Cowart v. Fender*, 137 Ga. 586, 73 S. E. 822, Ann. Cas. 1913A, 932, where the nature of the action is discussed, and the distinction between it and an action sounding in tort is shown.

[4] 4. Presumptively an agent to sell can sell only for cash. 31 Cyc. 1357. The authority of Cantrell and Chipley as agents for the corporation was limited to a sale of the stock for cash or its equivalent, as explained in the evidence. Hence the title to the stock did not pass into the plaintiff upon the execution of the note. This is true, without reference to whether the plaintiff had knowledge of the terms of the contract between the corporation and its agents.

[5] 5. It is contended that when the plaintiff did not pay his note at maturity, and the company canceled the stock and returned the note, the transaction was ended so far as the company was concerned, and the subsequent payment of the money by the plaintiff did not bind the company to issue the stock, or render it liable to return the money received by its agents. Cantrell and Chipley were, under the evidence, general agents of the company, to dispose of stock in its behalf. The only limitation upon their authority was that the sale should be for cash. If, after the cancellation of the stock, the company had returned to the plaintiff his note, and notified him that the sale of stock had been canceled and the agency of Cantrell and Chipley revoked, a different question would arise. The plaintiff's subscription was still outstanding. Certainly, in the absence of notice to the contrary, he had a right to assume that he was being held liable on his subscription and the note given therefor, and had the right, upon payment of his note, to demand the issuance of the stock. The agency of Cantrell and Chipley to sell the stock had not been revoked, and, even if it had, the plaintiff had no notice of it. He had, therefore, a right to continue to treat these parties as the duly authorized agents of the company to receive the money. Whatever money Cantrell and Chipley received as agents for the company is deemed in law to have been received by the corporation itself, and, as to the amount so received, the plaintiff was clearly entitled to recover against the corporation.

[6] 6. The evidence discloses, however, that Cantrell and Chipley did not receive the whole amount paid by the plaintiff to Lockridge & Tanner, but that some amount, not disclosed by the evidence, was deducted by these parties, and the balance paid over to Cantrell and Chipley. If Lockridge & Tanner were also the agents of the corporation, this would make no difference; but if they were merely the agents of Cantrell and Chipley, the company would not be bound to refund to plaintiff the money which they received, but did not pay over to any agent of the corporation authorized to receive it. We can find no evidence which would have authorized, certainly none which required, a finding

that Lockridge & Tanner were agents of the corporation. They so described themselves, but their conclusion is not supported by the evidence. They were employed by Cantrell and Chipley to sell stock for them. They had no contract with the corporation, were not liable to it in any way, and were not authorized by it to bind it by any sale of stock or collection of money therefor.

[7] Cantrell and Chipley had no authority from the corporation to appoint other agents for the corporation. Cantrell was vice president of the company when it was organized, and afterwards president; but this did not give him authority to appoint agents to sell stock for the corporation. *Minnesota Lumber Co. v. Hobbs*, 122 Ga. 25, 49 S. E. 783; *Swindell & Co. v. Bainbridge Bank*, 3 Ga. App. 364, 60 S. E. 13. Lockridge & Tanner not being agents of the corporation, nor authorized to collect money in its behalf, there is no reason in equity or good conscience why the corporation should be made to pay back money which they have appropriated to their own use. Cantrell and Chipley would be bound to do so, but not the corporation. The company is bound to account to the plaintiff for the money received by Cantrell and Chipley, although they retained it, and without reference to their right to withhold it from the corporation. Having received the money for the corporation and by its authority, it is responsible to the same extent as if the money had been paid into its treasury. The minutes of the corporation introduced in evidence, together with the other evidence, demanded a finding that Cantrell and Chipley were mere trustees for the corporation to sell its stock and not the owners of the stock itself. Neither the testimony of Lockridge & Tanner, nor the correspondence introduced in evidence, authorized a finding that they were agents of the corporation. They were not so appointed by any one having authority to bind the corporation, nor were they held out by the company to the plaintiff as its agents in such a way as to estop the corporation from pleading the contrary.

[8] 7. The numerous objections to testimony need not be considered in detail. Neither the stock certificate nor the correspondence was essential to the plaintiff's case, and their admission in evidence, even if erroneous, was harmless. All of the direct evidence of the witness Cantrell was objected to in *solido*, on numerous grounds. Some of it was clearly admissible, and the objection to the whole of it was properly overruled. *Ray v. Camp*, 110 Ga. 818, 36 S. E. 242; *Harris v. Amoskeag Lumber Co.*, 97 Ga. 465, 25 S. E. 519; *American Insurance Co. v. Bailey*, 6 Ga. App. 424, 425, 65 S. E. 160; *Walker v. Riley*, 6 Ga. App. 519, 65 S. E. 301; *Thompson v. Carter*, 6 Ga. App. 604, 65 S. E. 599.

[9] It is competent for a person to testify that he acted as agent for another, though mere hearsay evidence of declarations of agency is inadmissible. No demand on the

company for the stock was necessary, and hence testimony as to such demand was immaterial. Testimony of Lockridge and Tanner and Moore that Lockridge & Tanner were agents of the corporation stated a mere conclusion, not supported by the proven facts. Standing alone, it would be the statement of a fact; but, other facts having been proved, which show that in law there was no such agency, the statement became merely an erroneous conclusion. The contract between Lockridge & Tanner and their agent Moore was not binding on the corporation, but was admissible against Moore's principals to show his agency. The expenses of litigation were not recoverable against the corporation, and evidence thereof was inadmissible. In the light of the judge's note to the bill of exceptions, there was no error in admitting the extract from the minutes of the corporation.

Upon another trial, if the evidence is substantially the same, the defendant corporation will be liable for the amount which its agents, Cantrell and Chipley, may have received, and Lockridge & Tanner will be liable for the sum which they and their agent Moore retained. The relative rights of the corporation and Cantrell and Chipley, as between themselves, must be settled between them; no such issue being germane in the present suit. The case must be again tried in the light of the rulings herein made.

Judgment reversed.

COOK v. HIGHTOWER & CO. (No. 4,999.)
(Court of Appeals of Georgia. Aug. 25, 1918.)

(Syllabus by the Court.)

1. VERDICT SUSTAINED.

The evidence adduced in support of the defendants' pleas, which were held sufficient by this court, would have authorized a verdict in her favor, but did not demand such a finding. The issue was one purely of fact, it was fairly presented by the trial judge, and the verdict is supported by evidence.

2. HUSBAND AND WIFE (§ 154*)—LIABILITY OF WIFE—DEBT CONTRACTED JOINTLY WITH HUSBAND.

Even though the plaintiff, at the beginning of the transaction, made a contract with the defendant and her husband jointly, and took their joint note, and though the subsequent note to the wife, sued upon in the present case, may be a renewal by the wife of the former obligation, a recovery against her was authorized, because there was evidence that the husband acted as her agent and that she received the consideration of the note. To allow husband and wife to unite their joint credit in procuring the means of supplying the joint resources is not contrary to public policy, and the power of the wife to join her husband in contracting a debt exists, where it appears that the debt contracted is not one assumed for the purpose of paying the husband's debt, or of becoming his surety.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 604; Dec. Dig. § 154.*]

3. INSTRUCTIONS—NO ERROR.

The complaints as to expressions or intimations of opinion by the court upon the evidence

in charging the jury, are not well founded; and the instructions upon which error is assigned were pertinent to the evidence.

4. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—BURDEN OF PROOF.

The trial court, in the absence of an appropriate and timely request to that effect, is not required to specifically instruct the jury as to which party carries the burden of proof on a particular point or issue. It is enough in such a case that the court correctly informs the jury upon which party lies the burden of proof in the case as a whole.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 622-641; Dec. Dig. § 256.*]

5. COSTS (§ 41*)—NOTICE (§ 13*)—ATTORNEY'S FEES—SUFFICIENCY OF PLEADING.

The court did not err in overruling the demurrer, in which the complaint is made that the allegations of the petition are insufficient to bind the defendant for liability for attorney's fees. The notice by letter of the claim for attorney's fees is sufficient, provided the letter conveys such notice as is required by law and is timely received by the defendant. It is not necessary to state in a petition how the notice was served, if it be alleged that it was served.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 133-136; Dec. Dig. § 41; * *Notice*, Cent. Dig. §§ 37, 38; Dec. Dig. § 13.*]

Error from City Court of Miller County; R. D. Bush, Judge.

Action by Hightower & Co. against Zenie Cook. Judgment for plaintiffs, and defendant brings error. Affirmed.

B. W. Fortson, of Arlington, and W. I. Geer, of Colquitt, for plaintiff in error. Bush & Stapleton, of Colquitt, for defendants in error.

RUSSELL, J. This is the second appearance of this case before this court. The issues are specifically set out in the statement of facts in *Cook v. Hightower*, 11 Ga. App. 657, 75 S. E. 1058.

[1] 1. On the trial now under review there was no effort to curtail the rights of the defendant in introducing testimony in support of the pleas, which were heretofore held to be proper and sufficiently pleaded. The issue presented was purely one of fact. From the evidence adduced the jury might have found for the defendant, but they were authorized to find that the note, which was the basis of the suit, was not obtained by duress, and that Mrs. Zenie Cook, though a married woman, received the consideration of the note which was the basis of this suit.

[2] 2. As was held by Judge Jackson in *King v. Thompson*, 59 Ga. 380: "Whether or not a married woman, who signs a note with her husband, is responsible out of her separate estate therefor, turns upon the question whether she signed to raise money on her own account, or as surety, or to assume a debt of her husband. If the note was given in regard to her own business, conducted by her husband for her, she is bound; if as surety for him in his business, or to pay his debts, her separate estate is not bound." Judge Bleckley, in *Scofield v. Jones*, 85 Ga.

824, 11 S. E. 1034, puts the point more sentimentally by saying: "The true test of the real debtor or debtors is: To whom did the consideration pass?" If the note here involved represents a valid debt at all, it is practically undisputed that it represents the purchase price of a tract of land which is in the possession of Mrs. Cook and over which she has exercised dominion for several years. It matters not that at the beginning of the transaction Hightower made a contract with Mrs. Cook and her husband jointly, and originally took their joint note for the money which he had advanced to pay for the land. In *Amos v. Cosby*, 74 Ga. 793, land had been set apart as a homestead to the husband as head of the family, consisting of his wife and minor children. The husband and wife, by a joint deed, conveyed it with warranty of title. The purchaser sold it with warranty to a second purchaser, and afterward a lien superior to the homestead was enforced against it, causing a loss to the second purchaser of over \$400. An action against the husband and the wife upon their warranty, to make good this loss, was sustained, although the wife set up her coverture in bar of the same. The court said: "Nor is Mrs. Amos relieved by reason of her being a married woman. She had the right to make the deed with her husband. There having been a homestead set apart to her husband, under the act of 1868, she was a usee, and was not a surety of her husband, and is equally bound with him." In *Runnals v. Aycock*, 78 Ga. 556, 3 S. E. 657, an action on a joint note was defended by the wife, and resulted in a judgment against her, which was upheld. In *Francis v. Dickel*, 68 Ga. 255, the suit was on an account against the husband and wife as partners. A recovery against the wife alone was had, the jury having found that there was no partnership.

That a debt can be created, which in contemplation of law would be a debt of the wife, as well as the debt of her husband, has been frequently recognized by the Supreme Court. It is so recognized as to joint notes in *Mashburn v. Gouge*, 61 Ga. 513, in *Wingfield v. Rhea*, 73 Ga. 477, and in *Harrold v. Westbrook*, 78 Ga. 5, 2 S. E. 695. In the much earlier case of *Skinner v. Allen*, 49 Ga. 557, the verdict was upheld against the wife because it appeared that she was the beneficiary of some of the transactions of which the draft which was the basis of the suit formed a part. The fact that the transaction may have been carried on by the husband as agent for his wife would not affect the rule. This was held in *King v. Thompson*, *supra*. In *Scofield v. Jones*, *supra*, Chief Justice Bleckley said that the joining with the husband in contracting a debt is not an assumption by the wife of his debt, for he has no debt existing to be assumed, and the debt created is her own from the beginning. "Moreover, there is nothing contrary to public policy in allowing

husband and wife to unite their joint credit in procuring the means of supplying joint resources in the shape of a home, or a place of business from which to derive an income for the support of a family. Very often it would contribute to the well-being and prosperity of both, and to the permanent good of the family. No doubt such a power can be abused and misapplied; but this is no reason for not recognizing its existence, or why the law should not tolerate it, if on the whole its results are beneficial, rather than pernicious. At all events, we think the power exists at present under our law."

Though the defendant in the present case adduced testimony which would have authorized a finding in her favor, there was sufficient evidence in conflict therewith to warrant the verdict; and no material error appears in any of the rulings upon the admissibility of the testimony.

[3] 3. The complaints as to expressions or intimations of opinion by the court upon the evidence are not well founded, and the instructions were pertinent to the evidence.

[4] 4. Under a well-settled rule, the court was not required to specifically instruct the jury as to the burden of proof upon a particular point in evidence, in the absence of a request to that effect. It is complained that "the court erred in not giving in charge to the jury, even without a written request to do so, a charge in substance as follows: That if it should appear to them from the evidence in the case that any part of the note sued on was the debt of the defendant's husband, before the jury would be authorized to find a verdict in favor of the plaintiff, the burden would be upon the plaintiff to point out by evidence that for which the defendant was liable as security, and that for which she was liable as original maker, and that unless the plaintiff could point out by evidence which part of the note was the original obligation of the defendant, and which part of the note was the original debt of her husband, if any part should appear to be the debt of her husband, the plaintiff would not be entitled to recover in the case." It is also complained that "the court erred in not charging the jury, even without a written request to do so, that if it should appear to them from the evidence that the note sued on embraced indebtedness which was originally the debt of the defendant, as well as an indebtedness which was originally the debt of the defendant's husband, the burden would be upon the plaintiff to point out by evidence that for which the defendant was liable as the original promisor, and that for which she was liable as surety only, and that for which she was liable by way of assuming her husband's debt, provided the evidence showed that she had assumed her husband's debt, or any part of the same, and provided, further, that they should believe, from the evidence, that any part of the note

sued on was originally the debt of her husband, and provided, further, that it should appear that any part of the note sued on was originally the debt of her husband, and that she stood his security. Movant contends that a charge of this character or substance should have been given to the jury, because it is her contention that the note sued on embraced a note which had been given by her husband for the purchase of the Mason land, and that she stood her husband's security for the purchase money of the Mason land." The omission to give these instructions, in the absence of a request, was not error.

[5] The court did not err in overruling the demurrer to the fourth paragraph of the plaintiff's petition, in which it is insisted that the allegation of the petition is insufficient to bind the defendant to liability for attorney's fees. The paragraph of the petition referred to is as follows: "Petitioner shows that they have served said defendant with written notice of their intention to bring this suit to December term, 1910, of the city court of Miller county, ten days prior to the filing of this suit, in order to bind for attorney's fees. Copy of this notice is hereby attached, marked 'Exhibit A.'" The notice attached to the petition is in the form of a letter, in which it is specifically stated that, "if the claim is not paid by the 18th day of November, 1910, we will institute suit on the same in the city court of Miller county, returnable to the December term, 1910." We think this notice by letter fully meets the point made by the demurrer. Where it is averred that the notice required by law, in order to bind the defendant with liability for attorney's fees, has been served, it is not necessary for it to appear how it was served. This the proof must disclose, and in the present instance we think that testimony to the effect that in response to this notice the defendant called to see the plaintiff's attorney, prior to the return day of the term to which the suit was filed, and stated her inability to pay the claim, in response to the notice, would authorize the jury to find that the requisite notice had been given the defendant in time. Judgment affirmed.

BOWMAN et al. v. KIDD. (No. 4,516.)
(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

EXECUTION (§ 155*)—EVIDENCE (§ 178*)—LEVY—FORTHCOMING BOND—ACTION—SECONDARY EVIDENCE.

The trial judge did not err in overruling the certiorari.

(a) Where the value of the property levied on by his *fi. fa.* does not exceed the amount of his judgment, the plaintiff in execution has such an interest in a forthcoming bond as authorizes the suit upon the bond to be brought in his name. Section 3729, Civil Code 1910; Hart v. Thomas, 75 Ga. 529; 17 Cyc. 1226-1229.

(b) A constable can testify to the fact that

he posted the advertisement (section 4765, Civil Code) of a sale under a justice's court *fi. fa.* and, upon proof of the loss or destruction of such advertisement, may testify as to its contents.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 425-433; Dec. Dig. § 155; * Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.*]

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action between Clark Bowman and others and C. I. Kidd. From the judgment, Bowman and others bring error. Affirmed.

Skelton & Skelton, of Hartwell, for plaintiffs in error. A. G. & Julian McCurry and A. S. Richardson, all of Hartwell, for defendant in error.

RUSSELL, J. Judgment affirmed.

DRAKE v. LEWIS.

LEWIS v. DRAKE.

(Nos. 4,875, 4,921.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. APPEARANCE (§§ 17, 19*)—ATTACHMENT (§ 241*)—REPLEVY BOND—JURISDICTION—WAIVER OF OBJECTIONS.

The giving of a replevy bond does not preclude a defendant in attachment from objecting to the jurisdiction of the court over his person. Appearance and pleading to the merits amount to a waiver of the want of jurisdiction; but as defenses in attachment cases may be made at any time before final judgment, it is no ground for overruling a motion to dismiss a declaration in attachment because of a failure to allege jurisdiction of the defendant that the motion was not filed at the appearance term, or that it was filed simultaneously with a plea to the merits. The failure of a petition to show jurisdiction of the person is an amendable defect; but in attachment cases such a defect may be taken advantage of by motion made at the trial term, and unless cured by amendment the declaration should be dismissed.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 70-75, 79-82, 84-90; Dec. Dig. §§ 17, 19; * Attachment, Cent. Dig. §§ 829-838; Dec. Dig. § 241.*]

2. ABATEMENT AND REVIVAL (§ 85*)—PLEADING—JURISDICTION—WAIVER OF PLEA.

Under the practice in this state, all of a defendant's pleadings may be filed simultaneously, and, when so filed, should be disposed of in logical order. A defendant does not waive a plea to the jurisdiction by filing simultaneously therewith a plea to the merits, either upon the same or upon a separate paper. If upon the same paper, it is immaterial which plea is first in sequence, if the defendant first presents and insists upon a disposition of the plea to the jurisdiction.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 156, 508-510; Dec. Dig. § 85.*]

3. ABATEMENT AND REVIVAL (§ 5*)—ANOTHER ACTION PENDING.

The pendency of an attachment proceeding upon which no declaration was filed at the first term will not abate a second attachment between the same parties under which the same

property was seized and upon which a declaration was duly filed.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 27-30, 99-104; Dec. Dig. § 5.*]

4. COURTS (§ 188*) — MUNICIPAL COURT — CLAIM EX DELICTO.

A city court cannot entertain a plea attempting to set off a claim arising *ex delicto* against a suit arising *ex contractu*.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 439, 440, 442, 447, 448, 451, 452, 454, 458, 464, 465, 467, 468; Dec. Dig. § 188.*]

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by C. M. Lewis against J. W. Drake. Judgment for plaintiff, and defendant brings error, and plaintiff assigns cross-error. Judgment on both main and cross bill of exceptions reversed.

W. I. Geer, of Colquitt, and B. W. Fortson, of Arlington, for plaintiff in error. Glessner & Park, of Blakely, for defendant in error.

POTTLE, J. On November 13, 1912, an attachment was sued out by Lewis against Drake. The ground of attachment was not set forth in the affidavit, but in all other respects the proceedings were regular. Bond was given, and the attachment was issued and made returnable to the January term of the City Court of Blakely. Apparently upon the assumption that the attachment was void, Lewis, on November 28, 1912, sued out another attachment, upon the ground that Drake was causing his property to be moved beyond the limits of the state, and caused a levy to be made upon the same property which had been seized by the sheriff under the first attachment. Drake gave bond and replevied the property. While the first attachment was pending, declaration upon the second attachment was filed to the return term on January 11, 1913, alleging an indebtedness upon a promissory note. On December 16, 1912, prior to the filing of the declaration, Drake filed a plea consisting of two paragraphs. In the first paragraph it was averred that the second attachment should be abated and dismissed because of the pendency of the first proceeding. The second paragraph contained a plea to the jurisdiction of the court; it being averred that, when the attachment issued, Drake was a resident of Decatur county. On February 24th Drake filed another plea to the jurisdiction, and at the same time moved to dismiss the declaration, because it failed to allege the residence of the defendant. On the same day, and subject to the motion to dismiss, the defendant filed a plea denying indebtedness, and averring that the consideration of the note had failed by reason of certain facts alleged in the plea. The court overruled the motion to dismiss the declaration, struck the plea to the jurisdiction and the plea of former suit pending, and overruled a demurrer to the plea to the merits of the action. The trial

resulted in a verdict for the plaintiff, and the defendant's motion for a new trial was overruled. He has excepted to the several judgments adverse to him, and the plaintiff by cross-bill complains of the refusal to strike the plea to the merits.

[1] 1. The correctness of the action of the court in overruling the motion to dismiss the declaration and in striking the plea to the jurisdiction depends upon whether the defendant had in any way waived his right to object to the jurisdiction of the court. Giving the replevy bond did not amount to a waiver. *Cincinnati Ry. Co. v. Pless*, 3 Ga. App. 400, 60 S. E. 8. Appearance and pleading to the merits is a waiver, and if counsel for Lewis is correct in his contention that the filing of the first plea submitted the defendant to the jurisdiction of the court, the court was right in striking the plea to the jurisdiction and overruling the motion to dismiss the declaration. If this premise is wrong, then both of these rulings were erroneous. Defenses in attachment cases may be made at any time before final judgment. Civil Code, § 5104. It was not too late at the trial term to object to the petition because of failure to show jurisdiction of the defendant; for, while this defect was amendable (Civil Code, § 5691), the defendant was not precluded from attacking the petition on this ground, unless he had previously appeared and pleaded to the merits. *Hall v. Mobley*, 13 Ga. 318. The motion to dismiss having been filed simultaneously with the so-called plea of failure of consideration, the filing of this plea did not preclude a consideration of the motion, and *Richmond & Danville Railroad Co. v. Mitchell*, 95 Ga. 78, 22 S. E. 124, has no application.

[2] 2. The correctness of the court's rulings upon the question of jurisdiction turns, therefore, upon whether the filing of the first plea amounted to a waiver of the defendant's right to object to the jurisdiction. The plea is rather anomalous, in that, before challenging the jurisdiction of the court, the defendant urged that the attachment proceeding should be abated because of the pendency of a former attachment. Counsel for Lewis is doubtless correct in assuming that a plea of former suit pending is such a plea that the filing thereof without a protestation would have the effect of submitting the defendant to the jurisdiction of the court; but we cannot agree with them in the further contention that the defendant waived his right to have his plea to the jurisdiction determined merely because it followed, instead of preceding, the paragraph of the plea setting up the pendency of the first attachment. The strict rules of common-law pleading do not prevail in this state. It is common practice to file special demurrers going merely to form simultaneously with a general demurrer attacking the substance of a pleading, and no

one would contend now that so doing would be a waiver of the right to insist upon the special demurrers.

A petition may be attacked at the same time both in form and substance, either in the same demurrer or in a separate pleading. When this is done, the correct practice is to have the pleading first perfected in form, and then determine the question of its sufficiency in substance. And so where a defendant files simultaneously a plea to the jurisdiction and a plea to the merits, even though the latter does not contain an express protestation, the plea to the jurisdiction should be considered and disposed of. The filing of such a plea simultaneously with the plea to the merits is itself a protestation against the jurisdiction of the court, and the plea to the merits must be treated as having been interposed subject to this protestation. Nor does it make any difference that the two pleas are in the same paper, nor which of them precedes the other. The logical order, of course, would be to set forth the objection to the jurisdiction first; but this is immaterial if at the trial the defendant presents and insists upon a disposition of the objection to the jurisdiction before insisting upon the other plea. Any other rule would be too technical and out of harmony with the liberality of pleading prevailing in this state. "Pleading to the merits, *without more*, is a waiver of jurisdiction." *Bunting v. Hutchinson*, 5 Ga. App. 194, 63 S. E. 49. But pleading to the merits at the same time with a plea to the jurisdiction is not. *Cox v. Adams*, 5 Ga. App. 296, 63 S. E. 60; *Stallings v. Stallings*, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Civil Code, § 5664. The court erred in striking the plea to the jurisdiction, and, no offer to amend the declaration having been made, the motion to dismiss it should have been sustained.

[3] 3. It was not erroneous to strike the plea of former suit pending. While the first attachment was not void on its face (*Penn v. McGhee*, 6 Ga. App. 631, 65 S. E. 686), as no declaration on it was filed and the proceeding was in rem, it was not such a suit as would abate the second attachment and the declaration filed thereon. *Weston v. Beverly*, 10 Ga. App. 261, 73 S. E. 404; *Lane v. Brinson*, 12 Ga. App. 760, 78 S. E. 725.

[4] 4. Since the case must be tried again, it becomes necessary to dispose of the question raised by the cross-bill. The suit was upon a promissory note. The defendant pleaded that the note was given for the balance due on the purchase price of certain timber suitable for manufacture into cross-ties of specified dimensions; that the plaintiff refused to permit the defendant to cut and remove the timber, and has taken possession thereof and ousted the defendant; that the plaintiff has converted to his own use 600 cross-ties cut from the timber and

lying on the land; that the defendant "has already paid to plaintiff balance of said purchase money and that he has not cut and removed from said land enough cross-ties to pay him for the amount of cash that he has already paid to plaintiff; that there has been a total failure of consideration of said note." The plaintiff demurred to the plea, upon the ground that it attempted to set off a claim arising *ex delicto* against a cause of action arising *ex contractu*, and that the city court was without jurisdiction to entertain such a plea. The demurrer was well taken and should have been sustained. The facts pleaded do not show a failure of consideration, but show merely an actionable tort, consisting of an unlawful interference with the defendant's right to cut the timber and a wrongful conversion of cross-ties which had been cut from the timber. Such a defense is forbidden by our Code, except in a court having equitable jurisdiction, and it is allowed then only upon equitable grounds, such as insolvency and nonresidence. Civil Code, 5521; *McLendon Bros. v. Finch*, 2 Ga. App. 421, 58 S. E. 690; *Hecht v. Snook*, 114 Ga. 921, 41 S. E. 74. The rulings above announced render unnecessary a determination of the motion for a new trial.

Judgment on both main and cross bills of exceptions reversed.

LOTZ v. WALKER. (No. 5,040.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. POSSESSORY WARRANT (§ 2*)—EVIDENCE.

The trial judge did not err in sustaining the certiorari and awarding the property in dispute to the defendant, in view of the fact that the testimony that the plaintiff had voluntarily parted with its possession was wholly undisputed.

[Ed. Note.—For other cases, see *Possessory Warrant*, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. POSSESSORY WARRANT (§ 2*)—PROCEDURE—EVIDENCE.

A possessory warrant is not a proper means for the recovery of personal property, unless the property was taken from the possession of the complaining party by fraud, violence, seduction, or other means of like character; and it is essential to the maintenance of the proceeding that it be shown that the property was taken without his consent.

[Ed. Note.—For other cases, see *Possessory Warrant*, Cent. Dig. § 2; Dec. Dig. § 2.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by H. W. Lotz against G. W. Walker. Judgment for plaintiff was reversed on certiorari, and he brings error. Affirmed.

McClelland & McClelland, of Atlanta, for plaintiff in error. Edgar A. Neely, of Atlanta, for defendant in error.

RUSSELL, J. Judgment affirmed.

DUNN v. STATE. (No. 5,010.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

*(Syllabus by the Court.)***1. BANKS AND BANKING (§ 62*)—INSOLVENCY—INDICTMENT OF DIRECTOR—SUFFICIENCY.**

An indictment based upon section 204 of the Penal Code of 1910, which alleges that a named trust company is "a corporation duly incorporated and chartered under the laws of Georgia, and doing and carrying on a banking business, and was a bank," sufficiently avers that the institution named is "a chartered bank," within the meaning of that section of the Code.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 122-124; Dec. Dig. § 62.*]

2. BANKS AND BANKING (§ 61*)—CHARTERED BANK—INSOLVENCY.

A company incorporated mainly for the purpose of exercising, and vested with, the powers usually conferred upon companies authorized to act as guardian, receiver, or other trustee, is not a "chartered bank," within the purview of a penal law, merely because it may be empowered to exercise, as a mere incident to the main object of incorporation, some of the functions of a bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 121; Dec. Dig. § 61.*]

3. BANKS AND BANKING (§§ 2, 61*)—"CHARTERED BANK"—"BANK"—INSOLVENCY.

The words "chartered bank," as used in section 204 of the Penal Code of 1910, refer to a corporation having the powers, and exercising as the main object of its creation all or some of the functions, of a "bank" prescribed in section 2266 of the Civil Code of 1910.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 2, 121; Dec. Dig. §§ 2, 61.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 682-689; vol. 8, p. 7587.]

4. BANKS AND BANKING (§ 61*)—CHARTERED BANK—TRUST COMPANY.

There is nothing in the decision in *Mulherin v. Kennedy*, 120 Ga. 1080, 48 S. E. 437, which requires a ruling that a trust company, incorporated merely as such under the provisions of section 2815 et seq. of the Civil Code of 1910, is a "chartered bank," within the meaning of the penal laws of this state relating only to such banks.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 121; Dec. Dig. § 61.*]

5. BANKS AND BANKING (§ 61*)—CHARTERED BANK—TRUST COMPANY.

A company, incorporated merely as a trust company, under the provisions of the act of 1898 (Civil Code 1910, § 2815 et seq.), is not a chartered bank, though it exercises, as an incident to the main object of its creation, the power to receive trust funds on deposit and the power to lend money.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 121; Dec. Dig. § 61.*]

6. BANKS AND BANKING (§ 61*) — TRUST COMPANY.

Under the act of 1898 (Civil Code, § 2815 et seq.) trust companies incorporated under its provisions "may acquire and exercise all the rights and privileges, and be subject to the same liabilities and restrictions, as apply to banks, upon compliance with the laws of this state providing for the incorporation and regulating the business of banks."

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 121; Dec. Dig. § 61.*]

7. BANKS AND BANKING (§ 61*)—TRUST COMPANY.

The provisions quoted in the preceding headnote mean simply that a trust company may obtain a charter as a bank, and, after having done so, may exercise, in addition to its other powers, all the functions of a bank. If a trust company incorporated under the act should avail itself of this provision, and thus acquire the privileges of a bank, it would be a chartered bank, within the meaning of the penal laws of this state, though exercising the dual functions of a trust company and a bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 121; Dec. Dig. § 61.*]

8. JUDICIAL NOTICE OF CORPORATE CHARTER.

Whether the courts know judicially without proof that a trust company incorporated under the act of 1898 (Civil Code 1910, § 2815 et seq.) has or has not obtained a charter conferring upon it banking privileges as authorized by that act, is not involved in the present case, and for that reason is not decided.

9. BANKS AND BANKING (§ 62*)—INSOLVENCY — PRESUMPTIONS — PROSECUTION OF DIRECTOR—BURDEN OF PROOF.

Upon the trial of the present indictment the state carries the burden of proving that the trust company named in the indictment is a chartered bank. This burden cannot be successfully carried, unless it appears that the company has obtained a charter authorizing it to exercise the privileges of a bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 122-124; Dec. Dig. § 62.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

B. S. Dunn was convicted under Pen. Code 1910, § 204, as director of an insolvent bank, and brings error. Affirmed.

C. A. Picquet, of Augusta, J. P. K. Bryan, of Charleston, S. C., and Gunter & Gyles, of Aiken, S. C., for plaintiff in error. A. L. Franklin, Sol. Gen., of Augusta, and John M. Graham, of Atlanta, for the State.

POTTLER, J. The plaintiff in error was indicted for violating the provisions of the act of 1833, codified in section 204 of the Penal Code. The indictment (omitting formal parts) was in the following words: "For that the said B. Sherwood Dunn, in the county aforesaid, on the 19th day of July, 1912, with force and arms and unlawfully, being then and there a director of the Citizens' Trust Company, a corporation duly incorporated and chartered under the laws of Georgia, and doing and carrying on a banking business, and was a bank in said state and county, and city of Augusta, Georgia, and as such officer and director of said corporation and bank being by law charged with the fair and legal administration of its affairs, the said Citizens' Trust Company, then and there pending, and during the said official charge and responsibility of the said B. Sherwood Dunn, did then and there be and become fraudulently insolvent, contrary to the laws of said state, the good order, peace, and dignity thereof." The accused demurred, upon the ground that no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

criminal offense was charged, because the statute under which the indictment was framed applies only to officers of a chartered bank, and the indictment shows on its face that the accused was not an officer of a chartered bank, and because the officers of a chartered trust company are not punishable for its insolvency, whether fraudulent or not. The demurrer was overruled, and the accused excepted.

[1] 1. Under section 204 of the Penal Code "every insolvency of a chartered bank" "shall be deemed fraudulent," and the president and directors punished therefor, unless they can show that the affairs of the bank have been fairly and legally administered. In *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383, the act of 1833 was discussed at length. It was there held that, notwithstanding we now have no state banks of issue, the act has not become obsolete, but is applicable to any chartered bank. It was further held in that case that it was competent for the General Assembly to prescribe, as a rule of evidence, as was done in the act under consideration, that mere proof of the insolvency of a chartered bank raises a presumption against the officers named in the act that the insolvency was fraudulent and that the officers thus named participated in the fraud. By the very letter of the statute it applies only to chartered banks, and therefore, unless the indictment sufficiently charges that the corporation of which the plaintiff in error was a director was a chartered bank, the indictment is fatally defective. His contention is that the allegations of the indictment show that the company in which he was director was not a chartered bank, but a trust company organized under the provisions of the act of 1898 (Acts 1898, p. 78), codified in article 8 of the Civil Code, section 2815 et seq.

The indictment charges that the Citizens' Trust Company "was a corporation duly chartered under the laws of Georgia." So there can be no question that it is sufficiently alleged that the company was duly chartered. It is further averred that the company "was doing and carrying on a banking business and was a bank." Having alleged in one place that the company was duly chartered and in another that it was a bank, it is clear that it sufficiently appears in the indictment that the corporation was "a chartered bank." It is contended that the very name of the corporation shows it was a trust company, and not a bank; but there is no statute in this state, like there is in some others, requiring that the word "bank" shall appear in the name of every corporation clothed with banking powers. Certainly it was not essential that the word "incorporated," or "chartered," and the word "bank" should have appeared in the indictment in juxtaposition. It is enough if it appears from the indictment as a whole that the institution was a chartered bank; that is to

say, a corporation clothed with the powers usually exercised by banking institutions. Since the Citizens' Trust Company may be a bank, and as it is alleged to be a bank duly chartered under the laws of this state and engaged in the banking business, the indictment was not subject to the demurrer.

[2] 2. It seems to have been conceded, however, that the Citizens' Trust Company was organized under the act of 1898, appearing in Civil Code, § 2815 et seq., and as the point can be made upon the trial, we deem it proper to express our views upon the main question sought to be raised by the demurrer, viz., whether an institution incorporated under the act of 1898 is a "chartered bank," within the meaning of the provisions of the act of 1833, codified in section 204 of the Penal Code. The mere fact that a company organized under the act of 1898 may exercise some of the functions of a bank would not make it a bank within the meaning of a penal law, subject to a strict construction in favor of one charged with its violation. *Mercantile National Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *State v. Reid*, 125 Mo. 43, 28 S. W. 172; *Wells Fargo Co. v. Northern Pacific Railway Co. (C. C.)* 23 Fed. 469; *Nash v. Brown*, 165 Mass. 384, 43 N. E. 180; *Jenkins v. Neff*, 163 N. Y. 320, 57 N. E. 408; 3 Am. & Eng. Enc. Law (2d Ed.) 791. In the *Youmans Case*, supra, this court held that section 204 would not be so strictly construed as to exclude all banks save banks of issue, such as were in existence when the act of 1833 was passed, but that the section, having been re-enacted in the several Codes, would now apply to all corporations clothed with the functions and carrying on the business of banks. Assuming that the Citizens' Trust Company was incorporated under the act of 1898, the question is, Is it a "chartered bank?" or, to state the question somewhat differently, Does the act of 1898 confer upon persons incorporated under its provisions the powers and functions usually exercised by banks?

[3] 3. Banks are of three kinds: Banks of deposit, which include savings banks and all others which receive money on deposit; banks of discount, being those which lend money on collateral or by means of discounts of commercial paper; and banks of circulation, which issue bank notes payable to bearer. *Rapalje & L. Law Dict. tit. "Bank."* "A bank is an institution for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts, and the issuance of its own promissory notes, payable to bearer, as currency, or for the exercise of one or more of these functions." 3 Am. & Eng. Enc. Law (2d Ed.) 789. A bank is "an institution usually incorporated, with power to issue its promissory notes, intended to circulate as money (known as bank notes), or to receive the money of others, on general deposit, to form a joint fund that shall be used by the institution for its own benefit,

for one or more of the purposes of making temporary loans and discounts, of dealing in foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money, or with both these powers, and with privileges, in addition to these basic powers, of receiving deposits and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business." See, also, *Boone on Banking*, § 3, p. 6; *Bolles on Banking*, 2; 1 *Morse on Banks and Banking* (4th Ed.) § 2, p. 6.

When the General Assembly re-enacted the act of 1833 as found in the Code, the term "bank," as therein used, must have been understood in the sense in which it is commonly accepted; that is, to apply only to an institution exercising the main functions of a bank, such as receiving money on general or special deposit, discounting commercial paper in the usual course of trade, and lending money on approved collateral. The functions of a bank in this state are prescribed by statute and are limited. In addition to the usual powers of corporations, a bank is authorized "to hold, purchase, dispose of, and convey such real and personal property as may be necessary for its uses and business; to discount bills, notes, or other evidences of debt; to receive and pay out deposits, with or without interest; to receive, on special deposit, money or bullion, or foreign coins, or stock, or bonds, or other securities; to buy or sell foreign or domestic exchange, or other negotiable paper; to lend money upon personal security, or upon pledges of bonds, stocks, or negotiable securities; to take and receive security, by mortgage or otherwise, on property real or personal; to increase or decrease the capital stock in the manner hereinafter provided." Civil Code, § 2266 (6), (7), (8). The words "chartered bank," as used in section 204 of the Penal Code, refer to a corporation having the powers, and exercising in whole or in part, as the main object of its creation, the functions, prescribed by section 2266 of the Civil Code. In other words, if a chartered institution has for its primary object the exercise of all or some of the principal functions prescribed by this statute, it is a chartered bank. If such was not the main purpose of its organization, it is not a chartered bank within the meaning of the penal law under which the indictment was framed.

[4] 4. Under the Constitution of this state all charters to "banking" companies shall be issued and granted by the Secretary of State. Civil Code, § 6446. It has been held that the act of 1898, "authorizing the Secretary of State to grant charters to trust companies with banking privileges," is not violative of this provision of the Constitution. *Mulherin v. Kennedy*, 120 Ga. 1080, 48 S. E. 437. The precise question now being dealt with was not involved in that decision. The General Assembly may constitutionally authorize the Secretary of State to incorporate

a trust company, with some of the incidental powers usually exercised by banks; but this does not mean that such an institution would be a chartered bank within the meaning of the Penal Code. At least prior to the act of 1898 the superior courts could grant charters to companies to perform many, if not all, of the functions exercised by trust companies under the act of 1898. The act of August 13, 1910, is a recognition of this. Acts 1910, p. 98. But a company so incorporated, no matter what its powers, could not be said to be a "chartered bank," for banks, since the Constitution of 1877, can only be incorporated by the Secretary of State.

[5] 5. The powers of a trust company incorporated under the act of 1898 are set forth in section 2817 of the Civil Code. In general, these powers are those which are necessary or proper to be exercised by one performing the functions of a trustee for an individual or a body corporate, or of a legal representative of an estate, or as guardian, receiver, and the like. They bear little or no similarity to the powers usually conferred upon banking institutions. It is true a trust company under the act has power "to receive deposits of trust moneys, securities and other personal property from any person or corporation and to loan money on real estate or personal securities." But it does not, like a bank, receive money on deposit subject to check, or engage in the business of discounting commercial paper in the usual course of business, as a bank does. The lending of money is one of the functions of a bank, but this does not make every money lender a banker. Receiving money or securities on special deposit for safe-keeping is another function of a bank, but it does not follow that every such fiduciary is engaged in the business of banking. These powers conferred under the act of 1898 are merely incidental to the main object of the enactment, which is to authorize bodies corporate under the statute to act as guardian, executor, receiver, or other trustee, and as such (but not as a bank) to exercise certain incidental powers, some of which are also performed by banks. It seems clear that a company which is incorporated merely as a trust company under the act of 1898 is not a chartered bank.

[6] 6. The foregoing discussion has proceeded upon the assumption that the corporation has acquired only the special powers conferred by the act of 1898, and has not availed itself of the privilege granted in paragraph 12 of section 2817, which provides that any company incorporated under the act "may acquire and exercise all the rights and privileges and be subject to the same liabilities and restrictions as apply to banks, upon compliance with the laws of this state providing for the incorporation and regulating the business of banks." This provision is itself a legislative declaration that a company organized under the act is not to be regarded as a bank unless it "complies with

the laws of this state providing for the incorporation and regulating the business of banks"; that is to say, unless it applies for and has granted to it a charter as a bank under the provisions of section 2262 of the Civil Code. In this connection it is also significant that under section 2821 any savings bank, or trust, security, or guarantee company, incorporated before the act of 1898, and having a paid-up capital of not less than \$100,000, may obtain the privileges conferred by the act upon complying with certain specified conditions. It is manifest that the General Assembly intended to put companies incorporated under the act in a class by themselves, having only the powers conferred, and subject alone to the liabilities and restrictions imposed, by the act and by such general laws as apply to all corporate bodies.

[7] 7. If, however, a trust company incorporated under the act of 1898 should apply for and obtain a charter as a bank, then it would be "subject to the same liabilities and restrictions as apply to banks," civil as well as penal. It would then become a chartered bank. It would be both a trust company and a bank. There is no constitutional objection to the General Assembly conferring upon trust companies banking privileges, nor upon banks the functions of a trust company. If the latter should be done, the institution would not cease to be a bank; and if the former, it would become a bank, though retaining, in addition to its banking privileges, the functions of a trust company. If this should be done, the company would be invested with *all* the functions of a bank, and not with *some* of them merely, and hence the authorities cited above and relied on by counsel for plaintiff in error would not be applicable.

[8] 8. There is nothing in the indictment to indicate whether the Citizens' Trust Company was incorporated under the act of 1898, or whether, if so, it has availed itself of the privilege conferred by that act and obtained a charter as a bank. There is some doubt whether we ought to take judicial cognizance of the company's charter, and we prefer to leave this an open question. See *Atlanta & West Point R. Co. v. Atlanta Railroad Co.*, 124 Ga. 125, 52 S. E. 320; *Atlanta Terra Cotta Co. v. Georgia Railway Co.*, 132 Ga. 537, 64 S. E. 563; *White v. Atlanta Railroad Co.*, 5 Ga. App. 308, 63 S. E. 234; *Hartwell Ry. Co. v. Kidd*, 10 Ga. App. 771, 74 S. E. 310. If the courts can take judicial cognizance of what appears on the executive minutes or files of the government (*Ragland v. Barringer*, 41 Ga. 114), there would seem to be no good reason why they ought not to notice judicially any matter of public record in any of the departments of the government, such as charters in the office of the Secretary of State, or the rules and regula-

tions of the Railroad Commission, and the like.

[9] 9. Upon the trial of the present case the burden will be upon the state to show that the Citizens' Trust Company is a chartered bank. If it should appear that the company was incorporated under the act of 1898, and given only the powers conferred by that act, then, under the view we take of the law, the defendant cannot be convicted under the indictment. On the other hand, if it should appear that, in addition to having been incorporated under that act, the company has applied for and obtained a charter as a bank, as provided in paragraph 12 of section 2817 of the act, the company is to be regarded as a chartered bank, within the meaning of section 204 of the Penal Code. Judgment affirmed.

BLACK v. STATE. (No. 4,405.)

(Court of Appeals of Georgia. Aug. 30, 1918.)

(Syllabus by the Court.)

1. PERJURY (§ 25*)—INDICTMENT—EVIDENCE. "An indictment for perjury should specifically allege, and the proof should show, how and wherein the testimony upon which the perjury is assigned was material to the issue in the trial in which the alleged false testimony was delivered." *Askew v. State*, 3 Ga. App. 79 (1), 59 S. E. 311.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

2. INDICTMENT AND INFORMATION (§ 125*)—PERJURY—SEPARATE STATEMENTS.

"In a prosecution for perjury, it is permissible to join in a single count * * * a number of separate and distinct material statements alleged to have been falsely sworn to by the defendant in the same legal investigation." *McLaren v. State*, 4 Ga. App. 643, 62 S. E. 138. And if perjury is established as to any one of the material statements, a conviction will be upheld.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

3. PERJURY (§ 11*)—INDICTMENT—MATERIALITY OF EVIDENCE.

"The question whether or not a particular statement is material depends upon the nature of the proceedings and the matters at issue, and can be determined in each case for that case only." A test of materiality is whether the alleged false statement could have influenced the decision as to the question at issue in the judicial proceeding in which the perjury is alleged to have been committed. If the statement influenced the decision of the tribunal to which it was made, it was material to the investigation.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*]

4. PERJURY (§ 1*)—WHAT CONSTITUTES—SEVERAL FALSE STATEMENTS.

Perjury consists of willfully, knowingly, absolutely, and falsely testifying in a matter material to the issue under investigation in a judicial proceeding; and the design of the statute is to punish the false witness and prevent this detestable offense, which is subversive of justice; but the punishment is directed against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the moral obloquy of the witness as a whole, and consequently, though more than one false statement be willfully made by the witness on the same trial, he does not thereby become guilty of more than one offense of perjury. The gist of the offense of perjury is the disregard and corrupt violation of the oath which the witness has taken, and the offense is complete if there be one false statement willfully, knowingly, and absolutely made with intent to obscure or conceal the truth. The fact that the witness has made other knowingly false statements under the same oath does not create new offenses, for the sanctity of the oath has already been violated by him, though the concurrence of other similarly false statements may supply ground for the imposition of a heavier penalty than would otherwise have been imposed. It is proper, too, where a witness has willfully, knowingly, absolutely, and falsely testified as to more than one matter material to the issue, to allege each of the false statements, because proof that the alleged perjurer has in the same judicial investigation made other false statements may tend to illustrate the motive with which each statement was made.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5305-5310; vol. 8, p. 7751.]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

George Black was convicted of perjury, and brings error. Reversed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. T. C. Milner, Sol. Gen., of Cartersville, and Geo. W. Stevens, of Atlanta, for the State.

RUSSELL, J. The defendant was indicted for the offense of perjury. He filed a plea of former jeopardy, attaching thereto a copy of another indictment for perjury against him and a copy of the record of his acquittal upon that charge. The plea of autrefois acquit and the issue formed upon the defendant's plea of not guilty in the present case were, by consent of counsel, tried together, and the jury found against the plea in bar and returned a verdict of guilty. The defendant moved for a new trial, and excepts to the judgment overruling the motion.

[4] The question presented is whether one who has taken a lawful oath as a witness in a judicial investigation, and who as such witness, knowingly and willfully makes more than one absolutely false statement as to more than one matter material to the issue, can more than once commit the offense of perjury in the same investigation and under the sanctity of the same oath. We are of the opinion that the identity of the proceeding and of the oath administered the witness excludes the possibility that the witness is guilty of more than one perjury in the particular investigation. There is but one violation of the oath.

The offense of perjury is most detestable. The perjurer should be most severely punished, for the administration of justice depends

upon the truth, and perjury would undermine and destroy the administration of justice; and yet, to our mind, the matter is not unlike a case of murder, in which the murderer may have poisoned, stabbed, and shot the deceased, and thereafter, before life had become completely extinct, cast his victim into the sea, where, in his helpless condition, he must necessarily be drowned. Though evidence might show that any one of the instrumentalities which the murderer set in motion would, in a very short time, have produced the desired result of killing the person assaulted, there could not be more than one case of murder. Evidence might show that the deceased would have died from poison if he had not been shot, and that he would have died from the shot if he had neither been poisoned nor stabbed, and that he would have bled to death from the stabbing if he had neither been shot nor poisoned, and that he would certainly have died from one or all three attacks made upon him if he had not been cast into the sea; and yet it cannot be held that there could be four cases of murder growing out of the death of the deceased.

And so we apprehend the rule to be in regard to perjury. The witness binds himself by the sanctity of his oath, and calls upon God to witness that in the particular legal investigation in which he is sworn he will tell only the truth. If, as to any matter material to the issue, he willfully, knowingly, absolutely, and falsely violates this oath, intentionally testifying that which he knows to be untrue, he is guilty of perjury; but the repetition of other falsehoods under the same oath and in the same investigation cannot make new and additional cases of perjury, because his oath has already been violated, its sanctity has been destroyed, and the vital force of his self-assumed obligation has been extinguished. The oath remains; the judicial proceeding is still continuing, but the sanctity of his obligation has been destroyed by the first willful falsehood, and it cannot be restored by any act within his power on the one hand, nor is an additional offense committed by any repetition of any number of false statements upon his part on the other. The administration of the oath and voluntary subjection to its binding authority is exhausted, so far as the particular investigation is concerned, when the witness has willfully, knowingly, absolutely, and falsely testified as to one material matter.

[2] Subsequent falsehoods under the same oath do not make new perjuries, but only exhibit additional ways in which the perjury was committed, and therefore, as was held in the McLaren Case, 4 Ga. App. 643, 62 S. E. 138, a number of separate and distinct material statements, alleged to have been falsely sworn to, may be joined in the same count. If the defendant is guilty as to any one of them, he is guilty of perjury; and if

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

the evidence shows he is guilty of more than one false statement, either may illustrate the defendant's knowledge that he was swearing falsely, and illustrate as well the fact that the false statement was intentionally and willfully made.

[1] The question, then, is presented as to whether the alleged false statement in the indictment, on which the defendant had previously been tried, was material. If it was, the acquittal of the accused upon that indictment would bar any further prosecution for perjury alleged to have been committed in the particular judicial investigation. If the statements alleged to have been knowingly, willfully, and falsely made in the indictment upon which the accused had been tried were not material to the issue, then the plea in bar would be worthless. In the former case in which the defendant in this case was tried it was alleged in the indictment that he willfully, knowingly, absolutely, and falsely swore that he was a single man, when in truth and in fact he was not a single man, but was a married man, and an investigation of the testimony in the record shows that, while this testimony was apparently irrelevant and immaterial, it was, in the case in which the defendant was testifying, a material matter, because it was the statement of a fact which, if true, would very likely have influenced the jury in the case then pending, and in which the defendant was a witness.

The case in which Black was a witness was that of Mrs. Maynard against the Western & Atlantic Railroad Company, an action for damages alleged to have been caused by the railroad company's negligence in setting out fire by sparks, which burned her two-story frame storehouse. The material question in that case was the extent of Black's knowledge as to the origin of the fire. He testified in that trial that he was at the store about ten minutes before the fire, and that the fire caught near the stove flue. If the defendant had testified truthfully that he was a married man, the jury might have doubted his statement that he was at Mrs. Maynard's house at a late hour of the night on which the fire occurred. He swore he was a single man, which would naturally cause the jury to give credence to the statement that he was visiting there at a late hour at night and that he saw the fire start—that it started from the stove flue, and not from sparks thrown out from the railroad company's train. And while it was not at first apparent that his false statement that he was a single man would or could be material, an investigation of the record as a whole shows that it was necessarily material, because, if the jury believed it to be true, it tended to supply a reason for his absence from home and his presence at Mrs. Maynard's storehouse on the night of the fire, and thus corroborated other testimony tend-

ing to show that the railroad company was not liable in the proceeding then pending.

It is true that under the ruling in the Askew Case, 3 Ga. App. 79, 59 S. E. 311, the indictment under which the accused was previously tried may have been subject to demurrer, in that it did not allege how or why the alleged false testimony was material in the trial of the case of Mrs. Maynard against the Western & Atlantic Railroad Company; but since that point is not involved, it merely becomes a question as to whether or not the fact of Black's marriage was material. If this was material, as we think it was, then his acquittal upon the charge of perjury, as to any matter he may have testified to in the trial of the case of Mrs. Maynard against the Western & Atlantic Railroad Company, is a bar to any further trial for any other false statement made by him under the same oath and in the course of the same judicial investigation.

[3] The test which has uniformly been applied in determining whether a former prosecution is a bar to another is the solution of the question as to whether the two accusations refer to the same transaction, or, in other words, whether, under the two different charges, it is sought to punish the accused more than once for the same criminal act. If the two offenses spring out of the same transaction, an acquittal or conviction in one is a bar to any further prosecution. *Ingram v. State*, 124 Ga. 449, 52 S. E. 759, and citations; *Gully v. State*, 116 Ga. 527, 42 S. E. 790; *Burch v. State*, 4 Ga. App. 384, 61 S. E. 503; *Whitaker v. State*, 9 Ga. App. 213, 70 S. E. 990. The defendant having been acquitted of perjury in swearing falsely in the case of Mrs. Maynard against the Western & Atlantic Railroad Company, he cannot again be tried for an alleged perjury which he is charged to have committed in the same case and under the same oath alleged in the former indictment. *Burch v. State*, 4 Ga. App. 384, 61 S. E. 503; *People v. Stephens*, 79 Cal. 423, 21 Pac. 856, 4 L. R. A. 845; *Triplett v. Commonwealth*, 84 Ky. 193, 1 S. W. 84; *U. S. v. Lee*, 4 Cranch, C. C. 446, Fed. Cas. No. 15,586; *Jackson v. State*, 14 Ind. 327; *State v. Eggesht*, 41 Iowa, 574, 20 Am. Rep. 612.

In the first indictment for perjury the state was required to prove that Black was lawfully sworn; that he consciously assumed the obligation of the oath, with an understanding of its purpose and obligation; that after being so sworn he willfully and knowingly testified absolutely falsely as to a matter which was of sufficient materiality as to influence the finding of the jury in the case then pending. If the state failed to prove any of these material essentials of the crime of perjury, and an acquittal resulted, the defendant is none the less protected by his plea of former jeopardy: for the plea of former adjudication extends, not only to what was proved

on the former trial, but also to everything that could properly have been proved.

For another reason it would seem that the plea of former jeopardy would be good, if we are right in holding that there can only be one indictment predicated upon false testimony under the same oath, because the verdict acquitting Black would be conclusive upon the state, and constitute an estoppel by judgment upon the point that Black was not sworn as a witness in the case of Mrs. Maynard against the Western & Atlantic Railroad Company. An inspection of the record in the former trial of Black for perjury shows that the defendant at that time admitted that he had testified as stated in the bill of indictment. The court charged the jury that the facts testified to by him were material to the issue in the case of Mrs. Maynard against the Western & Atlantic Railroad Company, and thus the only defense left open to Black was whether or not a lawful oath was administered. This issue the jury found against the state, and the finding of the jury in that case is conclusive in this. We think, therefore, that the trial judge erred in refusing to grant a motion for new trial.

Judgment reversed.

HANSON v. STATE. (No. 5,044.)
(Court of Appeals of Georgia. Aug. 30, 1913.)

(*Syllabus by the Court.*)

LARCENY (§ 32*)—THEFT OF PAPERS—INDICTMENT.

An indictment framed under section 163 of the Penal Code of 1910 need not allege ownership of the paper taken and carried away.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 81-92, 99; Dec. Dig. § 32.*]

Error from Superior Court, Fulton County; L. S. Roan, Judge.

J. B. Hanson was convicted of larceny, and brings error. Affirmed.

Green, Tilson & McKinney, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., E. A. Stephens, and Alonzo Field, all of Atlanta, for the State.

POTTLE, J. The accused was convicted under an indictment charging a violation of section 163 of the Penal Code, which is as follows: "If any person shall take and carry away any paper, document, deed, will, or other writing relating to real or personal estate, with an intention to impair, prevent, or render difficult the establishment of a title to real or personal estate, or mutilate, cancel, burn, or otherwise destroy said paper, document, deed, will, or other writing, with the intention aforesaid, he shall be guilty of simple larceny, and be punished by imprisonment and labor in the penitentiary for not less than one year nor longer than three years." The indictment charged the wrongful and fraudulent taking and carrying

away of the deed from J. B. Hanson to J. M. Casey to certain real estate. It also averred that Hanson obtained the deed from Casey upon false and fraudulent representations, for the alleged purpose of placing the deed in a safety deposit box in a bank which had been rented for Casey; that the deed was never in fact placed in the safety deposit box, but was carried away and retained by the accused, with the intention to impair, prevent, and render difficult the establishment of the title to the tract of land described in the deed. The accused made a motion in arrest of judgment, upon the ground that the indictment failed to allege to whom the deed belonged. The motion was overruled, and he excepted.

It is contended that since the section of the Code under which the indictment was framed designates the offense as simple larceny, and as in an indictment for simple larceny it is necessary to allege ownership of the property, the indictment is fatally defective. The question as to whether it is necessary to allege ownership depends, not upon what the offense is designated, but upon the language of the statute. It is not essential in every form of larceny under the statutes of this state that ownership of the property taken shall be alleged. For example, under section 172 of the Penal Code, larceny from the person is defined to be "the wrongful and fraudulent taking of money, goods, chattels, or effects, or any article of value, from the person of another, privately without his knowledge, in any place whatever, with intent to steal the same." It has been held that under this statute it is not necessary to allege ownership of the property stolen. *Hugo v. State*, 110 Ga. 768, 38 S. E. 60. In that case it is pointed out that in the definition of simple larceny the property taken is described as "the personal goods of another," and hence that an indictment under that section must allege that the goods taken belonged to some person and identify the owner; whereas, under the language of the statute defining larceny from the person, it is only necessary to allege that the property was taken from the person of another in the manner described in the statute, that proof of that person's possession of the property would raise a presumption of ownership, and in the absence of anything to the contrary the presumption would become conclusive.

The gist of the offense defined in section 163 is the taking and carrying away of any paper described in that section, with intent to impair, prevent, or render difficult the establishment of "a title" to real or personal estate, or the destruction of such paper with the intention aforesaid. The deed described in the indictment bears on its face evidence of a title. It is not necessary to allege whose title, nor to whom the deed belonged; such allegations being merely matters of descrip-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion, and not elements in the offense. The indictment alleges that the deed was taken from the possession of one Casey, with intention to impair, prevent, or render difficult the establishment of the title to Casey. It was taken from his possession, and was presumptively his deed. It is immaterial, however, under the statute, whose deed it was, because, if it was taken away from Casey with the intention to impair the title of anybody, an offense was committed under the statute. This case differs from *Norfleet v. State*, 9 Ga. App. 853, 72 S. E. 447, which was reaffirmed in *Guyton v. State*, 12 Ga. App. 562, 77 S. E. 830. In those cases it was held that it is necessary to allege ownership in an indictment framed under sections 192, 194 of the Penal Code, charging larceny after a trust. These decisions were placed upon the construction given by the court of those sections, and particularly upon the language therein making it a necessary element of the crime that the property shall have been intrusted for the use or benefit of the owner or other person delivering it. It was held merely that, where the violation of the trust is a failure to apply the property to the use and benefit of some person other than the person delivering it, the indictment must allege that the other is the owner of the property.

Without deciding whether a demurrer would have been good, we hold that the motion in arrest of judgment was properly overruled. Judgment affirmed.

BROWN v. STATE. (No. 4,951.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. RULINGS ON EVIDENCE.

The objections to the admissibility of testimony are without merit.

2. INSTRUCTIONS.

The charge of the court correctly states the law applicable to the issues made by the evidence, and the assignments of error as to excerpts from the charge are not well founded.

3. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—EXPRESSION OF OPINION.

Where the evidence showed that the accused was drunk at the time he committed the offense, an instruction to the jury that "voluntary drunkenness is no excuse for crime" is not subject to exception on the ground that it was an expression of opinion on the facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

4. CRIMINAL LAW (§ 942*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence was merely impeaching in character and there was no abuse of discretion in overruling this ground of the motion for a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.*]

5. VOLUNTARY MANSLAUGHTER.

The evidence presented the theory of voluntary manslaughter, and the judge properly charged the law on that subject.

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Andrew J. (alias Bud) Brown was convicted of crime, and brings error. Affirmed.

McLaughlin & Jones, of Greenville, for plaintiff in error. J. R. Terrell, Sol. Gen., of Greenville, for the State.

HILL, C. J. Judgment affirmed.

ALEXANDER v. CITY OF ATLANTA.

(No. 4,555.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. GAMING (§ 75*)—KEEPING GAMING HOUSE—EVIDENCE.

The agreed statement of facts discloses a very plain violation of the law of this state which forbids keeping a gaming house. Pen. Code, 1910, § 389. One who permits others to assemble in a house or room which is in his control and play game of chance in which anything of value is hazardous is guilty of keeping a gaming house, regardless of his purpose in permitting the game.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 189, 199–201; Dec. Dig. § 75.*]

2. MUNICIPAL CORPORATIONS (§ 592*)—ORDINANCES—VALIDITY.

In the absence of express statutory authorization to the municipality, a municipal ordinance which attempts to punish for an act which has been penalized by a law of the state is void. When the state prescribes a punishment for an act as a crime, its jurisdiction to punish for that act is exclusive, unless the right to punish for it has been expressly delegated to a subordinate department of the government.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311–1314; Dec. Dig. § 592.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

T. C. Alexander was convicted of violating an ordinance of the City of Atlanta. On certiorari, the judgment of conviction was affirmed, and defendant brings error. Reversed.

Moore & Branch, of Atlanta, for plaintiff in error. Jos. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

RUSSELL, J. The plaintiff in error was tried before the recorder of the city of Atlanta, charged with a violation of a municipal ordinance under which it was made unlawful for any person, firm, or corporation to conduct or carry on any business in the city of Atlanta by means of any wheel or similar device in which the elements of chance are used for the purpose of attracting trade. The case was tried before the recorder upon an agreed statement of facts, and resulted in the conviction of the accused. Upon certiorari to the superior court, the certiorari was overruled, and the judgment of the recorder thereby affirmed.

Two defenses are presented by the writ of

error: (1) That the evidence does not show that the accused was guilty of any offense; and (2) that it was not within the power of the municipal court to punish the accused, for the reason that the ordinance is void, because it is covered by the state law, and attempts to punish for the same acts for which provision is made by the state law.

[1] 1. In view of what we shall hold as to the second contention of the plaintiff in error, it would seem unnecessary to rule upon the first point, were it not for the fact that the determination of the question as to whether the accused was shown to have been guilty of a violation of a state law renders plain our duty under the law in ruling upon the second point. According to the agreed statement of facts, the accused had in charge in his place of business a species of slot machine, in which, if one deposited a nickel, he was certain to receive in return a package of chewing gum, with the chance of winning with the next nickel 20 trade checks, which could be exchanged for 20 drinks of beer. The instrument itself developed the occasion when this profitable return for the investment of a nickel could be received, but naturally there was always in the mind of the player the expectation, when he deposited his nickel, that the next turn of the wheel would bring the indication or announcement of the coveted 20 trade checks. We agree with counsel for defendant in error that "the machine described in the agreed statement of facts is a perfection of invention in concealing its true purpose. As described, it might be mistaken for an alms box beside a church door, but it has its fangs."

According to the evidence, one of the results of this fascinating game was that on Saturdays the machine would sell from 75 to 100 packages of gum, and would attract crowds of spectators; as well as participants, while it was being operated. There can be no doubt that the agreed statement of facts showed the defendant to be guilty of a violation of the state law as to the offense of keeping a gaming house. Penal Code, § 389. The contention is made that the operation of the machine cannot be considered as a game of chance, for in any event, and for every nickel deposited, the player received the value of his money. This is true, and if this were the whole truth the statute would not be violated. But the player stands a chance to get 20 times the value of his deposit in the slot, and it is the pressure of this chance that continues the progress of the game and makes it a game of chance. *Meyer v. State*, 112 Ga. 20, 37 S. E. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17; *Whitley v. McConnell*, 133 Ga. 738, 66 S. E. 933, 27 L. R. A. (N. S.) 287, 134 Am. St. Rep. 223.

In order to commit the offense of gaming it is not necessary that money be the stake; the statute penalizes also playing for anything of value. The 20 trade checks, according to the statement of facts, have

a value of \$1; and as gaming does not necessarily consist in playing for money, it is not necessary for a violation of the law against keeping a gaming house, that money shall be hazarded. One who permits others, with his knowledge, to come together and play in a house or room, which is under his control, for articles of value other than money, is just as guilty as if money alone was at stake.

[2] 2. Having reached the conclusion that the defendant is guilty of keeping a gaming house, it is of course clear that it is not within the power of the city of Atlanta to punish for this offense. The ordinance attempts to avoid the effect of the usual rule upon this subject by penalizing only such gaming as may be done in the conduct or carrying on of other business, and for the purpose of attracting trade. The statute of the state forbids the keeping of a gaming house, no matter what may be the purpose with which it is kept, and as much denounces the offense if the purpose is to attract trade on the part of those who are engaged in a business as it does in a case where such a consideration is wholly foreign to the intentions of the keeper of the gaming house. When the state assumes to punish for the commission of an act which it has denounced as a crime, its reservation of jurisdiction is absolutely exclusive. It reserves to itself the sole right to punish the offender, not only in the maintenance of its own dignity, and with a view to uniformity of procedure and penalty, but also in order to protect the citizen from being twice placed in jeopardy, or from being twice punished for the same offense. There is no exception to this rule, save where the state expressly delegates to some subordinate department of the government the right, in its stead, to punish for the particular act forbidden by the state law.

The enactment by a municipality of an ordinance against the keeping of a gaming house by one who is carrying on a business, and whose purpose in keeping the gaming house or gambling device in a house under his control is merely to attract trade, is absolutely futile, because the statute of the state forbids the keeping of a gaming house by any person, and does not permit it for any purpose, and the addition in the ordinance of descriptive terms applicable to only one class of persons who might keep gaming houses does not add a single additional element to the constituents of the state offense, or subtract a single ingredient therefrom.

The decision of this case is practically controlled by the ruling of this court in *Cotton v. Atlanta*, 10 Ga. App. 397, 73 S. E. 683. This case differs from that of *Athens v. Atlanta*, 6 Ga. App. 244, 64 S. E. 711, and other similar cases which are cited, and the rulings in those cases will not be extended. This court, recognizing the extreme difficulty attending the enforcement of the regulations prohibiting the traffic in intoxicating liquors,

went to the extreme limit allowable under the peculiar circumstances of those cases.

Nothing is better settled than that a municipal ordinance which attempts to interfere in the enforcement of a state statute, or attempts to assume jurisdiction of offenses which are cognizable alone under the laws of the state, is absolutely void. For this reason, in the absence of any express grant to the city of Atlanta in its charter, the ordinance under which the accused was convicted is void, his conviction was unauthorized, and the judge of the superior court erred in not sustaining the certiorari.

Judgment reversed.

SIMMONS v. HAWKINS. (No. 5,087.)
(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

CERTIORARI (§ 70*)—REVIEW—JUSTICES OF THE PEACE—DIRECTING VERDICT.

This is a certiorari case involving \$25. On appeal to a jury in the justice's court a verdict was directed for the plaintiff. While a justice of the peace has no authority to direct a verdict, yet, where the evidence shows that the verdict as directed was demanded, this court will not reverse the judgment of the superior court, refusing to sustain the certiorari, on the sole ground that the verdict was directed by the justice. *Meeks v. Carter*, 5 Ga. App. 421, 63 S. E. 517.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 195-208; Dec. Dig. § 70;* Appeal and Error, Cent. Dig. § 571.]

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Action between W. S. Simmons and J. L. Hawkins. From the judgment, Simmons brings error. Affirmed.

J. H. Smith, of Eden, for plaintiff in error.
C. T. Guyton, of Guyton, for defendant in error.

HILL, O. J. Judgment affirmed.

JOHNSON v. STATE. (No. 5,025.)
(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§§ 224, 236*)—ILLEGAL SALE—EVIDENCE.

This case falls within the well-settled rule that on a trial for selling intoxicating liquor a prima facie case is made out for the state by proof of a delivery of the whisky by the accused and payment to him of money or other thing of value by the purchaser. If the accused defends upon the ground that he was acting solely as agent for the purchaser, the burden is upon the accused to show that he was not interested in the sale, received no benefit therefrom, and acted solely as agent for the buyer. *McGovern v. State*, 11 Ga. App. 267, 74 S. E. 1101. In the present case the accused did not carry this burden; nor was there any evidence which authorized an instruction

upon this theory. None of the assignments of error are meritorious.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275-281, 300-322; Dec. Dig. §§ 224, 236.*]

Error from City Court of Baxley; A. V. Sellers, Judge.

Will Johnson was convicted of selling intoxicating liquors, and brings error. Affirmed.

W. W. Bennet, of Baxley, for plaintiff in error. C. H. Parker, Sol., and J. P. Highsmith, both of Baxley, for the State.

POTTLE, J. Judgment affirmed.

RICHTER v. CATHY. (No. 4,671.)
(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 236*)—INSTRUCTIONS—CREDIBILITY.

The court erred in instructing the jury that they could believe the witness or witnesses who had the best opportunity of knowing the facts about which they testified and the least inducement to swear falsely, without qualifying this instruction by the addition of the proviso, "if the witnesses are of equal credibility." *Wood v. State*, 1 Ga. App. 685 (4), 58 S. E. 271; *Lawrence v. State*, 10 Ga. App. 786, 74 S. E. 300; *Nashville, Chattanooga & St. Louis R. Co. v. Hubble*, 139 Ga. 300, 76 S. E. 1009.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.*]

2. APPEAL AND ERROR (§ 170*)—REVIEW—CONSTITUTIONALITY OF STATUTE.

In *Fortune v. Braswell*, 139 Ga. 609, 77 S. E. 818, the Supreme Court decided that sections 8712 and 3713 of the Civil Code, upon which this suit is based, are unconstitutional. However, we decline to consider this point, because the question as to constitutionality of the statute is not presented in the specific mode required by law, and was not raised in the lower court. *First National Bank of Senoia v. Jones*, 12 Ga. App. 158, 76 S. E. 1042.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1035-1062, 1099, 1100; Dec. Dig. § 170.*]

Error from City Court of Madison; K. S. Anderson, Judge.

Action between R. D. Richter and J. B. Cathy. From the judgment, Richter brings error. Reversed.

Middlebrooks & Burrus, of Madison, for plaintiff in error. Williford & Lambert, of Madison, for defendant in error.

RUSSELL, J. Judgment reversed.

CHANDLER et al. v. BAGGETT et al.
(No. 4,362.)
(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. CERTIORARI (§ 54*)—EXCEPTIONS TO ANSWER—NOTICE—TRAVERSE.

Exceptions to the answer to a petition for certiorari must be filed in writing, and notice

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereof given to the opposite party before the case is called in its order for hearing. Exceptions to the answer, and traverse of the answer are both means for perfecting it, and of presenting to the reviewing court what actually transpired upon the trial in the lower court. But, if both exception and traverse are filed in the same case, the court should act on the exception before disposing of the traverse. Civ. Code 1910, § 5196; *Thomas v. State*, 7 Ga. App. 638, 67 S. E. 894.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 138; Dec. Dig. § 54.*]

2. CERTIORARI (§ 54*)—EXCEPTIONS TO ANSWER.

If no notice of the exceptions is given the opposite party until after the trial upon the traverse, the exceptions are too late, and may properly be stricken.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 138; Dec. Dig. § 54.*]

3. CERTIORARI (§ 56*)—TRAVERSE TO ANSWER—SUFFICIENCY.

A traverse to the answer to a petition for certiorari is sufficiently definite when the particular portion of the answer which it is sought to contradict and disprove is specifically referred to and denied, and it is positively stated that a specific portion of the petition, identified by reference thereto, relates the truth with regard to the point at issue. Civ. Code 1910, § 5200.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 143, 144; Dec. Dig. § 56.*]

4. APPEAL AND ERROR (§ 117*)—MATTERS REVIEWABLE—REFUSAL TO APPROVE BRIEF OF EVIDENCE.

The refusal of a trial judge to approve a certain portion of a brief of evidence is not proper subject-matter of review by means of a motion for a new trial, nor can such refusal be reviewed by direct exception. The remedy, if any, is to be found in a petition for mandamus.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 805-812; Dec. Dig. § 117.*]

5. CERTIORARI (§ 62*)—DETERMINATION OF MERITS.

A final determination of the merits of a certiorari cannot be had until the issue formed upon the traverse to the answer of the inferior tribunal, whose judgment is under review, has been correctly adjudicated. The office of the traverse to the answer of an inferior judicatory is to contradict the statements of the lower court as to what actually transpired upon the trial, and if the facts in dispute are material to the issue the reviewing court cannot properly pass upon the merits of the case until it has ascertained what is the truth in relation to these facts in dispute.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 170-173; Dec. Dig. § 62.*]

6. CERTIORARI (§ 70*)—REVIEW—RULINGS ON TRAVERSE.

The court erred in striking the traverse to the eighth and ninth paragraphs of the answer of the chairman of the board of county commissioners, but exceptions to this ruling were not preserved by filing exceptions pendente lite, and the ruling is not reviewable by a motion for a new trial.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 195-208; Dec. Dig. § 70.*]

Error from Superior Court, Rockdale County; L. S. Roan, Judge.

Petition for certiorari by F. M. Chandler and others against A. Baggett and others. From the judgment, petitioners bring error. Affirmed.

A. C. & J. H. McCalla and A. M. Helms, all of Conyers, for plaintiffs in error. J. R. Irwin, of Conyers, and J. E. & L. F. McClelland, of Atlanta, for defendants in error.

RUSSELL, J. Judgment affirmed.

TURNER et al. v. BANK OF MAYSVILLE. (No. 4,552.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 534*)—ACTION ON NOTE—ATTORNEY'S FEES.

A contract may be in part conditional and in part unconditional. A note, such as that which is the basis of this suit, may be unconditional, in so far as it relates to the payment of the principal and interest; but the stipulation under which the maker agrees to pay 10 per cent. on the amount of the note as attorney's fees is by law conditioned upon proof that the maker was served with the 10 days' notice required by law (Civ. Code 1910, § 4252); and for that reason attorney's fees cannot be recovered unless it appears from the answer of the defendant, or from testimony introduced upon the trial, that he was notified as required by law.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

2. BILLS AND NOTES (§ 534*)—ACTION ON NOTE—ATTORNEY'S FEES.

Even though the suit be in default, it is error, in the absence of proof that the defendant was notified of the claim for attorney's fees as required by law, to enter judgment for attorney's fees in a suit upon a promissory note containing a stipulation for the payment of such fees.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

Error from City Court of Jefferson; G. A. Johns, Judge.

Action by the Bank of Maysville against J. H. Turner and others. Judgment for plaintiff, and defendants bring error. Affirmed, with directions.

J. S. Ayers, of Jefferson, for plaintiffs in error. A. C. Brown, of Jefferson, for defendant in error.

RUSSELL, J. The Bank of Maysville brought suit upon a note, against Turner as principal and Holder as indorser, or guarantor. In the note the maker promised to pay all costs of collection, including 10 per cent. attorney's fees. The defendants filed no answer, and the judge entered judgment against them by default, as upon an unconditional contract in writing, for the amount of the note and for attorney's fees of 10 per cent. of the amount of the principal and interest. It appears from the record that there was no evidence that the notice required in section 4252 of the Civil Code had been given.

[1] This judgment was erroneous. Under the provisions of Civil Code, §§ 5660, 6295,

6296, 6516, the trial court is authorized to render judgment in all cases founded upon unconditional contracts in writing when no issuable defense is filed under oath. But since a contract may be in part conditional and in part unconditional, it is plainly to be seen that the stipulation as to attorney's fees is a conditional contract, and therefore the allegation upon the point of the notice of claim of attorney's fees must be supported by proof. If the holder of a note should settle or compromise with his debtor, he might abandon his claim for attorney's fees; and whether this happened or not, the notice required by law, and which is necessary to bind the maker of the note for the payment of attorney's fees, must be proved to have been given. The fact that the case is in default does not relieve the plaintiff from the necessity of proving that the defendant was notified, at least ten days before the return day at which suit was brought, to the effect that he expected to claim attorney's fees. A note such as that which is the basis of the pending suit may be unconditional, in so far as it relates to the payment of the principal and interest; but the stipulation under which the maker of the note agrees to pay 10 per cent. as attorney's fees is by law conditioned upon proof that the maker of the note was served with the 10 days' notice required by law (Civil Code, § 4252); and for that reason attorney's fees cannot be recovered, unless it appears from the admissions of the defendant in his answer, or from testimony introduced upon the trial, that he was notified as required by law.

[2] In the present case no effort was made to prove that the defendant was notified, and therefore the judgment against him for attorney's fees is without evidence to support it. The court entered the judgment for attorney's fees without giving the defendant an opportunity to discharge his obligation free from this burden. *Mt. Vernon Bank v. Gibbs*, 1 Ga. App. 662, 58 S. E. 269. In this we think the court erred; and for this reason we order that the plaintiff write off the attorney's fees which were awarded to him, as well as the sum of \$37.31 excess of interest, which was included in the judgment by mistake in the calculation of the interest, and that the costs be taxed against the defendant in error.

Judgment affirmed, with direction.

SKINNER v. STATE. (No. 4,677.)
(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. RULINGS ON EVIDENCE.

The several assignments of error to rulings upon evidence are wholly without merit.

2. CRIMINAL LAW (§ 1163*)—HOMICIDE (§ 339*) — APPEAL—HARMLESS ERROR—STATEMENT OF ACCUSED.

A verdict of guilty of assault with intent to murder would have been authorized; and the evidence as a whole so demanded at least the verdict of guilty of stabbing, which was returned by the jury, that the errors in rulings as to the defendant's statement on the trial as presented in the record, are immaterial. The right of a defendant in a criminal trial "to make to the court and jury such statement in the case as he may deem proper in his defense" (Pen. Code 1910, § 1036) should not be abridged in any case. However, upon a review of the defendant's statement in the present record, it is palpably plain that this right was substantially accorded him. There was nothing in the language of the judge in his colloquy with counsel which could by any possibility have prejudiced the defendant's case; and though it is not proper practice for the court to interrupt the defendant's statement, or to attempt to direct it conformably with the rules of evidence, the matter omitted from the defendant's statement in this case, due to the rulings of the court (as appears from the statement of defendant's counsel in the record), was so trivial and inconsequential that the omission can in no view of the case be presumed to have been harmful to the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163;* Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

H. D. Skinner was convicted of stabbing, and brings error. Affirmed.

J. S. James, of Atlanta, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, for the State.

RUSSELL, J. Judgment affirmed.

ATLANTIC COAST LINE R. CO. v. WHITNEY. (No. 4,413.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. PROCESS (§ 163*)—AMENDMENT.

The court did not err in permitting the process to be amended, so that it would bear test in the name of the presiding judge of the court, and thereafter ordering service to be perfected, returnable to a later term of the court. Upon this point the decision is controlled by the ruling of this court in *Beach Lumber Company v. Baxley Banking Company*, 8 Ga. App. 251-253, 68 S. E. 946. There is "no time limit by law when the amendment to writs shall be made." *White v. Hart*, 35 Ga. 269.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 224-238; Dec. Dig. § 163.*]

2. RAILROADS (§ 394*)—PLEADING (§ 216*)—DEMURRER—INJURY TO PERSON ON TRACK—PETITION.

There was no error in overruling the special demurrers to the plaintiff's petition, and the petition as a whole was sufficient to withstand the general demurrer. It was for the jury to say whether the wire which caused the fall of the plaintiff was the efficient proximate

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cause of the plaintiff's injury, or whether her injury was due to the acts of negligence alleged against the defendant; and the question could not be settled in a ruling upon demurrer. The ruling upon this point is controlled by the decision of this court in *Atlantic Coast Line Railroad Company v. Daniels*, 8 Ga. App. 775, 70 S. E. 208.

(a) In an allegation charging that the agents of the railroad company had knowledge of a custom on the part of the public of using a portion of its tracks as a pathway, and that this portion of the track was used with the permission of those officers having charge of the tracks at that point, it is not necessary to allege by name the particular officers or employees therein referred to. The statement that the name of these agents of the company is unknown to the petitioner is sufficient designation.

(b) Construed in connection with other portions of the petition, the eighteenth paragraph, which alleged that the defendant was bound to anticipate the presence of the plaintiff upon the track, was not demurrable.

(c) The allegation of the petition in reference to the wantonness and willfulness with which the alleged injury was inflicted may be demurrable; but the demurrer itself was defective and insufficient, in that it was not specific enough to point out the defect, so as to require the judgment of the trial court.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1331-1338; Dec. Dig. § 394; **Pleading*, Cent. Dig. §§ 535-539; Dec. Dig. § 216.*]

3. VERDICT—INSTRUCTIONS—DENIAL OF NEW TRIAL.

The evidence authorized the finding of the jury, the verdict was not excessive, the charge of the court was a full, fair, and complete presentation of the law applicable to the issues involved, and there was no error in refusing a new trial.

Error from City Court of Valdosta; O. M. Smith, Judge pro hac.

Action by Lizzie Whitney against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet & Branch, of Quitman, and E. K. Wilcox, of Valdosta, for plaintiff in error. J. R. Walker, A. J. Little, and Jas. M. Johnson, all of Valdosta, for defendant in error.

RUSSELL, J. Judgment affirmed.

THOMSON v. McLAUGHLIN. (No. 4,873.) (Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 434*)—FAILURE TO PERFORM—PRESUMPTION OF FRAUD.

A promise to do certain acts or perform certain services, made to induce the execution of a promissory note, though made with no intention of performance, is not such a fraud as will authorize the admission of parol evidence thereof to vary the terms of a note which contains no such stipulation.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

2. EVIDENCE (§§ 429, 434*)—PAROL CONTRACTS—CONSIDERATION.

The consideration of a note is always the legitimate subject of inquiry; but where it is insisted that part of the consideration was a verbal promise, and the evidence as to such promise would completely defeat and void the written instrument by proof of negotiations and agreements which could and should properly have been included in the writing, and there is no contention that the omission of these stipulations from the contract was due to either fraud, accident, or mistake, parol evidence upon the subject should not be admitted.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1969-1971, 1973, 1974, 2005-2020; Dec. Dig. §§ 429, 434.*]

(Additional Syllabus by Editorial Staff.)

3. INSURANCE (§ 184*)—PREMIUM NOTES—REBATE.

An agreement between insured and an agent of the insurer that, if the insured will take the local agency of the company, the agent will write other insurance locally without the aid of insured, and divide his commissions on same with insured, so as to provide for the payment of his premium notes, is a mere subterfuge, amounting to an illegal rebate.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 184.*]

4. FRAUD (§ 20*)—WHAT CONSTITUTES—FALSE STATEMENT.

A false statement is not fraudulent, when there is no reason why it should be believed and acted upon.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

Error from City Court of Madison; K. S. Anderson, Judge.

Action by J. E. McLaughlin against W. G. Thomson. Judgment for plaintiff, and defendant brings error. Affirmed.

Williford & Lambert, of Madison, and Saml. H. Sibley, of Union Point, for plaintiff in error. Middlebrooks & Burrus, of Madison, and Payne & Jones, of Atlanta, for defendant in error.

RUSSELL, J. McLaughlin sued Thomson on a promissory note for \$101.19 principal. The defendant filed a plea in which he attempted to set up that he was induced by fraud to sign the note. The fraud as alleged consisted in promises by McLaughlin to Thomson to the effect that, if Thomson would take certain insurance policies from the company of which McLaughlin was agent and give notes for the premium, he would assist Thomson to write certain insurance, from which Thomson would earn more than enough commissions to pay the premium notes. It was alleged that these promises were fraudulent, because McLaughlin, at the time he made them, had no intention of complying with them. McLaughlin's promise, it was alleged, was accompanied by the statement that he would guarantee that Thomson would earn a sufficient amount in commissions, upon business which McLaughlin would help Thomson to write, to pay the note. Two notes were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

given; one for \$151.80, and one for \$101.19. Thomson paid the first note at maturity, and in his plea he asked for a recovery against McLaughlin for the amount of the paid note. The note sued on was given in renewal of the second note; and in his plea he asked that he be relieved from payment of the note sued upon, because it was fraudulent and illegally obtained, and was without consideration. The court overruled a demurrer to this plea, and, as the plaintiff did not except to this ruling, it became the law of the case, and the court was bound to adhere to it in the subsequent conduct of the trial. *Georgia Northern Railway v. Hutchins*, 119 Ga. 504, 46 S. E. 659; *Hawkins v. Studdard*, 132 Ga. 265, 63 S. E. 852, 131 Am. St. Rep. 190. Upon the trial of the case, however, the testimony developed that the representations and promises made by McLaughlin to Thomson did not amount to a fraud, and thereupon the court, as we think, correctly excluded all of the testimony which had been introduced, and directed a verdict for the plaintiff.

[2] The testimony adduced not only sought to void the note, because of fraud in procuring its execution, but it tended to vary the terms of this unconditional contract in writing, and, but for the ruling of the court upon the demurrer, none of it would have been admissible. But, conceding for the purposes of the case, and in view of the court's ruling that the testimony adduced is legally admissible, it failed to show fraud.

The history of the transaction as related by Thomson himself is that McLaughlin, as agent of the Equitable Life Assurance Society, came to Madison and induced him to take a \$10,000 policy of term insurance, upon which the annual premium was \$145. Subsequently McLaughlin returned to Madison and persuaded Thomson to take, instead of the \$10,000 of term insurance, \$9,000 of ordinary life insurance, upon which the annual premium amounted to \$252.99, instead of \$145, which was the premium upon the term insurance. The premium upon the \$9,000 policy of insurance was divided into two notes, one for \$151.80 and the other for \$101.19, due upon different dates. Thomson testified that he paid the first note, upon McLaughlin's assurance that he would come to Madison and assist him in writing enough business to pay the entire premium. As a result of correspondence between the parties before the second note became due, and of McLaughlin's renewed assurance that Thomson could write enough insurance to pay the premiums, and that he was ready, at any time Thomson would designate, to go to Madison and help Thomson, the note sued on was given by Thomson to McLaughlin to cover the amount of the second note; McLaughlin paying the second note (which had been made

payable to Burr, manager of insurance company).

The statements of McLaughlin, subsequent to the time when the original notes were executed, are of but little materiality, and the inquiry as to whether he was guilty of a fraud should properly be confined to what transpired prior to and at the time the first notes were executed, because Thomson is not in any worse condition by reason of renewing the note than he was when he originally gave it, and there can be no fraud unless injury of some kind results. The only purpose for which the subsequent oral and written communications could be admissible would be to illustrate the motive of McLaughlin in the representations made by him at the time that the first notes were given. McLaughlin gave Thomson the agency of the insurance company at Madison. He told him he could easily get enough business to earn therefrom a sufficient amount in commissions on premiums to pay the two premium notes which he had given. Certainly this was not such a statement as would amount to a fraud, for it related to a matter as to which Thomson's opportunity for knowledge was equal to McLaughlin's. Presumably Thomson would know better than McLaughlin how many probable insurers lived within the territory, because the evidence disclosed that McLaughlin did not live in that vicinity. McLaughlin told Thomson, and he afterward wrote to him, that he would come to Madison and lend his assistance in procuring insurance for which Thomson would be entitled to a commission on the premiums. Upon a former occasion Thomson had carried McLaughlin around Madison and introduced him to a few probable insurers. Thomson admits that he was to lend assistance, in a way, to secure names and prospects. It does not appear that he complied even with this undertaking.

Thomson further testified: "After he began to talk to me, and I had sufficient confidence in him to believe him, he assured me that I would never have it to pay; and I told him then that I was signing the note, but it was up to him to get it paid. He assured me again I would never have it to pay. I told him I did not have time to devote to the work. I signed two notes, payable to Burr, manager of the Equitable at Atlanta." He also testified: "Right at that time he asked me to take the agency for the company. He said: 'I want to get somebody here to act as agent and I want you to take the agency.' I told him I didn't have time. He said all he wanted was to have a man here, and he would come down and write the business." It is apparent from this testimony that the statement did not amount in law to a fraud, because there was no reason why Thomson should have reposed any con-

fidence in McLaughlin, no reason why he should have believed his statement, and especially no reason why he should sign a note upon McLaughlin's assurance that he would pay it.

[1, §] The law does not assume that one can be defrauded by such circumstances as these; for there is no reason why one should permit himself to be so defrauded. The act done is a voluntary act, with full knowledge of the law and all the probable consequences. Furthermore, the statement that McLaughlin was to do all of the work and divide his commissions with Thomson, so as to provide for the payment of Thomson's two notes, would have amounted to nothing more than a subterfuge by which Thomson would have been given the first two premiums, and this would have been a rebate, which is contrary to law. It is very apparent from the record that the court refused to strike the plea in order to enable the court to determine, from the evidence, whether the note had in fact been procured by fraud. The court may possibly have erred in not striking the plea. Upon this we are not required to rule, for there was no exception to the ruling on the demurrer. But the court did not err in ruling out all of the testimony after it was introduced, because it is very apparent that it did not support such a plea of fraud as is required by law. It is perhaps true that a fraud might have its inception in a promise made with such apparent sincerity as to deceive the promisee, but which the promisor had no intention whatever of fulfilling. In such a case the making of the promise, if there were any special reason why the promisee should have reposed confidence in the promisor, might amount to a fraud.

We do not think this case is similar in principle to a violation of the labor contract law as embodied in section 715 of the Penal Code, because a statutory rule of evidence gives vitality to the penal statute. But even if the rule applicable to that criminal statute were applied to the facts of this case, there could not be a conviction, because, under the rulings in *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022, *Patterson v. State*, 1 Ga. App. 782, 58 S. E. 284, and numerous succeeding cases, it must have appeared that McLaughlin entertained the intent to defraud at the time he procured the notes; and the testimony as to his subsequent conduct, as well as the letter which was introduced in evidence wholly rebuts such an inference. The evidence of Thomson himself, who was the only witness in the case, failed to establish that the notes were procured by fraud; and, regardless of the ruling of the court upon the answer, this testimony was properly ruled out.

[4] The case could have no other proper conclusion, because a false statement is not fraudulent, when there is no reason why

the statement should be believed and acted upon. *Branan v. Warfield & Lee*, 3 Ga. App. 586, 60 S. E. 325. It must also be borne in mind that there is no contention that Thomson did not receive the policy for which he had contracted, nor that the company in which he is insured is not thoroughly solvent and able to comply with its contract of insurance. Thomson, therefore, has been as fully protected by the contract of insurance which he received in return for his notes as an insured person who paid the entire premium in cash.

Judgment affirmed.

WRIGHT v. BANK OF SOUTHWESTERN GEORGIA. (No. 4,429.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. MOTION TO SET ASIDE JUDGMENT.

The ruling in this case is controlled by the decision of this court in *Benford v. Shiver*, 13 Ga. App.—, 78 S. E. 860.

2. NEW TRIAL (§ 27*)—JUDGMENT (§ 384*)—MOTION TO SET ASIDE—GROUND FOR NEW TRIAL.

The ground of the motion for a new trial, which asks that the judgment be set aside upon the showing made for a continuance, is in effect a motion to set aside judgment, made at the term at which the judgment was rendered; and since it was shown to the court that the defendant was providentially prevented from attending court by an illness which rendered it impossible for her to be at court, and that she had previously filed a meritorious defense, which, if supported by evidence, would have relieved her from any liability upon the notes which were the basis of the suit, the judgment should have been set aside, in order that the defendant might be heard on the substantial issue raised by the pleadings.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 40, 41; Dec. Dig. § 27; **Judgment*, Cent. Dig. §§ 727-732; Dec. Dig. § 384.*]

3. CONTINUANCE (§ 47*)—HUSBAND AND WIFE (§ 25*)—JUDGMENT (§ 385*)—MOTION TO SET ASIDE—PROCUREMENT OF CONTINUANCE—EVIDENCE—DUTY OF HUSBAND.

Proof that the defendant was a married woman, who was not separated from her husband, was, without more, not sufficient to disprove and impeach a defendant, who testified, on a showing for a continuance, that she had no one by whom she could send a physician's certificate or otherwise notify her counsel that she was physically unable to attend the court. Even if there be a presumption that every husband does his duty, the duty of making a showing for a continuance for his wife in a suit upon a note, evidencing a debt which was originally the debt of the defendant's first husband, is not imposed by law upon the second husband as the successor to the marital offices of his predecessor.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 147; Dec. Dig. § 47; **Husband and Wife*, Cent. Dig. §§ 148-151, 153, 154, 525; Dec. Dig. § 25; **Judgment*, Cent. Dig. § 707; Dec. Dig. § 385.*]

4. WORDS AND PHRASES—"LIVING TOGETHER."

As applied to husband and wife, the phrase "living together" does not always import that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

they are living in the same place. The expression merely implies that there has been no separation, voluntary or legal, which can legally be said to have released either from their duties to the other under the strict letter of the law.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4193.]

Error from City Court of Leesburg; H. L. Long, Judge.

Action by the Bank of Southwestern Georgia against C. S. Wright. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Maynard, of Americus, and Ware G. Martin, of Leesburg, for plaintiff in error. Ellis, Webb & Ellis, of Americus, for defendant in error.

RUSSELL, J. The Bank of Southwestern Georgia brought suit against Cynthia Styles Wright on two promissory notes, one dated April 25, 1903, and the other February 18, 1905. The defendant filed an answer, in which she averred that the notes were without consideration as far as she was concerned, for the reason that they were given for the debt of her former husband, Jesse Styles, and that her assumption of his debt was null and void. When the case was called for trial the defendant was absent. Her counsel stated to the court that they did not know why she was not present, and for that reason they were unable to make a showing for continuance. In the absence of a legal showing for a continuance, the trial judge very properly proceeded with the trial; and upon the introduction of testimony in behalf of the plaintiff, judgment was rendered in its favor (the case being, by consent of counsel, tried by the court without a jury).

During the term, and before the adjournment of the court, the defendant moved for a new trial. The motion for a new trial, in addition to the three general grounds, asked that the judgment be set aside and a new trial be granted upon the ground that on the date of the trial the defendant was at her home sick with malarial fever, and unable, on account of her illness, to advise her attorneys of the fact of her illness. The movant's residence was 18 miles from Leesburg, where the court was held. This special ground of the motion was supported by the affidavit of the defendant's attending physician, stating that she was suffering from chills and malarial fever, and that on July 18th (the date of the trial) she could not safely attend court, or go anywhere else, and that she still was under his treatment. It appears also from the affidavit of her counsel that she had been present at the court during every preceding term thereof since the suit was filed in March, 1911, and that when she did not appear they tried to get some information of her by telephone, but were unable to do so. The bank made a countershowing to the effect that the court was in

session three days before the date upon which the judgment was rendered, and that she had sufficient time to furnish the court with proper affidavit of her sickness, if she was ill; that she failed to allege, in the affidavit filed in support of her motion for a continuance, what she would testify in the trial of the case; and, furthermore, that at the time she was a married woman and lived with her husband, Shade Wright. The trial court sustained the countershowing and refused to set aside the judgment and grant a new trial.

[1] We think this case is fully controlled by the ruling of this court in Benford v. Shiver, 78 S. E. 860.

[2] The court was fully authorized to refuse the motion for a new trial, so far as it was predicated upon the general grounds, because the testimony for the plaintiff, not being disputed, required the judgment which was rendered. We think, however, that the court erred in not setting aside the judgment and reopening the case, so as to give the defendant a day in court. While the motion under consideration was presented as a ground of a motion for a new trial, it was filed as a separate paper and after the original motion for a new trial; and though it was denominated as a ground of the motion for a new trial, it was in effect a motion to set aside the judgment. In this ground, separately filed, it is specifically asked that the judgment be set aside. This is all that was or could have been asked in the premises; for the court did not err in ruling the case to trial upon the mere showing by counsel that their client was absent. But there subsequently developed a reason why the judgment should be set aside. Generally a motion to set aside a judgment may be filed at any time within three years. Of course, therefore, it can be filed at any time within the same term; and we know of no reason why a motion to set aside a judgment should be refused merely because it may be denominated as a ground of a motion for a new trial, which must be filed during the term.

[3] In the countershowing of the plaintiff the point is made that in the defendant's showing it does not appear what she expects to testify upon another trial of the case. The absence of a party, especially the sole party upon the particular side of the case, may of itself constitute a good ground for a continuance. The defendant had the right to be present, if for no other reason than to assist her counsel in the selection of the jury and in the conduct of the case, and in suggestions upon cross-examination of witnesses for the opposite party; and she had a plea, to sustain which it was evident she might and would properly be a witness. If she had been present, probably she might have been able to inform her counsel of other sources from

which information might have been derived in support of her answer. A motion to set aside a judgment is not confined, like a motion in arrest, to matter appearing upon the record, or appearing to be absent from the record; and as we pointed out in the case of *Benford v. Shiver*, supra (in which the facts are quite similar to those involved in this case), a judgment should be set aside when it appears that a party who had filed a substantial and meritorious defense was kept away from court under such circumstances as that the court should have continued the case upon a timely motion for a continuance, which informed the court as to the true reason of the party's absence.

A wife whose deceased husband has left no children, and who is by law his sole heir, can take his property, and, by paying his debts, avoid an administration, if all his creditors consent; and it may be that there is nothing in the defense to the effect that the debt evidenced by the notes is the debt of her deceased husband. Perhaps, however, a wife who assumes one of her husband's debts, without the consent of the other creditors, who have claims against his estate, would get no title to such property as was left by her husband. And we reverse the judgment with less reluctance because the character of the articles originally sold by the plaintiff bank to the defendant's husband is such that it may be true that, at the time the widow gave her notes in lieu of the notes given by her deceased husband to the bank, the corn, fodder, etc., had been used or dissipated; and in that case, if the husband left no other property, the making of the notes by the wife would be nothing more nor less than the assumption of her husband's debt. The evidence may show that by giving the notes the wife merely assumed the pre-existing debt of her husband, or even if that is not true, the defendant may otherwise sustain her plea of failure of consideration.

It is not disputed that the defendant was 18 miles from court at the time the judgment was rendered, and seriously ill with chills and malarial fever, and the seriousness of her illness is indicated by the affidavit of the attending physician, who on July 26th swore that she still was unable to leave her home for any purpose whatever. The refusal to set aside the judgment upon the ground of the defendant's illness seems to have been based on the fact that the court was in session three days before the date upon which the judgment was rendered, and that the defendant then had a husband who lived with her, and who could perhaps have

brought information of his wife's sickness to her counsel. It would seem that in a state of ideal connubial felicity nothing would be more natural than for a husband to find pleasure in the prompt and eager discharge of his spouse's slightest wish, to say nothing of that impelling sense of duty which would unconsciously actuate him to attend to any of her business affairs, and thus relieve her from even the smallest annoyance; but the evidence does not disclose whether the tie which bound Shade to Cynthia was the silken cord of love or the hateful chain of convention.

[4] As applied to modern wives and husbands, the phrase "living together" does not always import that they are living at the same place. The expression merely implies that there has been no separation, voluntary or legal, which can legally be said to have released either from their duties to the other under the strict letter of the law. We think, therefore, that the judge was not authorized to assume, from the testimony to the effect that Cynthia lived with Shade, that Shade was living with Cynthia, or at the house where Cynthia abode at the time of the trial, or during the three days before the trial, or even if he were there, that he was bound to journey 18 miles to Leesburg to inform the defendant's lawyers that his wife was sick. No presumptions arising from the evidence can be indulged, except such as are authorized by law; and as it was not the duty of the defendant's husband to assist her counsel, or give them information as to his wife, certainly nothing more could be presumed than that he would do his duty. But even if the husband should have performed this service for his wife, we hardly think the wife should be charged with the failure of her husband to do his duty. A general enforcement of this principle would be "hard law" for wives. Proof that the defendant was a married woman, who was not separated from her husband, was not, without more, sufficient to disprove and impeach a defendant, who testified, on a showing for continuance, that she had no one by whom she could send the physician's certificate, or otherwise notify the court that she was physically unable to attend the court. Even if there be a presumption that every husband does his duty, the duty of making a showing for a continuance for his wife in a suit upon a note, evidencing a debt which was originally the debt of the defendant's first husband, is not imposed by law upon the second husband as the successor to the marital offices of his predecessor.

Judgment reversed.

REIDSVILLE & S. E. R. CO. v. BAXTER.**GEORGIA COAST & P. R. CO. v. SAME**

(Nos. 4,591, 4,592.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULING ON DEMURDER.**

The plaintiff having elected to proceed upon the second count in his petition, the ruling addressed to the first count, even if erroneous, did not hurt the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

2. COVENANTS (§§ 31, 57*) — EVIDENCE (§ 461*) — PAROL — COVENANT — CONSTRUCTION—VALIDITY—"PERSONAL COVENANT"—"COVENANT RUNNING WITH THE LAND."

The plaintiff proved a covenant that ran with the land. To constitute a covenant running with the land, the covenant must have a relation to the interest in the estate conveyed, and the act to be done must concern the interest created and conveyed; but it is not necessary that privity of estate shall exist between the original grantor and a purchaser from the covenantee.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 31, 54; Dec. Dig. §§ 31, 57.* Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

For other definitions see Words and Phrases, vol. 2, pp. 1698-1703; vol. 6, p. 5337.]

3. COVENANTS (§ 69*)—ACCEPTANCE OF DEED — ASSIGNEE OF GRANTEE.

Where a deed was made in consideration of the "benefit and advantages which will accrue to [the grantor] by reason of the construction of the railroad of [the grantee] on, over, and through his lands," and upon the express "condition that said railroad company is to put a side track on said land and also a warehouse at the place requested" by the grantor, the grantee, by accepting the deed, entered into a covenant to comply with its terms, and this covenant ran with the land, and became obligatory upon a second company, which took over the rights, privileges, and franchises, and property of the former.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 67-69; Dec. Dig. § 69.*]

4. RAILROADS (§ 72*)—RIGHT OF WAY—COVENANTS—BREACH—PERSONS LIABLE.

A statement in a petition that a named railroad company, pursuant to an agreement of consolidation or merger, took over the property of another named railroad company, and was proceeding to operate and manage the same, prior to the time of the filing of the suit, would be sufficient to charge both the company in possession of the physical property and the company alleged to have been taken over. The fact that the deed or the transfer itself was not formally executed until after the commencement of the suit might (and in the present instance did) afford confirmation of the prior agreement to consolidate.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

5. COVENANTS (§§ 21, 114*)—CONSTRUCTION—PETITION—DEMURDER.

The court did not err in overruling the demurrer in which complaint was made that the petition set out covenants, conditions, and agreements different from those contained in the deed attached to the petition. Covenants are to be so construed as to carry into effect the intention of the parties, and their intention should

be collected from the whole instrument and the circumstances surrounding its execution.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 20, 189-202, 263; Dec. Dig. §§ 21, 114.*]

6. RAILROADS (§ 72*)—CONTRACTS—VALIDITY.

A contract by a railroad company to locate a station at a given point is not per se void. Such a contract is enforceable until it be established satisfactorily that there has arisen such a conflict between the railroad company's public duties on the one hand and its duties under the contract on the other that it is impossible for it to discharge the former without entirely abandoning the latter.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

7. RAILROADS (§ 72*)—EVIDENCE (§ 501*) — RIGHT OF WAY — COVENANTS—OPINIONS — BREACH OF COVENANT—DAMAGES.

Generally value is fixed by the opinion of those who are most familiar with the nature and intrinsic qualities of the object to be valued. The damages consequent upon a breach of a covenant, that a railroad company will place a side track and erect a warehouse to be used as a depot, in consideration of the grant of a right of way, are not necessarily speculative. The advantages of accessible railroad facilities are a matter of common knowledge, and their value may be estimated and determined by a jury upon a consideration of facts and circumstances from which it can be made to appear that enhancement could reasonably have been expected, and the probable amount of such enhancement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.* Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

8. COVENANTS (§ 119*)—EVIDENCE (§ 441*)—TRIAL (§ 85*)—BREACH OF COVENANT—PAROL—RECEPTION OF EVIDENCE—OBJECTION—DOCUMENTARY EVIDENCE.

None of the rulings upon the admissibility of testimony were harmful to the defendant.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 216-220, 264, 265; Dec. Dig. § 119.* Evidence, Cent. Dig. §§ 1719, 1723-1763, 1766-1845, 2030-2047; Dec. Dig. § 441.* Trial, Cent. Dig. §§ 222, 223-225; Dec. Dig. § 85.*]

9. COVENANTS (§ 135*)—BREACH OF COVENANT — INSTRUCTIONS.

There are numerous complaints of error in the instructions of the court to the jury; but none of them are meritorious.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 269; Dec. Dig. § 135.*]

10. COVENANTS (§ 134*)—RAILROADS (§ 72*)—BREACH—QUESTION FOR JURY—DEFENSES.

The evidence authorized the verdict for the plaintiff, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 268; Dec. Dig. § 134.* Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

Error from City Court of Reidsville; W. Sheppard, Judge.

Two actions sued together by J. H. Baxter, administrator, one against the Reidsville & Southeastern Railroad Company and the other against the Georgia Coast & Piedmont Railroad Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Hitch & Denmark, of Savannah, for plaintiffs in error. Way & Burkhalter, of Reidsville, for defendant in error.

RUSSELL, J. The two defendants in the lower court were sued together, and a single verdict was returned against both, and the two bills of exceptions will be treated together.

J. H. Baxter, as administrator of the estate of **J. H. Pinholster**, deceased, filed suit in the city court of Reidsville, on May 18, 1909, against the Reidsville & Southeastern Railroad Company and the Georgia Coast & Piedmont Railroad Company, companies organized and existing under the laws of the state of Georgia, to recover damages for the breach of a covenant or condition contained in a right of way deed. The covenant or condition referred to appeared in a deed from **J. H. Pinholster** to the Liberty City, Glenville & Manassas Railway Company, a railroad corporation under the laws of Georgia, and is in the following language: "Upon the condition that the said railroad company is to put a side track on said land, and also a warehouse at the place requested by said **J. H. Pinholster**." The condition quoted follows immediately after the description of the lands through which the right of way was granted. The deed was made on June 29, 1905. Thereafter the grantee changed its name to the Reidsville & Southeastern Railroad Company. The plaintiff sets forth a copy of the deed, and alleges: "It being well understood between said **J. H. Pinholster** and said Liberty City, Glenville & Manassas Railway Company that the said warehouse would constitute a regular station or depot on said railroad for the receiving and delivering of freights, as a common carrier, and that the land of the said **J. H. Pinholster**, near to and contiguous to said station or depot, would naturally be greatly enhanced in value by reason of its close proximity to said station or depot."

The allegation in which the Georgia Coast & Piedmont Railroad Company is charged with liability for a breach of the covenant is as follows: "Petitioner says that on the 21st day of November, 1905, the charter of said Liberty City, Glenville & Manassas Railway Company was amended by changing its corporate name to that of Reidsville & Southeastern Railroad Company, and that some time later, the date being unknown to petitioner, there was an agreement or contract of consolidation or merger made and entered into between the Reidsville & Southeastern Railroad Company and the Georgia Coast & Piedmont Railroad Company, the date and specific terms of which are unknown to petitioner, whereby and by virtue of which the said Georgia Coast & Piedmont Railroad Company has for more than a year past taken into its charge and custody the property of said Reidsville & Southeastern Railroad Company from the town of Collins, Ga., to the city of Darien, Ga., including the cars, engines, locomotives, rolling stock, tracks, and right of way, including said right of

way deeded to said Liberty City, Glenville & Manassas Railway Company by said **J. H. Pinholster** as aforesaid, and have for more than a year past been operating the said cars, engines, locomotives, and rolling stock over the line of the said Reidsville & Southeastern Railroad Company between the town of Reidsville, Ga., and the town of Ludowick, Ga., and over and upon the said right of way deeded by the said **J. H. Pinholster** to said Liberty City, Glenville & Manassas Railway Company as aforesaid; the said Georgia Coast & Piedmont Railroad Company, at the time it entered into said agreement with the said Reidsville & Southeastern Railroad Company, having full knowledge or notice of the terms, conditions, covenant, and agreement which constituted the consideration upon which the deed made by said **J. H. Pinholster** to the said Liberty City, Glenville & Manassas Railway Company, conveying the said right of way upon said land, was based, and full knowledge of the fact that said condition, covenant, and agreement had not been complied with, nor in any way performed."

The Georgia Coast & Piedmont Railroad Company filed general and special demurrers to the petition, and also an answer denying all of the material allegations thereof. The general and special demurrers were overruled "upon each and all of the grounds stated therein, except as to the ground, urged in argument, that the manner in which the damage alleged to have been sustained in the second count of said petition is not sufficiently set forth." The plaintiff afterward amended his petition to meet the order overruling the demurrers, and alleged in the amendment that the warehouse and side track were to be built on the 50-foot right of way granted. The defendant thereupon amended its answer, setting up a special defense, as follows: "That the covenants and conditions contained in the deed, a copy of which is attached to the plaintiff's petition, and for the breach of which damages are asked, is void, in that it is a condition and covenant impossible of performance, in that it is physical impossibility to construct a main track, a side track, and a warehouse on the 50-foot right of way granted in said deed." This amendment was allowed without objection. The court required an election, and the plaintiff elected to rely upon the second count of the petition. The case was tried before a jury, and resulted in a verdict for the plaintiff in the sum of \$400. Exceptions pendente lite were filed by the defendant to the overruling of its general and special demurrers and to other adverse rulings of the court. Each of the defendant railroad companies moved separately for a new trial, the motions were overruled, and in each bill of exceptions error is assigned upon the interlocutory rulings and upon the refusal of a new trial.

[1] 1. The plaintiff's cause of action was set forth in two counts, and the action of the court in compelling the plaintiff to elect upon which count he would proceed obviates the necessity of our passing upon the ground of the demurrer in which it was alleged that there was a misjoinder of causes of action, for, even if the court should have sustained this ground of the demurrer, the judgment overruling it was rendered harmless by subsequently requiring the plaintiff to elect upon which count he would proceed. In the first count it was alleged that the plaintiff was damaged in the sum of \$1,000, the alleged value of $6\frac{1}{2}$ acres of land embraced in the right of way appropriated by the railroad, and the depreciation of the entire tract for farming and agricultural purposes, by its being cut diagonally into two tracts, with lines on each side of the right of way about one mile long. In the second count it was alleged that, if the defendants had complied with the covenant of the deed, which was the sole consideration thereof, the value of plaintiff's adjacent land would have been enhanced \$1,000 by the construction of the side track and the erection of the warehouse or depot, as stipulated in the deed conveying the right of way.

In view of the rulings of the court, it is not necessary to rule upon the point as to whether a petition which alleges in different counts damages due to depreciation of his property, as well as damages due to enhancement of value of which he was deprived by the breach of the alleged covenant, is subject to demurrer for misjoinder of causes of action. The case as tried was confined to the inquiry as to whether the plaintiff was entitled to recover for the breach of the alleged covenant, and, even if the court erred in holding on demurrer that the plaintiff might recover the value of the land taken by the railroad company, plus the consequential damages to the land not taken, this ruling did not harm the defendants, in view of the plaintiff's electing to proceed only for the damages resultant upon the breach of the covenant in the deed executed by his intestate.

[2] 2. The next point raised in the record and first raised by demurrer is as to the construction of the covenant contained in the deed, and first, Is this covenant a personal covenant, or one which ran with the land? If it was a personal covenant, clearly the Georgia Coast & Piedmont Railroad Company would be relieved from any liability thereunder. If the covenant is one that runs with the land, it would follow it into the hands of assignees, and, if it appeared that the Georgia Coast & Piedmont Railroad Company was the assignee of the Reidsville & Southeastern Railroad Company, the former company would be liable for its own breach,

or for that of the Reidsville & Southeastern Railroad Company. *Brooks v. Water Lot Co. of Columbus*, 7 Ga. 101; *Howard Mfg. Co. v. Water Lot Co., etc.*, 53 Ga. 689.

Several assignments of error relate to alleged errors of the court in construing the contract, and especially in admitting parol testimony as illustrative of the intention of the parties in the contract. The rule which prohibits the introduction of parol evidence, which may vary the terms of a written contract, is not violated by allowing proof of extraneous circumstances which would illustrate the intentions of both parties, where there is doubt as to the precise meaning of the language employed in the covenant. If it be conceded that the language of a deed to land creates a covenant running with the land, which plainly inured to the benefit of the grantor, and which is plainly binding on the grantee and his assigns, and a breach of which would entail loss upon the grantor, and deprive him of any consideration whatever in exchange for the land, the rule which allows parol testimony in explanation of ambiguities should be applied with the utmost liberality against the grantee or his assigns, where it is attempted, by beclouding the provisions of the covenant, to get something of value for nothing.

The allegation of the plaintiff's petition which required the support of parol evidence did not seek to alter or vary the terms of the covenant in the deed, or suggest any additional stipulation not originally embodied in the covenant, and furthermore the condition that "the railroad company is to put a side track on said land, also a warehouse at the place requested by said J. H. Pinholster," is a part of the consideration of the deed, and is legitimate subject-matter of inquiry. As we see it, if it was not the intention of the parties that a side track and a warehouse should be placed upon the right of way granted by J. H. Pinholster, then, according to the terms of the instrument of conveyance, the deed was without consideration. A covenant in a deed is, generally, as a matter of fact, a part of the consideration, and hence the rule is well settled that covenants are to be so construed as to carry into effect the intentions of the parties, not only as it may be gathered from the terms of the contract as a whole, but also as it may be derived from the circumstances surrounding its execution. See *Atlanta Railway Company v. McKinney*, 124 Ga. 930 (2), 53 S. E. 701, 110 Am. St. Rep. 215, 6 L. R. A. (N. S.) 436; *Baxter v. Camp*, 126 Ga. 354, 54 S. E. 1036.

There is enough in the face of the deed, under the terms of which the Liberty City, Glenville & Manassas Railroad Company, which afterward by change of name became the Reidsville & Southeastern Railroad Com-

pany, obtained this right of way, to evidence that the covenant was one which ran with the land, and that its obligations would follow any assignee of the grantee in that deed. A personal covenant is one which has no relation to the land conveyed. *Atlanta Street Railway Co. v. Jackson*, 108 Ga. 638, 34 S. E. 184. To constitute a covenant running with the land the covenant must have a relation to the interest of the estate conveyed, and the act to be done must concern the interest created and conveyed. *Muscogee Manufacturing Co. v. Eagle Mills*, 126 Ga. 210, 54 S. E. 1028, 7 L. R. A. (N. S.) 1139. It is plainly set forth in Pinholster's deed that he is actuated in the conveyance by the "benefit and advantages which will accrue to him by reason of the construction of the railroad of said party of the second part on, over, and through his lands," and the act to be done concerns the estate he is creating, because the side track and the warehouse are to be put on the land previously described in the deed, to wit, a right of way 50 feet wide, over and through his entire tract of land, described as bounded by the lands of named landholders. *Atlanta Railway Company v. McKinney*, 124 Ga. 931, 53 S. E. 701, 110 Am. St. Rep. 215, 6 L. R. A. (N. S.) 436; *Willcox v. Kehoe*, 124 Ga. 487, 52 S. E. 896, 4 L. R. A. (N. S.) 466, 4 Ann. Cas. 437. There can be no question that under these principles the Reidsville & Southeastern Railroad Company is liable to the plaintiff for any breach of the covenant due to its omission to fulfill the covenant. In *Tucker v. McArthur*, 103 Ga. 415, 30 S. E. 283, it was held that it is not necessary that privity of estate should exist between the original grantor and the purchaser from the covenantor in order to create covenants which run with the land, and for that reason, if it properly appeared upon the trial that the Georgia Coast & Piedmont Railroad Company was the successor or assignee of the Reidsville & Southeastern Railroad Company, the original covenant running with the land would not be defeated or impaired. As to this the rulings of the Supreme Court, in *Georgia Southern Railroad v. Reeves*, 64 Ga. 492, and *Georgia Railroad & Banking Company v. Mayor and Council of Macon*, 86 Ga. 585, 13 S. E. 21, seem in point.

[3] 3. Pinholster made his deed in consideration of the benefit and advantages which would accrue to him by reason of the construction of the railroad of the said party of the second part on, over, and through his lands. Certainly parol evidence would be admissible upon the question as to whether any benefit or advantage was derivable from the construction of the railroad. The deed was made upon the express condition that the railroad company was to put a side track and a warehouse on said land (which, as we have shown, can only refer to the land granted) at such a place as the

grantor might request. It naturally follows from this that, if the grantee accepted the deed with these express stipulations, the grantee, in accepting it, entered into a covenant with the grantor to comply with its terms, and, if the Georgia Coast & Piedmont Railroad Company took over the rights, privileges, franchises, and property of the Reidsville & Southeastern Railroad Company (which was the original grantee under another name), this covenant would run with the land and would be obligatory upon the Georgia Coast & Piedmont Railroad Company. *Georgia Southern Railway v. Reeves*, 64 Ga. 492.

[4] 4. We will therefore next inquire whether the statement in the petition, to the effect that the Georgia Coast & Piedmont Railroad Company took over the Reidsville & Southeastern Railroad Company, in pursuance of an agreement of consolidation or merger, prior to the filing of the suit (although there is no allegation that the contract was actually executed until after the suit was filed), was sufficient to charge the Georgia Coast & Piedmont Railroad Company, as assignee or successor of the Reidsville & Southeastern Railroad Company, with liability for a breach of the covenant. As to this we concur in the opinion of the trial judge that the making of the deed of conveyance by the Reidsville & Southeastern Railroad Company to the Georgia Coast & Piedmont Railroad Company at a later date itself evidences a confirmation of a prior agreement which antedated the suit. Where one corporation takes all of the available property of another, and undertakes the exercise of its duties to the public as a public service corporation, the duty of carrying out all of its contracts may be implied, in the absence of proof that there was an express exemption from liability. In any event, if the court erred in ruling upon the pleading, no material harm has resulted to the plaintiff in error, for it is plain from the evidence that at the time the suit was filed all of the property and franchises of the Reidsville & Southeastern Railroad Company had in fact been taken over by the Georgia Coast & Piedmont Railroad Company, and for that reason there is no substantial merit in the point.

[5] 5. In the sixth paragraph of the defendant's demurrer complaint is made that the petition sets out covenants, conditions, and agreements wholly different from any condition, covenant, or agreement contained in the deed, and it is insisted that such collateral stipulations and independent agreements cannot be pleaded, in the absence of an allegation setting up fraud, accident, or mistake, as a reason why these agreements, or covenants, and conditions were omitted. The same objection is addressed to evidence which was admitted upon the trial, and it is also insisted that without this testimony the verdict is unsupported by the evidence. The

holster's deed is attached to the petition, and speaks for itself. We have already alluded to some of its salient provisions. It is stated in the fourth paragraph of the petition that it was understood that the warehouse would constitute a regular station or depot of the defendant railroad company, for the receipt and delivery of freight, and the same statement appears in the eighth paragraph; but it is evident that this statement is made in explanation of the uses to which the warehouse specified in the deed could be applied, and it is plainly not the introduction of an additional covenant. The statement that it was understood that this warehouse should be used as a depot might be proved by parol. That the warehouse would be of some use is inferable from the agreement to build it. It would be for the jury to say whether it would be reasonable to suppose that a railroad company would agree to build a warehouse and a side track in order to benefit an adjacent landholder, at which, however, it never intended to stop a train or to receive any freight. The grantee of the deed covenanted that it would build a warehouse and a side track at such a point on Pinholster's land as he might designate. Under the rule that covenants are to be construed so as to give effect to the intentions of the parties, we think that the demurrer to the fourth and eighth paragraphs was properly overruled, and upon the proof submitted we think the jury were authorized to find from the agreement itself that it was the intention of both parties that trains should stop sometimes, at least, and, under some circumstances, at the proposed warehouse. It is hard to see how there would be any enhancement in the value of Pinholster's property, if a train did nothing more than pass through at full speed, and the warehouse or depot was never used.

[6] 6. There is nothing in the evidence to authorize the conclusion that a compliance with the conditions of the deed executed by Pinholster would affect the proper discharge of the duties of the public service corporation, or would in any wise injuriously affect the public interest so as to render the covenant repugnant to sound public policy. This phase of the case is sufficiently elaborated in the sixth headnote.

[7] 7. The question which has given us the most concern is whether the damages are too speculative for recovery and incapable of legal estimation. We have reached the conclusion, however, that, in view of the testimony in the case, the finding of the jury was extremely moderate in amount, and we are not prepared to hold that the enhancement of real estate values, due to the conveniences supplied by proximity to a railroad station, is not capable of estimation from data which will enable the jury to award partial compensation for the results of a breach of such a covenant as that involved in this case. After all, every estimate

of value is a mere matter of opinion, and this principle is recognized by the courts. The jurors could not shut their eyes to the fact that it is a matter of universal experience that facilities for transportation and travel, where these facilities may be easily enjoyed, add to the value of nearby property. The increment of value which may be added in a particular case depends upon variant circumstances, and must be determined by the opinions of those who are conversant with the surroundings. But it cannot be said that, because there is not an analytical computation of the different elements upon which the opinion is based, the loss was not sustained, nor that the damages claimed are purely speculative. There is testimony in the present case that a compliance with the covenant would have enhanced the value of the adjacent land of Pinholster from \$1,200 to \$1,500. A witness may give an opinion based upon facts which he details, and then it is for the jury to say whether they reach the same conclusion, or whether upon the facts stated the opinion they reach differs from the opinion of the witness. There was testimony that, if the side track and warehouse had been put upon the land within a reasonable time, the location would have been a good shipping point and a good place for a gin and mercantile business. From these facts, as well as from the opinion of the witnesses as to how much these improvements would have enhanced the value of the land, the jury had the right to determine, in their opinion, the value of the probable enhancement. The facts of this case seem to bring it clearly within the rule announced in *Atlanta & West Point R. Co. v. Camp*, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. (N. S.) 594, 124 Am. St. Rep. 151, 14 Ann. Cas. 439.

[8] 8. None of the rulings upon the admissibility of testimony were harmful to the defendants. The court permitted the widow of Pinholster to testify as to a conversation between her husband and one Emerson. But it was shown that Emerson was the superintendent of the Georgia Coast & Piedmont Railroad Company, and was at the time engaged in locating stations along its line, and the objection to the effect that this testimony tended to vary the terms of the written contract is untenable. On the contrary, the testimony as to the alleged conversation was to the effect that Emerson admitted that Pinholster's construction of the contract was correct, and that he had agreed that, if the 50 feet of right of way was not enough land upon which to erect a warehouse, he would accept the necessary additional land which Pinholster then and there offered to deed to the railroad company as soon as they started to build the depot. Upon the point of Pinholster's offer to give the land there can be no objection, for if the original 50 feet had been too small to contain a suitable depot (in addition to the side track), the railroad company was empowered to con-

demn enough additional land adjoining to enable it to properly perform its duties to the public, though, according to the witness, Emerson did not raise any objection whatever, nor did he object to the condition contained in the covenant in the deed. A portion of the testimony may be objectionable upon the ground that the sayings of the deceased person were not against his interest, but this objection did not reach all of the testimony which the defendant moved to exclude, and therefore the court did not err in overruling the objection. The court did not err in admitting the deed from the Reidsville & Southeastern Railroad Company, which was executed subsequently to the filing of the suit, conveying all of the property of this railroad company to the Georgia Coast & Piedmont Railroad Company. There was testimony that this contract, while not formally reduced to writing, had been operative and treated as binding upon the parties themselves since March 1, 1906, and was therefore in effect prior to the filing of the suit. The conveyance itself recited that it was made for the purpose of effecting a merger or consolidation of the two railroads, in accordance with the provisions of a deed of trust executed by the Georgia Coast & Piedmont Railroad Company to the Morton Trust Company, trustee, dated March 1, 1906. Before the introduction in evidence of the deed, testimony was introduced showing that the Georgia Coast & Piedmont Railroad Company was in possession of all the property of the Reidsville & Southeastern Railroad Company and in complete control and management thereof.

[9] 9. There was no error in the instructions contained in the charge of the court. There are numerous complaints of error in the instructions of the court to the jury; but, for the reasons already given in ruling upon the demurrers, we think that none of them are meritorious. The court instructed the jury that they might look to the facts and circumstances of the case and see whether or not the Georgia Coast & Piedmont Railroad Company had entered into a contract of merger or consolidation at the time the suit was filed; that the contract need not be placed in writing at all; that, if the contract was made, and the execution merely deferred

to a future date, if the minds of the parties were together upon the terms of the agreement, the contract was made. In view of the evidence, direct and circumstantial, which tended to show that as far back as March 1, 1906, the Georgia Coast & Piedmont Railroad Company had executed a mortgage or deed of trust to the Morton Trust Company upon the railroad of the Reidsville & Southeastern Railroad Company and all its other property, the jury was authorized to find that at least as far back as March 1, 1906, and prior to the filing of this suit, there was a contract of merger or consolidation between these two railroads which was recognized between the parties themselves as valid and binding, while it might not have been effectual as a contract in competition with the rights of a third party.

[10] 10. There was evidence for the plaintiff which sustained every allegation in the petition, and there was no error in refusing a new trial upon the ground that it was contrary to the evidence. It was for the jury to say whether the spur track was a "side track," as that term is ordinarily understood. The evidence as to this point was in conflict. It was also within the power of the jury to find that the placing of a box car near the spur track, after the commencement of this suit, was not the construction of a warehouse within the meaning of the covenant.

The question as to whether the condition in the deed was impossible of performance was fairly submitted by the court. It was for the jury to say whether the warehouse which was in the contemplation of the parties could have been erected upon the right of way 50 feet wide by building the main line track on the outer edge instead of in the center of the right of way. Ordinarily the main track of a railroad is laid within the center of the right of way; but we see no reason why it is indispensably necessary that this should be done in every case, and, even if, as suggested by the witnesses for the railroad, the custom of placing the main line track in the middle of the right of way is universal, the railroad company could have complied with the covenant by condemning any additional land necessary for the construction of the warehouse.

Judgment affirmed.

BURRISS et al. v. BROCK et al.

(Supreme Court of South Carolina. June 24, 1913.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BONDS—AUTHORITY TO ISSUE.

Act Feb. 19, 1913 (28 St. at Large, p. 355), amending Act Jan. 5, 1895 (21 St. at Large, p. 921), by enlarging the Anderson school district, and authorizing the trustees of the new enlarged district to hold an election on the question of issuing bonds without requiring, as a condition precedent thereto, a petition of a majority of the freeholders of the district, does not violate Const. art. 2, § 13, providing that, in authorizing a special election in any "incorporated city or town" for the purpose of bonding the same, the General Assembly shall prescribe, as a condition precedent to such election, a petition of a majority of the freeholders of said city.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BONDS—AUTHORITY TO ISSUE.

There is no provision in the Constitution requiring a petition of freeholders as a condition precedent to an election on the question of issuing bonds of a school district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—STATUTES—IMPLIED REPEAL—BOND ISSUE.

Act Feb. 19, 1913 (28 St. at Large, p. 355), contains no repealing clause, yet, as it expressly authorizes the trustees of the Anderson school district to hold an election on the question of issuing bonds without requiring a petition of freeholders as a condition precedent thereto, impliedly repeals Civ. Code 1912, § 1743, requiring a written petition of at least one-third of the resident electors and a like proportion of the resident freeholders as a condition precedent to such election, since they relate to the same subject-matter and are inconsistent.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 41*)—ALTERATION AND CREATION OF NEW DISTRICTS.

Since Act Feb. 19, 1913 (28 St. at Large, p. 355), amending Act Jan. 5, 1895 (21 St. at Large, p. 921), enlarging the Anderson school district, provides, impliedly at least, that the enlarged district shall bear its just proportion of any tax for the liquidation of bonds of the old district, it does not violate Const. art. 11, § 5, providing that when a new school district is created, including cities or towns already embraced in special school districts, in which buildings, etc., have been erected by the issuance of bonds, the new school district shall bear its just proportion of any tax levied to liquidate such bond.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 71-80; Dec. Dig. § 41.*]

5. STATUTES (§ 90*)—SPECIAL ACTS—INCORPORATING SCHOOL DISTRICT.

Act Feb. 19, 1913 (28 St. at Large, p. 355), amending Act Jan. 5, 1895 (21 St. at Large, p. 921), creating the Anderson school district by extending its boundaries, does not violate Const. art. 3, § 34, subd. 5, prohibiting the incorporating of school districts by special law as such law does not incorporate a district but only amends a previous statute of incorporation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98-100; Dec. Dig. § 90.*]

6. STATUTES (§ 76*)—SPECIAL LAWS—APPLICABILITY OF GENERAL LAW.

Const. art. 3, § 34, subd. 11, providing that no special law shall be enacted where a general law could be made to apply, does not render invalid an act enlarging a school district and authorizing the trustees to hold an election on the question of issuing bonds.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.*]

7. STATUTES (§ 107*)—SUBJECTS AND TITLE OF ACTS—ACTS RELATING TO MORE THAN ONE SUBJECT.

Act Feb. 19, 1913 (28 St. at Large, p. 355), entitled "An act to amend an act to establish the Anderson school district, to authorize the establishment of free graded schools therein, and to provide the means for the equipment and efficient management of the same, approved January 5, A. D. 1895, so as to enlarge the said district and authorize the trustees to issue bonds, and to provide the means for the equipment and efficient management of the new district as amended," does not violate Const. art. 3, § 17, requiring that every act shall relate to but one subject, which shall be expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

8. CONSTITUTIONAL LAW (§ 63*)—LEGISLATIVE POWER—DELEGATION.

Act Feb. 19, 1913 (28 St. at Large, p. 355), amending Act Jan. 5, 1895 (21 St. at Large, p. 921), enlarging the Anderson school district and authorizing the trustees of the enlarged district to hold an election on the question of issuing \$100,000 of bonds, and providing that, if the voters should refuse to authorize the bonds, the trustees may suspend this amendment and carry on school according to the original act until such time as the voters shall authorize the bonds, does not confer legislative power upon the trustees, since the Legislature itself prescribed the contingency upon the happening of which the amendment should be suspended.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

9. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BOND ISSUE—CONDUCT OF ELECTIONS—POLLING PLACES—NUMBER.

No law, constitutional or statutory, requires more than one voting place for an election such as is provided by Act Feb. 19, 1913 (28 St. at Large, p. 355), authorizing the trustees of a school district to hold an election on the question of issuing bonds.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.*]

Action by C. O. Burriess and others to restrain J. A. Brock and others, trustees of the Anderson School District, from issuing bonds. Petition dismissed.

Weston & Aycock, of Columbia, for petitioners. Atty. Gen. Peebles and J. F. Lyon, of Columbia, for respondents.

HYDRICK, J. By an act of the Legislature approved January 5, 1895 (21 Stat. 921), the territory embraced within the corporate limits of the city of Anderson was created a separate school district, and the city was authorized to issue, and did issue, \$20,000 bonds, which were designated as school bonds, the proceeds of which were used to purchase lands and erect school buildings

thereon. In 1902 these bonds were refunded. In 1903 the city issued \$15,000 more of school bonds, the proceeds of which were used to purchase lands and erect buildings thereon for school purposes. In 1913 the Legislature passed an act (28 Stat. 355) entitled "An act to amend an act to establish the Anderson school district, to authorize the establishment of free graded schools therein, and to provide the means for the equipment and efficient management of the same, approved January 5, A. D. 1895, so as to enlarge the said district and authorize the trustees to issue bonds and to provide the means for the equipment and the efficient management of the new district as amended." The italicized portion of the title above quoted is the title of the act of 1895. The act of 1913 enlarges the old school district of the city of Anderson by annexing certain adjacent territory lying within the boundaries therein designated, and, so enlarged, the school district extends beyond the corporate limits of the city. Among other things, the act authorizes the board of trustees of the new school district to submit to the qualified voters residing therein the question of issuing \$100,000 of bonds, and provides that \$35,000 of the bonds so issued shall be exchanged for, or used to pay, the \$35,000 of school bonds issued by the city of Anderson, and the balance for the purpose of improving the present school property, acquiring additional property, and erecting buildings for school purposes. The title to all the property procured by the proceeds of the \$35,000 of school bonds issued by the city of Anderson is in the trustees, who were continued in office by the act of 1913 and made trustees of the new school district; and under that act all the property of the old school district becomes the property of the new school district. No part of the territory annexed to the old school district was under any bond debt for school purposes; nor was there any school property therein, so that the new district acquired no school property from the annexed territory.

At the election ordered by the trustees, only one box was provided, which was at the courthouse, in the city of Anderson, where all the voters of the district had to vote. The election resulted in favor of issuing the bonds, and, the trustees having advertised for bids for so much of them as are to be sold, this action was brought to enjoin the issuing thereof.

[1] The first objection made is that the act of 1913 violates section 13 of article 2 of the Constitution in authorizing the trustees to hold an election on the question of issuing bonds without requiring, as a condition precedent of such election, a petition of a majority of the freeholders of the district. The section in question reads: "In authorizing a special election in any incorporated city or town in this state for purpose of bonding the same, the General Assembly shall pre-

scribe as a condition precedent to the holding of said election a petition from a majority of the freeholders of said city or town as shown by its tax books, and at such elections all electors of such city or town who are duly qualified for voting under section 12 of this article, and who have paid all taxes, state, county and municipal, for the previous year, shall be allowed to vote; and the vote of a majority of those voting in said election shall be necessary to authorize the issue of said bonds." Even a casual reading of this section shows that it is not applicable to the election authorized by the act, which was not in any incorporated city or town, in the sense in which those words are used in the Constitution, nor for the purpose of bonding the same. But it was in a special school district, which was not even coterminous with the city, though it would have made no difference if it had been, because the purpose of the election was the bonding of the school district and not the city. The Constitution (section 5, art. 10) contemplates the issuing of bonds by different political divisions or municipal corporations extending over the same territory or parts thereof.

[2] There is no provision in the Constitution which requires a petition of freeholders as a condition precedent to an election on the question of issuing bonds of a school district, as that above quoted with regard to issuing city or town bonds.

[3] Section 1743 of the Civil Code of 1912 requires a written petition of at least one-third of the resident electors and a like proportion of the resident freeholders of the district as a condition precedent of such an election. But the act of 1913, being of later date, though it contains no repealing clause, yet as it deals with the same subject in so far as it affects the election in question, and it expressly authorizes the trustees to hold the election and does not require such a petition, necessarily has the effect of repealing so much of section 1743 as is inconsistent with its own provisions.

[4] The petitioners' next contention is that the act of 1913 violates section 5 of article 11 of the Constitution, which provides: "That when any school district laid out under this section shall embrace cities or towns already embraced into special school districts in which graded school buildings have been erected by the issue of bonds, or by special taxation, or by donation, all the territory included in said school district shall bear its just proportion of any tax that may be levied to liquidate such bonds or support the public schools therein." The specific objection urged is that the act fails to provide that all territory included in the new district shall bear its just proportion of any tax that may be levied to liquidate the \$35,000 of bonds issued by the city of Anderson. The act does provide, impliedly at least, that all the territory in the new district shall bear its just proportion of such a tax, for it provides that

the tax for that purpose shall be levied upon all the property of the district as assessed for taxation for all other purposes. It is suggested, however, that the newly annexed territory should pay a greater proportion of the \$35,000 than the old, and this because the old territory already owned the property acquired by the use of the proceeds of those bonds, while the new territory owned no property at all. But it must be remembered that the bonds have not been paid, and that they are presumed to represent the value of the property. There is nothing to show that it has increased or decreased in value since it was purchased. Therefore, as to that property, the two sections of the new district stand on the same footing as if the property had just been purchased. While the old territory has been taxed to pay the interest on the bonds since they were issued, the citizens thereof have had the use of the property as compensation therefor. Moreover, in the absence of any showing to the contrary, the court will presume that the Legislature considered that matter and obeyed the mandate of the Constitution and imposed upon each section of the new district its just proportion of such tax.

[5, 6] The next contention is that the act violates subdivisions 5 and 11 of section 34 of article 3 of the Constitution. That section prohibits local or special legislation on certain subjects. Subdivision 5 prohibits any local or special law "to incorporate school districts," and subdivision 11 provides that, "where a general law can be made applicable, no special law shall be enacted." These objections are met and answered by the decisions of this court in *State v. McCaw*, 77 S. C. 351, 58 S. E. 145, and *State v. Brock*, 66 S. C. 357, 44 S. E. 931.

[7] The objection that the act relates to more than one subject and that the subject thereof is not expressed in the title, contrary to the provision of section 17 of article 3 of the Constitution, is also untenable, as will clearly appear from a consideration of the title and the provisions of the act. This provision of the Constitution requiring that every act shall relate to but one subject, which shall be expressed in the title, has been so fully and so frequently expounded and applied that it would be useless to attempt to add anything upon that subject. See *Dove v. Kirkland*, 92 S. C. 313, 323, 75 S. E. 503, and cases cited.

[8] The last objection to the act upon constitutional grounds is because it confers upon the board of trustees power to suspend the operation thereof, if the result of the election should be against issuing the bonds, thereby, as it is alleged, conferring upon the trustees legislative power. The language relied upon to sustain this objection is as follows: "As it will be impracticable to carry out the amendment herein provided for if

the voters of said district should refuse to authorize the issuing of bonds herein provided and for the special school tax, the trustees are hereby authorized to suspend this amendment and to carry on schools according to the provisions of the original act until such time as the qualified voters shall authorize said bonds issued and said special tax levy, at which time the said board of trustees shall operate under this amendment." As the contingency upon which the trustees were authorized to suspend the act did not and cannot arise, since the voters did authorize the issue of bonds, it would seem that the question raised by this objection has become academic. But, properly construed, the act does not confer legislative power upon the trustees, because the Legislature itself prescribed the contingency, upon the happening of which the amendment should be suspended. No discretion to suspend the amendment was vested in the trustees. The language above quoted was intended merely as a direction to them as to the course which they should pursue on the happening of the contingency named.

[9] It was properly conceded that there is nothing in the fact that only one voting place was provided for holding the election. We know of no law, constitutional or statutory, and none has been cited, which required more than one voting place. Indeed, the act of 1895, of which the act of 1913 was only an amendment, required that the elections therein provided for should be held at the courthouse in the city of Anderson. It was suggested that separate voting places should have been provided for those residing in the new territory and those residing in the old, and that a majority of each section should have been required. It is sufficient to say that the Legislature did not so require, and we see no good reason why it should have done so.

The petition is dismissed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

EDWARDS et al. v. TOWN OF GUYTON
et al.

(Supreme Court of Georgia. Aug. 14, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 917*)—ISSUANCE OF BONDS—INJUNCTION.

Where a judge of the superior court has rendered judgment confirming and validating the issuance of bonds by a municipality, under the provisions of Civil Code 1910, §§ 445, 447, and no bill of exceptions assigning error upon such judgment is filed within 20 days from the date thereof, for the purpose of carrying the questions raised in the proceedings to validate the bonds to the Supreme Court, then, under the provisions of section 448 of the Civil Code, "the judgment of the superior court, so conforming and validating the issuance of the

bonds, shall be forever conclusive upon the validity of the bonds against the * * * municipality, * * * and the validity of the bonds shall never be called into question in any court in this state." Consequently, after the validation of certain municipal bonds, as recited above, no writ of error to the judgment validating the same having been sued out within the time prescribed by law, it was not error for the court below to refuse to enjoin the issuance of said bonds at the suit of certain taxpayers of the town issuing the bonds, upon the ground that the town was not authorized "to establish a system of waterworks in the town, nor a system of electric lights in the town"; the construction and installation of the system of waterworks and electric lights in the town being the objects to which the proceeds of the bonds were to be applied. *Epping v. City of Columbus*, 117 Ga. 263, 43 S. E. 803; *Holton v. City of Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199; *Baker v. City of Cartersville*, 127 Ga. 221, 56 S. E. 249. Whether the ground set forth in the petition for injunction, that "the levy of a tax to pay the interest and principal of the bonds will require the levy of a tax in excess of the rate of one-fourth of 1 per cent., the limit of the taxing power of the municipality as fixed by its charter," would be a good ground for injunction, is not decided, as the evidence did not require a finding that a levy of a tax sufficient to pay the interest and principal of the bonds would exceed the charter limit.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1913-1918, 1941; Dec. Dig. § 917.*]

2. APPEAL AND ERROR (§ 170*)—CONSTITUTIONAL QUESTIONS—PRESENTATION BELOW.

Questions as to the constitutionality of the Code sections cited, relative to the validation of bonds issued by a municipality, which were not raised at the hearing of the petition for injunction, and upon which no ruling was invoked in the court below, will not be considered in this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1035-1052, 1099, 1100; Dec. Dig. § 170.*]

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Action by M. Edwards and others against the Town of Guyton and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Geo. H. Richter, of Savannah, for plaintiffs in error. C. T. Guyton, of Guyton, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

OWWART et al. v. SINGLETARY.

(Supreme Court of Georgia. July 21, 1913.)

(Syllabus by the Court.)

1. REFERENCE (§ 101*)—APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—MOTION FOR RE-REFERENCE.

While the report of the auditor was not as full or explicit as it might have been, under the facts of the case, there was no reversible error in overruling a motion for a re-reference.

(a) The recovery of the amount of an open

account was waived; and if there was a lack of specification as to its items, this will not require a reversal.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 169-180; Dec. Dig. § 101; *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

2. REFERENCE (§ 99*)—MOTION FOR RE-REFERENCE.

The action was equitable in character, the evidence was sufficient to authorize the finding of the auditor in favor of the plaintiff, and the ruling of the presiding judge in overruling the exceptions thereto was not error.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 157-168; Dec. Dig. § 99.*]

3. VENDOR AND PURCHASER (§ 39*)—CONTRACT—VALIDITY—RIGHT TO REPURCHASE.

It is legally possible for one person to sell land to another at an agreed price, and at the same time to secure the right to repurchase it; and if actually made in good faith, such a transaction is enforceable.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 9; Dec. Dig. § 39.*]

4. FRAUDS, STATUTE OF (§ 18*)—PROMISE TO ANSWER FOR ANOTHER'S DEBT—ACCEPTANCE OF DEED.

The obligee in a bond for title made a warranty deed to another. In the deed it was provided that the grantee bound himself to see that the obligations of his grantor under the bond should be complied with, and the grantee took possession and rented to the grantor. Held, that this provision bound the grantee to pay the purchase money, and it was not obnoxious to the statute of frauds.

(a) Whether the transaction in the present case was in fact a sale with an option to repurchase, or a method of securing an indebtedness, and whether there was fraud, or usury, or what was the actual consideration, were questions dependent upon the evidence; and the auditor having reported in favor of the taker of the deed attacked on such grounds, and the presiding judge having overruled exceptions to his report, and such finding and ruling being authorized by the law and evidence, this court will not interfere.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 27-31; Dec. Dig. § 18.*]

5. VENDOR AND PURCHASER (§§ 95, 214, 215*)—ESTOPPEL (§ 38*)—ASSIGNMENTS (§§ 3, 58*)—FORFEITURE—BOND FOR TITLE—RESTRICTIONS ON ALIENATION.

Where a bond for title stipulated that it was not transferable, and the obligee, before paying any of the notes given for the purchase money, executed a warranty deed to a third person, in which there was a provision binding the grantee to pay the purchase-money debt of the grantor, and the grantor became the tenant of the grantee, and where the grantee paid to the obligor in the bond more than half of the purchase-money notes as they became due, if thereafter the maker of the bond, with the consent of the obligee therein, accepted from another the unpaid balance of the purchase money before it fell due, and executed to such person a fee-simple conveyance, he taking with notice of the rights of the grantee from the obligee in the bond, and thereafter conveying to such obligee a life estate in one-half of the land, under such circumstances the grantee from the obligee in the bond could, in a proper equitable action, obtain a decree against the person so taking a deed from the obligor in the bond, requiring such person to make a deed to the plaintiff upon payment of the amount paid out by such defendant, less proper credits for mesne profits, and a decree against such person and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the obligee in the bond, canceling the deed to the latter and recovering the property.

(a) No question of whether tender was necessary arises under the pleadings and evidence.

(b) The obligor in the bond having died, no representative of the estate was made a party, and the action proceeded against the grantee from such obligor and the obligee in the bond. The defense was not by an administrator of such obligor, but by the obligee and the person taking a conveyance from the obligor, with notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 158-160, 436, 442-452; Dec. Dig. §§ 95, 214, 215;* Estoppel, Cent. Dig. §§ 99-107; Dec. Dig. § 38;* Assignments, Cent. Dig. §§ 5, 121-123; Dec. Dig. §§ 3, 58.*]

Hill, J., dissenting.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by A. J. Singletary against Caroline Cowart and others. Judgment for plaintiff, and defendants bring error. Affirmed.

On January 27, 1907, A. J. Singletary filed his equitable petition against R. S. Grimsley, H. H. Grimsley, Caroline Cowart, and Mrs. E. E. Holmes. It does not appear that Mrs. Holmes was served, or that her administrator was made a party after her death. The petition alleged in substance as follows: On December 24, 1902, Mrs. Holmes bargained to Caroline Cowart a certain described lot of land. The purchase price was fixed at \$1,250, represented by 23 notes of \$50 each, and one note for \$100, falling due, respectively, on the 1st days of September, October, November, and December, in each successive year thereafter; the last note being due on December 1, 1908. Mrs. Holmes gave to Caroline a bond for title in accordance with these terms. On January 12, 1903, Caroline Cowart represented to the plaintiff that she was unable to comply with her agreement to pay the notes as they became due, and offered to convey to him the land if he would pay the notes as they matured. She accordingly executed to him a warranty deed for the land, in which was contained a recital that he bound himself to see that her obligations to Mrs. Holmes should be complied with. He accordingly paid to Mrs. Holmes the notes as they matured, and at the date of the filing of the petition he had paid to her 15 of the notes, amounting to \$750, besides interest. Caroline Cowart, after the execution of her deed to the plaintiff, leased the land from him, and remained in possession thereof as his tenant; but the term of her tenancy has expired. On November 6, 1906, she and R. S. Grimsley, for the purpose of defrauding him and defeating his rights, and with full knowledge of them, had Mrs. Holmes to execute to Grimsley a warranty deed to the land. (H. H. Grimsley, though made a party, appeared in the progress of the case to have no interest in the matter.) R. S. Grimsley paid to Mrs. Holmes the balance due on the land, and all the purchase-money notes were surren-

dered to him, except those which the plaintiff had previously taken up. Grimsley made a deed conveying a life estate in one-half of the land to Caroline Cowart. It is the purpose and intention of Grimsley to take possession of the land, and of Caroline Cowart to surrender it to him. The plaintiff has always been ready, willing, and able to comply with his contract and pay the balance of the purchase-money due as it matured, and he offers to do so. He prays that Grimsley be enjoined from taking possession of the land; that Caroline Cowart be enjoined from surrendering it to him; that she be ousted from possession; that his lien for rent be established; that Grimsley be required to accept so much of the purchase price of the land as has fallen due by the terms of the notes, and be required to deliver to the plaintiff the notes for such amount held by Grimsley, and to accept the payment of the remaining notes as they mature; that, upon the payment by the plaintiff of the balance of the purchase money, Grimsley be required to execute to the plaintiff a deed to the land; that the deed from Grimsley to Caroline Cowart be surrendered and canceled; and for process and general relief. The plaintiff amended by alleging that Caroline Cowart was insolvent, and that the defendants had remained in possession, and had enjoyed the rents, issues, and profits, of the yearly value of \$200, for which the plaintiff prayed judgment as mesne profits.

Answers were filed by R. S. Grimsley and Caroline Cowart, in which they denied the alleged grounds for recovery, and averred that Grimsley was a purchaser for value from Mrs. Holmes. They attacked the deed from Caroline Cowart to Singletary on substantially the following grounds: (1) It was procured by fraud. (2) It was procured by duress. (3) It was upon an inadequate consideration, coupled with great disparity in mental capacity on the part of the contracting parties. (4) It was given to secure a usurious debt. (5) It was given as a security for or in payment of the debts of her husband. It was also contended that Singletary made no valid and binding promise in writing to pay the notes given by Caroline Cowart to Mrs. Holmes. Caroline Cowart offered, in her answer, to pay to the plaintiff any sum that might be found justly due to him.

A demurrer to the petition was overruled, but no exception was taken to that ruling. A verdict was rendered in favor of the plaintiff. The case was brought to this court, and the judgment was reversed on account of errors in the charge. *Grimsley v. Singletary*, 133 Ga. 56, 65 S. E. 92, 134 Am. St. Rep. 196. Later the case was referred to an auditor, whose report found in favor of Singletary. A motion for a re-reference was made and denied; and to this ruling exceptions pen-

dente lite were filed, and error was subsequently assigned thereon. Exceptions of law and fact to the report of the auditor were filed. The presiding judge overruled the exceptions of law, declined to approve the exceptions of fact, and rendered a decree, in substance, that Grimsley should recover of Singletary \$435.70, with interest from the date of the auditor's report (that being the difference between the amount paid by Grimsley to Mrs. Holmes and the amount found against him on account of mesne profits for the half of the land to which he had held possession), less \$100 for the rent of the land for the then current year; that, upon tender of payment of this net amount, Grimsley should execute to Singletary a conveyance of the premises in dispute; that the plaintiff recover of Caroline Cowart and Grimsley the premises in dispute, subject to a lien in favor of Grimsley for the amount decreed in his favor, with interest; that Singletary recover of Caroline Cowart \$570 rent; and that the deed from Grimsley to her be canceled. Caroline Cowart and Grimsley excepted. The record does not show whether Mrs. Holmes was ever served. No answer by her is in the record. But it appears in the evidence that she was dead at the time of the trial, and no representative on her estate is shown to have been made a party. Other material facts appear in the opinion.

Walter Park, of Blakely, and Pope & Bennett, of Albany, for plaintiffs in error. A. G. Powell, of Atlanta, and C. L. Gleesner, of Blakely, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1, 2] 1-3. The members of this court are agreed as to all matters involved in this case, except one. The issues of fact were found in favor of Singletary by a jury on a former trial, and by the auditor when the case was referred to him. The presiding judge has approved that finding, and the evidence was sufficient to authorize him so to do. There was no error in overruling the motion for a re-reference. The report of the auditor, while somewhat meager, was sufficiently full to withstand the attack made upon it in the motion for a re-reference, and a reversal is not required. This disposes of the contention that the deed made by Caroline Cowart to Singletary was procured by fraud; that the transaction was not in fact a sale with an option to repurchase, but was the securing of an indebtedness; that this debt was infected with usury and included a debt of her husband; that there was such mental disparity between the parties and such inadequacy of consideration as to amount to fraud; and all others depending on questions of fact. Under the evidence, the decision in Baggett v. Trulock, 77 Ga. 369, 3 S. E. 162, is not controlling. See, in this connection, Felton v. Grier, 109

Ga. 320, 35 S. E. 175; McElmurray v. Blodgett, 120 Ga. 9, 47 S. E. 531; Brown v. Bonds, 125 Ga. 833, 838, 54 S. E. 933.

[3] We were requested to review and overrule the decision in Felton v. Grier, supra. Its special application to this case is the ruling that, it being legally possible for the owner of real estate to sell it to another at an agreed price and at the same time secure the right to repurchase, the law will enforce such a transaction when actually made. Whether any criticism can be made upon anything that was said in the opinion is immaterial. The principle announced is correct, and we decline to reverse it.

[4] 4. It was urged that Singletary did not bind himself in writing to Caroline Cowart to pay the purchase-money notes which were given by her to Mrs. Holmes; that, if there was any promise to that effect, it was in parol; and that such a promise was obnoxious to the statute of frauds. In the deed to Singletary it was recited that Caroline Cowart had given her notes for the purchase money of the land to Mrs. Holmes, and that "Singletary bonds [binds] himself to see that said bond is complied with." The acceptance of this conveyance by Singletary bound him to carry out such covenant. Kytie v. Kytie, 128 Ga. 387 (2), 57 S. E. 748. As between him and his grantor such an agreement to pay purchase money was not within the statute of frauds. Ford v. Finney, 35 Ga. 258; Gorman v. Wood, 73 Ga. 370, 374; Coldwell Co. v. Cowart, 138 Ga. 233, 243, 75 S. E. 425.

[5] 5. We now come to the only point of difference between the members of this court. The bond for title which was given by Mrs. Holmes to Caroline Cowart, after describing the terms of the sale and the notes given for the purchase money, and binding Mrs. Holmes "to make or cause to be made" good and sufficient title in fee simple to the land upon payment of the notes, contained the following: "It is hereby understood and agreed that time is of the essence of this contract; and should the party of the second part fail to pay said notes as they become due, then this bond to become null and void, and whatever money shall be paid shall be treated as rent at the rate of \$150 per annum. And it is further stipulated that this bond is not transferable to any one." Under the facts of the case, the majority of the court are of the opinion that neither of the two clauses above quoted prevented Singletary from having equitable relief. The first clause declares time to be of the essence of the contract, and provides for a forfeiture in case of nonpayment of the purchase money. This clause does not undertake to put any restriction upon the transfer of the bond or the alienation of the property by the purchaser. There was no evidence to show that Mrs. Holmes ever claimed any forfeiture or breach of the bond arising from nonpayment.

On the contrary, she received payment from Singletary of 15 of the notes substantially, if not exactly, as they fell due, and received a large part of the purchase money from Grimsley in discharge of the remaining notes before they were due. She could not, of course, claim a forfeiture and at the same time receive the purchase money. So that any contention that there was a forfeiture and a resale, without regard to the original contract, finds no support whatever in the evidence. Indeed, such is not the contention; but this clause is used in support of the position that there was a limited restriction on alienation, as will appear below.

The clause of the bond for title upon which this branch of the case depends is the second clause above quoted, which reads as follows: "And it is further stipulated that this bond is not transferable to any one." If the insertion of such a stipulation in the bond for title rendered the conveyance by the obligee to Singletary absolutely void, so that he acquired no right thereunder, and no equity arose in his favor by reason of the payment of a large part of the purchase money to Mrs. Holmes, and so that Mrs. Holmes could make a conveyance to Grimsley, receiving from him the balance of the purchase money, less what Singletary had paid, and so that Grimsley could convey a life interest in half of the land to Caroline Cowart, and Singletary could thus be entirely left out, and would have no equitable right whatever, then the finding of the auditor and the decree of the court were wrong; otherwise, they were right. There was evidence tending to show that Mrs. Holmes knew that Singletary was sending to her money to pay the notes of Caroline Cowart as they fell due, and that she accepted the money from him and delivered up the notes so paid. There was also abundant evidence to show that Grimsley knew that Caroline Cowart had made a deed to Singletary, and that Singletary had leased the place to her as his tenant, and that Grimsley was thus affected with notice that Singletary had or claimed some character of interest in the land before Grimsley took a deed from Mrs. Holmes. It is also undisputed that, in acquiring title from Mrs. Holmes by paying the balance of the purchase money before it was due, Grimsley knew that a large part of the purchase money had been paid, and that he was receiving the benefit of such payments, and was getting the land for such balance, and not for the entire amount stipulated in the bond. He testified in general terms that he did not know that Singletary had made these payments, but thought that they had been made by Caroline Cowart; but he admitted having testified on a former trial that Caroline had told him that she had made a deed to Singletary, and, as stated above, there was evidence showing that he was put on notice or inquiry as to Singletary's interest, and the auditor found against him. Hence, in con-

sidering whether the report of the auditor and the decree can be declared to be erroneous as matter of law, we must accept it as a fact that Grimsley acted with notice of Singletary's interest. Under such facts, can it be held that Singletary had no equitable rights, and that he was cut off from all relief by reason of the provision in the bond for title that it was not transferable? The argument in favor of such a position must rest substantially upon one or all of these contentions: First, that the bond obligating the maker to convey a fee-simple title upon payment of the purchase money is to be analogized to a conveyance in fee simple, and that in such a conveyance there may be a limited and reasonable restriction upon alienation; second, that the bond for title is to be analogized to a chose in action, which at common law was not assignable; third, that it is to be considered as a contract between the obligor and the obligee, and that the obligor had the right to provide with whom she desired to deal, and that the contract should not be assignable.

Before taking up each of these contentions separately, it may be well to note that, strictly speaking, there was no transfer of the bond, but that the obligee made a warranty deed to Singletary. Whatever title the maker of such a deed might acquire thereafter by payment of the purchase money would pass to her grantee. *Parker v. Jones*, 57 Ga. 204; *Isler v. Griffin*, 134 Ga. 192, 87 S. E. 854; *Powell on Actions for Land*, § 141. By the payment of the part of the purchase money, he or she undoubtedly acquired an equitable interest, which could be conveyed. We deem it unnecessary to consider the question of whether the record of her deed carried constructive notice to Grimsley, as we have found that there was sufficient evidence to show actual notice on his part. If this conveyance by Caroline Cowart to Singletary be treated, as substantially an assignment of the bond for title to him, nevertheless was it void, and did he acquire no rights thereunder, or by virtue of his payment of a considerable part of the purchase money?

The first contention stated above is dependent upon analogizing the restraint upon an assignment of a bond for title to a restriction upon alienation by the grantee in a fee-simple deed. Civil Code, § 3657, declares: "An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional powers of disposition during his life, and descending to his heirs and legal representatives upon his death intestate." This definition excludes the right to limit the power of disposition during the life of the grantee, if the estate is one in fee simple. Moreover, by section 3718 of the Civil Code it is declared: "A condition repugnant to the estate granted is void." In *Freeman v. Phillips*, 113 Ga. 589,

38 S. E. 943, it was held: "A devise giving a fee in land to remaindermen on the termination of a life estate, with the restrictions that the remaindermen should 'never mortgage, rent, or sell said parcel of land,' vests in such remaindermen, at the death of the life tenant, a fee in such land free from the restrictions sought to be imposed. The restraint upon alienation, being repugnant to the nature of the estate, is void." We are not dealing now with base fees, or reversions, or limitations over, or with the question whether, construing a particular conveyance as a whole, the estate conveyed is in fact a fee simple, or a less estate, but with a conveyance in fee simple in which it is sought to restrict the right of alienation by the grantee.

If we look to authorities outside of our own Code and decisions, attempts to impose general restraints on alienation in granting a fee-simple estate are held void, as repugnant to the estate granted. Restraints upon alienation of leasehold interests, estates for years, and the like are held to be valid, in order to protect the versionary interest of the grantor. Some courts have held that, coupled with the grant of a fee-simple interest, there may be a reasonable restraint on alienation for a limited time, or prohibiting a conveyance to a particular person, or the like. The leading case in this country in which this subject is elaborately discussed is *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 476, 57 Am. Dec. 470. In *Mandelbaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61, the subject was again discussed at length by *Christiancy, J.* He attacked vigorously the statement of some text-writers and judges that a grant of a fee-simple estate could be made, and at the same time the grantee could be restricted from selling such estate for a limited time. He declared that this statement had arisen from a misconception of the actual ruling in *Large's Case*, 2 Leonard, 82, and had been perpetuated by erroneous obiter dicta which had grown into positive assertion. In conclusion he said: "And we think it would be unwise and injurious to admit into the law the principle, contended for by the defendants' counsel, that such restriction should be held valid, if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question, would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the court of last resort; and upon what standard of certainty can the court decide it? * * * The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void." See, also, 2 Jarman on Wills (2d Ed.) 1490. This seems to accord

with the definition of a fee-simple estate in our Codes. See, also, in this connection, *Manierre v. Welling*, 32 R. I. 104, 78 Atl. 507, Ann. Cas. 1912C, 1311, and note.

In 24 American and English Encyclopedia of Law (2d Ed.) 867, it is said: "There are many dicta, as well as a few direct authorities, to the effect that restraints on alienation for a limited time are valid; but in a number of cases the validity of such restraint has been said to be doubtful, and on principle, and according to the weight of authority, a restriction, whether by way of condition, or of limitation over, or of bare prohibition against any and all alienation, although for a limited time, of a vested estate in fee, whether in possession or remainder, is void. In the case of a contingent remainder, however, or of any other interest not vested, a restriction upon the power of alienation to last as long as the interest remains contingent is valid." As stated above, we need not consider the subject of conditions or limitations over, here mentioned, as they are not now involved. In jurisdictions where it is held that a restraint upon the right to sell a fee-simple interest for a limited time is permissible, it is generally held that, to be enforceable, it must be coupled with a reversion or a limitation over. 1 *Warvelle on Vendors* (2d Ed.) § 451, p. 532; *Fowlkes v. Wagoner* (Tenn. Ch. App.) 46 S. W. 586; *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623, 637. In 1 *Warvelle on Vendors* (2d Ed.) § 453, p. 533, it is said: "Restraints with respect to time have in several instances been held good, and the conditions sustained, provided the restriction is limited to a 'reasonable period'; but the weight of authority would seem to be against the validity of restraints upon alienation, however limited in time." See, also, *Gray, Restraints on Alienation* (2d Ed.) §§ 54, 105, et seq.

Without entering at length into the various authorities on this subject, we think it is clear that, if the test applicable to conveyances of a fee-simple estate with an attempted restriction on alienation were applied to the provision of the bond for title now under consideration, it would not be valid. Even should we follow those authorities which hold that there may be a restraint upon alienation for a reasonable time, the restraint sought to be imposed in this bond is not in terms limited as to time. The preceding provision of the bond, which declares time to be of the essence of the contract, and authorizes, or seeks to authorize, a forfeiture in case of nonpayment, cannot help the case. It did not declare a reasonable time within which there should be no alienation; nor does it appear that the obligor in the bond has in any manner sought to declare a forfeiture. If it could be held that this amounted to a restraint upon alienation for a reasonable time, namely, until the last payment should fall due, it could only be enforced for the benefit of the obligor. And when Mrs.

Holmes received the purchase money due to her in full, she had no further right to insist on the restraint upon alienation.

The writer has dwelt at some length on the question of restraint upon alienation of a fee-simple estate, because it is an important principle in the law of real estate, and there should be no misapprehension as to it, and also because in consultation some of our Brethren were of the opinion that the analogy is important, if not controlling, in the case. In so far as the argument rests upon the rule that at common law choses in action were not assignable, so as to convey title, but only an equitable interest, it is sufficient to say that this rule has been changed by our statute. In Civil Code, § 3853, it is declared that "all choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable." In *Bewick Lumber Co. v. Hall*, 94 Ga. 539, 21 S. E. 154, a written instrument was as follows: "Credit check \$6.50. Number 687. February 20, 1891. Issued to Aaron Hatton. Not transferable. Payable on demand in merchandise by Bewick Lumber Company. Johnsonville, Georgia. G. B. Monroe." It was held that this was a chose in action arising upon a contract, and that it was assignable, under the provisions of the Code section above quoted. This ruling was made in spite of the fact that the paper contained the words "not transferable." It may be remarked, however, that this was not an executory contract containing mutual obligations. That class of contracts will be next considered.

The third ground upon which the argument rests is that parties have a right to contract, and, among other terms of a contract, to provide that it shall not be assignable, and that, as against the party who does not consent to the assignment, the assignee obtains no right. Certain classes of contracts are inherently nonassignable in their character, such as promises to marry, or engagements for personal services, requiring skill, science, or peculiar qualifications. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to such contract. The rule is sometimes stated by saying: "Contract rights coupled with liabilities, or involving a relation of personal confidence between the parties, cannot be transferred to a third person by one of the parties to the contract without the assent of the other."

Tifton, Thomasville & Gulf Ry. Co. v. Bed-

good & Co., 116 Ga. 945, 43 S. E. 257. That case furnishes an illustration of the rule. The contract then before the court bound a railway company, for a sufficient consideration, to put in a side track to connect its main line with the sawmill of a certain firm, and to transport over its railway lumber shipped by that firm at a certain rate; and it bound the firm to ship all the lumber cut by them over the company's railway, with a named exception. The firm entered upon the contract an assignment of their interest in it, and the transferee entered upon it an assignment to another firm, who sought to enforce the contract against the railway company. It was held that such a contract was not assignable without the consent of the railway company.

In *Sims v. Cordele Ice Co.*, 119 Ga. 597, 46 S. E. 841, it was held that an option or contract right to purchase designated property within a given time at a stipulated price, payable in installments, and coupled with certain other agreements, upon the credit of the person owning such right, was not assignable without the consent of the other party.

In *Simms v. Lide*, 94 Ga. 553, 21 S. E. 220, a contract under seal was made by the owner of land to convey it to another upon payment of a stipulated price within a given time. It recited a consideration of \$5. Before the end of the period mentioned the obligee in the contract agreed with another person to sell his interest in the land arising under such contract. He caused the amount of purchase money to be tendered to the maker of the agreement, which she refused. He then filed an equitable petition, for the use of the person with whom he had contracted, to enforce specific performance. It was held by this court that, after the obligee in the contract had elected to pay the stipulated price, and had tendered it within the specified time, and demanded a conveyance, specific performance might be enforced at his instance, "suing in behalf of a third person to whom he has sold all his interest in the premises or in the contract sought to be enforced."

In *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, Perry executed to Sims a paper in the following terms: "This is to certify that I have this day bargained to Jim Sims fifty acres of land off of the southeast corner of lot No. 240 in the 4th district of Terrell County, Ga.; the road running from the Hayes place to Dorse Henry's being the line. I agree to make him a good title on his paying me \$500. I agree to run said amount three years, provided he pays the rent promptly." Within less than a year after the making of this instrument, a certain person, on behalf of Sims, tendered to Perry the principal and interest in full, and demanded that a deed be made to Sims. Perry declined to do so. Two days later Sims transferred all his interest under the paper

to one Paschal. Paschal tendered to Perry the principal and interest due, and demanded a deed, which was refused. Paschal filed an equitable petition to compel specific performance. It was held that "an assignee of such an agreement, who takes it from the vendee, being thereby subrogated to all his rights, assumes, upon filing a proceeding to enforce the agreement, all his liabilities thereunder, and upon a continuance of the tender is entitled to maintain an action for specific performance of the agreement."

In *Sims v. Cordele Ice Co.*, supra, the two cases last cited were distinguished from the one then under consideration, on the ground that the right to purchase the property in controversy for a designated sum was neither coupled with the assumption of any further liability by the purchaser to the seller, nor did it involve any relation of personal confidence between the parties. In other words, where it was a mere matter of paying the money and taking a title, and the money was paid or tendered, so that no further obligation remained open for performance, the contract was assignable.

In *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455, R. and P. entered into a contract by which P. leased from R. a lot of land for five years, covenanting to build on it a comfortable cabin, and clear and keep under good fence 20 acres of the lot, or more, if he chose, and at the expiration of five years to pay R. \$100 for the land, and in the meantime to pay the taxes on the lot, and then the title to the land was to be made to him by R. P. assigned his interest in the land. It was held that the interest was assignable, and that the assignees might have specific performance of R., on showing compliance with the covenants to be performed by P. In these cases the question of limiting by agreement the power to assign a contract, so as to transfer both the rights and duties of the party attempting to make the assignment was not involved. But they throw light on the question, by illustrating the difference between the assignability of an executory contract involving liabilities and mutual obligations, and one involving merely the payment of a sum of money and the taking of title, where the purchase money is paid or tendered. This distinction is important in connection with contracts which contain a provision against assignment, as well as in regard to contracts which are nonassignable without such a provision as will be seen later on.

It has been quite frequently said that the parties to an executory contract may in terms prohibit its assignment, so that an assignee does not succeed to any rights in the contract by virtue of the assignment. This broad statement, however, is subject to certain modifications. It would hardly be held that a vendor and vendee of land could contract that the vendee should never assign or yield possession of the land sold, and thus preclude it from being seized and sold for the

vendee's debts. As to a contract for the sale of land, such a provision is simply for the benefit or security of the vendor. If the vendor receives the full purchase price, he needs no further security, and can no longer insist on a provision against alienation or assignment, the object of which was to secure such payment or to limit his dealings in regard to the sale to his vendee. If a case might arise where other rights of the vendor than the payment of the purchase money require protection, no such fact appears in this case. The vendor may also waive such a provision by his conduct.

In *Cheney v. Bilby*, 74 Fed. 52, 20 C. C. A. 291, a contract for the sale of land contained a stipulation "that no assignment of the premises or of his contract shall be valid unless with the written consent of the first party and by the indorsement of the assignment thereon." An assignment was made. Subsequently the assignee filed an equitable petition against the vendor, alleging that all of the engagements of the vendee had been promptly fulfilled. One objection raised was that, if it should be conceded that the original vendee could enforce specific performance of the contract, his assignee could not do so. Caldwell, J., said: "This restraint upon the power of the purchaser to assign the contract unquestionably expired when the last purchase-money note fell due, and complete performance of the contract was tendered by the complainant. The complainant's right to a deed then became absolute. From that time the seller was a mere naked trustee of the legal title, and the purchaser or his vendee the equitable owner of the land. It was no longer any concern of the seller what the beneficial owner of the land did with it, for he no longer had any interest in it. The purchaser had the right to convey his equitable title, or assign his contract to whom he pleased, without asking Cheney's consent; and his vendee would succeed to all his rights." It was then said that the sale or assignment had in fact been ratified, and it was added: "Inasmuch, then, as the provision in question was only intended to secure the faithful performance of the agreement by the purchaser or his assignee, it would be both unreasonable and inequitable to hold that Cheney, the vendor, is privileged to take advantage of the provision, to avoid performance on his part, after the entire amount of the purchase money has been promptly paid or tendered. We must assume, whatever may be the fact in this regard, that the provision against assigning the contract without the vendor's consent was inserted therein for an honest and legitimate purpose; that is to say, for the purpose of securing the punctual payment of the purchase money, and a full compliance with other executory agreements, either by the original purchaser or by his assignee."

In *Grigg v. Landis*, 21 N. J. Eq. 495, it was

held that, where it appears on the face of a contract respecting the sale of land that the prohibition of assignment is not the main purpose of the covenant, but a mere incident to and security for such purpose, the contract is assignable in equity, and the assignee has all the equitable rights of the assignor. It was said that, the restriction being in the nature of a mere security for the performance of the principal covenants, such relief may be given by a court of equity as shall appear to be equitable under the circumstances of the case. See, also, *Wagner v. Cheney*, 16 Neb. 202, 20 N. W. 222; *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14; *Thomassen v. De Goey*, 133 Iowa, 278, 110 N. W. 581, 119 Am. St. Rep. 605.

Turning now to some of the decisions in this state, in *Street v. Lynch*, 38 Ga. 631, Burnett purchased land from Hanna, took a bond for title, and paid him a part of the purchase money. Lynch bought the land from Burnett, paid the entire purchase money, and took a bond for title. Burnett deposited with him the grants from the state of Georgia, and promised to return home and pay the balance of the purchase money to Hanna, and then make a deed to Lynch. Instead of doing so, Burnett sold the land to Street before he paid the balance of the purchase money to Hanna; and Burnett and Street went to the widow and father of Hanna, who had died, and Burnett paid the balance due on the land with part of the money which Street was to pay him for the land, and at his request the Hannas made the deed, not to him for Lynch's benefit, but to Street, the subsequent purchaser. Chief Justice Brown said: "Now the whole case would seem to turn upon notice. If Street, at the time he made the purchase, had notice of the sale to Lynch, he took subject to the rights of Lynch, and held the land as the trustee for Lynch, and the most he could claim was, that Lynch pay him the amount of balance of purchase money paid by him to Hanna, when he was bound to make Lynch a deed and deliver the possession to him."

In *Brown v. Crane*, 47 Ga. 483, it was held: "Where M. held a tract of land under bond for titles from W., and sold the same to C., executing a bond to make a fee-simple title so soon as he obtained a title from W., C. paying the purchase money in full, and B., with a full knowledge of these facts, confederating with others, by threats, etc., induced M. to sell the land to transfer to him W.'s bond, under which transfer B. procured a deed from W., held, that a demurrer to a bill filed by C., setting up the foregoing facts and praying that B. may be decreed to execute to him a title to said land, was properly overruled." Chief Justice Warner in the opinion said: "The view which a court of equity will take of it is to regard the defendant as holding the legal title to the land in trust for the benefit of the com-

plainant, who had previously purchased and paid for it, and of which fact the defendant had full knowledge at the time he purchased the land from Maulden and procured the legal title thereto to himself."

In each of these cases there was no direct assignment of the bond for title held by the original vendee, but he gave an independent bond for title and received the purchase money; and it was held that one who took with notice of that fact took subject to the right of such purchaser. In the present case, the original obligee in the bond conveyed the land by warranty deed to Singletary, and the evidence sufficiently shows that Grimsley took his deed from the obligor with notice of Singletary's rights. See, also, *Bryant v. Booze*, 55 Ga. 438; *Pearson v. Courson*, 129 Ga. 656, 659, 59 S. E. 907.

It is true that, in the cases from which quotations are made above, the original bond for title did not contain a stipulation against a transfer. But if we are correct in the statement which we have made, that the ground on which such a stipulation can be sustained in an executory contract is for the protection of the vendor, that there was no hint of any right on the part of Mrs. Holmes requiring protection, except to secure payment of the purchase money, and that when she had been fully paid she could not further insist on such a stipulation as against the grantee of her purchaser, then, under the facts of this case, the stipulation in the bond for title had served its purpose and was no longer of force. Mrs. Holmes did no more than protect herself by such a stipulation until she received her purchase money. She had received it in full. She conveyed her title, and took up her bond for title. While she was named as a party in the action, it appears in the evidence that she died, and her administrator appeared to have been made a party; so that neither she in her lifetime nor her administrator after her death appeared and sought to enforce the stipulation against assignment. The only persons who are attempting to assert priority over the rights of Singletary, and who claim that Singletary has no interest because of such stipulation in the original bond, are Grimsley, who took with notice of Singletary's rights, and sought to get advantage of the payments which had been made by the latter, and Caroline Cowart, who could not set up such a claim against her warranty deed. In this respect the case differs from such a case as that of *Lockerby v. Amon*, 64 Wash. 24, 116 Pac. 463, 35 L. R. A. (N. S.) 1064, Ann. Cas. 1918A, 228, if we should follow the court in speculating as to whether the vendor might have had some other need for protection operating after payment or tender of the purchase money, which a majority of this court are not prepared to do.

Under the facts as disclosed by the evidence, Grimsley and Caroline Cowart could not defeat Singletary's rights, because of

the stipulation in the bond from Mrs. Holmes to Caroline Cowart that it should not be transferred.

Judgment affirmed. All the Justices concur, except

HILL, J. (dissenting). I cannot concur in the decision reached by my learned Brethren in this case. The evidence tends to show that Mrs. Holmes owned a farm in Early county. She had leased it for a number of years to Singletary, who in turn subrented it, first to Shep Cowart, and later to his wife, Caroline. At the expiration of the lease to Singletary, Caroline Cowart, whose husband had become involved in debt, and who had formerly belonged as a slave to the parents of Mrs. Holmes, made a contract of purchase for the lot of land in controversy with Mrs. Holmes for the sum of \$1,250, the latter executing to Caroline a bond for title, with the stipulation that "this bond is not transferable to any one." Singletary was a merchant and did a supply business. The Cowarts were indebted to him for supplies for the farm. Caroline, before the first purchase-money note became due, and before she had paid any of the purchase money, executed a deed to the land to Singletary, "for and in consideration of that A. J. Singletary will comply with the conditions of the bond she holds from Mrs. E. E. Holmes, receipt of which is hereby acknowledged." Contemporaneously with the execution of the deed, Singletary executed an instrument by the terms of which he declared that he had "leased to Caroline Cowart all of the cleared land" on the lot in controversy for a term of six years, the consideration of the lease being 1,750 pounds of middling lint cotton payable October 1st each year. It is stipulated in this lease that Singletary agrees at the "termination or end of this lease, should the said Cowart pay all rents that may be due on this lease and all other indebtedness that she may owe said Singletary, and in addition \$750, then the said Singletary agrees to make said Cowart a deed to said lot of land. It is distinctly understood that this is a lease contract, and not a sale; but, as stated, should said Cowart at the termination of this lease pay all rents, all other indebtedness, and \$700, the deed is to be made."

The evidence of Caroline and her husband tended to show that she did not know she was executing a deed to Singletary; that they were ignorant, and could neither read nor write, and were told by Singletary that the instrument was merely a "showing" or note for what they owed Singletary. The testimony of Singletary tended to deny all this, and to show that it was understood that the instrument signed was a deed. Caroline brought cotton to Singletary each fall after the lease, which her evidence tended to show was to be applied by him, as her agent, to the land notes of Mrs. Holmes.

Singletary insists that he paid the money arising from the sale of the cotton to Mrs. Holmes on his own account as part of the purchase money, and not on the contract of Caroline with Mrs. Holmes. He testified: "I would not say positively I wrote and told her I had bought the land or not. I would not say I wrote her that, but I wrote her to give her to understand that it was a good debt, and I would take it up; but I would not say that I wrote her, and told her Caroline had deeded me the land. She knew I was paying them. She knew I wrote and told her to send them to the bank. Q. She did not know who it was for? A. I don't reckon she did. I wrote and told her I would pay the notes. * * * I just wrote Mrs. Holmes I would see the notes were paid."

The evidence tends to show that Singletary paid a portion of the notes, the first four directly to Mrs. Holmes, and the others through the bank. Caroline had possession of the first four notes paid. After a number of the notes had been paid by or through Singletary, the evidence tends to show that Caroline induced R. S. Grimsley to take up the remaining purchase-money notes, amounting to \$727, which he paid to Mrs. Holmes upon Caroline's request, and Mrs. Holmes consented to, and did, execute a warranty deed to Grimsley, upon the promise of the latter to give Caroline a home for her lifetime." After the execution of the deed from Mrs. Holmes to Grimsley, the latter executed a deed to Caroline to "a life interest" in one-half of the lot of land in controversy. It is provided in this deed that in the event the land shall be levied upon by any process whatever, or that Caroline or Shep Cowart shall lease or sell the land, it shall revert to the grantor.

From a careful inspection of the record in this case, I think that the court erred in entering a decree requiring Grimsley to execute to Singletary a deed to the premises in dispute. I am aware of the rule that "If, after notice that another has made a contract for the purchase of land, a third person cuts in, buys it, and takes a conveyance, such person stands in the place of his vendor, and a court of equity, if it would decree a specific performance of the contract against the latter, will render a like decree against the former." *Bryant v. Booze*, 55 Ga. 438. But the present case is different from the *Bryant Case*. There is no evidence in the instant case that Mrs. Holmes, the original vendor, ever knew that Caroline had sold to Singletary a title that she did not possess. The title was in Mrs. Holmes, and she was not bound, in selling it, to examine the records and see whether some one else claimed a title to her land. This duty may be upon a purchaser, but not upon one having the legal title and who desires to sell; and it is clear that Mrs. Holmes had the legal title. Nor is there in the record any evidence tending to show that Mrs. Holmes knew that Singe-

tary was paying her the money for himself, but, on the contrary, Singletary testified, "I don't reckon she did" know who the money was paid for. Under the circumstances, Mrs. Holmes could not be made to execute a deed to Singletary. She had not contracted with nor sold to him the land. She had no knowledge that he was paying her the notes as a purchaser, from herself, or from Caroline. She had sold to another (Caroline), and the latter had requested that titles be made to Grimsley. How could Mrs. Holmes be made to perform specifically to Singletary, when she had never contracted to do so, or in any other way become bound to do so? If she cannot be made to perform specifically as to Singletary, I fail to see how her vendee can be so compelled. Mrs. Holmes' administrator was not a party to this suit.

It is argued that the assignee of the obligee in the bond stands in the shoes of the obligor, and that when part of the purchase money is paid by the assignee, and the remainder is tendered by him to the vendor, the latter will be compelled to execute a conveyance. But the reply is that there was a restriction in the bond for title that it was not to be transferable. The assignee had notice of the restriction; and there is authority that such restriction, if reasonable, is valid. Thus "a condition may be imposed in a deed on the power of alienation in certain cases, as that the land shall not be conveyed before a certain date, or to a certain person." 2 Devlin on Real Estate, § 382. In the case of *Griggs v. Landis*, 19 N. J. Eq. 350-353, it is said: "Any person in selling his property, or making a contract for the sale, has a right to make such agreements and conditions as the purchaser will assent to, provided they are not contrary to law, or the policy of the law. It is not allowed to make property inalienable; it is contrary to the policy of the law; but it is permitted to restrain alienation for a limited time, or for certain specified purposes, or on certain conditions. * * * And there is nothing inequitable in the provision that until all arrears are paid up, and all stipulations complied with, the contract shall not be assigned, even in equity. It must be held, therefore, that the assignment, made in express violation of the positive provisions of the contract, is void, and the complainant, claiming through such assignment, is entitled to no relief in equity."

In 1 *Warvelle on Vendors* (2d Ed.) § 452, it is said: "While the general principle that the conveyance of an estate in fee simple imports absolute ownership in the grantee, and that any restriction or condition imposed inconsistent with or repugnant to the estate so granted is void, seems to have been adopted as a universal rule of law, it has nevertheless been held in England from very early times that partial restraints may properly be annexed to a grant of the fee, and that the grantee may not disregard such partial re-

straint under penalty of forfeiture of his estate. This doctrine has also been recognized in some of the American states, and in a number of states it has been held that a condition not to alien to a particular person or persons is valid"—citing *Cowell v. Col. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *Jackson v. Schutz*, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195. Likewise: "Restraints with respect to time have in several instances been held good, and the conditions sustained, provided the restriction is limited to a reasonable period." *Id.* § 453, citing *Stewart v. Brady*, 3 Bush (Ky.) 623; *Dougal v. Fryer*, 3 Mo. 40, 22 Am. Dec. 458; *Langdon v. Ingram*, 23 Ind. 360.

In the case of *Lockerby v. Amon*, 64 Wash. 24, 116 Pac. 463, 35 L. R. A. (N. S.) 1064, Ann. Cas. 1913A, 228, the defendants entered into a written contract whereby they agreed to sell S. certain real estate. A cash payment was made, and the remainder was to be paid on or before two years after the date of the contract, with interest at eight per cent. per annum. It was provided in the contract that the "parties of the first part will sell to the said party of the second part, his heirs and assigns." It was also provided that, if the purchase money was paid according to the intent and tenor of the contract, then the parties of the first part were to make a warranty deed to the premises to the party of the second part. It was further provided that "no assignment of this agreement shall be valid without the consent and signature of W. R. Amon and Sarah M. Amon, his wife, the parties of the first part." The contract was afterwards assigned by the obligee to J., who tendered the full amount due under the contract and demanded a deed. On being refused, he brought suit to compel specific performance. A judgment of dismissal was entered, on the ground that the contract was not assignable. The Supreme Court of that state affirmed the judgment, holding: "A provision in a conditional sale contract of real estate that it shall not be assigned without the consent of the vendor is valid, and an assignee without such consent secures no enforceable rights under the contract." In answer to the argument in that case that the restriction against alienation was designed only to insure payment of the purchase money, and, *that* being tendered, there could be no reason for withholding the deed, Chadwick, J., well said: "These arguments are not new, and find some support in the authorities; but they have been rejected by a majority of the courts. The privilege of selecting a grantee is an incident of ownership, and we cannot presume, as did the Supreme Court of Minnesota, that 'at most this stipulation against an assignment is merely collateral to the main purpose of the contract designed as a means of securing and enforcing payment of what was undertaken by the

vendee, to wit, the prompt payment of the purchase money. When the vendor has received all his purchase money he has received all that he is entitled to, and all that the provision against an assignment was intended to secure.' *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14. While this reasoning is entitled to consideration, we cannot accept it as the end of the law. A vendor may have confidence that his vendee will not use the property to his disadvantage. It is his privilege to decline to deal with strangers. Or he may, by limiting the right of assignment, save any question as to the interest of intervening third parties, a result not altogether unlikely under our community property system. Or he may be unwilling to assume to pass upon the legal sufficiency of an assignment." And in the case of *Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859, it was said: "It [the assignment of the bond] compelled the city to deal with strangers, and to determine at its peril which of the contesting claimants was entitled to the fund. This may have been one of the very contingencies contemplated by the city, and against which it sought to provide by making the contract nonassignable." And see 88 Am. St. Rep. 201; 4 Cyc. 20. In *Langdon v. Ingram*, 28 Ind. 360, it was held: "A condition that a grantee or devisee shall not alienate for a particular time, or to a particular person, is good."

But it may be insisted that such a restriction as that contained in the bond in the present case, against alienation of the bond for title, is against public policy and void, unless by the terms of the restriction there is a limitation over of the property, or a forfeiture of the rights of the obligee in case of alienation; and there is some authority to that effect. But if a restriction against alienation, without a clause of forfeiture, is void as being against public policy, I fail to see why it is not equally so when there is a provision for forfeiture in case of alienation; for the foundation of this rule of public policy is that the public welfare demands that there be freedom to dispose of what one owns, and there is as much restraint on disposition where a forfeiture is imposed as when there is simply an agreement not to transfer.

Nor is the restriction void in this case because it amounts to a perpetuity. Under my construction of the bond for title, it cannot be transferred until the time when the last purchase-money note is paid, and I think that this is a reasonable time within which to limit alienation. And, as held in many jurisdictions, a contract in restraint of alienation is not void if not unreasonable. An option in a lease to be exercised within 15 years has been held not void as against perpetuities. 1 Page on Contracts, § 382. Any other rule than this would deprive two or more persons of the right to contract; and

this itself would be contrary to public policy. Two or more persons may contract without let or hindrance, provided the contract does not contravene some rule of law or of public policy. It is the right of every one to contract with whomsoever he pleases; and to hold that one cannot so contract, within the limitations above specified, would be to deprive him of a constitutional right. One has the right to select the person with whom he deals, and to restrict the time of payment named in a contract to a reasonable time, and prohibit alienation within such time; and that is only what this contract does. What was the effect of the restriction in the bond? If a reasonable condition imposed in a deed is valid, a similar one in a bond for title would likewise be valid. The effect of the condition in this bond was that there could be no transfer of the bond, or a conveyance of the land in controversy by the obligee in the bond, until the last purchase-money note was paid; and this, I think, was a reasonable condition. The evident purpose of the vendor was to secure a home to her old servant, Caroline, and she was not to alienate or transfer the bond until it matured and the vendor could execute to her a deed to the land. The restriction as to alienation was limited, at all events, to a period of about six years, the maturity of the last note, as the bond stipulated that "time is of the essence of this contract; and should party of the second part fail to pay said notes, as they become due, then this bond becomes null and void, and whatever money is paid shall be treated as rent at the rate of \$150 per annum." It follows, from what has been said, that Caroline could not alienate or transfer the bond before the last note was due, and whosoever took a deed from Caroline before that date, with notice of the condition in the bond, was bound by that condition; and having no power to transfer the bond, she certainly could have no power to convey the land before the time stipulated in the bond. Therefore, when Singletary took the deed with notice of the condition in the bond, he acquired no right contrary to the condition.

This case is very different from the *Bryant Case*, supra, where a third person had "cut in" to deprive a purchaser of his trade. In the view I take of the case, at the time Grimsley purchased the land from Mrs. Holmes, Singletary had not effected a legal contract of purchase of the land from Caroline, on account of the restriction in the bond providing that she could not alienate it, or with Mrs. Holmes; and hence Grimsley had the legal right to purchase from any one having the legal right to sell. Mrs. Holmes never having parted with the legal title to Caroline, nor having sold to Singletary, so far as the evidence discloses, and Caroline having no right to sell to Singletary, Grimsley had the right to purchase from Mrs.

Holmes, with the consent of Caroline that her contract with the obligor be canceled; and, having done so, Grimsley secured a good title relatively to Singletary and Caroline. While it is true Grimsley had notice of the deed from Cowart to Singletary, he also had notice of the restriction in the bond. It may be that Caroline is liable to Singletary on her warranty, if she executed the deed to him, as the auditor finds that she did, and that she is estopped from setting up that she had no title to the land; but I think there is no privity as between Grimsley and Singletary, and consequently the court could not, for the reasons given above, compel Grimsley to execute a deed to Singletary, or enter a decree canceling the deed from Mrs. Holmes to Grimsley, or enter a judgment for any amount against Grimsley.

WILLIAMS v. STATE. (No. 4,389.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 335*)—LIMITATIONS—BURDEN OF PROOF.

Where, to relieve an accusation from the bar of the statute of limitations, a fact constituting an exception to the statute is alleged, the burden is on the state to prove the exception.

(a) Where, from an accusation charging a misdemeanor, alleged to have been committed by defrauding a certain corporation, it appeared that the offense was committed more than two years before the date of the accusation, and it was alleged that the offense was unknown to the corporation until within the two years preceding the date of the accusation, the burden was upon the state to show that the offense was unknown until within that period to any of the officers or agents of the corporation whose knowledge would be imputable to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 723-728, 730-751; Dec. Dig. § 335.*]

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Lewis Williams was convicted of swindling, and brings error. Reversed.

Z. B. Rogers, of Elberton, for plaintiff in error. Boozer Payne, Sol., of Elberton, for the State.

RUSSELL, J. Lewis Williams was accused in the city court of Elberton of the offense of cheating and swindling, and was convicted. The accusation charged that he represented to M. E. Maxwell & Co., a corporation, that he owned a certain mule, free of incumbrance, when, in truth and in fact, the mule did not belong to him, but was held by S. S. Brewer under a certain bill of sale. It was further alleged in the accusation that the crime was committed on March 16, 1909, but that the offense was unknown to the said M. E. Maxwell & Co. until April 1, 1911. The accusation was dated November 7, 1911. The defendant moved for a new trial upon the

grounds (1) that the verdict was contrary to the evidence and without evidence to support it; (2) that it was contrary to law; (3) that the court erred in admitting in evidence a "retainer of title and mortgage note," executed by the defendant to S. S. Brewer & Settle, which instrument retained title and ownership in said S. S. Brewer & Settle to one black horse mule, about six years old, weighing about 1,000 pounds and known as the "Hill mule"; (4) that the court erred in admitting in evidence a mortgage given by the defendant to M. E. Maxwell & Co., which was not recorded in Wilkes county, although it was not disputed that the defendant was living in Wilkes county at the time of the execution of the mortgage and ever since; (5) because the court erred in giving in charge to the jury section 719 of the Penal Code.

The determination of the question as to whether the verdict is contrary to the evidence and contrary to law depends upon a consideration of the assignments of error relating to the admissibility of the testimony to which the movant objected, and for this reason we shall consider these grounds together. It is necessary to pass upon these assignments of error in view of the fact that we feel constrained to grant another trial, but we shall deal first with the assignment of error which requires us to give the case that direction.

The state failed to prove that the alleged offense was not barred by the statute of limitations. In the accusation it is alleged that the false representations which the defendant was charged with making were in fact made on March 16, 1909. The accusation was not preferred until November 7, 1911. To prevent the bar of the statute of limitations, and to bring the case within one of the statutory exceptions, the accusation further alleged that the offense set out was unknown by said Maxwell & Co. until April 1, 1911.

Where an indictment charges that the offense alleged to have been committed beyond the period of the statute of limitations was unknown, the burden is on the state to prove the exception. *Flint v. State*, 12 Ga. App. 169, 76 S. E. 1032; *Cohen v. State*, 2 Ga. App. 689, 59 S. E. 4. In *Mangham v. State*, 11 Ga. App. 427-438, 75 S. E. 512, this court was dealing with a presentment, a proceeding in which there is no prosecutor; and, moreover, the point was not controlling upon the decision. The proof showed that M. E. Maxwell & Co. is a corporation. M. E. Maxwell swore that he did not know of the offense until the spring of 1911, and Sisk testified to the same effect. But the evidence did not disclose that either was an officer of the corporation through whom knowledge would be imputed to the corporation, or was an officer of the corporation at all. The proof does not show that there were not other officers of the corporation, or that the officers did not know,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for a period of more than two years before the filing of the accusation, that the alleged offense had been committed. Presumably the corporation had officers. If the commission of the offense was known to them, their knowledge must be imputed to the corporation, the exception is not proved, and the offense is barred.

Unless the prosecutor was the only person interested in the offense, proof that it was unknown to him would not suffice to relieve the bar of the statute of limitations and bring the case within the exception, and so, where it affirmatively appears that a corporation is the party defrauded and the party interested in the prosecution, the state does not carry the burden resting upon it, unless it is affirmatively made to appear that none of those officers whose knowledge may be imputed to the corporation knew of the commission of the offense for a period of time exceeding two years prior to the commencement of the prosecution. In other words, it must appear that the prosecution was begun within less than two years from the time that knowledge of the commission of the offense was brought home to any single officer of the corporation whose personal knowledge, due to his relation, could be imputed to the corporation. The state having failed to bring the case within the exceptions set out in section 30 of the Penal Code, the verdict was contrary to law.

The court erred in admitting in evidence the note and mortgage retaining title in S. S. Brewer & Settle. The accusation charged that the defendant's statement, that the mule was unincumbered, which was made with the intent to deceive and defraud M. E. Maxwell & Co., was not true because "the aforesaid mule did not then and there belong to Lewis Williams, but was held by one S. S. Brewer under a certain bill of sale." This was a material allegation, and even if the note with retainer of title had been admitted without objection, there would be a fatal variance between the allegata and probata. Even in a civil case proof that the title to property rested in a partnership would not be admitted to sustain an allegation of individual ownership (*Commercial Bank v. Tucker*, 94 Ga. 289, 21 S. E. 507; *Davenport v. Henderson*, 84 Ga. 313 (1), 10 S. E. 920; *East Tennessee, Virginia & Georgia R. Co. v. Herrman*, 92 Ga. 385 (3), 17 S. E. 344); and certainly in a criminal case there should be no greater laxity than in a civil proceeding.

Without regard to this, the document, the introduction of which was permitted by the court, should not have been admitted, because the accusation alleged that the defendant represented that he owned "a certain bay horse mule about six years old, weighing about 900 or 1,000 pounds, named 'Jim,' and that said mule was unincumbered"; where-

as, in the note or mortgage admitted by the court, S. S. Brewer & Settle retained title and ownership in a "black horse mule, about six years old," "built on blocky order," and known as the "Hill mule." Omitting other points of difference, it is plain that the same mule cannot be properly described as a bay mule and at the same time be a black mule. The able counsel for the state very frankly and properly concedes that, if the allegation as to Brewer's ownership cannot be treated as surplusage, then there is a fatal variance between the allegata and probata, and the conviction will not be sustained.

There are many descriptive averments which could be omitted from an accusation, which, when made, become material and must be proved as laid. In the present case it might have been sufficient to allege that the defendant falsely stated to M. E. Maxwell & Co. that his ownership in the mule in question was unincumbered; whereas in truth and in fact the defendant did not own the mule, or his title was incumbered. It is doubtful, however, if such an allegation would have put the defendant sufficiently on notice of the charge against him to have enabled him to prepare and defend against the charge; but when the state alleged that his statement was untrue because the said mule was held by one S. S. Brewer under a certain bill of sale, this allegation became the crux of the case. It appears from the record that, but for the prior lien of S. S. Brewer & Settle, the M. E. Maxwell & Co. might be able to collect the sum of \$69.02 by a sale of the mule, but that, due to the priority of the lien of Brewer & Settles, the Maxwell & Co. corporation is unable to enforce the collection of its debt, and therefore is subject to loss, and is defrauded.

In *Fulford v. State*, 50 Ga. 591, and many later decisions, it is said that if the entire averment may be omitted, of which the descriptive matter is a part, or can be rejected as surplusage, then the descriptive matter falls with it and need not be proved; also, "if any unnecessary averments disconnected with the circumstances which constitute the stated crime be introduced, they need not be proved, but may be rejected as surplusage." In *Joyce on Indictment*, § 359, the author says that the names of third persons who are collaterally connected with the offense, and whose identity is not essential to such a description thereof as is necessary to properly inform the accused of the nature and cause of the accusation against him, need not be stated. Under this rule it has been held that, in an indictment for betting at cards, the names of participants other than the defendant need not be given; and in an indictment for selling intoxicating liquors, the person to whom the sale is alleged

to have been made need not be named; and in an indictment for resisting an officer who is taking a prisoner to jail it is not necessary to name the prisoner who is being carried. Many examples of like kind might be given, but, although it might have been unnecessary in the first instance to have named the person who held the retainer of title, we do not think that the averment can for that reason alone be treated as surplusage. An averment which may become material because it is incorporated as a part of the charge must be descriptive of an essential element of the crime, and we think this is the case in the present instance. According to the allegation of the accusation, the defendant's representation that he was the owner of the mule was false because the mule was the property of S. S. Brewer.

The facts with relation to the introduction of the mortgage given by the defendant to M. E. Maxwell & Co. on March 18, 1909, as certified by the trial judge, are as follows: The defendant objected when the mortgage was tendered in evidence upon the ground that its execution had not been proved. The mortgage gave evidence of having been recorded January 29, 1912, in the clerk's office of the superior court of Elbert county. When the defendant objected, the state's counsel replied that the mortgage had been recorded, and thereupon the objection was withdrawn. It does not appear that at this time the defendant's counsel saw the mortgage itself or examined the entry of record; but when he started to argue the case he moved the court to rule the mortgage out of the evidence because, the defendant having resided at that time and ever afterward in Wilkes county, and not in Elbert county, the mortgage was not entitled to record in Elbert county, and therefore it was not admissible without proof of its execution by the subscribing witness. The court overruled this motion, and exception was taken to this ruling. The evidence is undisputed that the defendant had never lived in Elbert county, and that at the time of the execution of the mortgage to Maxwell & Co., as well as since, he lived in Wilkes county; and of course the Code requires that mortgages to personalty be recorded in the county of the residence of the mortgagor.

Evidence of recordation sufficient to dispense with proof of the execution of a mortgage to personalty must be proof that the mortgage was recorded in the county of the mortgagor's residence. But since the execution of a writing may be proved by the admissions of the person who signed it, and there is some evidence in regard to admissions made by the defendant to the effect that he made a mortgage to M. E. Maxwell & Co., which

may be inferred to be the same as the paper introduced in evidence, we are not prepared to hold that the judge erred in submitting to the jury the question as to whether the execution of the mortgage was sufficiently proved by these admissions of the defendant himself. The motion of the defendant's counsel, under the circumstances, did not come too late; for it is apparent, by the statement of the state's counsel, he was intentionally misled, and it was not too late for the state to ask that the case be reopened, and that proof of the execution of the mortgage be permitted. But in view of the testimony in regard to the admissions by the defendant that he execute a mortgage to M. E. Maxwell & Co., and there being no hint that he ever made more than one mortgage to this corporation, it does not appear that the defendant was hurt by the ruling.

The court did not err in charging the jury in the terms of section 719 of the Penal Code that "any person using any deceitful means or artful practices, other than those which are [specifically] mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated is [guilty of] a misdemeanor under our law," upon the ground, as assigned, that the provisions of section 719 are inapplicable to the accusation. The prosecution was not based upon the provisions of section 703, for the alleged representation of the defendant was confined solely to the ownership of a certain mule, and did not relate generally to his "respectability, wealth, or mercantile correspondence and connections." This is conceded by counsel for plaintiff in error. Counsel insists, however, that the accusation, if it sets out any offense, charged the offense defined in section 713 of the Penal Code. We cannot concur in this view, for that section relates specifically to the subject of giving false information by one who is interrogated as to the facts, and it does not appear from the accusation in this case that the accused was interrogated as to whether there was a lien upon the mule in question or not. On the contrary, it would appear that his statement was made voluntarily and without solicitation or interrogation, with the purpose on his part of obtaining credit.

On account of the state's failure to prove that the offense was not barred by the statute of limitations, and the error of the court in admitting in evidence a document showing that title was reserved to a partnership not mentioned in the accusation, and in property not mortgaged to M. E. Maxwell & Co., the verdict finding the accused guilty was contrary to law and the evidence, and a new trial should have been granted.

Judgment reversed.

**SUPREME RULING OF FRATERNAL
MYSTIC CIRCLE v. BLACK-
SHEAR. (No. 4,355.)**

(Court of Appeals of Georgia. Aug. 30, 1918.)

(Syllabus by the Court.)

INSURANCE (§ 718*)—FRATERNAL BENEFIT ASSOCIATIONS—ACTION ON POLICY—EVIDENCE.

This case is controlled by the decision of the Supreme Court in *Fraternal Life & Accident Association v. Evans*, 140 Ga. —, 78 S. E. 915. It appears from the record that the plaintiff in error is a fraternal beneficiary association, and therefore is exempt from the rule prescribed in section 2471 of the Civil Code of 1910, which provides that the constitution or by-laws of insurance companies doing business in this state, whether they are foreign or domestic, shall not be received in evidence as a part of the insurance policy, or as an independent contract, unless embodied in or attached to the policy. The trial judge therefore erred in excluding from evidence the by-law of the plaintiff in error.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1854; Dec. Dig. § 718.*]

Error from City Court of Athens; H. S. West, Judge.

Action by E. S. Blackshear against the Supreme Ruling of the Fraternal Mystic Circle. Judgment for plaintiff, and defendant brings error. Reversed.

T. S. Mell, of Athens, for plaintiff in error.
W. M. Smith and Cobb & Erwin, all of Athens, for defendant in error.

RUSSELL, J. Mrs. Blackshear sued the Supreme Ruling of the Fraternal Mystic Circle on a benefit certificate upon the life of her husband, Thomas B. Blackshear, for \$2,000. The defendant association pleaded that it was a fraternal beneficiary order as defined in chapter 2, art. 9, § 7 (section 2866-2877), of the Civil Code; that the deceased came to his death by his own hand, and that the certificate provided, as one of its conditions, that each member should comply "with the constitution, laws, rules, and requirements of the Supreme Ruling of the Fraternal Mystic Circle, now in force or as they may be amended or altered"; and that the insured had agreed in his application for membership that the constitution and by-laws were a part of the contract as fully as if they were set forth at length therein.

One of the by-laws of the defendant association provides that in the event that a member commits suicide within the first 20 years of his membership, whether the act be voluntary or involuntary, conscious or unconscious, or whether the insured be sane or insane at the time, or if the insured die from the effect of any drug administered by himself, then the beneficiaries of such member shall be entitled to only one-twentieth of the amount of the death benefit stated in the certificate for each year of the membership of the insured. It was uncontradicted that

the insured himself inflicted the wound which caused his death. The case was tried by the court sitting as court and jury, and the judgment rendered for the plaintiff was the amount of the certificate. The defendant moved for a new trial upon the general grounds, and also upon the ground that "the court erred in holding that the constitution and laws and by-laws of the defendant were not binding on the plaintiff because they were not attached to the certificate sued on"; the defendant insisting that it is a fraternal beneficiary order, and as such is exempt from the provisions of the law requiring by-laws to be attached to the certificate or policy of insurance.

There was sufficient evidence to authorize the court to find that the insured was insane at the time he killed himself, that he was a member of a subordinate ruling in Macon, Ga., that the contract was in force at the time of his death, that the age of the insured was correctly stated in his application, and that the plaintiff was the beneficiary named in the contract. Therefore the only real question presented in the case is whether the court erred in holding that the by-laws of the defendant were not binding upon the insured or the plaintiff because they were not attached to the certificate, and erred in not sustaining, for that reason, the defense predicated upon the by-law, under which the defendant insisted that it was only indebted to the beneficiary in the sum of \$341.14, which it had tendered.

The plaintiff in error asks that we review the ruling of this court stated in paragraph 6 of the decision in the case of *Heralds of Liberty v. Bowen*, 8 Ga. App. 325, 68 S. E. 1008. The same request is made by counsel not employed in the present case, but having cases involving the same point, who were granted special permission to file briefs.

This case is controlled by the ruling of the Supreme Court in *Fraternal Life & Accident Association v. Evans*, 140 Ga. —, 78 S. E. 915, in which it was held that fraternal beneficiary orders shall be governed exclusively by the provisions of chapter 2, art. 9, § 7 of the Civil Code (sections 2866-2877), and are, by the provisions of section 2869, exempt from the provisions of section 2471, requiring life and fire insurance policies, which refer to the application for insurance or to the constitution, by-laws, or other rules of the company, to contain or have a copy of the same attached thereto, in order to authorize the introduction of such constitution, by-laws, or rules in evidence as a part of the policy. The trial judge, therefore, erred in holding that the constitution, by-laws, rules, and requirements of the Supreme Ruling of the Fraternal Mystic Circle, were inadmissible for the reason that the same did not appear in the certificate of membership and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were not attached thereto by copy as an exhibit.

It is not necessary to review the ruling in the case of *Heralds of Liberty v. Bowen*, supra, because the point here presented was not involved when that case was before this court. This is plain from the wording of paragraph 3 of that decision, in which we held that "an association which issues policies of insurance, but, so far as appears, has no ritual nor any initiation, cannot be legally classed as a fraternal beneficial association under the laws of Georgia, and may be treated as an ordinary insurance company." This ruling related especially to the matter of service, upon which we ruled in the preceding part of the decision; but it is not in conflict with the sixth paragraph, in which we held that the act of August 17, 1906 (Acts 1906, p. 107), now embodied in section 2471 of the Code, applied to such assessment associations as the *Heralds of Liberty* appeared from the record to be (as indicated in paragraph 3 of the decision); i. e., associations without ritual or form of initiation, or lodge form of government, but purporting to be and sometimes called "fraternal associations." It appears from the record in that case that, though the *Heralds of Liberty* had supreme headquarters located in a sister state, Bowen had never been initiated, and there was not, at that time, a single lodge within the state of Georgia, nor any proof that Bowen was a member of any subordinate lodge here or elsewhere.

The distinction between assessment companies, such as the record shows the *Heralds of Liberty* to be, whether fraternal or not, and fraternal beneficiary associations, dealt with in chapter 2, art. 9, § 7 of the Civil Code, is pointed out by *Presiding Justice Evans in Fraternal Life & Accident Association v. Evans*, supra. In that case the court rules that "the General Assembly have differentiated fraternal beneficiary associations from co-operative and assessment companies. The latter are classed as insurance companies (Civil Code, §§ 2412 to 2450), while the former are exempt from the provisions of the insurance laws (section 2869 of the Code)." Having held in the *Bowen Case*, supra, as to the matter of service, that the plaintiff in error was not a fraternal beneficiary association, we were certainly compelled to hold that it was not exempt (not being a fraternal beneficiary association) from the requirement of section 2471 of the Civil Code, as to the matter of incorporating in the certificate or attaching thereto, as an exhibit, a copy of its constitution, by-laws, or rules, before they would be admissible in evidence.

The case at bar comes squarely under the ruling in *Fraternal Life & Accident Association v. Evans*, supra. The proof shows that the Supreme Ruling of the Fraternal Mystic Circle is the supreme body of that fraternal

beneficiary association, which has subordinate lodges (or "rulings"). The supreme council is a representative body, and, before membership, applicants must be formally initiated according to the ritual. Upon this state of facts the Supreme Court ruled that such fraternal beneficial associations, unlike mutual co-operative and assessment insurance companies (and this includes all fraternal insurance companies which do not possess the requisites essential to constitute them fraternal beneficiary associations), are, by the provisions of section 2869 of the Code, exempt from the rule prescribed in section 2471. It follows that the trial judge, in the case now before us, erred in excluding from evidence the by-laws of the defendant fraternal beneficiary association.

Judgment reversed.

HARRISON v. LEE. (No. 4,424.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. CONTRACTS (§ 94*)—FRAUD—EFFECT.

Fraud voids all contracts (Civ. Code 1910, § 4254), and the law is liberal in allowing ways and means for relieving from the consequences of fraud, provided the presence and evil of the alleged fraud is first shown.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

2. BILLS AND NOTES (§ 103*)—FRAUD (§ 20*)—WHAT CONSTITUTES—FALSE STATEMENTS.

The court correctly sustained the demurrer to that paragraph of the defendant's answer which stated that the defendant was induced by fraud to sign the note. If the defendant could read, there was no reason why he should have reposed special confidence in the agent of the plaintiff; nor was there any exigency which compelled him to haste in executing the note. The agent of the plaintiff did not fully state the contents of the note, but his statement as to the matter to which the statement related was true. But even "a false statement is not fraudulent, when there is no reason why the statement should be believed and acted upon." *Branan v. Warfield & Lee*, 3 Ga. App. 586 (2), 60 S. E. 325.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 233-240; Dec. Dig. § 103.* *Fraud*, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

3. EVIDENCE (§ 441*) — CONTRADICTION OF WRITING—WARRANTY.

If the answer of the defendant had set up such a state of facts as would have authorized the conclusion that the defendant was induced to sign the note by fraud on the part of the agent of the plaintiff, the defendant would have been entitled to introduce proof of a breach of any warranty from which resulted a failure of consideration. But since the defendant failed to allege that the execution of the contract was induced by fraud, his plea, in which it was sought to contradict the terms of the written contract by parol testimony in support of the defense that there had been a breach of an oral warranty given prior to the contract, was properly stricken. The contract here involved contained no express warranty. The allegation that its execution was procured by fraud was necessary, and proof to that effect was essen-

tial, before the defendant would be permitted to ingraft upon the contract an express warranty as to the age of the mules. The case might be different if the defendant had merely pleaded failure of consideration resulting from a breach of the implied warranty that the mules were merchantable and reasonably suited for the purposes intended.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

4. DEMURRER TO PETITION.

There was no error in sustaining the demurrer.

Error from City Court of Jeffersonville; L. D. Shannon, Judge.

Action by Z. Harrison against W. G. Lee. Judgment for defendant, and plaintiff brings error. Affirmed.

L. D. Moore, of Macon, for plaintiff in error. F. Chambers & Son, of Macon, for defendant in error.

RUSSELL, J. Judgment affirmed.

GILLESPIE v. BACON PECAN CO. (No. 4,542.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. SALES (§ 428*) — ACTION FOR PURCHASE PRICE—SET-OFF.

A plea which properly alleged that the defendant had given notes for the purchase price of trees bought by him from the plaintiff, and had been compelled to pay these notes because they were transferred for value, before maturity, to innocent purchasers, should have been allowed as an amendment to the answer. Such an amendment would have afforded the defendant the right to set off, as against the account sued on, an amount, out of the sum paid by him to the innocent holder of the notes, equal to the damages which the defendant would be entitled to recover for breach of implied warranty as to the trees purchased by him. In other words, if the defendant was forced to pay the notes after the discovery of the defects in the trees purchased by him, because his notes were in the hands of innocent purchasers, whose rights could not be affected by failure of consideration or a breach of warranty, he could have pleaded the failure of consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214-1223; Dec. Dig. § 428.*]

2. SALES (§ 435*) — ACTION FOR PURCHASE PRICE—ANSWER—SET-OFF.

In the present case the defendant sought to set up that he was compelled to pay the notes he had originally given to the plaintiff, because they were in the hands of innocent purchasers. However, the plaintiff specially demurred to this answer, upon the ground that the defendant's plea did not state when the alleged notes were given, or to whom they were transferred, nor otherwise state sufficient facts to enable the court to decide that the bank to which the defendant alleged he had paid the notes was a holder who purchased the notes before maturity, and therefore the statement that the bank was an innocent purchaser was a mere conclusion of the pleader. The plaintiff was entitled to know the time when the notes were given, and to whom they were transferred; and, upon the refusal of the defendant to

amend his plea, it was not error to strike the plea.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1239-1245; Dec. Dig. § 435.*]

3. DIRECTION OF VERDICT.

Upon the evidence submitted, so far as the same was pertinent to the pleading, the judgment of the court in directing a verdict was harmless to the defendant.

Error from City Court of Albany; D. F. Crosland, Judge.

Action by the Bacon Pecan Company against J. W. Gillespie. Judgment for plaintiff, and defendant brings error. Affirmed.

S. J. Jones and Mann & Milner, all of Albany, for plaintiff in error. R. J. Bacon, of Albany, for defendant in error.

RUSSELL, J. The G. M. Bacon Pecan Company brought suit on an account against J. W. Gillespie for \$1,805.60, besides interest, for pecan trees alleged to have been furnished to Gillespie in 1912. Gillespie pleaded that the trees were bought by him for a corporation of which he was president, and that the corporation was liable and not himself.

It was admitted on the trial that the number of trees stated in the account attached to the petition, at the price named, were supplied as alleged, and the only question originally at issue in the case was whether Gillespie was liable individually, or whether his corporation, the Albany Paper Shell Pecan Company, was the party liable. On the introduction of evidence as to orders for the trees by J. W. Gillespie individually, and acceptance by the G. M. Bacon Pecan Company, the court held that the contract, as shown by the letters and replies, constituted, as a matter of law, a contract with J. W. Gillespie individually. Thereupon Gillespie offered an amendment seeking to set off damages by alleged breach of contract in connection with the trees furnished Gillespie during the winter of 1910-11, one year prior to the transaction which was the basis of suit. The contract, as appears from the record, was in writing, its terms being set forth in correspondence between the parties, and there is no express warranty therein.

The first amendment offered (the refusal to allow which is assigned as error) was based upon the theory of ingrafting an express warranty by parol upon the written contract, which was then in evidence. The defendant subsequently, by sworn amendment, which was allowed, set up a breach of implied warranty as to the trees furnished in the winter of 1910-11. There was evidence in behalf of the plaintiff showing a waiver of this implied warranty, by payment in full, after full knowledge of the number of trees that had died, and also by renewal of note after the facts of the alleged death of numbers of trees and the breach of the contract were discovered; but there was evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence for the defendant that the notes were paid, not voluntarily, but because they had passed to the bank as an innocent purchaser, and that as to the purchaser of the notes for value failure of consideration was no defense. Thereupon the court directed a verdict in favor of the plaintiff.

[1-3] The decision of this court upon the questions presented will be sufficiently understood from the headnotes.

Judgment affirmed.

J. G. & G. W. DURDEN v. AYCOCK BROS.
(No. 4,770.)

(Court of Appeals of Georgia. Aug. 16, 1913.
Rehearing Denied Sept. 16, 1913.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 138*)—PRIORITIES
—LIEN ON CROPS.

The lien of a mortgage on a crop, given to secure payment for money, supplies, or other articles of necessity, to aid in making and gathering the crop, is superior to a lien of a mortgage thereon not given for this purpose, though recorded first.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. § 138.*]

2. CHATTEL MORTGAGES (§ 138*) — LIEN ON CROPS—PRIORITIES—"JUDGMENT."

The purpose of the act of 1899 (Acts 1899, p. 78) was to give such preference to the mortgage creditor who furnished money or supplies to aid in making a crop as would enable insolvents, who might not otherwise be able to obtain credit, to pursue their ordinary vocation of farming, instead of being forced to become vagrants, and perhaps criminals. And since the legislative intention would be defeated if, merely because of priority of record, a contract lien were held to be superior to a lien of a judgment, which arises by operation of law, the word "judgment," as used in section 3349 of the Civil Code of 1910, so far as applicable to proceedings by rule brought to distribute funds in custodia legis, includes any final process under which the property (the proceeds of the sale of which are subject to distribution) was brought to sale or could have been legally sold.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. § 138.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

Error from City Court of Monroe; A. C. Stone, Judge.

Action by Aycock Bros. against one Adcock to foreclose a mortgage on certain cotton. Judgment for plaintiff and J. G. & G. W. Durden placed a mortgage on the same property in the hands of the levying officer. Aycock Bros. brought a rule to determine question of priority of liens. Judgment for Aycock Bros., and J. G. & G. W. Durden bring error. Reversed.

Jos. H. Felker, of Monroe, for plaintiffs in error. Walker & Roberts, of Monroe, for defendants in error.

RUSSELL, J. The single question presented by this record is whether the lien of a

mortgage on a crop given to secure payment for advances furnished to aid in making and gathering the crop in the year in which the mortgage was given, is inferior to the lien of a mortgage given to another creditor to secure the payment of the debt of a former year, merely because it was not recorded until after the mortgage given to secure the older indebtedness was recorded in the clerk's office of the superior court. Generally, as among themselves, the priority of mortgage liens is fixed by the date of the record, in the absence of the elements of notice (Civil Code, §§ 3259, 3260); and in the present case the decision of the trial judge seems to rest upon the fact that the mortgage in favor of the defendant in error was recorded at a time prior to the record of the mortgage of the plaintiff in error. The following undisputed facts appear from the record:

One Adcock was indebted to the firm of Aycock Bros. for guano and other articles, which indebtedness was represented by two notes, one due October 1, 1911, and the other due October 1, 1912; both of them representing indebtedness for the year 1911. On May 18, 1912, Adcock mortgaged his crop of cotton to J. G. & G. W. Durden to secure payment for \$200 worth of supplies, to aid, as stated in the mortgage itself, in making his crop of that year. On the same day he executed to Aycock Bros., as security for the payment of pre-existing indebtedness to them, a mortgage upon 3,000 pounds of his first lint cotton, to be grown upon the same place. The Aycock mortgage was recorded on the day of its execution; the Durden mortgage was not recorded until May 22, 1912. On October 15, 1912, Aycock Bros. foreclosed their mortgage; and before the sale of Adcock's cotton the Durdens placed their mortgage in the hands of the levying officer. Aycock brought a rule against the officer, and the question of priority of lien was submitted for adjudication to the Judge of the city court of Monroe. There was testimony that one of the firm of Aycock Bros. had notice of the Durden mortgage when the Aycock mortgage was executed; but this evidence seems not to have been considered by the court, and it is immaterial, in the view that we take of the case here. Regardless of the question of notice, it is admitted that Aycock's mortgage was first recorded, but that Durden's mortgage was given to secure payment for supplies which were used to aid in making the crop of 1912, while Aycock's mortgage secured debts of the year 1911, and did not secure a debt to aid in making the crop of 1912. The trial judge directed the funds in court, after the payment of the costs, to be applied upon the mortgage *fi. fa.* of Aycock Bros., no doubt, as we have said above, determining the issue by the priority of the record.

[1] We think the court erred in this rul-

ing. We have not been able to find any case in which the exact point has been decided by the Supreme Court, but we think that the rulings in *Franklin v. Callaway*, 120 Ga. 382, 47 S. E. 970, and *Akin v. Comer & Co.*, 138 Ga. 733, 75 S. E. 1121, clearly indicate the importance of construing section 3349 of the Civil Code in accordance with the legislative purpose which was manifest in its passage. The section as taken from the act of 1899 (Acts 1899, p. 78) provides that "the lien of mortgages on crops, which mortgages are given to secure the payment of debts for money, supplies, and other articles of necessity, including live stock, to aid in making and gathering such crops, shall be superior to judgments of older date than such mortgages." As pointed out by Mr. Justice Lamar in *Franklin v. Callaway*, supra, it is apparent that the status of this enactment is somewhat anomalous. The Legislature was dealing with a condition in which persons holding older *fi. fas.* had liens on everything owned or which might subsequently be acquired by one who might wish to engage in farming. According to section 2787 of the Code of 1895 (Code of 1910, § 3329), the liens established therein stood in the following order: (1) Liens in favor of the state, counties, and municipal corporations, for taxes. (2) Liens in favor of creditors by judgment and decree. (3) Liens in favor of laborers. (4) Liens in favor of landlords. (5) Liens in favor of mortgagees. (6) Liens in favor of landlords furnishing necessities. At the time of the passage of the act of 1899 the lien of a judgment creditor was superior to the lien of a mortgagee subsequently acquired; and while, anterior to the passage of that act, the priority of the lien as among the mortgagees was established by the date of the record of their respective mortgages, it cannot be supposed that while the General Assembly was singling out that particular class of mortgages which secured the payment of supplies necessary to make crops, and making the lien of such a mortgage superior to the lien established by a judgment or decree, the Legislature intended that a mere contract lien, created to secure an indebtedness not of that class which it was seeking to prefer, should be entitled to priority over judgments. And yet to rule that because of priority of record a mortgage given to secure the debt of a previous year has priority of lien over a mortgage given to secure payment for supplies furnished in the year in which the crop was made, and which were furnished for the specific purpose of enabling that particular crop to be made, would in many cases have precisely that effect.

If the contention of the defendant in error is sound, the statement we have just made might be illustrated by the present case. If priority of lien is to depend solely upon the date of the record of the respective

mortgages, the Aycock mortgage *fi. fa.* would take the fund in the hands of the constable (or sheriff, as the case may be) to the exclusion of the Durden supply mortgage *fi. fa.* Any judgment creditor of Adcock, by placing his *fi. fa.* in the hands of the officer, could, by rule, take the fund away from Aycock; and thus the provisions of section 3349 would be absolutely nullified, because the fund at last would have been applied to a judgment of older date than the Durden *fi. fa.* The judgment creditor could not take the fund directly from the Durden mortgage, but through the intermediation of the Aycock *fi. fa.* he could indirectly subvert the superiority of the Durden lien into inferiority. Or would the court have to hold in such a case that the lien of the Aycock mortgage was superior to the mortgage for supplies in favor of the Durdens because the Aycock mortgage was first recorded, but that, inasmuch as the lien of the judgment creditor who had intervened was superior to that of the Aycock mortgage, and the Aycocks could not hold the fund to be applied on their mortgage *fi. fa.*, the fund should, by reason of this intervention, be applied upon the Durden mortgage, because the lien of the Aycock mortgage was inferior to the lien of the judgment?

It is very plain, from the rulings in the *Franklin* and *Akin* Cases, supra, that the recording of the mortgages provided for in section 3349 of the Civil Code is a matter of very little importance. It is adjudicated in those cases that it is a matter of no consequence whatever, where a mortgage given for supplies to aid in making a crop comes in conflict with an older *fi. fa.* In the *Franklin* Case Justice Lamar says, "Whether the paper was recorded on the day it was executed, or months afterwards, will make no difference," and in the *Akin* Case the mortgage for supplies was not recorded until after the *fi. fa.* had actually been levied. When a mortgage given to aid in making a crop comes in conflict with a mortgage given to secure a debt made for a different purpose, the matter of record cannot be of any more importance than when the contest is between the mortgage given for supplies and the *fi. fa.* on a common-law judgment, unless it was the intention of the General Assembly to give to mortgages executed to secure debts of every kind a priority over older judgments.

The use of the word "date" in section 3349 of the Civil Code is not without some significance. A lien can only find full fruition in final process. The Aycock mortgage could not have brought the crop here involved to sale without being foreclosed, or without a mortgage *fi. fa.*, and the mortgage *fi. fa.* is final process (in a sense a judgment), unless its progress be arrested by some proceeding appropriate for the purpose of transforming it into mesne process. As no creditor or claimant interposed any objec-

tion to the proceeding to enforce the collection of the mortgage, and the fund in court was raised by the sale under the mortgage *fi. fa.*, the affidavit to foreclose the mortgage, followed by execution, can well be treated as a judgment, and as such was inferior to the lien inherently present in the mortgage given for supplies, whether the latter had ever been recorded or not. Under the act of 1899 it took priority of an older judgment having a lien on the same crop, whenever it became a perfect crop mortgage for supplies. *Franklin v. Callaway*, *supra*. See, also, *Thompson-Hiles v. Dodds*, 95 Ga. 754, 22 S. E. 673; *Dickenson v. Stults*, 120 Ga. 635, 48 S. E. 173. As pointed out by Chief Justice Simmons in the *Dodds* Case, "before the adoption of the act of 1899, the effect of failure to record a mortgage within the time prescribed by law was to postpone it 'to all other liens created or obtained * * * before the actual record of the mortgage,'" and that act was not intended to place creditors on any better footing in this respect than that occupied by them before.

[2] 2. It is manifest that the Legislature intended by the passage of the act of 1899 to open a door of hope to persons engaged in the occupation of farming who might have become so heavily involved as to be unable to make a crop without assistance, and who could not obtain any assistance, because they had no means of securing supplies necessary to aid them in making a crop. A failure to make a crop the preceding year, or the loss of a crop, though either might be due to providential cause, might place a poor tenant or cropper in a position in which he would not be able to secure the payment of any advances made to him by pledge or lien upon property in his possession or control. Furthermore, he might be so greatly involved in debt that, even if he made a crop, this crop would be subjected to the superior lien of creditors who had obtained or who might obtain judgments against him; and thus he would be totally unable to comply with any obligations he might make in the spring in furtherance of his farming operations. The Legislature very wisely saw that it was possible, under these conditions, for a large class of our people to be left helpless and hopeless, with the strong probability that in numbers of these cases such persons would become vagrants and then criminals. And such a condition of affairs would tend necessarily to diminish the products of agriculture and to cripple the pursuit of this our leading occupation. A prudent man would not be willing to make advances with but small prospect of being paid for the supplies which he advanced, and when there was every probability that the crop, which could not have been produced without his intervention and assistance, would be diverted, from payment for the very supplies without which no crop would have been made, to the payment of

creditors who had in no way aided in the creation of the crop, however just their older demands.

The purpose of the act of 1899 was to give insolvent farmers another chance, and it could only be done by giving to those who might wish to furnish farmers with the supplies, without which the crop could not be made, such security as would encourage the advancing of the necessary assistance in the way of supplies. The debt due for these supplies is declared, in the *Franklin* Case, to be in the nature of purchase money; and, considering the broad and beneficent purpose of the act, we conclude that it was the intention of the Legislature to put the lien of a mortgage, taken for the purpose of securing payment for such supplies, in a class by itself, apart from mortgages given to secure ordinary debts. This being true, the date of the record of the crop mortgage for supplies is immaterial, except in a contest as to priority in a case where there is a contest between two or more crop mortgages for supplies furnished in the year in which the crop was made. Even as to a crop mortgage for supplies for a different year from that in which the crop in question was made, it cannot be said that the supplies furnished were necessary in making that crop; nor can it be said that for that reason the debt due for such supplies is in the nature of purchase money, when the supplies were used for producing another and a different crop.

It is our opinion, therefore, that under the undisputed facts of the record the funds in the hands of the officer of the court should be paid upon the debt for the supplies which aided in producing the crop from which that fund was realized, and should be directed to be applied to the mortgage *fi. fa.* of the *Durdens*.

Judgment reversed.

PEAVY v. SANGSTER et al. (No. 4,995.)
(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

The evidence in the present record is substantially the same as it was on a former trial, upon a review of which it was held that a verdict in favor of either party would have been supported by evidence. *Peavy v. Clemons*, 10 Ga. App. 507, 73 S. E. 756.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. EXECUTORS AND ADMINISTRATORS (§§ 444, 449*) — PETITION — SUFFICIENCY — PLEADING AND PROOF.

Suit was brought by two named individuals, who in the first paragraph of the petition described themselves as administrators of the estate of a deceased person. The petition then set forth facts showing that the defendant was indebted to the estate in a named sum and prayed for process. *Held*: (1) In the absence

of a special demurrer, the petition sufficiently showed that the persons named as plaintiffs were seeking to recover in their representative capacity as administrators of the estate of the deceased person named in the petition. See Civil Code 1910, § 5690. (2) It being admitted in the answer that the plaintiffs were administrators as alleged, it was not necessary for them to prove it; and a verdict in their favor as administrators should not have been set aside because of the absence of such proof.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1813-1817, 1837-1841, 1850-1854; Dec. Dig. §§ 444, 449.*]

3. APPEAL AND ERROR (§ 667*) — VERITY OF RECORD—ANSWER.

In the bill of exceptions there is a specification of "the defendant's answer on which the case was tried." The clerk of the trial court transmitted with the record a paper purporting to be an answer filed in the case, duly verified, which contains an admission of the allegation in the petition that the plaintiffs are administrators of the estate therein referred to. This document must be treated as the answer filed in the case, notwithstanding a suggestion in the brief of counsel for plaintiff in error that the answer which had been filed in the case was lost, and that in lieu thereof a paper purporting to be an answer was used on the trial, which contained a denial of the representative character of the plaintiffs. Especially is this true when the suggestion is made solely upon information received from others by counsel who had not been connected with the case before it reached this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2862, 2863; Dec. Dig. § 667.*]

Error from City Court of Vienna; Robt. Hodges, Judge.

Action by A. H. Sangster and another, administrators, against W. B. Peavy. Judgment for plaintiffs, and defendant brings error. Affirmed.

Jule Felton, of Montezuma, L. L. Woodward, of Vienna, and Crum & Jones, of Cordele, for plaintiff in error. Busbee & Busbee, of Vienna, for defendants in error.

POTTLE, J. Judgment affirmed.

TIMMONS v. STATE. (No. 4,653.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 683*) — SUPPLEMENTAL STATEMENT BY DEFENDANT—REBUTTAL.

While permission to a defendant in a criminal case to make a second or supplemental statement on his trial is a matter of discretion on the part of the trial judge, and the exercise of this discretion will not be interfered with unless abused, still it is error to refuse to permit a defendant to make a statement strictly in rebuttal of an alleged confession of guilt which was not shown upon the state's case in chief but was reserved and introduced as new matter after the defendant had made his statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Joe Timmins was convicted of crime, and brings error. Reversed.

Sheffield & Askew, of Arlington, for plaintiff in error. B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the state.

RUSSELL, J. Judgment reversed.

BINDER et al. v. GEORGIA RY. & ELECTRIC CO. (No. 4,847.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 330*)—STREET CAR PASSENGER—ABUSE BY MOTORMAN—DEFENSE.

The evidence supports the verdict.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1370, 1372, 1373; Dec. Dig. § 330.*]

2. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—CURE BY VERDICT—INSTRUCTIONS.

The refusal to instruct the jury that they could consider, on the question of damages, the "worldly circumstances" of the defendant, even if the instruction should have been given, was not harmful error, since the verdict was for the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

3, 4. CARRIERS (§ 317*)—EVIDENCE (§ 271*)—ACTION BY STREET CAR PASSENGER—EXCLUSION OF EVIDENCE—SELF-SERVING DECLARATION.

There was no material error in rulings on testimony.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.* Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

5. CARRIERS (§ 315*)—ACTION BY STREET CAR PASSENGER—EVIDENCE ADMISSIBLE UNDER GENERAL ISSUE.

Where a suit is brought against a street railway company to recover damages for failure to perform its duty of protecting a passenger from alleged wrongful conduct of its motorman, the defendant, under the plea of the general issue, can introduce evidence showing that the conduct of the motorman was fully warranted and justifiable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 315.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Joseph Binder and others, executors, against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Binder sued the Georgia Railway & Electric Company for damages for an assault and battery alleged to have been made upon him by an agent of the defendant while he was a passenger on one of its cars. The verdict was in favor of the company, and the plaintiff's motion for a new trial was overruled. The evidence makes substantially the following case: Plaintiff, while a passenger, sitting at the front of the defendant's car,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was attracted by a scuffle on the rear end of the car, and, on looking back, saw an inspector of the company removing forcibly a man from the rear platform. The inspector, in so doing, pulled a black-jack from his pocket and hit the man with it across the face, and a stream of blood followed the blow. The motorman yelled, "That's good, hit him again," and with that stopped the car and ran back to the rear platform. Several passengers, including the plaintiff, stepped off the car. One passenger said, "It is a shame to hit a man that way." Plaintiff said, "Yes, it is a pity; the inspector shouldn't have struck him that way." The motorman said to him: "It is none of your God damn business; he has got a right to kill him if he wants to. You get to hell on the car; it is none of your business." Plaintiff replied, "I was not talking to you." The motorman ordered the passengers back on the car, and one passenger said to him, "If you are man enough, put me on." The passengers then got back on the car. The motorman continued to curse the plaintiff, and made motions as though to remove the brass lever, and seemed to be trying to draw the plaintiff into a fight. The plaintiff was standing on the front platform, and both men and women heard the motorman's abuse of him. When the plaintiff got off at his destination he told the motorman that he was going to report him, and thereupon the motorman cursed and abused him, calling him a "God damn liar," as he left the car. He was mortified and humiliated by the conduct of the motorman, but, because of the presence of lady passengers, he controlled himself, saying nothing except that he intended to report the facts to the company and ask for the motorman's discharge. He testified that at his request his attorney wrote to the company, stating the facts and asking that the motorman be discharged, and agreeing that if this was done he would be satisfied. On the second day following he got on a car of the defendant company. He did not then see who was the motorman. When he was getting off the car as his destination the motorman, the one who was on the car on the previous occasion, recognized him, "shook his fist, and said, 'God damn,' and something like 'a Jew,'" which was not fully understood by the plaintiff. The testimony of the plaintiff as to these facts was corroborated by other passengers. In rebuttal the motorman testified that the inspector who was trying to remove the man from the rear platform was his brother; that the plaintiff, who was on the front platform, said the inspector was "a dirty scoundrel"; that he (the motorman) said, "Go and tell him about it, don't tell me;" and the plaintiff said: "I will not do it; it is just a dirty outrage. The men of the street car company are a set of damn thieves and scoundrels anyway." Two witnesses testified that the plaintiff did

not use the language imputed to him by the motorman.

Besides the general grounds that the verdict was without evidence to support it and was contrary to law, the motion for a new trial contains the following grounds: (1) That the trial judge refused to allow the plaintiff to prove the "worldly circumstances" of the defendant. (2) That the trial judge refused to allow the plaintiff to prove that after the occurrence complained of, whenever the motorman saw him, and while the motorman was performing his duty for the company, he shook his fist and clinched his teeth at the plaintiff. (3) That the trial judge refused to allow the plaintiff to introduce in evidence the following extract from a letter of his attorney to the defendant: "Mr. Binder does not desire to hold the company responsible for his mistreatment by this motorman, provided the company will remedy the situation, that permits a passenger to be thus insulted; he feels that such a man has no business in a position where he comes in contact with the public, and asks that you make a full investigation of this matter." (4) That the judge erred in allowing the testimony of this motorman to go in evidence, since this testimony was introduced for the purpose of proving justification, when there was no plea of justification, but only a plea of the general issue. This exception is presented in several forms in the motion for a new trial.

M. H. Silverman, of Atlanta, for plaintiffs in error. Colquitt & Conyers, of Atlanta, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] 1. We think the general grounds of the motion for a new trial are without merit. The trial judge fully instructed the jury on the principles of law pertinent to the issues, as laid down in the case of *Mason v. N., C. & St. L. Ry.*, 135 Ga. 741, 70 S. E. 225, 33 L. R. A. (N. S.) 280. Of course the general principle is well recognized that carriers are under a duty to exercise extraordinary diligence to protect their passengers not only from the insults of their servants but from the insults of their fellow passengers. The jury was authorized to believe in this case, under the evidence of the motorman, that this passenger was not entitled to the protection of the company, for, if the evidence of the motorman is the truth of the transaction, the passenger had forfeited this right of protection by his abusive language and opprobrious words used to the motorman. The evidence preponderates against the motorman's testimony; yet the matter was for the exclusive determination of the jury; and, if they believed the passenger did use opprobrious words to the motorman (the words to which the motorman testified), such words were sufficient to justify him in denouncing the statement made by

the passenger and might have justified an assault and battery, although the evidence does not show that the motorman made any assault and battery, or even an assault upon the passenger. A passenger has no license, because of his relation as passenger, to use opprobrious words and abusive language, without provocation, to an employé of the company in charge of the car; and, if he does so, the employé has the right, within proper limitations, to protect himself and to resent the language of the passenger. Any provocation or aggravation of the servant by a passenger which will not fully justify him in his resentment will not free the master of liability. An act which may not amount to a justification may yet amount to a mitigation and, if the mitigating circumstances be strong enough or the injury small, may furnish a basis only for recovery of nominal damages. But, according to the evidence of the motorman in this case, the passenger was wholly unjustified in using the opprobrious words and abusive language, and the motorman became thus entirely justified in his conduct, and such conduct could not be the basis of liability against the master. *Mason v. N. C. & St. L. Ry.*, supra, and cases therein cited.

[2] 2. Even if the refusal of the judge to allow the plaintiff to prove the worldly circumstances of the defendant company was erroneous, the error was immaterial and harmless in view of the verdict for the defendant. The jury never reached the question of the measure of damages, in that they found a verdict generally for the defendant, and this question is merely a moot question here. *McBride v. Georgia Ry. & Elec. Co.*, 125 Ga. 515, 54 S. E. 674.

[3] 3. There was no error in the refusal of the judge to permit the plaintiff to show that, subsequently to the tort complained of, the offending motorman, whenever he would see the plaintiff riding on his car, would shake his fist and clinch his teeth at the plaintiff. This subsequent conduct might furnish cause for a separate suit against the company and might be construed to be an insult to the passenger, but it certainly was not relevant to the conduct made the basis of the present suit. The case of *Gasway v. A. & W. P. R. Co.*, 58 Ga. 216, relied upon by the plaintiff in error, is not applicable to the questions made in this record. In that case the company retained the offending servant after knowledge of a tort for which the company was liable, and the subsequent conduct was pertinent to the point of ratification of the tort by the principal.

[4] 4. There was clearly no error in refusing to permit the introduction in evidence of an extract from a letter written by the plaintiff's attorney to the defendant. This extract illustrates no question in the record, was entirely irrelevant and immaterial, and was self-serving on the part of the plaintiff.

[5] 5. The remaining grounds of the motion for a new trial present in different form the one point that the defendant could not prove justification of the conduct of the motorman, and thus escape liability, without filing a formal plea of justification; that the proof was not admissible under the plea of the general issue. The rule is well settled as to torts that justification must be set up affirmatively and by a special, formal plea. *Ratteree v. Chapman*, 79 Ga. 574, 579, 4 S. E. 684. Pleas of justification refer to such torts as malicious prosecution, assault and battery, libel and slander, and the like. *Central of Georgia Ry. Co. v. Morgan*, 110 Ga. 168, 171, 35 S. E. 345. A plea of justification admits the tort and sets up facts of justification, and under such a plea the defendant has the affirmative and assumes the burden of proving justification. In the present case the gravamen of the complaint is not primarily liability for the tort of the motorman but liability for the neglect of the defendant company to discharge a public duty in the protection of its passengers from the insults of its employes, a duty which the law imposes upon it. In other words, the suit is based, not on the wrong of the motorman in insulting the passenger, but upon the failure of the carrier to protect the passenger from the insult. A petition which did not allege this failure of the carrier to perform its duty would be subject to demurrer. Now, when the carrier denies by a plea the essential fact upon which the claim for damages is predicated, to wit, the failure to protect its passengers from insult, it can prove under that general denial any fact which under the law disproves its liability; and it effectually escapes liability by proof that it did not fail in the performance of this obligation. Proof that the offending servant was justified in the use of the language complained of, or the insult given, or the unlawful act, necessarily proves that the carrier has not failed in the performance of its duty to the passenger. It would seem to be logically and legally impossible to file a plea of justification when the gist of the action is a neglect of duty. If the defendant admits the allegations of negligence, he necessarily admits not only prima facie liability but ultimate liability. In other words, it cannot justify its negligence in failing to perform its duty to the passenger, for the law authorizes no such defense; and, if it admits its own negligence in this respect, it can only defend by showing either that the plaintiff's negligence was the proximate cause of the injury or that the plaintiff, by the exercise of ordinary care, could have known of the defendant's negligence and avoided its consequences; and either of these defenses can be made under the general denial. We think this view is not only in consonance with sound reason but is clearly deducible from decisions of the Supreme Court.

In *Central of Georgia Ry. Co. v. Morgan*, supra, it was held that a plea of justification could not be made to a suit for injury to property by the running of a railroad train, and that all the evidence tending to show justification was admissible under a plea of the general issue. In *Chapman v. A. & W. P. R.*, 74 Ga. 547, it was said that, to constitute a plea of justification, the facts alleged must be such as are not admissible under the plea of the general issue. *Horton v. Pintchuck*, 110 Ga. 355, 358, 35 S. E. 663; *Brunswick & Western R. Co. v. Wiggins*, 113 Ga. 842, 846, 39 S. E. 551, 61 L. R. A. 513; *Cole v. A. & W. P. R. Co.*, 102 Ga. 474, 476, 31 S. E. 107.

We conclude that the case was fairly tried; and while the evidence preponderates against the verdict, yet there was some evidence to support it; and, as no error of law of a prejudicial character is shown by the record, this court will not disturb the judgment refusing another trial.

Judgment affirmed.

WILCOX, IVES & CO. v. ROGERS.
(No. 4974.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. ACCORD AND SATISFACTION (§ 11*)—REMITTANCE ON CONDITION—EFFECT OF ACCEPTANCE.

Where property is delivered to a creditor by his debtor, with instructions to sell it and send the debtor a sum of money and to apply the balance of the proceeds as a credit on the debt, and the creditor agrees to sell the property and apply the proceeds on the debt but declines to pay the debtor the sum specified by him, and thereupon the debtor instructs the creditor that, unless his instructions are complied with, the acceptance and disposition of the property by the creditor must be treated as a settlement of the debt, and after such notice the creditor disposes of the property without paying to the debtor the amount of money which he demanded, there is a complete accord and satisfaction of the debt.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75-82; Dec. Dig. § 11.*]

2. ACCORD AND SATISFACTION (§ 11*) — REMITTANCE ON CONDITION — EFFECT OF ACCEPTANCE.

Applying the foregoing principle to the facts of the present case, the evidence fully authorized the verdict, and no error of law was committed.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75-82; Dec. Dig. § 11.*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Action by Wilcox, Ives & Co. against C. W. Rogers. Judgment for defendant, and plaintiff brings error. Affirmed.

H. C. Beasley, of Reidsville, for plaintiff in error.

POTTLE, J. [1, 2] The defendant was indebted to the plaintiffs on a promissory note given for the purchase price of fertilizers. The note became due in the fall, and the plaintiff sent his collecting agent to see the defendant and obtain payment. The defendant did not have the money to pay but did have on hand 16 bales of cotton. He informed the agent that he was willing to ship these 16 bales to the plaintiffs in order that they might sell them and apply the proceeds on the note, provided they would honor his draft for \$100, which he needed to pay his cotton pickers. The agent agreed for the cotton to be shipped but stated that he did not know whether his principal would honor the draft or not. Thereupon the defendant shipped the cotton to the plaintiffs and at the same time wrote a letter stating that the cotton had been shipped and requesting that it be sold on arrival, that his draft for \$100 be paid, and that the balance be credited on his note. To this letter the plaintiffs replied, stating that they would handle the cotton to the best advantage and place the proceeds as a credit on the note. They declined, however, to pay the draft and requested that the defendant withdraw it. Thereupon the defendant wrote the plaintiff as follows: "Yours of the 15th inst. received; somewhat surprised; the 16 bales of cotton is my cotton yet; the contract must go where I say go. Now if you want to give me my note for some [same?] handle the same that way. If not you had better place contents as I tell you. We are sending draft back to you for collection. Pay same and send my note at once." To this letter the plaintiffs replied, declining to honor the draft, but stating their willingness to turn over the cotton to any factor the defendant might select, provided they were paid the amount of their indebtedness. They further stated that they were willing to sell the cotton to the best advantage and place the proceeds to his credit, and if anything was left, they would either honor his draft or forward check in settlement. The letter concluded with the statement that, if what had been said was not satisfactory, they would be glad to receive remittance in full, upon receipt of which they would turn over the bill of lading for the cotton to anybody the defendant might designate. The defendant made no reply to this letter. The plaintiffs sold the cotton, credited the proceeds on the note, and brought suit for the balance. The defendant pleaded an accord and satisfaction. The jury found in his favor; and the plaintiffs' motion for a new trial was overruled.

The evidence authorized the verdict. The plaintiffs' agent had no authority to accept from the defendant anything else than the full amount of the note in cash. The defendant was not bound to ship to the plaintiffs his cotton, nor were they bound to accept it.

When he shipped it, however, they were bound either to refuse to take it at all or to accept it upon his terms. The effect of the last letter written by the defendant was that he was willing for the plaintiffs to sell the cotton and apply the proceeds to the note, provided they would honor his draft for \$100. If they accepted the cotton for the purpose of selling it and applying the proceeds to the note, they were bound to do so upon the terms stated in the defendant's letter; that is, upon the condition that they honor his draft for \$100. This they declined to do but wrote to the defendant a letter proposing to sell the cotton upon the best terms possible and apply the proceeds to his note. The defendant, however, declined to agree to this but, on the contrary, peremptorily notified the plaintiffs that they must take the cotton upon the terms and conditions stated in his previous letter or let it alone. He further stated, in effect, that, if they did sell the cotton without paying his draft, they must do so upon the understanding that it paid his note in full. Upon receipt of this letter the plaintiffs were bound to do one of two things: Either to refuse acceptance of the cotton at all or to accept it upon the defendant's terms, which were either to honor his draft for \$100 or to accept the cotton in full satisfaction of the note. The mere fact the plaintiffs wrote to the defendant a letter declining to accept his terms does not prevent the transaction from amounting to an accord and satisfaction, when they did actually accept the cotton and dispose of it and refuse to pay his draft. The cotton belonged to the defendant. He had a right to dictate the conditions upon which it should be received, and the plaintiffs were bound to comply with his terms upon their acceptance of the cotton. The charge complained of correctly embodied the principle above stated. The instruction upon the subject of reconciling conflicts in the testimony was not altogether accurate but is not sufficient cause for a new trial. The evidence authorized the verdict, and no material error of law was committed.

Judgment affirmed.

UNION MUT. ASS'N v. COOPER.
(No. 4,816.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

CERTIORARI (§ 42*)—PETITION — SUFFICIENCY. The judge of the superior court erred in dismissing the certiorari on the ground that "the certiorari petition does not set out any clear and specific assignment of error upon any specific and judicial act of the justice, judicial decision, or judgment."

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 64-73, 75-79, 81-84, 87; Dec. Dig. § 42.*]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action in a justice's court by C. L. Cooper against the Union Mutual Association. Judgment for plaintiff, and from an order of the superior court dismissing a petition for certiorari, defendant brings error. Reversed.

C. J. Johnson, of Macon, for plaintiff in error.

HILL, C. J. The petition for certiorari set out the following facts: On December 18, 1911, C. L. Cooper sued out against petitioner in said justice's court a proceeding to foreclose an alleged laborer's lien for \$10 upon certain personal property, to wit, "more than 30 policies of insurance." Execution issued thereunder and was levied on said date by J. D. Barkley, a constable, upon a roller-top desk belonging to petitioner. When said levy was made, the defendant in execution (petitioner in certiorari) denied owing said pretended claim and offered to give bond. Refusing to comply with said request, said levying officer, under threat of immediately seizing said property, demanded and received from petitioner a cash deposit of \$12 upon the representation that the same would be accepted and held in lieu of the bond required by law, which petitioner offered to make, and pending the making of the same; petitioner parting with said \$12 upon the representation that the same would be refunded, and parting with the same as the only alternative to prevent the immediate seizure of said property, and under no agreement or condition of any kind whatever that the same should be applied to said pretended claim. The next day petitioner gave bond and filed a counter affidavit in said foreclosure proceeding. When the issue in the case came on regularly to be tried, the attorney for plaintiff in execution stated in his place that the court had paid over to him \$10, the amount of the claim sued on, and that he had paid over the same, less his fee, to the plaintiff, and that the case was at an end so far as the plaintiff was concerned; that he had no further connection with the case as attorney for plaintiff, and advised and urged the court to enter up the case on the docket as having been settled and costs paid by the defendant. Petitioner's attorney objected and moved to dismiss the case for want of prosecution. The court overruled this motion. Petitioner's attorney then moved the court that the case proceed to trial on its merits, and this motion was overruled by the court, and the court then ruled that the case had been settled and costs paid by the defendant and made an entry to this effect on the docket. The answer of the justice to said petition for certiorari admitted the truth of petitioner's allegation that, on the next day after said levy was made, petitioner gave the levying officer bond with good and suffi-

cient security approved by him, and also filed in said justice's court a counter affidavit in the case. The answer, however, denied other allegations in the petition. A traverse to this answer was duly filed.

The issue formed upon the petition for certiorari, the answer, and the traverse coming on regularly to be heard before a jury in the superior court, the judge took the case from the jury and passed an order dismissing the petition for certiorari on the ground that "the certiorari petition does not set out any clear and specific assignment of error upon any specific and judicial act of the justice, judicial decision, or judgment." In the petition for certiorari the following facts are set out, with the judgment of the court thereon, and a specific assignment of error made to the judgment: That the court overruled a motion by defendant to dismiss the case for want of prosecution; that the court overruled a motion by defendant that the case proceed to trial on its merits; that the court, over objection of defendant, ruled that the case had been "settled and costs paid by defendant," and entered up judgment accordingly. It is specifically alleged: First, that the judgment and rulings of the court are contrary to law; second, that the judgment of the court is contrary to the evidence; third, that the judgment is contrary to law for that petitioner has not been allowed his day in court and has not been given an opportunity to be heard on the merits of the case; that the court should have passed an order directing said levying officer to refund said \$12 to petitioner before entering up final judgment in the case; fourth, that the judgment is contrary to the evidence and the law for that the case has not been settled; that the defendant (this petitioner) has paid nothing in settlement of said claim of the costs. We can hardly conceive of assignments of error more specifically and definitely made. Certainly the overruling of the motion to dismiss the case for want of prosecution is a specific and judicial act of the justice, constituting a judicial decision and judgment. So also was his overruling the motion that the case be tried on the merits, and certainly the ruling that the case had been settled, and an entry to that effect on the docket was a decision given by the justice and was in the strictest sense a judicial and final decision. It would seem that the errors complained of are meritorious, but of this we say nothing. We hold only that the judge of the superior court erred in his judgment that "the certiorari petition does not set out any clear and specific assignment of error upon any specific and judicial act of the justice, judicial decision, or judgment." But, irrespective of this, certainly the issue on the traverse should have been submitted to the jury. See 17 Am. & Eng. Enc. of Law, 762; Fricks v. Miller, 41 Ga. 274; Craig v. Pope, 48 Ga. 551; Lowry

v. Parsons, 52 Ga. 356; Blandford v. McGehee, 67 Ga. 84, 88; Wylly v. Burnett, 43 Ga. 438.

Judgment reversed.

WOODWARD LUMBER CO. v. TOWN OF GRANTVILLE. (No. 4,962.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 376*)—MATERIAL FURNISHED TO CONTRACTOR—LIABILITY—FAILURE TO TAKE BOND.

A municipal corporation is not liable for material furnished to a contractor to be used in the construction of a public building in the city, upon the ground that the municipal authorities have failed to take from the contractor a bond, as required by the act approved August 12, 1910 (Acts 1910, p. 86), for the protection of persons furnishing material and labor for the construction of public works.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 911-913; Dec. Dig. § 376.*]

Error from City Court of Newnan; W. A. Post, Judge.

Action by the Woodward Lumber Company against the Town of Grantville. Judgment for defendant, and plaintiff brings error. Affirmed.

Dodd & Dodd, of Atlanta, and W. L. Stallings, of Newnan, for plaintiff in error. Hall & Jones, of Newnan, for defendant in error.

POTTLE, J. In section 1 of the act approved August 12, 1910, entitled "An act for the protection of persons furnishing material and labor for the construction of public works, and for other purposes," it is provided that any person who enters into a contract with the state, or county, or a municipal corporation for the repair, construction, or prosecution of any public building or public work shall be required to execute a bond, conditioned that the contractor "shall promptly make payment to all persons supplying him or them with labor or material, or both, in the execution of the work provided for in such contract." In section 2 it is provided that the person furnishing the material or labor, after the completion of the contract and within a year, shall, upon making affidavit that the labor or material has been supplied and payment therefor has not been made, be furnished with a certified copy of the bond, "and shall within said period have a right of action thereon," and be authorized to bring suit on the bond in the name of the state, county, or municipal corporation, as the case may be, for the use of the person furnishing the labor or material. Acts 1910, p. 86.

The town of Grantville entered into a contract with John F. Grandy & Son to construct a school building. The contractors executed a bond, conditioned that they should "faithfully perform said contract on their

part, according to the terms, covenants, and conditions thereof, except as are hereinafter provided." There was no condition in the bond requiring the contractors to pay for any labor or material furnished to them. The Woodward Lumber Company, in the name of the town of Grantville, brought suit on the bond, under the act of 1910, for the value of material which had been furnished to the contractors to be used in the construction of the school building. The case reached the Supreme Court, and it was held that, as the bond was neither literally nor in substance in accord with the provisions of the act of 1910, suit on the contractors' bond could not be maintained under that act in the name of the municipality, for the use of one who had furnished material to the contractors but had not been paid. *Town of Grantville v. Fidelity & Deposit Co.*, 139 Ga. 53, 76 S. E. 575. Thereupon the Woodward Lumber Company brought its action directly against the town of Grantville, predicated its right to recover upon allegations that the municipal authorities had negligently failed to require of the contractors the bond provided for by the act of 1910. The petition was demurred to on the grounds that no cause of action was set out; that the suit was barred by the statute of limitations, having been brought more than two years after the cause of action accrued; and that it did not appear from the petition that any claim in writing had ever been presented to the municipal authorities, in accordance with the provisions of section 910 of the Civil Code. The demurrer was sustained, and the plaintiff excepted.

Without reference to whether the suit is barred, or whether the claim should have been filed with the municipal authorities as a condition precedent to suit, we are clear that the petition set forth no cause of action. The act of 1910 was passed for the sole benefit and protection of persons furnishing material and labor for the construction of public works. This is its declared purpose as expressed in the title. Persons furnishing material or labor to be used in the construction of private property have a lien, and are therefore protected. They have no such protection in reference to public property. The purpose of the act of 1910 was to afford to persons who furnished material or labor to a contractor to be used in construction of public works a remedy for the collection of their debts. To this end it was provided that the public authorities should take from the contractor a bond for the protection of laborers and materialmen, upon which they might bring suit. It does not follow, however, that an action will lie against a municipality which fails to take this bond. Since all persons are bound to take notice of a public law, it may be that a contract with public authorities for the construction of a public work would be void unless the contractors

gave the bond required by the statute. As to this, however, we express no opinion. If the contract for the building of the schoolhouse in the town of Grantville was void, certainly no action would arise against a municipality in favor of one who furnished labor or material to the contractor. In any event a materialman furnishing material to the contractor was bound at his peril to ascertain the terms of the contract and of the bond which had been executed by the contractor. If it knew the terms of the bond, it furnished the material at its peril. If it did not know that the municipality had failed to take the bond required by the act of 1910, it was guilty of gross negligence, because the contract and bond were matters of public record in the office of the municipal corporation and open to the inspection of all those interested in ascertaining their terms. So that, without discussing the general liability of municipal corporations under section 897 of the Civil Code, or undertaking to determine what are legislative or judicial powers, and what are ministerial duties, we are very clear that the petition set forth no cause of action, because the plaintiff has sustained loss as much on account of its own negligence in failing to ascertain the terms of the bond as on account of the failure of the municipality to take the bond required by the act of 1910.

Judgment affirmed.

PHILLIPS v. CITY OF JEFFERSON.
(No. 4,754.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 142*)—OFFICERS—QUALIFICATIONS.

The solicitor of the city court and the clerk of the superior court were not disqualified, under section 258 of the Civil Code, to serve as members of the city council of the city of Jefferson.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 314; Dec. Dig. § 142.*]

2. MUNICIPAL CORPORATIONS (§ 142*)—"CIVIL OFFICERS"—QUALIFICATION—MUNICIPAL OFFICERS.

The only assignment of error argued in the brief is settled adversely to the contention of the plaintiff in error by the decision of the Supreme Court in *Long v. Ross*, 132 Ga. 288, 64 S. E. 84, in which it is held that officers of municipalities are not civil officers of this state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 314; Dec. Dig. § 142.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1198, 1199.]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Sing Phillips was convicted of violating a municipal ordinance, and, from the overruling of a certiorari by the superior court, brings error. Affirmed.

Ray & Ray, of Jefferson, for plaintiff in error. C. L. Bryson, of Jefferson, for defendant in error.

RUSSELL, J. Sing Phillips was tried for a violation of a municipal ordinance of the city of Jefferson against keeping liquor for illegal sale, and, being found guilty by the mayor, appealed to the city council. Hon. P. Cooley was mayor pro tem. and presided at the trial of the case upon appeal. Before proceeding with the case, the defendant filed written objection to the council as constituted upon the ground that Hon. P. Cooley and Hon. S. J. Nix, two members of the council, were disqualified to serve as aldermen or councilmen for the city of Jefferson for the reason that they were holding two offices at the same time, in contravention of the Constitution. It appears that Hon. P. Cooley was solicitor of the city court of Jefferson and Hon. S. J. Nix was at that time clerk of the superior court of Jackson county. The objections were overruled, and the case proceeded to trial, resulting in the conviction of the accused. In the petition for certiorari exception is taken to the introduction of certain evidence, but the only point insisted on in the brief is that in which the question as to the disqualification of these councilmen is raised.

[1] It is true that it is stated in the brief that "the judgment overruling the certiorari should be reversed because the evidence did not authorize conviction," but there is no argument advanced in support of this statement, and the brief proceeds immediately to cite authorities to sustain the main contention, to the effect that the council, with the presence of the solicitor of the city court and the clerk of the superior court, as members of it, was not legally constituted. Some of the authorities cited from other jurisdictions seem to lend support to the contention of the plaintiff in error, but these rulings of courts of our sister jurisdictions must yield to the adjudication of the Supreme Court in what we deem to be a case practically identical with the one now before us. It certainly makes no difference that in that case the mayor and council were appointed by the Governor (as provided by the charter of St. Marys); the ruling of the Supreme Court went beyond the method by which these officers were selected.

[2] It dealt with the character of the office which they filled, and it was distinctly held that municipal officers in this state do not come within the designation of civil officers of this state. In this view of it, the provision of the charter of Jefferson, which empowers the mayor and each member of the council, under certain circumstances, to discharge the duties of justice of the peace and sheriff, cannot affect the case, for, even if any one of them was on such an occasion a

state officer pro tempore, neither the mayor nor any of the council would be state officers when discharging municipal functions. The right to discharge upon occasion the duties of a state officer has been granted them, and perhaps, while executing the duties of the office of either justice of the peace or sheriff, the councilmen of the city of Jefferson might temporarily be civil officers of this state, but when acting as mayor or councilmen their duties would be of an entirely different nature, and the character of their offices would be fixed by the discharge of these municipal duties.

Judgment affirmed.

JUSTICE v. CHATTOOGA OIL MILL CO. (No. 4,898.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 90*)—ACTION ON STOCK SUBSCRIPTION—BURDEN OF PROOF—PAYMENT.

The general rule which puts upon the party alleging payment the burden to prove it applies to a subscriber of stock in a corporation when sued by the corporation on his written subscription for the stock. *Tippin v. Brockwell*, 89 Ga. 467, 15 S. E. 539.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.*]

2. CORPORATIONS (§ 90*)—ACTION ON STOCK SUBSCRIPTION—DIRECTION OF VERDICT.

Where a subscriber to the stock of a corporation was sued by the corporation on his unconditional written subscription for the stock, and his execution of the contract of subscription was proved, and the contract was introduced in evidence, and no plea of payment or other defense was made, the court did not err in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.*]

Error from Superior Court, Chatteoga County; Moses Wright, Judge.

Action by the Chattooga Oil Company against J. W. A. Justice. Judgment for plaintiff, and defendant brings error. Affirmed.

C. D. Rivers, of Summerville, for plaintiff in error. Ennis & Shaw, of Rome, for defendant in error.

HILL, C. J. Judgment affirmed.

GRAY v. STATE (two cases).

SAFFOLD v. SAME.

(Nos. 4621, 4622, 4623.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 528*)—EVIDENCE—PLEAS OF JOINT OFFENDERS.

The court erred in admitting in evidence the pleas of guilty of two defendants, jointly

indicted with the accused, on trial for the offense of assault and battery. "The confession of one joint offender or conspirator, made after the enterprise is ended, is admissible only against himself." Penal Code 1910, § 1035.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 528.*]

Error from Superior Court, Early County; W. C. Worrell, Judge.

Cliff Gray and others were convicted of assault and battery, and bring error. Reversed.

Glessner & Park, of Blakely, for plaintiff in error. J. A. Laing, of Dawson, B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

RUSSELL, J. It is only necessary to deal with one of the assignments of error, for it is not likely that any errors which may have been committed on the former trial of this case will recur upon the new trial which we are constrained to grant. As to one of the assignments we will say, in passing, that whether the defendants were influenced by a controlling motive is a question of fact, but state's counsel should not be permitted, in argument, to go beyond the legitimate deductions to be drawn from the evidence actually introduced. It appears from the record that six persons made an assault upon the person of one John Weems and, after compelling him by force to go with them to a lonely and secluded spot, gave him an outrageous beating. Six persons were indicted for this offense; the plaintiffs in error being three of the number. Two of those indicted, Will Williams and Mark Hodge, pleaded guilty, and upon the trial the court permitted the pleas of guilty which had been filed by the defendants Williams and Hodge to be introduced against the plaintiffs in error. Proper and timely objection was made to the introduction of this testimony. The effect of this evidence was to use the confession of Williams and Hodge against the defendants then on trial as evidence of a conspiracy. The evidence was not essential to the state's case, because the accused were not indicted for riot; and, being indicted for assault and battery, it was not necessary

that conspiracy be shown. The purpose of the testimony, therefore, was to increase the probative value of other testimony tending to fix the crime upon the accused as being three of those persons who were identified by the prosecutor.

After a conspiracy is shown, the sayings of any of the conspirators in regard to the criminal project not yet completed are admissible, but after the conspiracy is ended no one of the conspirators is bound by the admissions or confessions of his fellows. Admissions of guilt by Williams and Hodge were not necessarily evidence that even the declarants affirmed that the other defendants were guilty; and the only way in which these defendants could be affected by anything which Williams or Hodge might say in regard to the matter, after the transaction was over, would be by either of them testifying as a witness. Even if the suggestion that the defendants Williams and Hodge intended, in their pleas of guilty, to say that all of the persons indicted were likewise guilty could be inferred from the fact that they had pleaded guilty, such a statement would be nothing more than mere hearsay upon the trial of other defendants than themselves. "Where two persons have been jointly indicted for the same offense, but are separately tried, a judgment of conviction against one of them is not competent on the trial of the other, inasmuch as his conviction is no evidence either of joint action or of the guilt of the accused." 12 Cyc. 445; *People v. Bearss*, 10 Cal. 68; *State v. Fertig*, 98 Iowa, 139, 67 N. W. 87; *Clark v. Commonwealth*, 14 Bush. (Ky.) 166; *People v. Mullins*, 5 App. Div. 172, 39 N. Y. Supp. 361; *People v. Keif*, 126 N. Y. 661, 27 N. E. 556, affirmed 58 Hun, 337, 11 N. Y. Supp. 928, 12 N. Y. Supp. 896; *State v. Bowker*, 26 Or. 309, 38 Pac. 124; *Bell v. State*, 33 Tex. Cr. R. 163, 25 S. W. 769; *Harper v. State*, 11 Tex. App. 1; 14 Cent. Dig. Cr. Law, § 987. The trial judge may have been misled by the dictum in *Kirksey v. State*, 11 Ga. App. 146, 74 S. E. 902, and, in so far as anything said in the opinion in that case conflicts with what we now rule, the same is disapproved.

Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In re HARTSFIELD. (No. 4,911.)
(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

CONTEMPT (§ 66*)—WRIT OF ERROR—RIGHT OF REVIEW—WAIVER—PAYMENT OF FINE.

Under the facts in this record the imposing of a fine upon the plaintiff in error by the trial judge, with an alternative of ten days' imprisonment, for alleged contempt of court, was an abuse of discretion; yet, the fine having been paid to avoid the alternative sentence of imprisonment, the writ of error as to this judgment cannot be entertained. The case is controlled by the case of *White v. Tifton*, 1 Ga. App. 569, 57 S. E. 1038, and citations.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.*]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

R. G. Hartsfield was fined for contempt with an alternative of 10 days' imprisonment, and brings error. Writ of error dismissed.

Erle M. Donalson and T. S. Hawes, both of Bainbridge, for plaintiff in error. M. E. O'Neal, Sol., of Bainbridge, for defendant in error.

HILL, C. J. Writ of error dismissed.

GLANTON v. CITY OF ROME. (No. 4,912.)
(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

NEGLIGENCE (§ 136*)—PROXIMATE CAUSE OF INJURY—ACCIDENT.

The evidence disclosing that the plaintiff's injuries were the result of pure casualty unmixed with negligence on the part of the defendant, a nonsuit was properly granted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by Green Glanton against the City of Rome. Judgment for defendant, and plaintiff brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error. Max Meyerhardt, of Rome, for defendant in error.

RUSSELL, J. Judgment affirmed.

STEWART v. STATE. (No. 5,007.)
(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

RECEIVING STOLEN GOODS (§ 3*)—ELEMENTS—KNOWLEDGE THAT GOODS WERE STOLEN.

The defendant was convicted of the statutory offense of receiving stolen goods, knowing them to have been stolen. The strongest evidence connecting the accused with the alleged offense was his statement to the sheriff. Since there is nothing in this testimony which author-

izes the conclusion that the defendant knew that there had been a burglary, or that the hams in question had been stolen, the verdict of guilty was not authorized.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 5; Dec. Dig. § 3.*]

Error from City Court of Tifton; R. Eve, Judge.

John Stewart was convicted of receiving stolen goods, and brings error. Reversed.

C. C. Hall, of Tifton, for plaintiff in error. Jas. H. Price, Sol., of Tifton, for the State.

RUSSELL, J. Judgment reversed.

OWENS v. BRIDGES. (No. 5,002.)
(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§§ 6, 235*)—ABSOLUTE "BILL OF SALE" AS "CHATTEL MORTGAGE."

A paper stipulating that the maker conveys certain described personalty to secure a debt, and that upon payment of the debt the creditor will reconvey the property to the debtor, is a bill of sale to secure a debt and not a mortgage. The stipulation for a reconveyance of the property is not a defeasance clause, such as a provision that the instrument would be void upon payment of the debt. Upon payment of the debt a reconveyance can be compelled, but until this is done the instrument remains operative as a bill of sale, even though the debt is paid. See *Bellerby v. Thomas*, 105 Ga. 477 (4), 30 S. E. 425; *Williamson v. Orient Ins. Co.*, 100 Ga. 791, 28 S. E. 914; *Pitts v. Maier*, 115 Ga. 281, 41 S. E. 570; *Ellison v. Wilson*, 7 Ga. App. 214, 66 S. E. 631.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23-41, 496-499, 507; Dec. Dig. §§ 6, 235.*]

For other definitions, see Words and Phrases, vol. 1, p. 800; vol. 2, pp. 1098-1106.]

2. EVIDENCE (§ 370*)—ADMISSIBILITY—RECORDED BILL OF SALE.

"A recorded deed of personal property is entitled to go in evidence without other proof." *Bell v. McCawley*, 29 Ga. 355 (2). In *Giannone v. Fleetwood*, 93 Ga. 491, 21 S. E. 76, the court was dealing with an unrecorded bill of sale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1538, 1559, 1560, 1562-1578, 1592; Dec. Dig. § 370.*]

3. CHATTEL MORTGAGES (§ 176*)—ACTION ON DEBT—AMOUNT OF RECOVERY.

The plaintiff having elected to take a money verdict, the measure of his damages could not exceed the principal and interest of his debt, less any sum which had been received by him in part payment, notwithstanding the value of the property exceeded this amount due at the time of the trial. *Holmes v. Langston*, 110 Ga. 861, 36 S. E. 251. The original debt was \$350, with interest from January 21, 1907, at 7 per cent. per annum. The plaintiff testified that on or about September 25, 1910, he had received on the debt \$106. Hence the amount due on the date of the verdict, to wit, March 25, 1913, was \$381.20. The verdict was for \$448. Direction is given that the excess be written off from the verdict and judgment.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 335, 337-339; Dec. Dig. § 176.*]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by R. L. Z. Bridges against Henry Owens. Judgment for plaintiff, and defendant brings error. Affirmed, with direction.

M. E. O'Neal, of Bainbridge, and W. I. Geer, of Colquitt, for plaintiff in error. Albert H. Russell, W. V. Custer, and W. O. Fleming, all of Bainbridge, for defendant in error.

POTTLER, J. Judgment affirmed, with direction.

SOUTH GEORGIA RY. CO. v. ATKINS.
(No. 4,991.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 91*)—RAILROADS (§ 441*)—KILLING OF LIVE STOCK—NEGLIGENCE—PLEADING.

The strictness of pleading necessary in suits in the superior and city courts is not required in justices' courts. Nevertheless, where a suit is brought in a justice's court against a railroad company for the killing of live stock, it is essential that the plaintiff should, at least in general terms, allege that the killing was the result of the negligence of the defendant company. A failure to make such allegation will subject the summons to dismissal, in the absence of an amendment, upon a demurrer pointing out this defect. The presumption of negligence which the law raises against a railroad company is a rule of evidence, and not of pleading, and is applicable as such to all suits brought against railroad companies in the courts of this state for damage sustained by the running of their engines, cars, or other machinery.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 307-323; Dec. Dig. § 91;* *Railroads*, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by Mrs. J. L. Atkins against the South Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Branch & Snow, of Quitman, for plaintiff in error. Wm. H. Long, of Quitman, for defendant in error.

POTTLER, J. This was an action originating in a justice's court. The summons required the defendant "to answer plaintiff's demand in an action or a suit on a claim for damages, a copy of which said claim for damages is hereto attached." The copy of the claim for damages referred to is as follows: "The South Georgia Railway Co. to Mrs. J. L. Atkins, Dr., July 30th, 1910. To one medium-sized light-colored Jersey cow about three years old, the property of Mrs. J. L. Atkins, killed by your freight train No. 6 going north about 9:30 a. m., near the Quitman Foundry in the city of Quitman, \$50.00." The defendant demurred on the

ground that no cause of action was set forth against it, and that it was not alleged, either in the summons or in the cause of action thereto attached, that the defendant had been guilty of any negligence. The demurrer was overruled, and, after an adverse verdict, the defendant sued out a writ of certiorari to the superior court, which was also overruled, and it excepted.

1. It has been often ruled that the strictness of pleading required in the superior and city courts should not be applied to suits in justices' courts. Hence it has been held that in a suit in a justice's court against a railroad company, founded upon the negligence of the defendant, a general averment of negligence is sufficient, and the specific acts thereof need not be set forth. *Ga. Southern & Fla. Ry. Co. v. Oliver*, 6 Ga. App. 308, 64 S. E. 1007, and cases cited. In *Atlantic Coast Line R. Co. v. Lane*, 9 Ga. App. 524, 71 S. E. 918, the plaintiff sued the railroad company for the killing of live stock. In the summons the defendant was required "to answer to plaintiff's demand upon an action for damages to personal property, * * * a copy of which cause of action is hereto attached." In the copy of the cause of action it was stated: "All of the above property killed by the running of engine, cars, or other machinery of the Atlantic Coast Line Railroad Company at and near McGriff street crossing in the town of Whigham, Ga., and in said district G. M., said county and state." It was held that the summons was sufficient, and that there need be no express averment of negligence, since, where property was killed by the running of the engines, cars, or other machinery of the railroad company, there was a presumption of negligence, and the plaintiff made out a prima facie case upon proof of such killing. In the case of *Ga. Ry. & Elec. Co. v. Knight*, 122 Ga. 290, 50 S. E. 124, suit for damages was brought in a justice's court. It was held: "The defendant company had the right to be put on notice of the specific acts of negligence by reason of which it was charged that the plaintiff had been damaged. But a suit in a justice's court which in general terms alleged negligence was good against an oral demurrer made after trial before the justice and at the trial upon an appeal to a jury in the justice's court." Upon further reflection we are satisfied that the decision of this court in the *Lane Case*, supra, is not in harmony with the ruling of the Supreme Court in the case last cited. The presumption of negligence which the law raises against a railroad company is a rule of evidence, and not of pleading. It is therefore necessary, in a suit in a superior or city court, claiming damages on account of negligence of the railroad company, to allege affirmatively that the defendant was negligent, and, if the information is called for by special demurrer,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the petition is defective if it does not set forth the specific acts of negligence upon which the plaintiff relies. *Ga. R. Co. v. Williams*, 3 Ga. App. 272, 59 S. E. 846. This allegation of negligence may be proved by the presumption of negligence which the law raises, and, if this presumption is not rebutted, the plaintiff will be entitled to recover. This presumption extends only to the acts of negligence alleged. *Ga. R. Co. v. Williams*, supra. Hence, before any presumption will arise, negligence must be alleged. While the same strictness of pleading which prevails in the superior and city courts is not required in a justice's court, it is nevertheless necessary in that court to allege negligence in general terms, or else the summons and the cause of action attached thereto will be subject to demurrer. Except as to the form of the pleading, the rule that the presumption of negligence which the law raises against railroad companies is a rule of evidence and not of pleading is applicable in the same way in all the courts. This has been the rule announced by the Supreme Court and the decision of this court in the case of *Lane*, supra, is not in harmony with this ruling, and for this reason cannot be followed. The court erred in overruling the demurrer.

Judgment reversed.

E. MATTHEWS & SON v. RICHARDS.
(No. 4987.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 441*) — PAROL — BILLS AND NOTES.

An indorsement of a promissory note in blank cannot by parol evidence be shown to have been intended by the parties as an indorsement without recourse.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719, 1723-1763, 1765-1846, 2030-2047; Dec. Dig. § 441.*]

2. PRINCIPAL AND SURETY (§ 108*) — DISCHARGE OF SURETY—EXTENSION OF TIME.

Mere indulgence or extension of time of payment of a promissory note, granted to the maker without consideration, does not operate to discharge a surety or an indorser on the note.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 213-218; Dec. Dig. § 108.*]

3. PRINCIPAL AND SURETY (§ 105*) — DISCHARGE OF INDORSEER OR SURETY—NOVATION.

If a new note be accepted by the payee or indorsee, in renewal and satisfaction of a note previously given, without the consent of a surety thereon, this would amount to a novation of the original undertaking, and the surety would be discharged.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 191, 192, 196, 201-210; Dec. Dig. § 105.*]

4. EVIDENCE (§ 165*)—ADMISSIBILITY—BEST AND SECONDARY.

Where, to a suit on a promissory note against an indorser, he files such a defense as

that referred to in the last preceding headnote, it is not competent without laying the proper foundation, for a witness to testify that a second note was given in renewal of the note sued on. Such testimony amounts, to an inquiry into the contents of a writing, in violation of the rule requiring the best evidence to be produced.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 548-555; Dec. Dig. § 165.*]

Error from City Court of Cartersville; A. M. Fonte, Judge.

Action by E. Matthews & Son against S. J. Richards. Judgment for defendant, and plaintiffs bring error. Reversed.

Wm. T. Townsend, of Cartersville, for plaintiffs in error. Jas. R. Whitaker, of Cartersville, for defendant in error.

POTTLE, J. The plaintiffs sued the defendant upon a promissory note which had been executed by Davis Jenkins to the defendant and indorsed in blank by the defendant and delivered to the plaintiffs. The defendant pleaded that he sold the note to the plaintiffs at a discount, with the understanding that they would look to the maker alone for payment; that on maturity of the note the plaintiffs failed to collect the amount from Jenkins, although instructed so to do by the defendant, but, on the contrary, extended the time of payment to Jenkins, without the knowledge or consent of the defendant. By amendment the defendant pleaded that when the note matured the plaintiffs accepted in renewal thereof the individual note of Jenkins, without the knowledge or consent of the defendant. The trial resulted in a verdict in favor of the defendant, and the plaintiffs' motion for a new trial was overruled, and they excepted.

[1] 1. There was no demurrer to any of the defendant's pleas. The indorsement of the defendant was in blank. It therefore imported that the indorser would pay if the maker failed to do so. Civil Code, § 4279. It was not competent for the defendant to show by parol evidence that, notwithstanding this apparently unconditional promise to pay in the event the maker did not, the real agreement between the parties was that the indorsee would not look to the indorser for payment. In other words, the defendant sought to show by parol that the unconditional indorsement was in fact intended by the parties as an indorsement without recourse. He could no more do this than the maker of the note could show by parol that the promisee agreed never to collect it. *Sasser v. McGovern*, 11 Ga. App. 88, 74 S. E. 797; *Stapleton v. Monroe*, 111 Ga. 848, 36 S. E. 428; *Brewer v. Grogan*, 116 Ga. 60, 42 S. E. 525. Parol evidence is not admissible, in an action on a note by a bona fide holder against the maker, indorser, or surety, of any declaration or agreement which is inconsistent with the promise to pay the instrument. Hence an agreement between indorser and indorsee

that the words "without recourse" shall be written over the signature of the former will be no defense to an action by one who is indorsee of the paper for value and without notice. Nor would the fact that the indorsee had knowledge of such an agreement be a defense to the action. *Joyce on Defenses to Commercial Paper*, § 342.

[2] 2. Mere indulgence to the maker of a promissory note, or an extension of the time of payment, without any new consideration, will not discharge a surety or indorser, even though done without his knowledge or consent. If, however, payment be extended to a definite time and upon a new consideration, the surety or indorser would be discharged, if it be done without his consent. *Tanner v. Gude*, 100 Ga. 157, 27 S. E. 938; *Preston v. Garrard*, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124; *Joyce on Defenses to Commercial Paper*, § 680. Since the defendant did not aver in his plea that there was a consideration for the extension of time granted by the plaintiff to the maker of the note, the original plea set forth no defense, and should have been disregarded on the trial.

[3] 3. The amendment to the defendant's answer did set forth a defense. It was therein averred that the plaintiff, without the knowledge or consent of the defendant indorser, accepted in renewal of the note indorsed by the defendant a new note of the maker. If true, this amounted to a novation of the original contract, and operated to release the indorser. *Smith v. First National Bank of Fitzgerald*, 5 Ga. App. 139, 62 S. E. 826; *Joyce on Defenses to Commercial Paper*, § 688.

[4] 4. On the trial the maker testified that, when the note sued on matured, he and the plaintiffs made a new note, payable to a bank, which he understood was in renewal of the note sued on, but that he did not take up the old note. One of the plaintiffs testified that the note given to the bank was not in renewal or settlement of the note sued on; that the note sued on had been indorsed to the bank by the plaintiffs, and, when the bank insisted on payment, the new note was given by the plaintiffs and Jenkins, the maker, and the note sued on was left with the bank as collateral. He further testified that the note sued on was never renewed, that the time of payment was never extended, and that the new note was made payable to the bank. To the testimony of Jenkins that the new note was in renewal of the note sued on, the plaintiffs objected on the ground that the renewal note was the highest and best evidence.

It is an easy matter to state generally that, where the contents of a written instrument become material in a legal investigation, the writing must be produced, or the foundation laid for the introduction of secondary evidence. *Civil Code*, § 5828. The difficulty lies

in the application of this general rule of evidence to the facts of the particular case. See 1 *Greenleaf, Evidence* (16th Ed.) § 5630. The wisdom of the rule is illustrated in the present case. If the plaintiffs gave their note to the bank in settlement of the note sued on, which had been discounted at the bank, it could not be a renewal of the original obligation, even though Jenkins, the maker who was liable on the first note, signed the second note also, and would not be a satisfaction of the first note, unless there was an agreement between the plaintiffs and Jenkins that it would be so accepted. On the other hand, if Jenkins executed his note to the plaintiffs, it might or might not have been accepted by the plaintiffs as a renewal of the first note, and therefore as a satisfaction thereof. Upon this question the new note was very material. It might show upon its face that it was not a renewal of the original obligation. If it did not, then it became material whether it was intended as a novation of the original note and was so accepted by the plaintiffs. It was not competent for the witness to testify generally that the new note was given in renewal of the note sued on, unless the alleged renewal note was produced for the inspection of the court and jury. The contents of the note consisted of the signatures of the makers and the indorsers, the date, the amount, the date of maturity, and all other stipulations therein contained. To allow a witness to testify as to any portion of the contents of the writing would be a violation of the rule against the introduction of secondary evidence. When the witness testified that the new note was given in renewal, he necessarily intended to convey the impression that the new note was executed by Jenkins and accepted by the plaintiffs in renewal of the note sued on, and such testimony necessarily involved an inquiry into some of the contents of the written instrument. No foundation having been laid for the introduction of the secondary evidence, it was inadmissible, and the court erred in overruling the objections thereto.

Judgment reversed.

MURPHY v. STATE.

STEWART v. SAME. (Nos. 4,725, 4,726.)
(Court of Appeals of Georgia. Sept. 16, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 656*)—WITNESSES (§ 246*)—
TRIAL—CONDUCT OF JUDGE—EXAMINATION—
QUESTIONS TO WITNESS.

The presiding judge may, with propriety, ask such questions as may tend to elicit the truth as to a transaction which is under investigation, but care should be used to see that no intimation of the opinion of the court is conveyed by the questions propounded. An opinion as to the merits of the case might be expressed by the form of the questions propounded, and the rights of one of the parties to a fair trial might thus be prejudiced and impaired; and in

such a case a reversal of a judgment refusing a motion for a new trial would necessarily result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656; * Witnesses, Cent. Dig. §§ 852-857; Dec. Dig. § 246.*]

Error from City Court of Brunswick; D. W. Krauss, Judge.

Ed Murphy and another were convicted of violating the prohibition law, and bring error. Reversed.

A. D. Gale, of Brunswick, for plaintiffs in error. Alfred H. Crovatt, Sol., and H. F. Dunwoody, both of Brunswick, for the State.

RUSSELL, J. The defendants were placed upon trial in the city court of Brunswick, charged with a violation of the prohibition law. There is evidence which would authorize the verdict of guilty returned by the jury. The legitimate deduction from the circumstances in proof would authorize the conclusion that the room in which one of the witnesses stated he had purchased intoxicating liquor was frequently used by the defendants as a place for such illegal sale. The witness Emmett Butts, however, is the only person who testified about purchasing intoxicating liquor; and, without his evidence, the acquittal of the defendants would, so far as appears from the record, have resulted as a matter of course. The plaintiffs in error complain because, after the solicitor of the city court had announced that he had no further questions to propound to the witness Emmett Butts (who at that time had not testified to anything which would tend to criminate the accused), the court subjected the witness to a severe and searching cross-examination, starting with the following question: "Witness, if you don't know anything more about this case than you have testified to, how is it they have you up here as a witness? Didn't you tell the officer you had purchased intoxicating liquors at this place?" To this question the defendants objected, upon the grounds that the court undertook to cross-examine the witness upon the part of the state without any proper foundation having been laid, and that the testimony sought was hearsay, and a voluntary statement upon the part of the witness not made in the presence of the defendants, and therefore could not be given in evidence against the defendants. These objections were overruled. Thereafter the witness testified to having told Mr. McCollough and Mr. Owens that he had gotten some whisky in the restaurant of a negro named Dabb, and that upon the advice of his employer, Mr. McCollough, he had told the sheriff about it. This testimony was objected to upon grounds similar to those interposed to the court's question. The court declined to approve the first ground of the amendment to the motion for a new trial, and from his approval of the second ground, what transpired, as stated by the

court, is as follows: In substance, the court interrogated the witness as objected to in the second ground of the amended motion for new trial. This interrogation by the court was not had until after both counsel for the state and the defendants had examined the witness. The inquiry by the court as to whether or not the witness had informed the officers of his connection with the alleged purchase of the intoxicating liquors was made as a matter of inducement, and for the purpose of ascertaining the truth.

We doubt not that the sole motive of the learned trial judge was to ascertain the truth of the transaction, but it is never proper for a judge to assume to discharge the duties of a prosecuting attorney. However anxious a judge may be for the enforcement of the law, he should always remember that he is as much judge in behalf of the defendant accused of crime, and whose liberty is in jeopardy, as he is judge in behalf of the state, for the purpose of safeguarding the interests of society. It is very plain that up to the point where the trial judge took charge of this witness the state had utterly failed to make a case. Whether the accused be guilty or innocent, he is entitled to be tried according to the voluntary testimony of the witnesses who appear and are sworn freely and voluntarily to testify. The natural effect of the judge's question, regardless of what the witness might have answered, was to impress the jury that the truth of the transaction was that the witness had purchased intoxicating liquors from these defendants; for the judge asked the witness if he had not previously told the officers that he had done so. The witness, being apprised that the judge knew of his previous statements, would naturally be impelled by fear to repeat a statement he had previously made, and that is precisely what happened in this case. It was no doubt plain to the jury, from the court's mode of questioning this witness, that the judge was firmly of the opinion that the witness, in first testifying, had evaded and concealed the truth, and that it was the judge's opinion that if the truth were told, there would be sufficient evidence to authorize a conviction. The same statement applies to the questions asked the witness Will Andrews. The judge certifies, as to this witness, that he did not ask the witness any questions until the witness had been examined by both counsel for the state and the accused, and that his questions were asked only in the interest of the truth, and for the purpose of ascertaining the truth. We do not question the motive of the trial judge, but there can be no question that such queries on the part of the presiding judge accentuate and impress upon the jury the answer of the witness, by conveying a clear and forcible intimation of the judge's opinion in the premises.

The defendants may be guilty, and if so they should be punished; but they cannot be found guilty in a court of law except upon a legal trial. In a criminal case the jury, and not the judge, sums up the evidence. When this witness Butts, after having been examined by counsel for the state and counsel for the accused, gave no information which would have authorized the conclusion that the defendants were guilty, was faced by the judge with the question as to his former statements to the officers, and the jury had heard the judge say to him: "Witness if you don't know anything more about this case than you have testified to, how is it that they have you up here as a witness?" even a casual listener would have been impressed by the consciousness that the court thought the witness knew more than he had told; and how much more strongly impressed were the jury, who look to the court for guidance.

This case is controlled by the rulings of this court in *Sharpton v. State*, 1 Ga. App. 542, 57 S. E. 929, and a number of subsequent decisions. The judge has the right to ask questions to elicit the truth, but the form of his interrogatory must be such as not to intimate or express an opinion as to the truth of the case, or the merits of the contentions of either of the parties. An intimation of opinion by question is as repugnant to the provisions of the Code (Penal Code, § 1058; Civil Code, § 4863) as a direct statement of opinion.

Judgment reversed.

HARTZ v. HARTZ. (No. 4,954.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION (§ 23*)—GIFTS (§§ 4, 48*)—EVIDENCE—DEFENSE IN TROVER.

Where a husband makes to his wife a gift of a chattel, and afterwards obtains and holds the possession of the property, he cannot, in a suit in trover brought by the wife to recover the property, set up title in a third person at the time the gift was made.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 163-166; Dec. Dig. § 28; * *Gifts*, Cent. Dig. §§ 3, 17, 87-94; Dec. Dig. §§ 4, 48.*]

(Additional Syllabus by Editorial Staff.)

2. GIFTS (§ 4*)—DEFINITION.

The three things essential to consummate a gift of a chattel are: Intention of the donor, acceptance by the donee, and delivery of the chattel, or something which the law will accept in lieu thereof. No writing is necessary.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 3, 17; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3084-3087; vol. 8, p. 7670.]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Minnie O. Hartz against Morris

A. Hartz. Judgment for plaintiff, and defendant brings error. Affirmed.

Miller & Jones, of Macon, for plaintiff in error. Minter Wimberly and Jesse Harris, both of Macon, for defendant in error.

POTTLE, J. Minnie Hartz brought an action of trover against her husband, Morris Hartz, from whom she had previously separated, to recover a diamond sunburst and a diamond horseshoe pin. She claimed title under a gift from him. According to her testimony, he gave her these articles shortly before their marriage, and stated to her that the sunburst had been left in his mother's will to his future bride, and that he was therefore giving it to her as a wedding present. She accepted the gift and continuously used the property as her own until her separation from her husband about six months after their marriage. Shortly before the separation she was taken to the hospital for an operation, and gave him both pieces of jewelry for safe-keeping. Upon the separation the husband refused to return the property. He never claimed title to either piece of jewelry, within the knowledge of the plaintiff, until after the suit was brought. The defendant did not deny the gift of the horseshoe pin, but did deny making his wife the present of the sunburst; as to this he contended that he merely consented for her to wear it. He further testified that at the time the wife claimed that the gift of the sunburst was made, and also at the time the suit was brought, the title to the sunburst was in himself and his brother Sidney Hartz jointly. It also appeared from the evidence that the American National Bank held a mortgage on the sunburst, which had been executed by the Hartz brothers. The trial judge charged the jury as follows: "Now you are not concerned in any way, so far as this case is concerned, with the rights of Sidney Hartz or with the rights of the American National Bank, if any it had, in the event you believe that by a preponderance of the evidence that the diamond sunburst pin was in truth and in fact given by Morris Hartz, as his property, to his wife, or to his betrothed, to be her property, or as a gift." He also instructed the jury as follows: "He (the defendant) further says that it was not his property (the diamond sunburst) to give; that it was the property of a partnership consisting of himself and his brother, and I have admitted to you that testimony tending to show that it was the property of himself and his brother, as tending to throw light upon the probability or improbability of the contentions of the plaintiff in the case that the defendant did give to her the diamond sunburst pin as contended by her." The jury returned a verdict in favor of the plaintiff for the property sued for, and the defendant, in his motion for a new trial, contends

that the verdict was contrary to the evidence, and that the court erred in the instructions above set forth.

[1] According to the testimony of the wife, the transaction relied upon by her in proof of her title contained all the essential elements of a gift. There was an intention to give by the donor, acceptance by the donee, and delivery of the article given. Civil Code, § 4144. The defendant did not dispute the gift of the horseshoe pin. Consequently the only question necessary to be decided is whether or not the defendant had a right to set up an outstanding title in his brother to an undivided half interest in the diamond sunburst. If the husband had sold the sunburst to his wife, and she had parted with anything of value in consideration therefor, it is clear that he would have been estopped to dispute his own title or his own right to sell. *Elliott v. Keith*, 102 Ga. 117, 29 S. E. 155; *Campbell v. Morgan*, 111 Ga. 200, 36 S. E. 621; *Southern Bell Tel. Co. v. Harris*, 117 Ga. 1001, 1004, 44 S. E. 835. Under our view of the law, it is unnecessary to discuss the question of the right of a cotenant to sue in trover for an undivided interest in property which is incapable of division. Upon this subject see 28 Am. & Eng. Enc. of Law (2d Ed.) 712, 715. It is conceded by counsel for the plaintiff in error that if the husband, in withholding the entire possession of the sunburst from the plaintiff, was a mere wrongdoer, the plaintiff might have recovered upon proof of her mere possession, and he would not be allowed to set up the *jus tertii*. *Mitchell v. Ga. & Ala. Ry.*, 111 Ga. 760, 764, 36 S. E. 971, 51 L. R. A. 622. It is argued, however, that the defendant was not a wrongdoer in withholding the possession of the property, and that hence the presumption of title arising from proof of prior possession in the wife was not conclusive against him. According to the wife's testimony, the gift was complete, and therefore irrevocable. It was founded upon a good consideration. It was given in contemplation of immediate marriage, and was ratified after marriage. We can conceive of no good reason why in such a case the husband ought not to be estopped to deny his own title, just as he would have been had he made a sale to his wife. The doctrine of estoppel is founded "upon the highest principles of morality, and recommends itself to the common sense and justice of every one; and, although it debars the truth in the particular case, and, therefore, is not unfrequently characterized as odious and not to be favored, still it should be remembered that it debars only in the case where its utterance would convict the party of a previous falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak." *Herman, Estoppel & Res Judicata*, § 670. The

gift from the husband to the wife was accompanied by an assertion of title. He is therefore estopped, not only by an implied assertion of title, but by an express assertion of title contained in his statement that the sunburst had been bequeathed in his mother's will to his future wife. A good consideration is in law as binding between the parties as a valuable consideration. If a husband, upon a consideration of love and affection, convey land to his wife by warranty deed, he would clearly be estopped, in a suit by her or her privies to recover the land, to deny that he had title when he conveyed it. In Alabama it has been held that a gift by a sealed deed is good, because the donor is estopped from saying that the property has not passed to the donee. See *Connor v. Trawicks*, 37 Ala. 289, 79 Am. Dec. 58, cited in *Thornton on Gifts*, § 190.

[2] In this state but three things are essential to consummate a gift of a chattel: Intention of the donor, acceptance by the donee, and delivery of the chattel, or something which the law will accept in lieu thereof. No writing is necessary. And, as between parties sustaining to each other the relation of husband and wife or parent and child, a gift from one to the other is supported by a good consideration; and there is as much reason why the doctrine of estoppel should be applied to the donor as there would be in a case of a sale from one to the other. Whether this rule should apply to a gift from one person to another where there is no such confidential relation need not be determined. The plaintiff having made out her case by proof of a gift from her husband, he cannot defend by setting up title in a third person at the time the gift was made. The trial court properly admitted evidence of title in Sidney Hartz, for the purpose of corroborating the testimony of the husband that he had made no gift; but it was not admissible for the purpose of defeating the wife's claim, if a gift was in fact made as she contended.

Judgment affirmed.

BROWN v. STATE. (No. 4,796.)

(Court of Appeals of Georgia. Sept. 16, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 15*) — PLEA IN ABATEMENT—GROUNDS.

The fact that there is another indictment pending in court against the defendant, charging him with the same offense, is no ground for a plea in abatement. *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 83-88, 448; Dec. Dig. § 15.*]

2. HOMICIDE (§§ 135, 142*) — INDICTMENT — SUFFICIENCY—PROOF.

The indictment for murder alleged that the accused killed the deceased by shooting him with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a certain pistol and rifle, giving to the deceased the mortal wound of which he died. This indictment was not subject to demurrer on the ground that it did not allege with sufficient particularity the weapon or the manner in which it was loaded, or that the weapon used was loaded with powder and leaden balls, or that it was aimed and pointed at the deceased, or that it did not allege that the weapon used was one likely to produce death. Under this indictment the state can prove the killing with either of the weapons alleged.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 215-223, 250-259; Dec. Dig. §§ 135, 142.*]

3. HOMICIDE (§ 127*)—INDICTMENT—SUFFICIENCY.

In an indictment for murder it is not necessary to allege that the defendant was a person of sound mind and discretion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 192-194; Dec. Dig. § 127.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Dan Brown was convicted of homicide, and brings error. Affirmed.

Francis H. Harris, of Brunswick, for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, for the State.

RUSSELL, J. Judgment affirmed.

MILLER et al. v. STATE. (No. 4,984.)

(Court of Appeals of Georgia. Aug. 16, 1913.
Rehearing Denied Sept. 17, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—CIRCUMSTANTIAL EVIDENCE.

The evidence in support of the verdict while entirely circumstantial measures fully up to the standard of proof required by the statute, in that it is inconsistent with innocence, and excludes every reasonable hypothesis except that of the guilt of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§§ 636, 864, 1174*)—INSTRUCTIONS—HARMLESS ERROR—PRESENCE OF ACCUSED.

After the jury on the trial of the accused for burglary had been instructed, and had been out for some time and until late at night considering the verdict, the trial judge, with the sheriff, went to the courtroom and, in the absence of the accused and of their attorneys, inquired of the jury whether they desired to be put to bed, or were likely to make a verdict. Without responding to this, one of the jurors inquired of the judge as to what he had charged with reference to the right of the jury to recommend that the defendants be punished as for a misdemeanor. The judge responded by stating that he had charged that, in the event the jury should find the defendants guilty, they would have the right to recommend that the defendants be punished as for a misdemeanor, and that, if such recommendation should be approved by the court, the defendants would receive a misdemeanor sentence. On the next morning, about 9 o'clock, a verdict was returned, finding the accused guilty and recommending that a misdemeanor sentence be imposed. Held: (1) The statement of the judge in answer to the question of the juror did not amount to a re-charge, and was equivalent to an instruction

merely as to a form of verdict that the jury could return, if they saw fit to do so. (2) At most it was merely a harmless irregularity, and is not sufficient to set aside a verdict strongly supported by the evidence, especially as it appears that the attorneys for the accused were immediately informed of the occurrence by the trial judge, and failed to make a motion for a mistrial or to have the error corrected in any manner until after verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2068, 2120, 3170-3178; Dec. Dig. §§ 636, 864, 1174.*]

Russell, J., dissenting in part.

Error from Superior Court, Lumpkin County; J. B. Jones, Judge.

Charles Miller and another were convicted of burglary, and bring error. Affirmed.

R. H. Baker, of Dahlongega, and Edgar Latham and Moore & Branch, all of Atlanta, for plaintiffs in error. Robt. McMillan, Sol. Gen., of Clarksville, and W. A. Charters and B. P. Gaillard, both of Gainesville, for the State.

HILL, C. J. The plaintiffs in error were jointly indicted for burglary, and on their trial were convicted. They filed a joint motion for a new trial, based upon the general grounds and upon numerous special assignments of error. This motion having been overruled, the case is here for review.

[1] 1. We do not deem it necessary to consider the general grounds for the purpose of showing that the verdict was supported by the evidence. While the conviction of the accused was based entirely upon circumstantial evidence, a careful examination of the evidence satisfies this court that the proof comes fully up to the standard required by law as to this character of evidence. The proved facts were not only consistent with the hypothesis of guilt, but excluded every other reasonable hypothesis save that of the guilt of the accused. Penal Code 1910, § 1010. We hazard nothing in saying that, in our opinion, it would be difficult to establish guilt by a clearer, stronger, or more consistent chain of facts and circumstances, or by circumstances which, taken together, would prove more conclusively the guilt of the accused. The verdict, therefore, should be allowed to stand, unless some material and prejudicial error of law was committed on the trial. An examination of all the special assignments of errors of law leads us to the conclusion that all but one are so clearly without merit as to render extended discussion of them wholly unnecessary. Indeed, this seems to have been the view entertained by learned counsel for plaintiffs in error, who, while not abandoning any of the grounds of the motion for a new trial, seem to rely principally upon one only. This one we will briefly consider and determine.

[2] 2. The ground referred to is as follows: "The jury was charged and entered upon the consideration of the case about 1

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

o'clock on the afternoon of April 24th, and remained in the jury room during the afternoon and until about 10 o'clock at night, considering the case. The verdict was returned at 9 o'clock a. m., April 25, 1913. During the afternoon the jury had stated, in response to inquiries from the court, that it was not likely to agree upon a verdict. About 10 o'clock at night the judge, in company with the sheriff, visited the courthouse and inquired of the jury at the door of the jury room if they desired to be put to bed or were likely to make a verdict; the purpose of the judge being to arrange for the care and comfort of the jurors during the night, unless they were likely to agree upon a verdict. At this point one of the jurors inquired of the judge as to what he had charged with reference to the right of the jury to recommend that the defendants be punished as for a misdemeanor. To this inquiry the judge responded by stating in substance, that he had charged that, in the event the jury should find the defendants guilty, they would have the right to recommend that the defendants be punished as for a misdemeanor, and that, if such recommendation should be approved by the court, the defendants would receive a misdemeanor sentence. Within a few minutes after this occurrence, the judge informed counsel for defendants as to what had occurred. The defendants and their counsel were not present, nor had they waived their right to be present. Movants contend that, inasmuch as their counsel was not present and had not waived the right to be present when the judge answered the question of the juror, a new trial should be granted, for the reason that the answer of the judge, made in response to the question of the juror, was, in effect, a recharge, and especially so to the juror who propounded the question."

It is well settled that in the trial of a criminal case, whether a felony or a misdemeanor, the accused has the right to be present, in person and by his attorney, during every stage of his trial from the arraignment to the verdict. *Lyons v. State*, 7 Ga. App. 50, 66 S. E. 149, and citations. This right cannot be lost except by a clear and distinct waiver thereof by the accused. *Martin v. State*, 51 Ga. 567, and citations. This right is guaranteed to the accused by the fundamental law of this state, in order that he and his counsel may see to it that he has a fair and impartial trial and that nothing is done that would in any wise tend to his prejudice. Unquestionably the trial judge should not in any manner communicate with the jury about the case, in the absence of the accused and his counsel, pending the trial, and the better practice is for the trial judge to have no communication with the jury on any subject except through the medium of the sworn bailiff in charge of the jury, and the communication should be restricted, in the absence of the accused and his coun-

sel, to matters relating to the comfort and convenience of the jury. There should be no communication which would tend in any manner to prejudice the accused (for instance, to hasten a verdict against him, or to induce jurors who might be for him to yield their convictions), and, unless the character of the communication clearly shows that it could not have been prejudicial to the accused, the presumption of law would arise that it was prejudicial, and the accused would be entitled to another trial. In line with this, it has been ruled in this state that, in the absence of both the prisoner and his counsel, the court could not call in the jury and read to them notes of the evidence (*Wade v. State*, 12 Ga. 25), and that, in the absence of the prisoner, who was confined in jail, the judge was not authorized to recharge the jury, although the prisoner's counsel was present and made no objection to the recharge (*Bonner v. State*, 67 Ga. 510).

The case of *Hopson v. State*, 116 Ga. 90, 42 S. E. 412, is relied upon by counsel for the plaintiffs in error. In that case it was held that "recalling a jury in a criminal case, who had retired to consider of their verdict, and, in the absence of the accused and his counsel, and without their consent, giving a second charge, is cause for a new trial, even though this charge be the same in substance as that which had been delivered in the first instance." In that case it was further said that it would make no difference whether both the accused and his counsel were ignorant of the recharge until after the trial ended, and that this irregularity might be taken advantage of after verdict, notwithstanding the knowledge thereof by the accused and his counsel while the trial was in progress. The first question, therefore, to be considered in the present case is whether the statement which the judge made in answer to the inquiry of the jury amounted to a recharge. In *Roberson v. State*, 135 Ga. 654, 70 S. E. 175, it was held not to be ground for a new trial that the judge, in the presence of the defendant, but during the voluntary absence of his counsel, repeated his instructions to the jury as to the different forms of verdict that might be rendered. In the present case it does not appear whether counsel was absent voluntarily or not, and, while it is not distinctly stated, it is fair to assume that the accused were involuntarily absent, because in confinement, for it is not at all probable that they were out on bond. We cite the *Roberson Case* not as to this phase of the question, but for the purpose of showing that the statement made by the trial judge in the present case was not a recharge, and simply amounted to a restatement of the form of the verdict. The *Hopson Case*, *supra*, is certainly a very strong authority in support of the contention of the plaintiffs in error; but we think it is differentiated from the present case by the fact that in that case the

judge recalled the jury and repeated his entire charge to them, in the absence of the accused and his counsel. Certainly this could not be allowed. To permit such practice would tend to undermine and to destroy the value of a fair and impartial trial and to deprive the accused of his inalienable right to be present at every stage of the trial and to have his counsel present for the purpose of protecting his rights, and in the Roberson Case, *supra*, the Supreme Court evidently took this view of the question, for the court distinguished that case from the Hopson Case by the fact that in the Hopson Case there was a repetition of the entire charge, while in the Roberson Case the judge repeated his instructions only as to the different forms of verdict authorized to be rendered.

In considering the right of the accused to be present at every stage of the trial, and to have his counsel present, we must not lose sight of the further principle, equally well established, that a new trial will not be granted on account of an error which manifestly caused no injury to the accused. It would be trifling with justice to set aside a verdict clearly and strongly supported by the evidence, solely on the ground that such an error had been committed by the trial judge. To warrant such action by a reviewing court, it must be manifest that the error was prejudicial in character. How could it have prejudiced the accused for the judge to have repeated to the jury, in answer to the juror's inquiry, what he had already stated, that they would have a right to recommend that the case be treated as a misdemeanor, and that he, in his discretion, could adopt such recommendation? The statement apparently was favorable to the accused. It emphasized the right of the jury to treat the case as a misdemeanor. It must be perfectly clear that it could not have induced any juror to yield up any conviction as to the essential fact of the guilt of the accused. If the members of the jury were divided or hesitating, it was not as to the guilt of the accused, but as to their right to make a recommendation that the case be treated as a misdemeanor; it did not hasten a verdict, for the verdict was not returned until 11 hours thereafter. Besides, the judge almost immediately made a statement of the occurrence to the counsel for the accused. If they thought the communication was prejudicial or was a recharge to the jury, it was their duty to have insisted then, or certainly the next morning, on the withdrawal of the case from the jury and the declaration of a mistrial.

We are not unmindful of the fact that in the Hopson Case it was said that it would be a matter of indifference whether the accused or his counsel knew of the alleged misconduct of the judge or not, that the irregularity could be taken advantage of after verdict. This question was not involved in the

Hopson Case, and this part of the opinion seems to have been obiter dictum of the judge who wrote the opinion. We are not willing to hold, in the absence of a direct decision to the contrary by the Supreme Court, that an irregularity in a criminal trial could not be waived by silence as well as by action. It has been frequently held by the Supreme Court that the unauthorized dispersal of the jury could be waived by silence, or by failure to make timely objection. It has also been held that knowledge of the disqualification of a juror is waived by failure to take timely advantage of the knowledge of the disqualification. Many rights involving a fair and impartial jury trial may be waived either by the conduct of the accused or his counsel, or by their silence. *Scott v. State*, 6 Ga. App. 567, 65 S. E. 359; *Waller v. State*, 2 Ga. App. 636, 58 S. E. 1106; *Davis v. Ragin*, 7 Ga. App. 308, 66 S. E. 806, and citations. The accused and his counsel should not be allowed to take their chances of a favorable verdict, with knowledge of an irregularity, and, after losing, set up such irregularity as ground for another trial. But we do not place our judgment solely on this view. We rather place it upon the opinion that the statement made by the judge in the present case to the juror did not amount to a recharge, but was equivalent simply to an instruction as to the form of a verdict which the jury was authorized to render, and that, even though an irregularity, it did not and could not result in injury to the accused. If we thought the accused had been deprived of any essential right by this statement made to the juror by the judge, we would not hesitate to grant another trial for that reason; but we cannot imagine any right that the accused was deprived of by the statement made to the juror as to the power of the jury to recommend that the charge of felony be treated as a misdemeanor. The evidence is so strong and so clear as to guilt that we do not feel that we should, in the interest of justice, declare another trial for a mere irregularity which, in our opinion, was immaterial, and which could not in any view have been productive of injury to the accused.

Judgment affirmed.

RUSSELL, J. (concurring specially). I agree, not without doubt, to the proposition that the circumstantial evidence tending to show the guilt of the accused was sufficient to authorize their conviction, and, that being so, this court is without jurisdiction to interfere with the verdict upon that ground or the motion for a new trial in which it is insisted that the verdict is contrary to the evidence. However, I do not concur in the opinion that the conduct of the trial judge was a mere harmless irregularity, nor can I view his statement to the jury as to their right and power to recommend otherwise than as an instruction in the nature of a

recharge. From a long personal and professional acquaintance with the judge who presided in this case, no man knows better than the writer that this upright magistrate is wholly incapable of consciously doing any act which would work injustice to any citizen or litigant. The judge who presided in the trial of this case is a model of fairness and impartiality. Nevertheless, I cannot consent to hold that the state of facts set forth in the record can be disregarded, as not tending to work prejudice to the rights of the accused to a fair and impartial trial. When the judge asked the jury in this case if they were likely to agree upon a verdict, in the absence of the defendants and of their counsel, it is apparent to my mind, from the question of the juror who acted as spokesman for that body, that the jury was in doubt as to what verdict should be rendered. It is inconceivable that a jury of ordinary intelligence does not know that in most felonies the punishment can be reduced, at the discretion of the judge, upon a recommendation to that effect. No doubt the jury had been discussing that phase of the case. It is a matter of common knowledge that the power of the jury to recommend that a felony be punished as for a misdemeanor frequently results in compromise verdicts, in which there is more or less doubt as to the real guilt of the accused of the offense charged. For a judge, in the absence of the defendant and his counsel, to recharge the jury upon this particular point is as harmful as if there had been an entire recharge. I think the defendants would have been entitled to a mistrial if they had moved in time; but, as was well said by the Chief Judge in his opinion, the defendants waived this right to object. It appears from the record that they had ample time and full notice. It does not appear that there was any reason why they could not have made a motion when the court reconvened on the morning following the incident to which reference is made. One accused of crime can waive any of his rights, or all of them, and where he remains silent and takes the chances of an acquittal, instead of claiming a right to which he is entitled, he cannot, after conviction, ask that that right be accorded him. *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523. Since the defendants waived their right to ask a mistrial, they must be adjudged to have forfeited this right entirely. The point is valueless to them here. If they had objected at the time and moved for a mistrial, I am of the opinion that it would have been clearly error for the trial judge to have refused to declare a mistrial.

POTTLE, J. (concurring specially). While in *Hopson v. State*, 116 Ga. 90, 42 S. E. 412, the Supreme Court said in substance that it made no difference whether the accused and

his counsel were ignorant of the fact that the jury had been recharged, and conceding that this statement was not obiter, yet later cases indicate a disposition of that court to modify the decision in the *Hopson Case*. This plainly appears from the decisions in *Roberson v. State*, 135 Ga. 654, 70 S. E. 175, *Richards v. State*, 136 Ga. 67, 70 S. E. 868, and *Baldwin v. State*, 138 Ga. 349, 75 S. E. 324. If the case sub judice were identical upon its facts with the *Hopson Case*, it would be our duty to follow that decision, because it has never been formally overruled; but it differs from the *Hopson Case* in two particulars: First, because it affirmatively appears in the present case that counsel sat silent for 11 hours, with knowledge of the fact that the judge had charged the jury as to their right to recommend; and, second, because in the *Hopson Case* the judge repeated his entire charge in the absence of the accused.

JEEMS v. LEWIS. (No. 5,016.)

(Court of Appeals of Georgia. Sept. 17, 1913.)

(*Syllabus by the Court.*)

1. BAILMENT (§ 18*)—LIEN.

A depository for hire has a lien upon the goods for his hire, and may retain them until he has been paid.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. § 18.*]

2. BAILMENT (§ 18*) — DEFENSE — LIEN OF BAILEE.

It is a good defense to an action in trover that the defendant holds the property sued for as a depository for hire, and has not been paid, and no equitable jurisdiction is needed to enforce it. It is purely defensive in its nature, and seeks no affirmative relief, either legal or equitable.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. § 18.*]

3. TROVER AND CONVERSION (§§ 1, 23*)—ELEMENTS OF TROVER—CONVERSION.

Trover lies only when there has been a conversion, and proof that the possession of the defendant is not wrongful defeats the action.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 1, 2, 163-166; Dec. Dig. §§ 1, 23.*]

Error from City Court of Miller County; W. I. Geer, Judge.

Action by Viola Lewis against Scrap Jeems. Judgment for plaintiff, and defendant brings error. Reversed.

P. D. Rich, of Colquitt, for plaintiff in error. Bush & Stapleton, of Colquitt, for defendant in error.

POTTLE, J. [1-3] The only question in this case is whether a bailee for hire can in defense to an action of trover, brought in a court having no equitable jurisdiction, plead that he has not been paid for keeping the bailed property. Trover never lies unless there has been a conversion. There is no

conversion as long as the party in possession has a right to retain the chattel against the person claiming the right to recover it. According to the plea, the defendant was a depositary for hire. She had a lien on the goods and a right to retain them until the hire was paid. Civil Code, § 3501; Seaboard Air Line Railway v. Shackelford, 5 Ga. App. 395, 63 S. E. 252. Having a right to retain the goods, there was no conversion, and no recovery could be had in trover until the hire was paid. Such a defense may be filed in any court in which the action may be brought. The defense is a legal and not an equitable defense, and the court needs no equitable jurisdiction to enforce it. The case is altogether different from Harden v. Lang, 110 Ga. 392, 36 S. E. 100, where trover was brought to recover property sold upon condition that title should remain in the seller until the purchase price was paid, and it was held that, unless some special equity intervened, such as insolvency or nonresidence, the defendant could not set off a claim for damages arising from a breach of the contract of sale. This is so because the action of trover is one sounding in tort. In the present case the defendant is not seeking to recover anything from the plaintiff, but merely to hold the goods until her lien is satisfied. This she has a right to do.

Judgment reversed.

LYON v. CEDARTOWN LUMBER CO. (No. 4,827.)

(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 183*) — MATERIAL FURNISHED ON CONTRACT—EFFECT OF LIEN.

Where materials are furnished for the improvement of real estate, upon the employment of a contractor, and it appears that there was one contract between the contractor and the owner for the improvement of the real estate, which consisted of two separate and distinct pieces of property, the improvements to be made at the same time upon both pieces of property and covered by the one contract, upon a compliance with the Civil Code of 1910, §§ 3352, 3353, a lien would attach upon both pieces of property, and, if the lien was duly filed and recorded as prescribed by section 3353, supra, within three months from the time the last item was furnished on the contract, it would be immaterial as to whether the last item referred to material furnished for the one piece of property or the other. New Ebenezer Ass'n v. Gress Lbr. Co., 89 Ga. 125, 14 S. E. 892.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 315-322; Dec. Dig. § 183.*]

2. DECISIONS FOLLOWED.

The other questions of law made in the record are fully controlled by the decisions of the Supreme Court in Green v. Farrar Lbr. Co., 119 Ga. 30, 46 S. E. 62, and Prince v. Neal-Millard Co., 124 Ga. 884, 53 S. E. 761, 4 Ann. Cas. 615.

3. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

The charge fully, fairly, and correctly presented the law applicable to the evidence, and the excerpts are without error, when considered in connection with the entire charge. The evidence fully supports the verdict, and no error of law appears.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by the Cedartown Lumber Company against Mrs. T. P. Lyon. Judgment for plaintiff, and defendant brings error. Affirmed.

John K. Davis and W. W. Mundy, both of Cedartown, for plaintiff in error. John L. Tison, of Cedartown, for defendant in error.

HILL, C. J. Judgment affirmed.

BRYANT v. GEORGIA FERTILIZER & OIL CO. (No. 4,824.)

(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

ALTERATION OF INSTRUMENTS (§ 9*) — MATERIALITY—MARGINAL MATTERS.

Where the defendant in an action on a promissory note admitted that the note was made by him, but set up by special plea, it was altered, in that the figures in the upper left-hand corner of the note were changed from \$110 to \$116, and at the trial it appeared from inspection of the note that, while the figures in the upper left-hand corner were \$116, the amount written out in words in the body of the note was "one hundred and ten dollars," principal, with interest and attorney's fees, a finding that the alteration in the figures was immaterial and did not affect the validity of the note as admitted by the maker was demanded, and there was no error in refusing to sanction a petition for certiorari brought for the purpose of having this finding reviewed.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 47-53; Dec. Dig. § 9.*]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by the Georgia Fertilizer & Oil Company against Joe Bryant. Judgment for plaintiff, and, from a refusal of the Superior Court to grant certiorari, defendant brings error. Affirmed.

Robley D. Smith, of Tifton, for plaintiff in error.

HILL, C. J. The Georgia Fertilizer & Oil Company brought suit against Joe Bryant on a promissory note in the city court of Tifton. A verdict and judgment were obtained against the defendant. Errors assigned on the refusal of the judge of the superior court to sanction the defendant's application for certiorari. The case made is as follows: The original petition alleged that the defendant was indebted in the sum of \$107 princi-

pal, besides interest and attorney's fees, on a promissory note, a copy of which was attached and made a part of the petition. In the upper left-hand corner of the attached copy of the note were the figures \$116, and in the body of the note were written out the words "one hundred and ten dollars," and on it was a credit of \$9. The defendant admitted giving the note to the plaintiff for \$110, and claimed that he was entitled to a credit of \$9. When the note was introduced in evidence by the plaintiff, and it appeared that the figures \$116 were on the note as above described, the defendant, with the permission of the court, filed an amendment to his plea, setting up in the amendment that the note had been changed or altered, in that the figures on the upper left-hand corner of the note were originally \$110, but were changed to \$116. His plea did not allege that the change had been made by the plaintiff for his benefit, or with any fraudulent intent. The trial judge submitted the question of alteration as a special issue, and the jury found that the note had been changed or altered, presumably in the particular indicated. On this special finding the judge ruled that, although the instrument had been changed, the change or alteration was not made with any fraudulent intent and was not material, and in no way affected the validity of the note, and this ruling is assigned as error.

We think that there is no merit whatever in the petition for certiorari, and that the judge of the superior court very properly refused to sanction it. The defendant admitted that he owed the note to the plaintiff for \$110, less the credit of \$9. The verdict was in accordance with this admission, to wit, \$101 principal, deducting the credit of \$9. Regardless of any other fact, it would be absurd to release the defendant from liability on his promise to pay, when the verdict is in exact accordance with his own admission made in open court. The change of the figures in the upper left-hand corner of the note from \$110 to \$116, whether made by the plaintiff or by some one for his benefit, was immaterial and wholly ineffective for this purpose, since it is well settled that the writing fully set out in the body of the note would control as to the amount due on the note, irrespective of the figures contained at the top or beginning of the note. Written words control where they are in conflict with mere figures. Clearly the alteration was wholly immaterial, and did not affect the validity of the instrument, which the defendant admitted to have been executed by him. Section 4296 of the Civil Code is controlling in this case. It says: "If a written contract be altered intentionally, and in a material part thereof, by a person claiming a benefit under it, with intent to defraud the other party, such alteration voids the whole con-

tract, at the option of the other party. If the alteration be unintentional, or by mistake, or *in an immaterial matter*, or not with intent to defraud, *if the contract as originally executed can be discovered and is still capable of execution, it will be enforced by the court.*" Here the contract as originally executed was not only discovered but absolutely admitted by the defendant, and it was certainly capable of being enforced by the court. The bill of exceptions in this case is so clearly without merit that this court feels constrained to affirm the judgment with 10 per cent. damages on the amount of the recovery in the trial court.

Judgment affirmed, with damages.

DANIEL v. BROWDER-MANGET CO.

(No. 4,936.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 454*)—ACTION—VENUE.

It has already been decided in this case that the defendant against whom the verdict was rendered could be sued in the county where his principal resided, and that the plea to the jurisdiction was properly stricken. *Daniel v. Browder-Manget Co.*, 11 Ga. App. 789. 76 S. E. 166.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 454.*]

2. BANKRUPTCY (§ 428*)—VENUE (§ 22*) — RESIDENCE OF DEFENDANTS—LOSS OF JURISDICTION.

Discharge in bankruptcy of the principal defendant would not oust the court of jurisdiction of a defendant secondarily liable. This is so because the plea of bankruptcy is one of personal privilege (*Collier on Bankruptcy* [9th Ed.] § 17, p. 404) and because there are circumstances under which one who has been discharged in bankruptcy may be compelled to pay a debt which was provable in bankruptcy, as, for instance, where the debt was not listed in the bankrupt's schedule and the creditor had no notice of the bankruptcy proceeding, or where, after the adjudication, a new promise to pay has been made by the debtor. *Shumate v. Ryan*, 127 Ga. 118, 56 S. E. 103. Where the court has jurisdiction of the person of one defendant when a suit is filed, the mere fact that he is subsequently discharged upon some matter in avoidance will not prevent the court from proceeding to judgment against another defendant, jurisdiction over whom is dependent, not upon liability of, but upon jurisdiction over, the discharged defendant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 782-786; Dec. Dig. § 428.* Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.*]

3. PLEADING (§ 225*)—AMENDED PLEADING—CONSTRUCTION.

Where a demurrer to a plea is sustained with leave to amend, and subsequently an amendment is allowed and filed without objection, the original and the amended plea should be considered together in order to determine whether a defense is set forth.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575-583; Dec. Dig. § 225.*]

4. PLEADING (§§ 225, 417*) — WAIVER OF RIGHT TO AMEND—RULING ON DEMURRER—WAIVER OF OBJECTION.

The filing of an amendment to meet a ruling sustaining a demurrer is a waiver by the amending party of his right to except to the order requiring the amendment to be made. *Brantley Co. v. Southerland*, 1 Ga. App. 804, 57 S. E. 980. But this rule does not operate conversely, and an unsuccessful exception to an order requiring an amendment does not prevent the filing of an amendment to meet the demurrer. Where the amendment is filed before exception is taken to the order requiring it, this may be urged as a waiver of the exception, but if not so urged, and the exception be overruled on its merits, the suing out of the exception is not a good reason for refusing to consider the amendment.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 575-583, 1401, 1402; Dec. Dig. §§ 225, 417.*]

5. PLEADING (§ 409*)—ANSWER—OBJECTION—ESTOPPEL.

It does not follow, however, that a plea, because it may be amended without objection, is to be treated, during the further progress of the trial, as setting forth a good defense, for a plea which is bad in substance may be ignored, or the defect may be taken advantage of by a motion to strike, or by objecting to evidence, or by an instruction from the court to disregard the plea, or in any other proper way. The law does not contemplate that a defendant shall prevail upon a plea which is bad in substance unless the plaintiff is estopped from challenging its sufficiency by a judgment which he himself invoked. See *Kelly v. Strouse*, 116 Ga. 872 (2a), 879, 43 S. E. 280.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1375-1383, 1386; Dec. Dig. § 409.*]

6. BILLS AND NOTES (§ 481*) — PLEADING — SUFFICIENCY.

While the plea as amended is complex, confusing, and somewhat duplicitous, it sufficiently charges, in the absence of a special demurrer and as against a general attack that it sets forth no defense, that the note sued on was without consideration, and that the plaintiff, with knowledge of this fact, conspired and colluded with the person to whom the note was given to collect the note from the defendant against whom judgment was rendered.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1530-1532, 1559-1561; Dec. Dig. § 481.*]

7. NEW TRIAL (§ 39*)—GROUNDS—INSTRUCTION.

This being so, it was error to deal with the pleadings and to instruct the jury upon the theory that the only defense raised by the defendant was one of non est factum. This error having entered into and affected the whole trial, a new trial should have been granted to allow the defendant an opportunity to sustain his defense of want of consideration and to show that the plaintiff was not a bona fide holder.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 57-61; Dec. Dig. § 39.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Browder-Manget Company against H. T. Daniel. Judgment for plaintiff, and defendant brings error. Reversed.

[1, 2] See, also, 11 Ga. App. 789, 76 S. E. 166.

J. F. Golightly, of Atlanta, and H. A. Hall, of Newnan, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendant in error.

POTTLE, J. The fundamental error into which counsel for the plaintiff and the trial court fell was in ignoring all the defendant's pleas except the plea of non est factum. General and special demurrers were filed to the answer. Upon these demurrers the court passed an order striking all of the answer except so much thereof as set up the defense of non est factum, "with leave to amend in ten days from this date." Subsequently, within the time allowed by the order, the defendant amended his answer and the amendment was allowed, "subject to objections." No objections of any sort were ever filed by the plaintiff to the answer as amended. The defendant sued out a bill of exceptions complaining of the order striking his original answer with leave to amend.

[3, 4] If the fact that he had acquiesced in this ruling by filing an amendment to meet the demurrer had been brought to the attention of this court, it would have been held that by filing the amendment he had waived his right to except to the judgment requiring the original answer to be amended. But this fact was not brought to the attention of this court, and the exception was dealt with on its merits; it being held that the court properly sustained the demurrers to the original answer. As the defendant, in response to the order granting him leave to do so, filed an amendment, and no objections were made thereto, and no attack of any sort was made upon the answer as amended, the court should have considered the answer as amended to determine whether or not it set forth any defense. *Olds Motor Works v. Olds Oakland Co.* (Sup.) 78 S. E. 902. The mere fact that the defendant excepted to the order requiring him to amend and that his exception to the order was not sustained did not amount to a waiver of his right to amend, which was granted by the order sustaining the demurrers to the original answer.

[5] However, if the answer as amended did not set forth any defense, it was properly ignored, because it is not necessary that a formal motion would be made to strike an answer which is bad in substance. Unless the plaintiff is estopped to call in question the sufficiency of the answer, he may do so by objecting to the evidence, or by asking for an instruction to the jury to disregard the answer, or in any other proper way in which the matter may be brought to the attention of the court.

[7] Hence the instruction which the court gave the jury, to the effect that the only defense which they need consider was that of non est factum, was proper, if the answer did not set forth any other valid defense. If it did, the instruction was errone-

ons and a new trial must necessarily result.

[6] The answer as amended alleged that the note sued on was really never due to the American National Beverage Company, from whom the plaintiff acquired it, but that it was executed by the defendant and turned over to that company, with the understanding that it was not to become binding on the defendant until after he had examined into the affairs of the company and ascertained that the representations of its officers as to its financial standing were true. It is further averred that, as an inducement to the defendant to execute his note for stock in that company, it was represented to him that the company was capitalized at \$400,000, with a paid-up capital of \$100,000. It is further averred that, in consideration of the execution of the note, certain officers and agents of the American National Beverage Company promised to elect the defendant president of the company, at a large salary. It is also alleged that the American National Beverage Company was in fact insolvent when the note was obtained, unable to obtain credit, and was in bankruptcy at the time suit was filed; that it was not capitalized at \$400,000 as represented and did not have a paid-up capital of \$100,000. If all these things are true and the note was not in fact, as is alleged, due to the American National Beverage Company as a complete and binding obligation, but was simply to be held by it in trust until the defendant could ascertain the financial condition of the company, then the defendant had a good defense as against the company.

The allegations relied on to show that the plaintiff was not a bona fide holder of the note are loose and general; but in the absence of a special demurrer they are, in our opinion, sufficient to constitute a defense against the plaintiff. In the original answer it was alleged that the plaintiff conspired with the American National Beverage Company, to fraudulently collect from the defendant the amount of the note. This was one of the allegations which was held to be indefinite and which the defendant was given leave to amend. In the amendment it is averred "that this note was taken by Browder-Manget Company at a time when the American National Beverage Company was unable to obtain credit, and that the said Browder-Manget Company is conspiring with the said American National Beverage Company to defraud the said H. T. Daniel out of the amount of this note." In other pleas it is averred that the plaintiff, when it took the note, did not pay full value for it, and knew that the American National Beverage Company was insolvent. A general charge of conspiracy and collusion is insufficient as against a special demurrer, but there was no objection of any kind to the answer as amended. In effect the defendant simply repeated in the amendment the general al-

legations of fraud which were contained in the original answer, and hence, if the amendment had been objected to, it should not have been allowed. No objections having been filed to the answer as amended, the general averments of fraud and collusion against the plaintiff were sufficient to raise an issue upon which the defendant was entitled to be heard before a jury. If, upon another trial upon the pleadings as they now stand, he can establish his plea of non est factum or prove that the plaintiff colluded with the American National Beverage Company, which was insolvent, to defraud him, that the defendant was deceived and defrauded by the American National Beverage Company, and that the plaintiff participated in the fraud and conspired with that company to fraudulently collect from the defendant the amount of the note, he would be entitled to prevail, otherwise not.

Judgment reversed.

JONES BROS. v. WATSON et al.

(No. 4,920.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

PRINCIPAL AND SURETY (§ 114*)—RELEASE OF SURETY—MISREPRESENTATION OF LAW.

Under the facts set forth in the opinion, the judge of the superior court erred in overruling the certiorari.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 240-243; Dec. Dig. § 114.*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action in a justice's court by Jones Bros. against J. W. Watson and one Holcombe. Judgment for defendant Holcombe and from the overruling of a certiorari by the superior court, plaintiffs bring error. Reversed.

Griffith & Matthews, of Buchanan, for plaintiffs in error. Jas. Beall, of Carrollton, for defendant in error.

HILL, C. J. Jones Bros. sued Watson, as maker, and Holcombe, as surety, on a promissory note for \$28 in a justice's court; and on appeal to a jury in that court a verdict was found against Watson and releasing Holcombe. Jones Bros. thereupon sued out a writ of certiorari, complaining of the verdict and judgment releasing Holcombe from liability on the note; the judge of the superior court overruled the certiorari, and that judgment is excepted to. The facts in the case, briefly stated, are as follows: Watson was a tenant of Holcomb for the year 1911. Watson, as maker, and Holcombe, as surety, executed the note sued on to Jones Bros. for supplies used by Watson as a cropper on Holcombe's place for the year 1911. In the fall of 1911 Watson delivered a bale of cotton to Holcombe, his landlord, for the

purpose of paying the balance due on this note. Holcombe took this bale of cotton to Bremen and there sold it to Jones Bros. When the settlement was to be made, Jones Bros. presented a note made by Watson for guano furnished him for that year and insisted that the proceeds of this bale of cotton should be applied first to the payment of this guano note. Holcombe at first refused to consent to this application, insisting that Watson had turned over the bale of cotton to him as his landlord to be sold for the purpose of applying the proceeds to the payment of the balance due on the note made by Watson, on which he (Holcombe) was surety. Jones Bros. according to Holcombe, told him that he (Holcombe) was also liable under the law on Watson's guano note because the guano furnished to Watson had been used by Watson, as cropper, for making the crop. Holcombe, in reply to this, said that if this was the law he would consent that Watson's guano note be first paid and that the balance of the cotton left over be applied on the note of Watson and himself. This was done. The guano note was paid in full and taken up by Holcombe, and the balance of the proceeds arising from the sale of the cotton was placed on the other note. The present suit is for the balance due on the note made by Watson and signed by Holcombe as surety.

Under these facts we think the verdict in the justice's court should have been against both Watson and Holcombe, and therefore that the judge of the superior court erred in overruling the certiorari. We do not see how, under these facts, Watson could have been held liable on the note and Holcombe released. Holcombe's insistence that he was induced to consent to the application of the proceeds arising from the sale of the bale of cotton to Watson's guano note, upon the statement of Jones Bros. that he was liable on this note because the guano furnished to Watson had been used on Holcombe's land to make the crop, was without force. No fraud is charged against Jones Bros. There was no fiduciary relation between Holcombe and Jones Bros. but they were dealing at arm's length; and Holcombe therefore had no right to rely upon this statement of Jones Bros. It is true that Holcombe had the right to control the proceeds of the sale of this cotton, which was made by his cropper to pay the cropper's debt to him; and this control was exercised by him, for he sold the bale of cotton and legally and voluntarily consented that the proceeds should be applied in payment of Watson's individual note for the guano. Even if Holcombe had been deceived by the statement of Jones Bros. that he was liable on Watson's individual note, and had been defrauded by this statement, it was no case for rescission or taking back of the payment which he had made of Watson's individual note, for he did not,

before the suit was brought, offer to restore the status quo by returning the Watson note to Jones Bros. On the contrary, he had delivered this note, marked "paid," to Watson. *Langston v. Aderhold*, 60 Ga. 376; *Railway Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350. We think therefore, that the learned judge of the superior court erred in overruling the certiorari.

Judgment reversed.

WEATHERINGTON v. STATE. (No. 4,965.)
(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. ARREST (§ 63*)—ARREST WITHOUT WARRANT—GROUNDS—INTOXICATING LIQUORS.

According to the uncontradicted evidence, it appears that there was no examination or search into the contents of the defendant's valise, but that he voluntarily disclosed its contents. The valise contained about three gallons of whisky in quart and pint bottles. The possession of such a large quantity might authorize the inference that its possessor was keeping the whisky for the purpose of illegal sale, and would authorize his arrest upon a charge of violating the municipal ordinance upon that subject, on the ground that the offense was being committed in the presence of the officer.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

2. CRIMINAL LAW (§ 393*)—EVIDENCE—VOLUNTARY DISCLOSURE BY ACCUSED.

In view of the fact that the contents of the valise were voluntarily disclosed by the accused, it was not error to admit in evidence the valise and its contents upon his trial for the offense of selling liquor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 871-874; Dec. Dig. § 393.*]

3. CONVICTION AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

John Weatherington was convicted of violating a municipal ordinance, and brings error. Affirmed.

Harrell & Wilson, of Bainbridge, for plaintiff in error. M. E. O'Neal, Sol., of Bainbridge, for the State.

RUSSELL, J. Judgment affirmed.

HARRELL v. SOUTHERN RY. CO.
(No. 4,967.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—FINAL JUDGMENT.

Where a petition is demurred to both generally and specially, and some of the grounds of the special demurrer are sustained as to certain items of damage claimed in the petition, and the allegations in reference thereto ordered stricken, and the general demurrer is overruled, and the petition is left to be tried

upon the allegations not stricken, a bill of exceptions sued out to the Court of Appeals, assigning error upon the sustaining of the special demurrer, is premature. The judgment complained of is not a final judgment, nor would it have been final if it had been rendered as claimed by the excepting party. Civ. Code 1910, § 6138; Hartman Stock Farm v. Henley, 4 Ga. App. 60, 60 S. E. 808; Neal-Blum Co. v. Zeigler, 11 Ga. App. 273, 75 S. E. 142.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. § 78.*]

Error from City Court of Eastman; J. A. Neese, Judge.

Action by J. M. Harrell against the Southern Railway Company. Certain grounds of special demurrer to the petition were sustained, and plaintiff brings error. Writ dismissed.

Jas. F. Broach and O. J. Franklin, both of Eastman, for plaintiff in error. Eschol Graham, of McRae, for defendant in error.

POTTLE, J. Writ of error dismissed.

MAYOR, etc., OF MACON v. LEONARD. (No. 4,879.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 759*)—DEFECTIVE STREETS—LIABILITY FOR INJURIES.

No error of law appears, and the evidence fully supports the verdict.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1596-1600; Dec. Dig. § 759.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Annie Leonard against the Mayor and Council of the City of Macon. Judgment for plaintiff, and defendants bring error. Affirmed.

A. W. Lane and R. W. Barnes, both of Macon, for plaintiffs in error. Napier, Maynard & Plunkett, of Macon, for defendant in error.

HILL, C. J. Annie Leonard sued the mayor and council of the city of Macon to recover damages for personal injuries, and, from a verdict of \$500 rendered in her favor, the defendant filed a motion for a new trial, which was overruled. The only question involved in the record arises upon the construction of section 2 of the act of 1903, under which the territory where the alleged injury occurred was incorporated and became a part of the city of Macon. Acts 1903, p. 579. The first section of this act extends the corporate limits so as to embrace certain territory therein described, and the second section of the act provides: "The mayor

and council of the city of Macon shall have full power and authority, and are hereby vested with power and authority to select, lay out and name such of the roads and alleys in the territory hereinbefore set forth, to be adopted and known as streets and public alleys of the city of Macon. The mayor and council of the city of Macon shall not be liable in any amount for any failure to keep in repair any of the roads or alleys in said territory, unless the same shall have been first selected, named and laid out as streets or alleys." It was conceded that the injury occurred on what is known as the corner of Third avenue and Middle street in this new territory, and the defense relied upon is that the mayor and council of the city of Macon had not, at the time of the alleged injury, selected, named, and laid out as streets, alleys, roads, avenues, and highways the streets in the territory where the injury was alleged to have occurred. The injury to the plaintiff occurred in July, 1912. It was admitted that during the preceding nine years (the period following the incorporation of the new territory) the city of Macon had exercised jurisdiction over this territory; that the city had a map, known as a property map of this territory, and had adopted this map as indicating the territory thus incorporated, this map having been made in August, 1903, immediately after the territory was incorporated into the city; that the mayor and council of the city of Macon had also placed sewers through this entire territory; that the police of the city patrolled the same; that the street sanitary wagons made the usual visits to this territory; that the city collected taxes from the property owners in this territory; and that the streets and sidewalks in the territory were worked and kept in order by the city of Macon—in other words, that for the nine years the city of Macon had exercised full jurisdiction and authority over the territory as a part of the city. It is true that the city had not, by any affirmative act of the mayor and council, "selected, named, and laid out as streets or alleys" the streets and alleys in this territory; but this, under the facts, we think immaterial, for it is unquestionably true that the city had adopted and accepted the streets and alleys which had already been laid out and named in the territory when it was taken over by the city. In other words, there was no change in the names of the streets and no change in their location. The names and locations remained the same.

Under this evidence we think the trial judge very properly charged the jury that under the law the streets and avenues in this territory formally became avenues and streets of the city of Macon; and that the particular street where the injury occurred, being thus a street of the city of Macon, was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 79 S.E.—16

governed by the same rule of law which applied to any other street, alley, or avenue in the city of Macon. We are of the opinion that incorporation during nine years under the act authorizing the incorporation of the territory aforesaid, and the acts of the city in collecting taxes and exercising jurisdiction over that territory all this time, and in causing to be made a property map thereof, upon which appeared the streets, alleys, and highways in that territory as they existed and were designated before the incorporation, are sufficient to charge the city, as to them, with the liability imposed upon it with reference to other streets of the city. The city could not, by simply failing to go any further in the laying out and naming of streets, escape all liability for a failure to exercise that diligence which the law imposes on a municipality as to its streets, avenues, and public alleys.

Judgment affirmed.

CHARLESTON & W. C. RY. CO. v. THOMPSON. (No. 4,335.)

(Court of Appeals of Georgia. Aug. 30, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 280*)—INJURY TO PASSENGER RIDING ON PASS—HEPBURN ACT.

As a general rule, a stipulation in a free pass, to the effect that the person who accepts such transportation himself assumes all risks of injury, is enforceable, and as to a passenger who has accepted free transportation a carrier is liable only for injuries resulting from wantonness or willful negligence; but an exception to this rule is presented in the provision of the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]) which permits a railroad company to issue free transportation to its employes and members of their families. As between such employes and the railroad company which employs them the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration paid for the services of the employé and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the court did not err in refusing to charge the jury that, if the plaintiff (who was the wife of an employé) was traveling on a free pass, she would not be entitled to recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

2. APPEAL AND ERROR (§ 969*)—DISCRETIONARY RULING—REFUSAL OF INSTRUCTIONS—CREDIBILITY OF WITNESSES.

Under the facts in this case it was not harmful error for the court to refuse to charge that testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, or equivocal, and, unless there is other evidence tending to establish his right to recover, he is not entitled to a finding in his favor, if that version of his testimony most unfavorable to himself shows that the verdict should be against him. The applicability of this rule of evidence in any particular case

is addressed to the sound discretion of the court, who must determine, in the first instance, as to whether the testimony is self-contradictory, vague, or equivocal. As the trial judge sees and hears the witnesses, it must be very manifest that he erred in the application of the rule before the exercise of his discretion will be interfered with.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845–3848; Dec. Dig. § 969.*]

3. NEW TRIAL (§ 108*) — GROUNDS — NEWLY DISCOVERED EVIDENCE.

The court did not err in refusing a new trial upon the ground of the motion which was based upon newly discovered evidence that the plaintiff was not legally married to the employé of the railroad company, on account of whom the free transportation was issued. The alleged newly discovered testimony at most only furnishes proof of a presumptive marriage, and this must yield when brought into competition with proof of an actual marriage. Upon this point the decision is controlled by the ruling of the Supreme Court in *Norman v. Goode*, 113 Ga. 121, 38 S. E. 317. "With no competing actual marriage proved, the law presumes marriage from cohabitation and repute. But this presumption the law declines to raise in opposition to a competing marriage actually proved." *Jenkins v. Jenkins*, 83 Ga. 287, 9 S. E. 542, 20 Am. St. Rep. 316.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Lizzie Thompson against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. K. Miller, of Augusta, for plaintiff in error. Wm. H. Fleming, of Augusta, for defendant in error.

RUSSELL, J. Judgment affirmed.

CHARLESTON & W. C. RY. CO. v. THOMPSON. (No. 4,334.)

(Court of Appeals of Georgia. Aug. 30, 1913. Rehearing Denied Sept. 16, 1913.)

(Syllabus by the Court.)

INJURY TO WIFE.

This case is controlled by the decision in *Charleston & Western Carolina Railway Company v. Thompson*, supra, this day decided. Under the ruling in that case the jury were authorized to find that Lizzie Thompson was the wife of George Thompson, the plaintiff in the present case, and he, as husband, was entitled to recover damages for the loss of her services.

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by George Thompson against the Charleston & Western Carolina Railway Com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pany. Judgment for plaintiff, and defendant brings error. Affirmed.

W. K. Miller, of Augusta, for plaintiff in error. Wm. H. Fleming, of Augusta, for defendant in error.

RUSSELL, J. Judgment affirmed.

MACON, D. & S. R. CO. v. YESBIK.

(No. 4,963.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. DEPOSITIONS (§ 64*)—EXAMINATION—REJECTION OF ANSWER.

It is no ground for rejecting answers to interrogatories that one set of questions was propounded to two witnesses, each of whom made separate answers to the interrogatories.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 133-141; Dec. Dig. § 64.*]

2. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

All of the other questions made in the record were settled adversely to the plaintiff in error when the case was before this court at a previous term. Yesbik v. Macon, Dublin & Savannah R. Co., 11 Ga. App. 298, 75 S. E. 207. There is no evidence in the present record that the damage to the goods resulted from a compliance by the initial carrier with instructions given by the shipper. The evidence demanded the verdict, and there was no error in refusing a new trial.

Error from City Court of Dublin; J. B. Hicks, Judge.

Action by Acy Yesbik against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jno. S. Adams, of Dublin, and Akerman, Akerman & McManus, of Macon, for plaintiff in error. W. C. Davis, of Dublin, for defendant in error.

POTTLE, J. Judgment affirmed.

CITY OF ROME v. FORD. (No. 4,876.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. DAMAGES (§§ 97, 178*)—PERSONAL INJURIES—EVIDENCE—LOSS OF ABILITY TO LABOR.

In a suit against a municipality to recover damages for personal injuries, where it was alleged and proved that the plaintiff, as a result of the injuries received, was unable to do his accustomed work and suffered great mental anguish and physical pain, it was not error to admit the following testimony of the plaintiff: "The fact that I have not been able to work and carry on my duties as I was accustomed to do before has worried me." Nor was the following instruction to the jury erroneous: "And I further charge you in this case that the loss of ability to labor is pain and suffering." In Powell v. Railroad Co., 77 Ga. 192, 200, 3 S. E. 757, it was held that the loss of ability to labor is pain, and that a physical injury that destroys the power of a human being to labor is one of the most serious injuries that it is pos-

sible to inflict. See, also, City Council of Augusta v. Owens, 111 Ga. 464, 479, 36 S. E. 830.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 233, 234, 472; Dec. Dig. §§ 97, 178.*]

2. DAMAGES (§ 216*)—TRIAL (§§ 228, 252*)—ACTIONS FOR PERSONAL INJURIES—INSTRUCTIONS.

Where the allegations of the petition claimed actual damages for the loss of ability to labor and also the amount of physician's bills, but there was no specific proof as to these items of damage, although there was evidence under which the plaintiff was entitled to recover for mental anguish and physical pain, the following charge was not improper: "As to this mental pain and suffering, the court can give you no particular rule by which you can arrive at that damage, if [the plaintiff] is entitled to recover; that is left to the enlightened consciences of intelligent jurors." There was no material error in this instruction in the use of the word "intelligent" instead of "impartial." The words, "enlightened consciences of intelligent jurors," are sufficient to include the idea that such jurors must also be impartial. Central R. Co. v. Kelly, 58 Ga. 107, 111; W. & A. R. v. Abbott, 74 Ga. 851, 856; Southern Bell Tel. Co. v. Jordan, 87 Ga. 69, 72, 13 S. E. 202. Nor, under the facts of this case, was the instruction above quoted erroneous because of allegations in the petition that the suit was for doctor's bills and medicine and for lost time, since these items of damage were not specifically proved, and the only damages proved as claimed were those which were properly included under the allegation for mental pain and suffering. The facts of this case distinguish it from that of Southern Railway Co. v. Davis, 132 Ga. 812, 65 S. E. 131, and cases cited therein.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.* Trial, Cent. Dig. §§ 505, 509-512, 526, 596-612; Dec. Dig. §§ 228, 252.*]

3. INSTRUCTIONS—VERDICT AND PROOF.

The charge as a whole was a fair, full, and correct presentation of the law applicable to the issues made by the pleadings and the evidence. The verdict is fully supported by the evidence, and no reason is shown for another trial.

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by L. E. Ford against the City of Rome. Judgment for plaintiff, and defendant brings error. Affirmed.

Max Meyerhardt, of Rome, for plaintiff in error. C. I. Carey and W. J. Nunnally, both of Rome, for defendant in error.

HILL, C. J. Judgment affirmed.

WITT v. BAKER. (No. 4,944.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

CONTRACTS (§ 340*)—BROKERS (§ 60*)—RIGHT TO COMMISSION—ANSWER—CONSIDERATION OF CONTRACT.

The court erred in striking so much of the defendant's answer as averred that no services had been rendered by the plaintiff in behalf of the defendant, and that for this reason the promise to pay the plaintiff "for services rendered previous" to the execution of the contract sued on was without consideration. The other parts

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the answer were properly stricken, as they set forth no defense.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1713-1715; Dec. Dig. § 340;* Brokers, Cent. Dig. § 91; Dec. Dig. § 60.*]

Error from City Court of Americus; W. M. Harper, Judge.

Action by J. H. Baker against J. C. Witt. Judgment for plaintiff, and defendant brings error. Reversed.

W. W. Dykes, of Americus, for plaintiff in error. Ellis, Webb & Ellis, of Americus, for defendant in error.

RUSSELL, J. On May 13, 1911, L. M. Rambo executed a written agreement to sell to J. H. Baker a tract of land located in Calhoun county, Ga., and known as the Davis estate place, consisting of 1,635 acres, more or less, at \$10 per acre. In this writing it was provided that Baker should pay to Rambo \$1,000 on June 15, 1911, and execute his promissory note for the balance of the purchase price, to become due December 1, 1911, whereupon Rambo should execute to Baker a bond for title to the land. On June 13, 1911, Baker signed upon this writing the following indorsement: "I hereby transfer my interest in the above bill of sale to J. C. Witt for valuable consideration." On the same day Witt and Baker entered into a written contract in which it was stated that Witt had bought from Baker land described, the description being the same as that contained in the writing from Rambo to Baker, and that it was agreed that Baker should transfer to Witt "the bill of sale" from Rambo, and that Witt would make the cash payment of \$1,000 and execute his note to Rambo as described in the instrument from him to Baker. The contract further stipulated: "It is further agreed that the said J. C. Witt and J. H. Baker are to use their best efforts to make a sale of the above-described land and divide any profits they may make over and above the net cost of same, said sale to be made on or before the first day of December, 1911, and the minimum price shall be not less than eleven (\$11.00) dollars per acre, and the said J. C. Witt agrees that, if said land is not sold on or before the first day of December, 1911, then he, the said J. C. Witt, further agrees to pay the said J. H. Baker two and one-half per cent. of the purchase price of the said described land for services rendered previous to this date."

Baker brought his action against Witt, making substantially the following allegations: Witt is indebted to plaintiff in the sum of \$408.75, besides interest from December 1, 1911. Baker purchased from Rambo the land described in the foregoing document at the price of \$10 per acre, and transferred to Witt the obligation of Rambo to convey title; Witt assuming the terms and conditions of

the contract made with Rambo. On or about June 15, 1911, Witt paid to Rambo a part of the purchase money, and Rambo executed to Witt a bond for title to the land. On or about November 30, 1911, Witt paid the balance of the purchase money for the land, and Rambo executed to him his warranty deed. Thereupon Witt entered into possession of the land and is now in possession. The plaintiff used his best efforts to make a sale of the land according to the terms of the contract, and was unable to do so on or before December 1, 1911, by reason of all of which Witt became indebted to him in fixed sum. Witt answered, denying the indebtedness, admitting that he had purchased the land from Rambo as set forth in the petition, but alleging that he had paid only \$16,000 for the 1,635 acres. He declined either to admit or deny, for want of sufficient information, the allegation that the plaintiff had used his best efforts to make a sale of the land on or before December 1, 1911. For further answer the defendant averred that when he purchased the land from Baker he was to have clear title, and that after executing the contract with Baker he found on record in the office of the clerk of the superior court of Calhoun county a lease of the poplar, cypress, and ash timber located on certain portions of the land, which lease was still in force, and that the timber therein described was worth \$1,300. The contract between Baker and the defendant did not except the timber, and Baker, in discussing the proposition of a sale with the defendant, pointed it out to him as an inducement for him to purchase the land. About the time the defendant paid for the property his attention was called to the lease of the timber on the land, and he called Baker's attention to it, and Baker stated to him that it had expired, by agreement or otherwise, and was not of force, and that the defendant would get all of the timber on the place that he had purchased. Defendant several times offered to pay Baker \$400 (this sum being 2½ per cent. of the amount which he paid for the land) if Baker would clear up the timber lease; but he failed and refused to do this. The existence of the timber lease made the land less valuable by \$1,300 than it would have otherwise been. Defendant prayed for a judgment against the plaintiff for \$900. The plaintiff demurred to this answer, on the grounds that it failed to set forth a defense sought to vary the terms of the written agreement between the parties, and failed to show how the defendant arrived at the value of the timber covered by the lease described in the answer. The demurrer having been presented in term time, an order was passed that the case be heard in vacation on April 11, 1913, at which time the court should have authority to pass upon all demurrers and amendments as if in term

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time, and enter up a judgment in the case, with the right of the losing party to except as if the rulings were made in term. It was further provided in the order that, if the hearing was not had at the time stated, the court would have the right to continue the hearing to a future date.

At the hearing on April 11, 1911, the plaintiff amended his petition by adding a copy of the agreement to sell executed by Rambo to Baker, a copy of the bond for title executed by Rambo to Witt, and a copy of the deed from Rambo to Witt. In both the bond for title and the deed it was stipulated that the instrument was executed subject to certain turpentine and timber leases theretofore executed by the grantor to timber on the land described. In each of these instruments the land was described as containing 1,635 acres, and the purchase price was stated to be \$16,000. Thereupon the defendant offered an amendment to his answer, averring that the agreement of the defendant to pay the plaintiff $2\frac{1}{2}$ per cent. of the purchase price of the land for services previously rendered was without consideration; that Baker did not render any services for the defendant prior to that date or in connection with this transaction, and for this reason was not entitled to recover the amount sued for. It was further averred that Baker was unable to sell the defendant the land described in the contract between him and Baker, and that Rambo refused to make the sale to him except subject to a certain lease (a copy of which is attached to the answer) of the cypress, poplar, and ash timber on certain portions of the land for \$1,300, to expire September 4, 1919. It was also alleged that Baker was present when the defendant and Rambo finally consummated the trade, that the defendant bought the land from Rambo upon an entirely different contract than the one made with Baker, and that "in closing the trade with L. M. Rambo the said J. H. Baker acquiesced therein, and therefore agreed that the contract between J. H. Baker and this defendant, which is sued on, should become null and void and of no effect, and he therefore waived all of his rights in said contract when the sale was made direct by L. M. Rambo to this defendant on a different contract altogether." It was further alleged that Baker was engaged in the real estate business in Sumter county, Ga., did not have a license to do a real estate business in Calhoun county, Ga., and the amount sued for is compensation for work performed by him as a real estate agent in connection with the transaction, and the sale was made by Baker in the regular course of business as a real estate agent. The trial judge took the case under advisement, and on April 26, 1913, entered a judgment sustaining the plaintiff's demurrer to the defendant's answer as amended, and entered up a judgment as in case of default in favor of plain-

tiff against the defendant for the principal sum of \$408.75 and \$40.11 interest. The defendant excepted.

1. Neither the agreement of sale to Baker executed by Rambo, which was transferred to Witt, nor the contract between Baker to Witt contained any exception in reference to the timber growing on the land. Growing timber, being a part of the realty, would, of course, pass under a conveyance of the land which did not except the timber. Upon the face of the papers, Baker obtained an option from Rambo and transferred his option to Witt, and at the same time executed to Witt an agreement to sell. There is nothing in the writing binding Witt to pay Baker any sum of money for the option which the latter had procured from Rambo. The only stipulation in the writing under which Witt became bound to pay Baker any money was that providing for the payment of $2\frac{1}{2}$ per cent. of the purchase price "for services previously rendered to this date." So far as appears, the services thus referred to may or may not have been connected with the sale from Rambo. For aught that appears, they may have been services rendered in an entirely separate and distinct transaction. The petition does not disclose what these services were; the language of the contract is ambiguous, and it is nowhere explained in the pleadings. The sum agreed upon to be paid could not have been intended as compensation to Baker for making a bona fide, but unsuccessful, effort to resell the land for Witt, for the services rendered were those performed prior to the execution of the contract. If the agreement to pay for services rendered referred to the procuring of the transfer of the option from Rambo, the defendant would be bound to pay, because it is admitted that Baker did procure from Rambo an agreement to sell the land, and did transfer this agreement to Witt. The fact that Rambo subsequently declined to make a conveyance which would include the timber, and that Witt accepted the deed which excluded the timber, would not affect Baker's right to recover compensation, if the parties really intended that he should be paid for his services in procuring the option. If, on the other hand, the expression "services rendered previous to this date," as used in the contract between Witt and Baker, referred to some other services, disconnected from the purchase from Rambo, then the defendant's pleas were sufficient to raise an issue. It is distinctly averred that no services were rendered by the plaintiff, and hence that the agreement was without consideration. The recital in the contract that services had been previously rendered would not estop Witt from proving the contrary. This recital was but a statement of the consideration of the promise to pay, and could be inquired into for the purpose of showing that no services had been rendered, and that the contract was for that

reason without consideration. See *W. E. Coldwell Co. v. Cowart*, 140 Ga. —, 75 S. E. 425.

To recapitulate the effect of our ruling is as follows: The expression in the contract, "services rendered previous to this date," is ambiguous. If it should appear that the parties intended that Baker should be compensated for his services in procuring the option from Rambo and transferring it to Witt, upon the pleadings as they now stand the plaintiff would be entitled to recover. If, however, it should appear that the expression "services rendered," as used in the contract, intended to relate to some services disconnected from the purchase from Rambo, then the burden would be on the defendant to show that no services were in fact rendered, and that for this reason his promise to pay was without consideration. So much of the defendant's plea as alleged that no services were rendered by the plaintiff, and that for this reason the promise to pay was without consideration, should not have been stricken. The other portions of the answer were properly stricken, as they set forth no defense. Judgment reversed.

WOLVERINE SOAP CO. v. SELLERS et al.
(No. 4,841.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—GRANTING NEW TRIAL—VERDICT.

In this case the verdict was not demanded by the law and the evidence, and the judgment granting a first new trial will not be disturbed. Civil Code 1910, § 6204.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from City Court of Cairo; J. R. Singletary, Judge.

Action between the Wolverine Soap Company and R. L. Sellers and others. From the judgment, the Soap Company brings error. Affirmed.

R. C. Bell and J. S. Weathers, both of Cairo, for plaintiff in error. R. R. Terrell, of Whigham, and J. M. Sellers, of Cairo, for defendant in error.

HILL, C. J. Judgment affirmed.

MOORE v. ROSSER. (No. 4,924.)

(Court of Appeals of Georgia. Sept. 9, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 270*)—DISTRESS—EVIDENCE.

Where a tenant agrees in writing to pay to the landlord a specified amount for the annual rental of premises therein described, evidence as

to the annual rental value of the premises is immaterial and irrelevant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1098-1123, 1125, 1126, 1128-1139, 1146, 1148; Dec. Dig. § 270.*]

2. LANDLORD AND TENANT (§ 150*)—DUTY TO REPAIR.

In the absence of an agreement to do so, a landlord is not bound to repair patent defects in a building, the existence of which was known to the tenant at the time the rental contract was entered into. *Akin v. Perry*, 119 Ga. 263, 46 S. E. 93.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 536, 538, 544-548, 555, 556; Dec. Dig. § 150.*]

3. LANDLORD AND TENANT (§ 270*)—DISTRESS—INSTRUCTIONS—DAMAGES.

In a contest between a landlord and a tenant on a distress warrant and counter affidavit, where each party claimed damages for failure of the other to perform the mutual stipulations of the contract in divers particulars, it was not erroneous to charge to the effect that the damages on one side should be set off against those on the other, and only the net amount of the damages should be allowed the tenant as a deduction from the amount of the distress warrant. *Johnson v. Patterson*, 91 Ga. 531, 18 S. E. 350.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1098-1123, 1125, 1126, 1128-1139, 1146, 1148; Dec. Dig. § 270.*]

4. APPEAL AND ERROR (§ 1002*)—VERDICT—EVIDENCE.

The controlling issues in this case were questions of fact, as to which the evidence was in sharp conflict, and, it appearing that no error of law was committed on the trial, this court will not disturb the verdict, and the refusal of the lower court to grant another trial must be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from City Court of Greenville; H. H. Revill, Judge.

Action between A. C. Moore and A. M. Rosser. From the judgment, Moore brings error. Affirmed.

McLaughlin & Jones, of Greenville, for plaintiff in error. N. F. Culpepper, of Greenville, for defendant in error.

HILL, C. J. Judgment affirmed.

F. T. HARDY & CO. v. JONES BROS.

(No. 5,019.)

(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 199*)—SALE OF PROPERTY—RECOVERY OF PRICE.

If goods owned by a partnership be sold by one of the partners, the partnership may recover the purchase price in its own name, though the purchaser has no knowledge of the existence of the partnership.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 362-368; Dec. Dig. § 199.*]

2. APPEAL AND ERROR (§ 728*)—SET-OFF AND COUNTERCLAIM (§ 44*)—ASSIGNMENTS OF ERROR—EXCLUSION OF EVIDENCE—SALE OF FIRM PROPERTY—ACTION FOR PRICE.

The evidence authorized, if it did not demand, the verdict. The assignment of error up-

on the rejection of evidence was not well taken, both because it does not distinctly appear what the witness would have testified, and because the ruling was proper upon the objection as set forth in the answer to the certiorari. The defendant did not claim to have had an agreement with the plaintiff partnership which would authorize the set-off pleaded, and, if the contract relied on was made with one of the partners solely in his individual capacity, and not in behalf of the firm, evidence as to the agreement of the partners was not relevant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012; Dec. Dig. § 728;* Set-Off and Counterclaim, Cent. Dig. § 68; Dec. Dig. § 44.*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by Jones Brothers against F. T. Hardy & Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Baum & Johnson, of Quitman, for plaintiff in error. Branch & Snow, of Quitman, for defendants in error.

POTTLE, J. Judgment affirmed.

MORGAN v. STATE. (No. 4,790.)

(Court of Appeals of Georgia. Sept. 16, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 594*)—CONTINUANCE.

The showing for continuance being in all respects regular and in compliance with the requirements of the statute, and the testimony of the absent witness being vitally material to the defense, the court erred in not granting a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

Error from City Court of Madison; K. S. Anderson, Judge.

Rob Morgan was convicted of crime, and brings error. Reversed.

E. H. George, of Madison, for plaintiff in error. A. G. Foster, Sol., of Madison, and Little & Powell, of Atlanta, for the State.

RUSSELL, J. Judgment reversed.

STATE ex rel. RAY v. BLEASE, Governor, et al.

(Supreme Court of South Carolina. Sept. 8, 1913.)

1. STATES (§ 165*)—BONDS—PAYMENT—NOTICE TO HOLDERS.

Where the action of the State Treasurer and Treasurer of the State Sinking Fund Commission, in publishing a notice to holders of state bonds to present them for payment, was authorized by a resolution of the Sinking Fund Commission, passed at a meeting at which it was unquestioned that a quorum was present, it was unnecessary to decide whether a quorum was present at a subsequent meeting, at which it was attempted to ratify such action.

[Ed. Note.—For other cases, see States, Cent. Dig. § 157; Dec. Dig. § 165.*]

2. STATES (§ 165*)—BONDS—POWERS OF SINKING FUND COMMISSION.

Under Act Feb. 17, 1912 (27 St. at Large, p. 738), authorizing the State Sinking Fund Commission to issue bonds and stocks for the purpose of calling in and paying a prior issue of bonds and stocks, the commission, as to matters within its discretion, is not subject to the control of the court.

[Ed. Note.—For other cases, see States, Cent. Dig. § 157; Dec. Dig. § 165.*]

3. STATES (§ 165*)—BONDS—ISSUANCE — DE-TAILS.

A resolution of the State Sinking Fund Commission authorized the Comptroller General to receive proposals for the purchase of bonds and stocks authorized by Act Feb. 17, 1912 (27 St. at Large, p. 738), and provided that he should report to the commission the proposals received, and provided, further, that the commission should sell the bonds and stocks at the best possible price obtainable, not less than par fiat; that after the completion of the sale the treasurer should call all bonds authorized to be redeemed by that act for redemption on July 1, 1913, but that if the sale should not be completed by that date, the call should abide the further order of the commission, and that the new issue of bonds and stocks should be dated and bear interest, and should specify the rate of interest, times, and places of payment thereof, etc., as therein provided. The resolution was adopted at a meeting at which it was claimed there was no quorum present. Held, that the resolution involved matters of detail either fixed by the terms of the act or within the discretion and judgment of the commission, and therefore still subject to its orders, and hence, where the commission subsequently refused to revoke such resolution, it impliedly ratified it.

[Ed. Note.—For other cases, see States, Cent. Dig. § 157; Dec. Dig. § 165.*]

4. STATUTES (§ 119*)—TITLES AND SUBJECTS OF ACTS.

The provision of Act Feb. 17, 1912 (27 St. at Large, p. 738), authorizing a new issue of bonds and stocks to be issued by the State Sinking Fund Commission for the purpose of calling in and paying a previous issue, is germane to the subject expressed in the title, which recites that it is an act to provide for the exercise by the state of its option to call in and pay the whole or any part of the bonds and stocks issued under an act mentioned, and does not violate Const. art. 3, § 17, providing that every act shall relate to but one subject, which shall be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 164-167; Dec. Dig. § 119.*]

5. OFFICERS (§ 30*)—CONSTITUTIONAL PROVISIONS—HOLDING TWO OFFICES.

Act Feb. 17, 1912 (27 St. at Large, p. 738), authorizing the State Sinking Fund Commission, composed under other statutory provisions of the Governor, State Treasurer, Comptroller General, Attorney General, Chairman of the Committee of Finance of the Senate and the Chairman of the Committee on Ways and Means of the House of Representatives, to call in and pay certain bonds and stocks of the state, and to issue new bonds and stocks for that purpose, does not violate Const. art. 2, § 2, providing that no person shall hold two offices of honor or profit at the same time, since membership in the commission is not an office, but merely involves the discharge of duties imposed by law on the various officers, and therefore merely an incident to their respective offices.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37-43; Dec. Dig. § 30.*]

6. STATES (§ 165*)—BONDS—PAYMENT—STATUTORY PROVISIONS.

The act of 1873 (15 St. at Large, p. 518), and subsequent acts, authorized an issue of bonds and stocks by the state called Green Consols. Various subsequent acts authorized the issue of bonds and stocks known as Brown Consols, for refunding the Green Consols and other outstanding debts. Acts Dec. 22, 1892, and Dec. 22, 1893 (21 St. at Large, pp. 24, 420), authorized a new issue of bonds and stocks known as Redemption Brown Consols, for the purpose of refunding outstanding bonds and stocks of the state, including Brown and Green Consols. Act Feb. 17, 1912 (27 St. at Large, p. 738), entitled "An act to provide for the exercise by the state of its option to call in and pay the whole or any part of the brown bonds and stocks issued under an act approved December 22, A. D. 1892," authorized the issuance of new bonds and stocks, and provides by section 6 that the proceeds thereof shall be applied to the payment of the redemption bonds and stocks issued under the act of 1892 and the consolidated bonds and stocks commonly called Brown Consols, and to no other purpose. Section 7 provides that the proceeds of sales thereof shall be kept as a separate fund, to be used exclusively for the final redemption of such Brown Bonds and Stocks issued under the act of 1892, and "said consolidated bonds and certificates of stock hereinbefore described," but that the sinking fund commission in their judgment may exchange the new bonds for Brown Consols upon such terms as may best subserve the public welfare. *Held*, that the act of 1912 does not authorize the refunding of Green Consols which are still outstanding, "the consolidated bonds and stocks hereinbefore described," mentioned in section 7, being the Brown Consols mentioned in section 6.

[Ed. Note.—For other cases, see States, Cent. Dig. § 157; Dec. Dig. § 165.*]

7. STATUTES (§ 119*)—BONDS—PAYMENT—STATUTORY PROVISIONS.

Act Feb. 17, 1912 (27 St. at Large, p. 738), so far as it authorizes the redemption of Brown Consols in addition to Redemption Brown Consols, violates Const. art. 3, § 17, which provides that every act shall relate to but one subject, which shall be expressed in its title, since the title specifically limits its object to the redemption of the bonds issued under Act Dec. 22, 1892 (21 St. at Large, p. 24), and hence only Redemption Brown Consols issued under the act of 1892 are redeemable thereunder.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 164-167; Dec. Dig. § 119.*]

8. STATUTES (§ 126*)—TITLES AND SUBJECTS OF ACTS.

While Const. art. 3, § 17, providing that every act shall relate to but one subject, which shall be expressed in its title, is very liberally construed, yet when the title of an act definitely and specifically limits its object, the court must limit the operation of the act to the subject so expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 192-196; Dec. Dig. § 126.*]

9. STATES (§ 165*)—BONDS—PAYMENT—STATUTORY PROVISIONS.

Act Dec. 22, 1892 (21 St. at Large, p. 24), authorized an issue of bonds and stocks called Redemption Brown Consols, for the purpose of redeeming other outstanding obligations of the state. Act Dec. 22, 1893 (21 St. at Large, p. 420), authorized the surrender of certain bonds and certificates of stock not covered by the act of 1892, and provided that the treasurer in exchange therefor should issue bonds or certificates of stock of the kind issued under the act of 1892, and known as Redemption Brown

Consols. The bonds issued under the act of 1893 recited that they were issued under the act of 1892. Act Feb. 17, 1912 (27 St. at Large, p. 738), authorized the sinking fund commission to call in and pay the bonds and stocks issued under the act of 1892. *Held*, that bonds and stocks issued under the act of 1893 are redeemable under the act of 1912 as though issued under the act of 1892, the act of 1893 being intended as an amendment supplementing the act of 1892 and enlarging its scope, especially as the state is estopped by the recital in such bonds to deny that they were issued under the act of 1892.

[Ed. Note.—For other cases, see States, Cent. Dig. § 157; Dec. Dig. § 165.*]

10. STATES (§ 164*)—BONDS—PAYMENT—LEGALITY.

The refunding of certain bonds and stocks of the state would not be enjoined on the ground that certain of them were issued in exchange for bills of the bank of the state which were stolen, that certain others were issued after the time provided by law, or to persons other than those authorized by law to receive them, or that certain others were issued in exchange for stock once surrendered, but not canceled, and stolen and again redeemed, where it was not alleged that any of the holders were not innocent purchasers for value before maturity and without notice, that they did not rest upon valid debts of the state, or that they were fraudulent or void in their inception.

[Ed. Note.—For other cases, see States, Cent. Dig. § 155; Dec. Dig. § 164.*]

11. STATES (§ 115*)—INDEBTEDNESS—POWER TO CONCUR.

The refunding of a valid existing debt does not increase the debt of the state, and does not need the sanction of the qualified electors under Const. art. 10, § 11, providing that the General Assembly shall not create any further debt or obligation, except for the ordinary and current business of the state, without submitting the question as to the creation of such new debt to the qualified electors at a general election.

[Ed. Note.—For other cases, see States, Cent. Dig. § 114; Dec. Dig. § 115.*]

12. STATES (§ 144*)—NEGOTIABLE PAPER—LIABILITY.

The liability of a state, upon negotiable paper issued by competent authority, is the same as that which attaches to private individuals under like circumstances.

[Ed. Note.—For other cases, see States, Cent. Dig. § 140; Dec. Dig. § 144.*]

13. STATES (§ 144*)—NEGOTIABLE PAPER—BONA FIDE PURCHASERS—PRESUMPTIONS.

Holders of negotiable paper issued by the state, in the absence of any showing to the contrary, are presumed to be innocent purchasers for value before maturity, and without notice of any objection to its validity.

[Ed. Note.—For other cases, see States, Cent. Dig. § 140; Dec. Dig. § 144.*]

14. STATES (§ 144*)—NEGOTIABLE PAPER—NOTICE TO BONA FIDE HOLDERS.

When authority to issue negotiable paper in the name of the state exists, neither irregularities nor frauds on the part of the officers or agents of the state intrusted with the exercise of such authority will affect it in the hands of innocent purchasers for value before maturity and without notice.

[Ed. Note.—For other cases, see States, Cent. Dig. § 140; Dec. Dig. § 144.*]

15. STATES (§ 144*)—NEGOTIABLE PAPER—NOTICE OF BONA FIDE HOLDERS.

The state is estopped to deny recitals on the face of negotiable paper in the hands of

innocent purchasers for value before maturity and without notice.

[Ed. Note.—For other cases, see *States, Cent. Dig.* § 140; *Dec. Dig.* § 144.*]

16. STATUTES (§ 119*)—TITLES AND SUBJECTS OF ACTS.

The provision of section 15 of the joint resolution of March 22, 1878 (16 St. at Large, p. 672), declaring certain bonds and certificates of stock of the state, issued after the terms of the officers who executed them had expired, to be in all respects as if they had been issued before the expiration of such terms of office, is germane to the subject expressed in the title, which recites that it is a resolution providing a mode of ascertaining the debt of the state and of liquidating and settling it, and hence the resolution did not violate Const. 1868, art. 2, § 20, requiring the subject of acts to be expressed in their title.

[Ed. Note.—For other cases, see *Statutes, Cent. Dig.* §§ 164-167; *Dec. Dig.* § 119.*]

17. STATES (§ 158*)—BONDS—RATIFICATION OF INVALID BONDS.

The provision of section 15 of the joint resolution of March 22, 1878 (16 St. at Large, p. 672), for ascertaining the debt of the state and liquidating and settling it, that certain bonds and certificates of stock issued after the terms of the officers executing them had expired were thereby declared to be in all respects as if they had been issued before the expiration of such terms of office, was valid, since, there being no constitutional requirement that the bonds or certificates of stock should be issued by any particular officer or person, the Legislature might have provided for their issuance by private individuals as agents of the state, and might ratify such unauthorized issuance.

[Ed. Note.—For other cases, see *States, Cent. Dig.* § 149; *Dec. Dig.* § 158.*]

18. STATUTES (§ 119*)—TITLES AND SUBJECTS OF ACTS.

Act December 20, 1878 (16 St. at Large, p. 704), entitled "An act to extend the time for refunding the unquestionable debt of the state," authorized the refunding until October 21, 1879, of obligations issued prior to January 1, 1866, and no others. Act December 24, 1879 (17 St. at Large, p. 110), entitled "An act to continue in force an act to extend the time for refunding the unquestionable debt of the state," extended the time for refunding obligations, issued prior to January 1, 1866, to October 31, 1880, and also provided for the refunding of obligations issued after January 1, 1866. *Held*, that the provision for refunding obligations issued after January 1, 1866, did not relate to a subject not expressed in the title of the act, contrary to Const. 1868, art. 2, § 20, since the title of the act of 1878 was broad enough to embrace a declaration by the Legislature of what the unquestionable debt of the state consisted, and hence to include such provision, and the act of 1879 was in effect only an amendment of the act of 1878, continuing it in force and extending its provisions to another class of debts.

[Ed. Note.—For other cases, see *Statutes, Cent. Dig.* §§ 164-167; *Dec. Dig.* § 119.*]

19. STATES (§ 115*)—BONDS—TIME FOR PAYMENT—REMOVAL OF LIMITATION.

Act Feb. 25, 1896 (22 St. at Large, p. 183), prohibited the refunding of coupon bonds, and the coupons thereof, after 20 years from the maturity of the bonds. Act Feb. 10, 1912 (27 St. at Large, p. 922), repeals the act of 1896 as to two certain bonds which matured in 1888. *Held*, that the act of 1912 and the refunding of such bonds thereunder did not increase the indebtedness of the state contrary to Const. art. 10, § 11, forbidding the General Assembly to create any further debt or obligation, except

for the ordinary and current business of the state, without submitting the question as to the creation of such debt to the electors, since statutes of limitations do not affect the validity of a debt barred thereby, or the moral obligation to pay it, and the act of 1896 therefore did not destroy any valid bond after the expiration of 20 years from its maturity, but merely prevented the treasurer from refunding it.

[Ed. Note.—For other cases, see *States, Cent. Dig.* § 114; *Dec. Dig.* § 115.*]

20. STATES (§ 165*)—BONDS—PAYMENT—"DATE OF ISSUE."

Under Act Dec. 22, 1892 (21 St. at Large, p. 24), authorizing the issuance of bonds and certificates of stock by the state, and providing that the state reserve to itself the right to call in and pay the whole or any part of the issue, at any time after the expiration of 20 years from the date of issue, the "date of issue" is the date borne by the bonds and stocks, and not the date when they were actually issued, and hence they were all redeemable 20 years after January 1, 1893, the date which all bore, though some were not actually issued until later.

[Ed. Note.—For other cases, see *States, Cent. Dig.* § 157; *Dec. Dig.* § 165.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1831.]

21. STATES (§ 165*)—BONDS—PAYMENT—CANCELLATION.

Act Dec. 22, 1892 (21 St. at Large, p. 24), authorizing an issue of bonds, provided that the Sinking Fund Commission should invest all sums coming into their hands in the bonds issued under that act, hold them as assets of the sinking fund, collect the interest thereon, and reinvest the interest in such consols, so that the sinking fund should be cumulative. It further provided that the state reserved the right to call in and pay the whole or any part of the issue at any time after 20 years from the date of issue. *Held*, that it was only intended to make the sinking fund cumulative until the time arrived for final redemption of the bonds and stocks, for the payment of which it was set apart; and, the state having exercised its option to redeem such bonds and stocks, the commission was not required to longer hold those called for payment as assets of the sinking fund, but should cancel them.

[Ed. Note.—For other cases, see *States, Cent. Dig.* § 157; *Dec. Dig.* § 165.*]

"To be officially reported."

Original action for an injunction by the State, on the relation of W. W. Ray, against Cole L. Blease, Governor, and others, composing the State Sinking Fund Commission. Ordered in accordance with the opinion.

Weston & Aycock, of Columbia, for petitioner. Attorney General Peeples and J. Fraser Lyon, of Columbia, for respondents.

HYDRICK, J. At the session of 1912 the Legislature passed an act entitled "An act to provide for the exercise by the state of its option to call in and pay the whole or any part of the Brown Bonds and Stocks, issued under an act entitled 'An act to provide for the redemption of that portion of the state debt known as the Brown Consol Bonds and Stocks,' by the issue of other bonds and stocks," approved December 22, A. D. 1892." 27 Stat. p. 738. The act provides that the Sinking Fund Commission, which is compos-

ed of the Governor, the State Treasurer, the Comptroller General, the Attorney General, the Chairman of the Committee on Finance of the Senate, and the Chairman of the Committee on Ways and Means of the House of Representatives, shall have authority to exercise the option reserved to the state in the refunding act of 1892 (21 Stat. p. 24) to call in and pay, at the expiration of 20 years from the date of issue thereof, the whole or any part of the bonds and stocks issued thereunder, dated January 1, 1893, and known as Redemption Brown Consols, and, for that purpose, that the commission shall be authorized to issue and sell 4 per cent. bonds and stocks, not exceeding the aggregate outstanding amount of the bonds and stocks that have been or may be issued under said act of 1892, and certain previous refunding acts, which are specifically mentioned.

During the year 1912, the commission passed several resolutions, and took some steps preliminary to carry out the provisions of the act. Hon. W. L. Mauldin, who was chairman of the Committee on Finance of the Senate, died before either of the meetings of the commission herein mentioned was held, and thereby a vacancy in the commission was created. On October 30, 1912, the commission passed a resolution that its clerk ascertain what amount of the sinking fund would be available on January 2, 1913, for retiring the Brown Consols, and that, when the amount was ascertained, "the necessary steps be taken for calling in the bonds to collect the amount thereof to be paid off and retired." That resolution was adopted at a meeting of the commission attended by four of its members, and its validity has not been questioned. On December 2, 1912, in pursuance of that resolution, the State Treasurer, who is the secretary and treasurer of the commission, published over his signature, as State Treasurer and treasurer of the commission, in a financial paper in New York and in two daily papers in this state, a notice to the holders of Redemption Brown Bonds, issued under the act of 1892, and numbered from 3,781 to 4,319, both included, to present the same to him, on January 1, 1913, for payment, and that interest accruing thereon after said date would not be paid.

On December 23, 1912, pursuant to a call of the chairman of the commission, due notice of which was given to each member thereof, the Attorney General, the Comptroller General, the State Treasurer, and Hon. L. J. Browning, who had been, and claimed that he was then, chairman of the Committee on Ways and Means of the House of Representatives, met together as the Sinking Fund Commission, and by unanimous vote passed several resolutions relative to the refunding of the state debt, under the act of 1912, the substance of which was as follows: (1) Ratifying the publication of the notice by the

treasurer above mentioned. (2) Authorizing the Comptroller General to receive proposals, pursuant to published advertisement or otherwise, for the purchase of the issue of bonds and stocks which the commission was authorized by the act of 1912 to issue. (3) That the Comptroller General report to the commission the proposals received, and that the commission sell the bonds and stocks at the best price obtainable, not less than par fiat. (4) That after the completion of said sale, the treasurer call all Redemption Brown Bonds (not already called) for redemption on July 1, 1913, but if said sale should not have been completed by that date, said call should abide the further order of the commission. (5) That the new issue of bonds and stocks should be dated and bear interest from January 1, 1913, specifying the rate of interest, times, and places of payment thereof, and the date of maturity of the bonds and stocks, and the privilege of redemption, according to the terms of the act. The validity of these resolutions is questioned by the petitioner and by some of the respondents, on the ground that, when they were adopted, Mr. Browning's term of office as a member of the House of Representatives had expired, and he was not therefore a member of the commission, and without him there were only three members present, and, as four members were necessary to constitute a quorum, no business could have been lawfully transacted at said meeting. Section 10 of article 3 of the Constitution provides that the terms of office of representatives chosen at a general election shall begin the Monday following such election. Mr. Browning's successor was elected at the general election held on November 5, 1912; therefore it is contended that he was not a lawful member of the commission on December 23, 1912, the date on which the resolutions in question were passed.

On January 6, 1913, this action for injunction was commenced against the former members of the commission to test the constitutionality of the act of 1912, and the authority of the commission thereunder to pay or refund certain outstanding bonds and stocks, which are particularly mentioned in the petition, and the validity of the resolution of December 23, 1912, in order that all questions as to the validity of the bonds and stocks which may be issued by the commission may be finally settled and determined. After the General Assembly had convened, pursuant to the Constitution, and after the state officers, who had been elected at the general election on November 5, 1912, had been inaugurated and qualified, and a Chairman of the Committee on Finance of the Senate and a Chairman of the Committee on Ways and Means of the House of Representatives had been appointed, an order was passed making these new officials parties respondent herein. After returns had been

filed on behalf of all the respondents, the case was referred to Halcott P. Green, Esq., as special referee, to take and report the testimony, together with his findings thereupon.

The referee finds that the allegations or suggestions contained in the return of His Excellency, the Governor, are unsustained, in so far as it is therein alleged or suggested that there was any irregularity or fraud in connection with the refunding of bonds under the act of 1892, or any unfairness, impropriety, illegality, or collusion in connection with any understanding or agreement on the part of the former members of the commission, or any of them, with any person, firm, or corporation relative to the purchase or sale of the bonds and stocks to be issued under the act of 1912, or with reference to the bringing of this action. As the matters referred to do not affect the validity of the bonds and stocks to be issued, and as no exception has been taken to the findings of the referee, we deem it unnecessary to prolong this opinion by a more detailed statement or consideration of them.

[1] It appears that the action of the State Treasurer and Treasurer of the Sinking Fund Commission, in advertising the call for the Redemption Brown Bonds, hereinbefore mentioned, to be presented to him on January 1, 1913, for payment, was based upon and authorized by the resolution of the commission passed at its meeting on October 30, 1912, at which there was a quorum of members whose title to office at that time is unquestioned, and that the resolution of December 23, 1912, so far as that call is concerned, was only an attempt to ratify what he had done. As his action was based upon unquestioned and unquestionable authority, it needed no ratification, which is necessary only when it is sought to validate an act done without authority.

[2, 3] As to the other resolutions of that date, the substance of which has been hereinbefore stated, it need only be said that it appears from their nature that they involve matters of detail which are either fixed by the terms of the act, or such as are within the discretion and judgment of the commission in carrying out the provisions of the act, and are therefore still subject to its orders; but as to matters within their discretion the commission is not subject to the control of the court. Furthermore, it appears that the commission as now constituted, refused to revoke these resolutions, and thereby impliedly ratified them. It follows, therefore, that it is unnecessary to decide whether the resolutions passed at the meeting of December 23, 1912, are valid or not; hence any decision or discussion of the questions involved in that issue would be mere obiter dictum.

[4] The validity of the act is questioned under the allegation that it violates section 17 of article 3 of the Constitution, which

provides that every act shall relate to but one subject, which shall be expressed in its title. The specific objection is that the body of the act provides for the issuance of bonds and stocks, while the title expressed only the subject of providing for the exercise of the state's option to call in and pay certain bonds and stocks. It is argued that the subject of calling in and paying certain bonds and stocks is not broad enough to cover the issuance of refunding bonds and stocks. But the title is broader than the argument assumes. It expresses the subject of making provision for the exercise of the state's option to call in and pay certain bonds and stocks, and whatever the Legislature deemed necessary or proper to make provision to accomplish that purpose is germane to the subject expressed in the title. The issuance of bonds and stocks is the usual method of accomplishing such a purpose, and in this respect the act does not violate the Constitution. *State v. O'Day*, 74 S. C. 448, 54 S. E. 607, and cases cited.

[5] It is next alleged that the act violates section 2 of article 2 of the Constitution, which provides that no person shall hold two offices of honor or profit at the same time. The specific point is that the Sinking Fund Commission is illegally constituted, in that it is composed of public officers. The answer to this objection is that membership in the commission is not an office. It merely involves the discharge of duties imposed by law upon the various officers who compose the commission—duties which are, therefore, merely incident to their respective offices. *State v. Potterfield*, 47 S. C. 75, 25 S. E. 39; *State v. Green*, 52 S. C. 520, 30 S. E. 683.

[6, 7] Without stating in detail the legislation under which the obligations of the state have been funded, consolidated, and refunded from time to time, it will be sufficient, for the purpose of making clear the objections which we shall next consider, to say that since the war between the states there have been three principal issues of bonds and stocks. The first are called Green Consols. These were issued under the act of 1873 (15 St. at Large, p. 518), and subsequent acts amending and extending its provisions. After the greater part of the state debt had been refunded under that act, it was discovered that many of the Green Consols had been issued to redeem bonds and stock which had been issued without authority of law, and were therefore void. After investigation into the validity of the entire debt of the state, the Legislature, in various acts from 1878 to 1880, authorized the issuance of bonds and stocks to take the place of Green Consols found to be valid, and for the refunding of the remaining outstanding valid debt of the state. These bonds were to be of the same kind as Green Consols in every respect material to the present inquiry, except their color. They were colored brown, and are commonly known as Brown Consols.

All Green Consols and Brown Consols matured July 1, 1893. In 1892 the Legislature passed an act entitled, "An act to provide for the redemption of that part of the state debt known as the Brown Consol Bonds and Stocks by issue of other bonds and stocks." 21 Stat. p. 24. The bonds and stocks issued under this act are called Redemption Brown Consols. It will be seen from the title of the act, above quoted, that it contemplated the redemption of only the Brown Consols. But, at the date of its passage, there were still outstanding some Green Consols and some other obligations of the state which had not been refunded, either in Green Consols or Brown Consols, which were, however, still fundable in Brown Consols; hence the act authorized an issue of new bonds and stocks sufficient in amount to redeem all the bonds and stocks of the state which had been or might be issued under the act of 1873, and all subsequent acts authorizing the issue of bonds and stocks. Thereafter, by the act of December 22, 1893 (21 Stat. p. 420), the Legislature authorized the State Treasurer to refund in Redemption Brown Consols the valid principal, with interest to July 1, 1893, of all bonds and stocks then fundable in Brown Consols. Doubtless this act was found to be necessary because of the specific limitation, both in the title and in the body of the act of 1892, of the use of the issue of bonds and stocks therein authorized, and the proceeds of the sale thereof to the redemption of Brown Consols. There are still outstanding certain Green Consols which have not been refunded.

The petitioner contends that the act of 1912 does not authorize the refunding of these outstanding Green Consols for two reasons: (1) Because the body of the act not only does not authorize it, but forbids the refunding of any, except Brown Consols; (2) because, if the body of the act can be properly construed as authorizing the refunding of Green Consols, it violates the Constitution, and is void to that extent, because that subject is not expressed in its title. This contention must be sustained upon both grounds. While the act is by no means as clear as it should have been upon this subject, yet we think, taking all of its provisions together, and considering them in the light of the other act upon the same subject, the intention to be gathered from the language used prohibits the funding of any except the Brown Consols, issued under the act of 1892. The only provisions of the act upon this subject are found in sections 6 and 7. Section 6, after authorizing the sale of the issue by the commission, provides that "the proceeds thereof shall be applied to the payment of the said redemption bonds and stocks, issued under the act of 1892, and the consolidated bonds and certificates of stocks, commonly called Brown Consols, and to no other purpose." Section 7, after providing for the sale and registry of the bonds and

stocks, says, "And the proceeds of such sales shall be kept as a separate fund, to be used exclusively for the final redemption of such Brown Bonds and Stocks issued under the act of 1892, and said consolidated bonds and certificates of stock hereinbefore described as shall not be exchanged for the bonds and certificates of stock, the issue of which is provided for in this act: Provided, however, that the Sinking Fund Commission, if, in their judgment it is best to do so, shall have authority to exchange, in whole or in part, the new four per cent. bonds for Brown Consols upon such terms as may best subserve the public welfare." Counsel for the commission admits that section 6 limits the use of the proceeds of sale to the payment of Redemption Brown Consols, issued under the act of 1892, and to Brown Consols, but they contend that the provision of section 7, above quoted, is inconsistent therewith, and, being last, it should control. But when we construe the provisions of both sections together, in the light of the other parts of the act, as we must, there is no inconsistency. Section 6 refers to two well-known classes of Brown Consols, to wit, Redemption Brown Consols, issued under the act of 1892, and Brown Consols, issued under previous acts. Section 7 refers to the same two classes, first, "such Brown Bonds and Stocks issued under the act of 1892," and second, "said consolidated bonds and certificates of stock hereinbefore described," which can certainly as clearly be referred to the Brown Consols mentioned in section 6 as to any other, and when so referred, there is no inconsistency in the terms of the statute. When there are two possible constructions of the provisions of an act, one of which makes them consistent with each other, and the other makes them inconsistent, the former must be adopted.

[8] While the body of the act does authorize the redemption of both Redemption Brown Consols and Brown Consols, the title specifically limits the act to the redemption of bonds and stocks issued under the act of 1892, namely, Redemption Brown Consols. While the courts construe the provision of the Constitution in question (that an act shall relate to but one subject, which shall be expressed in its title) very liberally to the end that legislation shall not thereby be needlessly hampered and embarrassed, still, when the title of an act definitely and specifically limits its object, as that of the act of 1892 does, to the redemption of a particular and specified issue of bonds, the court must limit the operation of the act to the subject so expressed in the title. Otherwise the provision of the Constitution in question would be set at naught. The Legislature may have had good reasons for limiting the commission to the redemption of the consols issued under the act of 1892. But it is not for us to inquire whether it had any reasons, or whether they were good or bad, or whether the failure to provide for the redemption of all the

outstanding obligations of the state is only a *casus omissus*. In either event we have no power to dispense with the mandate of the Constitution. The commission is therefore limited to the redemption of Redemption Brown Consols issued under the act of 1892.

It is argued, however, that Green Consols are, by the act of 1893, fundable in Redemption Brown Consols, and, this being so, the holders thereof could have them so refunded, and then the commission could refund the latter, and that, as the law does not require the doing of useless things, such circuitous proceedings should be unnecessary. On the other hand, the court cannot sanction the doing of that by the commission which is positively forbidden by the Legislature. Moreover, the commission cannot issue bonds or stocks under the act of 1892. Under that act bonds and stocks were issued by the treasurer. Whether the treasurer can still issue Redemption Brown Consols, under the act of 1892, to refund Green Consols is a question which we are not called upon to answer.

[9] The next question is whether the commission has authority to refund Redemption Brown Consols, issued under the act of 1893, as consols issued under the act of 1892. As we have seen above, the act of 1893 was clearly intended as an amendment supplementing the act of 1892, whereby its scope was enlarged so as to permit the refunding, not only of Brown Consols, but also of all outstanding obligations fundable in Brown Consols. The act specifically requires that the consols issued thereunder shall be of the kind issued under the act of 1892, known as Redemption Brown Consols, and the consols issued under the act of 1893 recite on their face that they were issued under that act. As we shall presently see, the state is estopped to deny that they were so issued.

[10] We proceed next to dispose of the objection to refunding certain bonds and stocks which are made in the following subdivisions of paragraph 20 of the petition:

"20. Certain bonds and stocks about to be refunded under the act of 1912 are not binding obligations of the state, and therefore such refunding will be an attempt to increase the indebtedness of the state for extraordinary purposes without an election, contrary to the provisions of section 11 of article 10 of the state Constitution, for the following reasons [a, b, and j are hereinafter considered]:

"(c) Brown Consols predicated upon the \$19,279.75 bills of the Bank of the State stolen and outstanding at the time of issuance of such Brown Consols, as stated in paragraph 16, are not binding obligations of the state, nor is any bond or stock whose origin is to be traced to said Brown Consols in so far as it rests thereon, because the issuance of said Brown Consols was an attempt to increase the debt of the state for extraordinary purposes, without an election,

contrary to article 16 of the state Constitution of 1868.

"(d) The act entitled 'An act to extend the time within which bills of the bank of the state may be funded, and to provide the manner of funding the same,' approved December 24, 1880, above mentioned in paragraph 17, authorized until July 1, 1881, the presentation of bills of the Bank of the State for examination and exchange for Brown Consols. Section 5 of said act provided as follows: 'That from and after the first day of July, 1881, all action and right of action, claim and demand, whatsoever, upon the obligations of the corporation known as the president and directors of the Bank of the State of South Carolina, and incident to or growing out of said obligations, shall cease and determine, and from thenceforth shall be forever barred.' This act has never been amended or repealed. After July 1, 1881, the end of the period limited by said act, \$36,139.34 of bills were presented, and \$18,069.59 of Brown Consols were issued in exchange. The issuance of said \$18,069.59 of Brown Consols, upon bills of the Bank of the State presented after the time limited for such presentation by the act of December 24, 1880, was unauthorized, and such Brown Consols are not binding obligations of the state, nor are any bonds or stocks resting upon such Brown Consols binding obligations in so far as they so rest."

"(f) In the months of July and September, 1893, but after July 1, 1893, \$1,029.29 of Brown Consols were issued in exchange for other bonds and stocks as shown by the second schedule appended to paragraph 18 hereof, and immediately thereafter were redeemed by exchange for $4\frac{1}{2}$ per cent. Redemption Brown Consols of like amount. As the acts providing for the issuance of Brown Consols directed that they should mature July 1, 1893, and therefore did not authorize the issuance of such Brown Consols after that date, and as the act of 1892, providing for the issuance of $4\frac{1}{2}$ per cent. Redemption Brown Consols, limited to July 1, 1893, the time within which Brown Consols could be exchanged, therefore said \$1,029.29 of Redemption Brown Consols were issued without authority of law, and are not binding obligations of the state. Moreover, the act of 1893 did not authorize the refunding by exchange of Brown Consols surrendered by persons other than the purchasers of the new consols, and said \$1,029.29 of Brown Consols were surrendered by persons other than such purchasers.

"(g) Brown Consols, in the aggregate, amount to about \$706,203.87, issued prior to July 1, 1893, were surrendered, and exchanged for $4\frac{1}{2}$ per cent. Redemption Brown Consols after that date, contrary to the above-mentioned provisions of the act of 1892, limiting the time for such surrender and exchange, and therefore the $4\frac{1}{2}$ per cent. Con-

sols issued in exchange for such Brown Consols were issued without authority of law.

"(h) A number of 4 per cent. Redemption Brown Consols issued under the act of 1889 as amended in 1890 were surrendered after July 1, 1893, and new 4½ per cent. Redemption Brown Consols were issued in exchange. Section 15 of the act of 1892 authorized the surrender of 4 per cent. bonds and the issuance of such 4½ per cent. bonds in exchange therefor 'as provided in this act,' and the limitation of time for surrender and exchange of Brown Consols contained in this act must therefore be applicable also to the surrender and exchange of the 4 per cent. Redemption Brown Consols. The new 4½ per cent. Consols issued in exchange for 4 per cent. Consols surrendered after July 1, 1893, were therefore issued without authority of law.

"(i) At some time between the years 1893 and 1902, at least \$14,500 of 4½ per cent. Redemption Brown Consol Bonds, surrendered and exchanged for stock pursuant to said act of 1892, were not canceled as required by said act, but were stolen by a clerk in the office of the State Treasurer, \$7,000 of said stolen bonds have since been surrendered and exchanged for stock as provided in the act of 1892. Although the Supreme Court has held, in the case of *Ehrlich v. Jennings*, Treasurer, 78 S. C. 269 [58 S. E. 922, 125 Am. St. Rep. 795, 13 Ann. Cas. 1166], that the state was estopped to deny the validity of one of said bonds, which was in the hands of a bona fide purchaser, it has not been established that the others have reached the hands of bona fide purchasers; and, until that fact be established, the issuance of new bonds and stocks, predicated upon such other stolen bonds or stock issued in exchange therefor will be unauthorized by law, and contrary to the provisions of section 11 of article 10 of the state Constitution."

The following principles were established in the Bond Debt Cases, 12 S. C. 200, and the cases of *Robertson v. Tillman*, 39 S. C. 298, 17 S. E. 678, and *Ehrlich v. Jennings*, 78 S. C. 269, 58 S. E. 922, 125 Am. St. Rep. 795, 13 Ann. Cas. 1166:

[11] (1) The refunding of a valid existing debt does not increase the debt of the state, and therefore needs not the sanction of the qualified electors, which is required by section 11 of article 10 of the Constitution before the public debt can be increased.

[12] (2) The liability of the state upon negotiable paper, issued by competent authority, is the same as that which attaches to private individuals under like circumstances.

[13] (3) Holders of such paper, in the absence of allegation to the contrary, are presumed to be innocent purchasers thereof for value, before maturity, and without notice of any objection to which it may be liable.

[14] (4) When authority to issue such paper exists, neither irregularities nor frauds on the part of the officers or agents of the

state who are intrusted with the exercise of such authority will affect it in the hands of such holders.

[15] (5) The state is estopped to deny recitals on the face of such paper in the hands of such holders.

Under the principles above stated, the objection made in each of the foregoing subdivisions must be overruled, because it is not alleged in the petition that any of the holders of the consols which the commission propose to redeem are not innocent purchasers thereof for value, before maturity, and without notice of the defects alleged; nor is it alleged that any of said consols are not rested upon valid debts of the state, or that they were fraudulent or void in their inception. Other reasons might be assigned, but we deem the foregoing sufficient.

[16, 17] The disposition of the remaining subdivisions of paragraph 20 depends somewhat upon other principles besides those above stated.

"(a) Green Consol Bonds and Stocks in the aggregate amount of \$54,800, described by their numbers and denominations in the report of the bond commission, were reported by the bond commission to have been executed and issued after the terms of office of the officials who executed and issued them had expired, as stated in paragraphs 12 and 13, and said consols were therefore not binding obligations of the state. These Green Consols are referred to in the following extract from section 15 of the 'joint resolution providing a mode of ascertaining the debt of the state and of liquidating and settling the same,' approved March 22, 1878: 'That the bonds and certificates of stock and exchange and transfer certificates of stock mentioned in said report as issued by F. L. Cardozo as State Treasurer, the same being signed by D. H. Chamberlain as Governor and countersigned by Thomas C. Dunn as Comptroller General, after the terms of these officials had expired, amounting in the whole to \$54,000, be and the same are hereby declared to be in all respects as if the same had been issued before the expiration of said the terms of office of said officials, and the validity thereof shall be determined as hereinbefore provided. * * *' This provision did not operate to validate these Green Consols because such validation is not expressed in the title of said joint resolution, and because such validation would have increased the indebtedness of the state for extraordinary purposes without an election, contrary to article 16 of the state Constitution of 1868. None of said Green Consols, nor any bond or certificate of stock whose origin is to be traced to said Green Consols, is a binding obligation of the state in so far as it rests thereon.

Under the decisions of this court, construing and applying the provision of the Constitution in question, the title of the joint resolution referred to in this subdivision is clearly

comprehensive enough in the expression of its subject to embrace the validation of the issuance of these consols by the officers named, after the expiration of their terms of office. The subject of the resolution was providing a mode of ascertaining the debt of the state. As to these consols, the mode provided as to the irregularity of their issuance was the declaration, by the Legislature itself, that they were, so far as that matter was concerned, a part of the valid debt of the state, a matter clearly germane to the subject expressed in the title. They were validated only with respect to that irregularity. In all other respects their validity was, by the terms of the resolution, subject to the investigation and decision of the court of claims, just as if they had been issued by said officials while in office. There was no requirement of the Constitution that they should be issued by any particular officer or person. Therefore it was competent for the Legislature to provide that they should be issued by private individuals, as the agents of the state; and, of course, it had the power to ratify what it could have authorized in the first instance. Morton, Bliss & Co. v. Comptroller General, 4 S. C. 430.

[18] It is not alleged that these consols were not rested upon valid debts of the state. If they were, as we have seen, the refunding of them did not increase the debt of the state.

"(b) The act entitled 'An act to extend the time for funding the unquestionable debt of the state,' approved December 20, 1878 (16 St. at Large, p. 704), above mentioned in paragraph 14, authorized the refunding, until October 31, 1879, of obligations issued prior to January 1, 1866, and no others. The act entitled 'An act to continue in force an act to extend the time for funding the unquestionable debt of the state,' approved December 24, 1879 (17 St. at Large, p. 110), above mentioned in paragraph 15, authorized the refunding, until October 31, 1880, of obligations issued prior to January 1, 1866, and also obligations issued after that date which should be found valid by Special Commissioner Colt. The subject of refunding obligations issued after January 1, 1866, is not expressed in the title of the latter act, as required by section 20 of article 2 of the state Constitution of 1868, and therefore no Brown Consols issued for such refunding pursuant to said act, nor any bond or certificate, whose origin is to be traced to said Brown Consols, is a binding obligation of the state in so far as it rests thereon."

Neither the title of the act of 1878, nor that of 1879, mentions any particular debt of the state, the time for the refunding of which was extended. In both the unquestionable debt of the state was the subject of the extension, without regard to whether it was issued before or after 1866. The subject expressed in the title of the act of 1878 is clearly broad enough to embrace the declaration

by the Legislature, in the body of the act, of what the unquestionable debt of the state consisted, which at the date of that act was confined to obligations issued prior to January 1, 1866. If at that time there had existed a class of obligations issued after January 1, 1866, which were considered unquestionable, it is clear that provision might have been made for refunding them also. If so, it is equally clear that it could have been made thereafter by amendment of the act; and the act of 1879 is, in effect, only an amendment of the act of 1878 (which was intended to be only of temporary force), continuing it in force and extending its provisions to another class of debts, to wit, those issued subsequent to January 1, 1866, which had been investigated and found to be valid by the special commissioner. It follows that this objection cannot be sustained.

"(e) The act of 1892, after authorizing the sale of the 4½ per cent. Redemption Brown Consols 'at not less than par or face value,' and directing the application of the proceeds thereof to the payment of the Brown Consols, and to no other purpose, authorized and required the State Treasurer to receive from the 'purchasers' of the new consols, who should surrender Brown Consols before July 1, 1893, all such consols tendered by them, and to issue new 4½ per cent. consols of equal face value in lieu of and in exchange for Brown Consols so surrendered. It was further provided that the 'holders' of the 4 per cent. Redemption Brown Consols should have the right to surrender them and receive in exchange therefor 4½ per cent. Redemption Brown Consols of equal face value 'as provided in this act.' The supplementary act of December 22, 1893, provided for surrender by the holders of all bonds and stocks refundable in Brown Consols and the issuance of 4½ per cent. Redemption Brown Consols directly in exchange therefor upon the same terms upon which they were refundable in Brown Consols. \$5,401,955.86 of the 4½ per cent. Redemption Brown Consols now outstanding were issued in the fiscal year ending October 31, 1893, and the remaining \$220,556.11 were issued subsequently. Of the former \$5,250,000 were issued to a purchasing syndicate pursuant to a contract made in March, 1893, \$150,926.57 were issued to holders of 4 per cent. consols in exchange for a like amount of such consols, and \$1,029.29 were issued to holders of Brown Consols issued after July 1, 1893, in exchange for a like amount of such consols, making a total of \$5,401,955.86. The syndicate purchased the new consols at 'par flat'—that is, at the face value—without including accrued interest, and made payment of \$2,929,596.74 in cash and \$2,320,403.26 in Brown Consols of equal face value, making a total of \$5,250,000. The bonds issued to the purchasing syndicate and paid for in cash were issued at various times, beginning May 16, 1893, and ending July 8, 1893. The bonds

issued to the purchasing syndicate and paid for in Brown Consols were issued at various times, beginning May 16, 1893, and ending July 10, 1893. The \$5,250,000 of Redemption Brown Consols issued to the purchasing syndicate exceeded, by \$20,113.80, the amount (\$5,229,886.20) of Brown Consols then outstanding and refundable under the act of 1892, as shown by the first schedule appended to paragraph 18. This overissue was due to the fact that in estimating the amount of Brown Consols to be redeemed on July 1, 1893, the date of their maturity, the officers who made the contract with the purchasing syndicate allowed some margin for such Brown Consols as might be issued between the date of the contract and July 1, 1893 (there being still outstanding many bonds and stocks exchangeable for Brown Consols), and the amount of Brown Consols issued during such period was not as large as was expected. Of the \$2,929,596.74 in cash received in 1893 from the purchasing syndicate for Redemption Brown Consols, sold as aforesaid, the sum of \$1,746.65 still remains in the treasury; the sum of \$20,919.51 was applied in 1894 to the payment of Green Consols (without authority of law), and the remainder of the cash received from the purchasing syndicate was applied to the payment of Brown Consols. The issuance of said \$20,113.80 of Redemption Brown Consols in excess of the amount of Brown Consols refundable under the act of 1892 was not authorized by the act of 1892, and was an attempt to increase the debt of the state without an election, in violation of section 11 of article 10 of the state Constitution of 1895. Said \$20,113.80 of invalid consols were among \$22,525.55 of consols issued on July 5, 6, and 8, 1893 (after issuance of all other consols sold to the syndicate and paid for cash); and, as they cannot be distinguished by date of issue from the remaining portion of said \$22,525.56 of consols, all of said \$22,525.56 of consols must be deemed invalid."

State Treasurer's Report for 1893, pp. 7, 8, 114.

The following finding of the referee, as to the allegations contained in this subdivision, to which no exception has been taken, show that this ground of objection cannot be sustained.

"I therefore conclude as matter of fact: (1) That there was no overissue of Redemption Brown Consols under the act of 1892, and that the entire proceeds of said issue of bonds, with the exception of the sum of \$1,746.65, now in the state treasury, has been used in the payment, redemption, and retiring of Brown Consols and 4 per cent. Brown Redemption Consols. (2) That no part of the said sum of \$20,113.80, being the difference between the proceeds of sale of the Redemption Brown Consols and the amount of outstanding Brown Consols refundable under the act of 1892 as shown by the treasurer's report and alleged in said subdivision (e) of

said paragraph 20 of petition, was used in the payment or redemption of Green Consols, but that the whole of said sum, with the exception of the amount now remaining in the treasury, was used for the payment, redemption, and retiring of Brown Consol Bonds and Stocks."

[19] "(j) In the present year, \$1,160 of Redemption Brown Consols, were issued in exchange for coupon bonds and coupons of the issue known as Funding Bills of the Bank of the State Bonds, pursuant to an act passed in January, 1912 (27 Stat. p. 922). As said bonds matured in 1888, they and the coupons thereof ceased in 1908 to be debts of the state, by reason of the act approved February 25, 1896 [22 St. at Large, p. 183], entitled 'An act to limit the time in which coupon bonds payable to bearer and their coupons of the state may be consolidated, converted, funded or paid, and to repeal conflicting laws,' which act prohibits the refunding of coupon bonds and coupons thereof after the expiration of 20 years from the date of maturity of such bonds. The attempt to revive said debts by said act of 1912, and the refunding thereof by exchange for Redemption Brown Consols, constituted an attempt to increase the indebtedness of the state without an election, in violation of section 11 of article 10 of the state Constitution, and therefore said \$1,160 of Redemption Brown Consols are not binding obligations of the state."

The effect of the act of 1893 was not to destroy any valid bond debt of the state, after the expiration of 20 years from the maturity of such bond; but it was merely to prevent the treasurer from refunding any such bond after the lapse of that time. It is a well-settled principle of law that the fact that a debt may be barred by a statute of limitations does not affect its validity, or the moral obligation to pay it. It is none the less a debt. The only effect of such a statute is to close the door of the opportunity afforded by the law to collect it. Therefore providing for the payment or refunding of such a debt does not increase the debt of the state. In numerous other instances mentioned in the petition the bar of a statute was removed by subsequent legislation.

[20] The petitioner's next contention is that, though the consols issued under the act of 1892 are all dated January 1, 1893, they were not actually issued until later dates, and as the act reserves to the state the right to redeem at any time after 20 years from "the date of issue," the commission have no right to call and redeem them until after 20 years from the dates when they were actually issued. The phrase "date of issue" means the date which the bonds and stocks bear, and not the date when they were actually issued, in the sense of being signed and delivered and put into circulation.

[21] The act of 1892 provides that the

Sinking Fund Commission shall invest all sums which may come into their hands from time to time in the consols issued under that act, and hold same as assets of the sinking fund, collecting the interest thereon, and re-investing the same in said consols, so that the sinking fund should be cumulative. Petitioner therefore contends that the commission have no right to cancel the Redemption Brown Consols which they have called for payment, but should hold the same as assets of the sinking fund under the aforesaid provision of the act. That provision of the act was intended to make the sinking fund cumulative only until the time should arrive for the final redemption of the bonds and stocks for the payment of which it was set apart, when, of course, it was intended that it should be used for that purpose. That time has arrived, and, by the express terms of the act, the state now has the right to call in and pay or redeem the whole or any part of the bonds and stocks issued under that act. Therefore the commission should cancel the bonds and stocks so redeemed.

It is therefore ordered that the commission be at liberty to carry out the provision of the act of 1912 in accord with the views and principles herein announced.

WATTS, J. While I do not think there was a quorum present at the meeting on December 18, 1913, as Hon. W. L. Mauldin, Chairman of Finance Committee of the Senate, was dead, and Hon. S. J. Browning's, Chairman of Ways and Means Committee of the House of Representatives, term had expired, his successor elected as a representative, yet for the reasons given by Mr. Justice HYDKICK I think this was not fatal, and I concur in the result of his opinion.

GARY, C. J., and FRASER, J., concur

TURNER v. DAVIS et al.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. PLEADING (§ 343*)—JUDGMENT ON PLEADINGS.

Where an order had been made by the clerk, to which no exception was taken, setting aside a default judgment for plaintiff in partition, and proceedings thereafter affecting the rights of defendants, and an answer was on file raising an issue of fraud, plaintiff was not entitled to a judgment upon the whole record, on the theory that the clerk could not make the order more than a year after the date of the judgment set aside.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.*]

2. JUDGMENT (§ 386*)—OPENING AND VACATING—FRAUD IN PREVENTING DEFENSE.

Under Revisal 1905, § 2494, providing that any party, after confirmation of a report of commissioners appointed to partition land, may impeach the proceedings and decrees for mistake, fraud, or collusion by a petition in the

cause, the clerk of the superior court was authorized to set aside, on motion of defendant, a judgment in partition proceedings, and allow defendant to file his answer, where defendant was prevented by fraud of plaintiff from defending the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 735-744; Dec. Dig. § 386.*]

3. DEEDS (§ 211*)—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence, in a partition proceeding, held to sustain a finding by the jury that a deed from defendant to plaintiff for a one-fifth interest in the land was procured by fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

Appeal from Superior Court, Nash County; Cline, Judge.

Suit for partition by Wiley T. Turner against Martha Ann Davis and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

This is a proceeding for partition of land, the plaintiff claiming to be the owner of an undivided one-fifth interest, under a deed executed by Martha Ann Davis and her children, all of whom are defendants. The summons was served on the 10th day of February, 1910, and within 10 days thereafter the plaintiff filed his complaint. The defendants filed no answer or demurrer to the complaint, nor did they enter an appearance in the proceeding until the 17th day of July, 1911, or about 17 months after the judgment had been entered adjudging the plaintiff to be the owner of one-fifth undivided interest in the land, and appointing commissioners to make partition thereof. On the 17th day of July, 1911, the defendants made a motion before the clerk of the superior court to set aside the decree adjudging the plaintiff to be the owner of an undivided one-fifth interest in the land and appointing commissioners to assign to him the same, alleging that the plaintiff had procured the deed from them by fraud, and that they were prevented by the fraud of the plaintiff from appearing and defending in said proceeding. The clerk allowed the motion as to the one-fifth of the land allotted to the plaintiff, and said defendants filed an answer, alleging that the deed to the plaintiff was procured by fraud, to which no exception was taken. The proceeding was then transferred to the civil issue docket, and when called for trial, the plaintiff moved for judgment on the whole record, for that the court was without jurisdiction or power, by a motion in the cause, to set aside the order of the clerk fixing the rights of the plaintiff in the land after the expiration of more than one year from date of the decree. The motion was overruled, and the plaintiff excepted. At the conclusion of the evidence, the plaintiff requested his honor to charge the jury that there was no evidence of fraud, which was refused, and the plaintiff excepted. The jury answered the issue of fraud in favor of the defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ants, and from the judgment rendered the plaintiff appealed.

T. T. Thorne, of Rocky Mount, for appellant. M. V. Barnhill and Jacob Battle, both of Rocky Mount, for appellees.

ALLEN, J. [1, 2] The court could not, in any event, have granted the motion of the plaintiff for judgment upon the whole record, because an order had been made, to which no exception was taken, setting aside all orders in the proceeding affecting the rights of the defendants, and an answer was on file raising an issue of fraud, but we are also of opinion that the order of the clerk was fully authorized by Revisal, § 2494, which, after providing for confirmation of the report of commissioners appointed to divide land in partition proceedings, says: "Provided, that any party, after confirmation, may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause."

[3] The exception that there is no evidence of fraud in procuring the execution of the deed under which the plaintiff claims is without merit. There is evidence that the defendants had employed the plaintiff to get them a deed for the land; that he came to them and asked them to sign a paper, which he said it was necessary for them to sign before they could get a deed and which was the deed under which the plaintiff claims; that he was asked to read the paper, and he said it was not necessary, and that he would not wrong the defendants out of anything; that the defendants did not know they were signing a deed; that the plaintiff paid nothing for the land; and that he denied to the defendants claiming any interest in the land after the execution of the deed.

There was evidence to the contrary, but we cannot pass on the weight of the evidence. No error.

WINSLOW v. WHITE.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. VENDOR AND PURCHASER (§ 13*)—VALUABLE CONSIDERATION—MARRIAGE.

Marriage is a valuable consideration for a contract for the sale of land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 14; Dec. Dig. § 13.*]

2. VENDOR AND PURCHASER (§ 13*)—CONTRACT—REQUISITES AND SUFFICIENCY.

A contract providing that, if W. would marry the daughter of the party executing it and be good and kind to her, such party would give W. certain land described was an agreement in consideration of marriage to convey such land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 14; Dec. Dig. § 13.*]

3. VENDOR AND PURCHASER (§ 22*)—CONTRACT—DESCRIPTION OF PROPERTY.

In a contract to convey land, a description of it as a strip of land lying between the lane

running through the farm and the lead ditch running through the J. P. W. farm, known as "the middle slipe," beginning at the main road and running parallel lines to the back line, sufficiently described the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

4. FRAUDS, STATUTE OF (§ 104*)—REQUISITES AND SUFFICIENCY OF WRITING—TIME OF EXECUTING.

Where long subsequent to a parol contract to convey land a written agreement to the same effect was executed, this was a sufficient memorandum within the statute of frauds requiring contracts concerning land to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 209; Dec. Dig. § 104.*]

5. SPECIFIC PERFORMANCE (§§ 28, 59*)—CONTRACTS ENFORCEABLE—CERTAINTY.

Where a written agreement provided that, if plaintiff would marry defendant's daughter and be good and kind to her, defendant party would convey a tract of land to plaintiff, the stipulation that plaintiff should be good and kind to defendant's daughter did not render the agreement too indefinite and uncertain to be specifically enforceable, nor was it a condition precedent covering the entire period of the married life of the parties, but was only a condition subsequent.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68, 181; Dec. Dig. §§ 28, 59.*]

6. VENDOR AND PURCHASER (§ 51*)—CONTRACT—CONSTRUCTION.

In determining the meaning of a stipulation in an agreement to convey land in consideration of the marriage of plaintiff to defendant's daughter, that plaintiff should be good and kind to her, the language of the stipulation, the relationship and evident purpose of defendant to provide for the support and kind treatment of his daughter, and the attendant circumstances were all proper for consideration.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 82; Dec. Dig. § 51.*]

Appeal from Superior Court, Perquimans County; Whedbee, Judge.

Action by W. O. Winslow against T. W. White. Judgment for plaintiff, and defendant appeals. Affirmed.

The suit, instituted in 1912, was to enforce the specific performance of an agreement to convey a tract of land; the instrument being in terms as follows: "State of North Carolina, Perquimans County. February 10th, 1904. This is to certify that, if Oscar Winslow will marry my daughter, Lily, and be good and kind to her, I hereby agree to give him all that strip of land lying between the lane running through the farm and the lead ditch running through the J. P. Winslow farm, known as the middle slipe, beginning at the main road and running parallel lines to the back line, estimated at valuation of 2,000 (two thousand). To have and to hold. Witness my hand. T. W. White. [Seal.]"

Plaintiff, a witness in his own behalf, testified as follows: "That he married the daughter of the defendant in 1904; that the agreement set out in the complaint was made before the marriage in 1904, but that the paper writing was actually written and delivered in the spring of 1912; that the parol

bargain was that the defendant would give the plaintiff \$1,500 if he would marry his daughter, and later it was changed, plaintiff saying he would give defendant the middle-slope of land and build a house on it. The marriage took place about three or four weeks after the bargain was made, and after the marriage a house was built upon the piece of land. That since the marriage plaintiff and his wife have lived together as man and wife, and that he has always been kind to her." Upon this, the evidence chiefly relevant, the court charged the jury, if they believed the evidence, they would answer the first issue, "Yes," and the second issue, "Yes, by marrying the daughter of defendant and living with her and treating her good and kind." Defendant excepted.

Verdict was rendered as follows: "(1) Did the defendant the ——— day of April, 1912, execute and deliver to plaintiff the paper writing, dated February 10, 1904, marked 'Exhibit A,' in accordance with a parol contract made in 1904, as alleged? Ans. Yes. (2) Has the plaintiff complied with the terms of said contract? Ans. Yes, by marrying the daughter of defendant and living with her and treating her good and kind up to the present date. (3) What damages is plaintiff entitled to recover of defendant for rent of said land? Ans. Nothing, for that plaintiff admits that he is indebted to defendant in a sum equal to the rent of said land for the year 1912." Judgment on verdict that defendant convey the land subject to condition that plaintiff will support the wife and always be good and kind to her, etc.

Chas. Whedbee, of Hertford, and Ward & Thompson, of Elizabeth City, for appellant. E. F. Aydlett, of Elizabeth City, for appellee.

HOKE, J. (after stating the facts as above). [1] It is well recognized that marriage is to be regarded and dealt with as a valuable consideration. *Gurvin v. Cromartie*, 33 N. C. 174, 53 Am. Dec. 406; *Page on Contracts*, § 299; 1 *Bishop on the Law of Married Women*, § 775. In this last citation the author quotes from *Johnston v. Dillard*, 1 Bay (S. C.) 232, in which marriage was said to be "the highest consideration known in law," and in the case it was further said to be "a consideration good against creditors unless done with fraudulent intent." And also from my Lord Coke as follows: "If a man had given land to a man with his daughter in frank marriage, generally a fee simple would pass without the word 'heirs,' for there is no consideration so much respected in law as the consideration of marriage in respect of alliance and posterity."

[2, 3] 2. The instrument contains an agreement on such a consideration to convey a tract of land sufficiently described.

[4] 3. The written agreement though executed long after the contract between the parties, which had been made by parol, is a sufficient memorandum to meet the provisions of our statute of frauds requiring contracts concerning land to be in writing. *Magee v. Blankenship*, 95 N. C. 563; 29 A. & E. p. 854. On the verdict, therefore, and under our decisions, the record presents a case calling for a decree for specific performance, the judgment entered in the cause. *Combes v. Adams*, 150 N. C. 64, 63 S. E. 186; *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141; *Price v. Price*, 133 N. C. 494, 45 S. E. 855; *Boles v. Caudle*, 183 N. C. 528, 45 S. E. 835.

[5, 6] It was chiefly objected for defendant that this relief was not open to plaintiff by reason of the stipulation also appearing in the instrument that plaintiff, the obligee, should be good and kind to the daughter. The position being that this stipulation rendered the agreement too indefinite and uncertain to permit the remedy sought in this case and in any court; second, that the same should be construed as a condition precedent covering the entire period of the married life of the parties. We would be most reluctant to adopt either of these views, tending as they do in the one case to invalidate the instrument and in the other to defeat its evident and controlling purpose, and having due regard to the language of this stipulation, the relationship and evident purpose of the obligor, to provide for the support and kind treatment of his daughter in her married life, and the attendant circumstances of the transaction, all of them proper to be considered in arriving at the intent of the parties as expressed in the entire instrument. *R. R. v. R. R.*, 147 N. C. 368-382, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363; *Merriam v. U. S.*, 107 U. S. 441, 2 Sup. Ct. 536, 27 L. Ed. 531. We are of opinion that the learned judge who tried the cause has given the correct construction to the agreement in holding this feature of it to be a condition subsequent, and as such directing that the same be incorporated in the deed to be made by defendant. Such an interpretation sufficiently satisfies the language of the provision, will best effectuate the purpose of the parties, and is in accord with our decisions more directly relevant to the question presented. *Helms v. Helms*, 137 N. C. 206, 49 S. E. 110.

We find no reversible error in the record, and the judgment as entered is affirmed.

No error.

BRINKLEY v. KNIGHT et al.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. MALICIOUS PROSECUTION (§ 34*)—RIGHT TO SUE—TERMINATION OF PROSECUTION.

Before an action for malicious prosecution can be instituted, the proceedings on which it is based must have terminated.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 70; Dec. Dig. § 34.*]

2. MALICIOUS PROSECUTION (§ 35*)—RIGHT TO SUE—TERMINATION OF PROSECUTION.

Plaintiff was arrested in January, 1911, on a complaint of defendant K. before a justice, and, the venue having been changed, plaintiff was discharged by the constable on the failure of the justice to appear on the date set for trial, whereupon plaintiff sued for malicious prosecution on February 7th following. On March 11th plaintiff moved in the original case to tax costs against defendant K., and that plaintiff be formally discharged. This motion was granted on March 15th, after which K. appealed to the superior court, where the case was remanded to the justice, with direction that he forthwith proceed to try the case or otherwise dispose of it, after which, at K.'s request, the costs of the criminal case were taxed against her. *Held*, that the criminal prosecution had not terminated when the action for malicious prosecution was instituted, and that it was therefore not maintainable.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 71-77; Dec. Dig. § 35.*]

Appeal from Superior Court, Gates County; Long, Judge.

Action by Richard Brinkley against Addie R. Knight and another. Judgment for plaintiff, and defendants appeal. Reversed.

The action, instituted on February 7, 1911, against both defendants, was for malicious prosecution, and, on averment duly made that Addie R. Knight had wrongfully sued out justice's criminal warrant and caused arrest of plaintiff for entering on the lands of said Addie R. Knight, after being forbidden, and that the other defendant had instigated and abetted said prosecution. Nonsuit having been taken as to defendant Knight, the cause was tried on issues as to liability of the other defendant, and the following verdict rendered: "(1) Did the defendant cause the wrongful prosecution of the plaintiff, or assist in same, as alleged? Ans. Yes. (2) If so, was such arrest and prosecution without probable cause? Ans. Yes. (3) Was such arrest and prosecution malicious? Ans. Yes. (4) Was such arrest and prosecution terminated at the time this action was commenced? Ans. Yes. (5) What damage, if any, is plaintiff entitled to recover? Ans. \$225." Judgment on verdict for plaintiff, and defendant excepted and appealed.

Winston & Biggs, Ward & Thompson, of Elizabeth City, Ward & Grimes, of Washington, N. C., and Chas. Whedbee, of Hertford, for appellants. Bond & Bond, of Edenton, and Smith & Banks, of Gatesville, for appellee.

HOKE, J. [1] It is the well-established position that, before an action for malicious prosecution can be instituted, it is necessary that the proceedings upon which it is based should have been properly terminated. *Wilkinson v. Wilkinson*, 159 N. C. 266, 74 S. E. 740, 39 L. R. A. (N. S.) 1215; *Stanford v. Grocery Company*, 143 N. C. 419, 55 S. E. 815; *Welch v. Cheek*, 125 N. C. 353, 34 S. E. 531; *Hatch v. Cohen*, 84 N. C. 602, 37 Am. Rep. 630; *Rice v. Ponder*, 29 N. C. 390; *Murray v. Lackey*, 6 N. C. 368.

[2] After giving the case most careful consideration, we are of opinion that the facts in evidence as they are now presented do not bring the plaintiff's cause within the principle. From these facts it appears that in January, 1911, Mrs. Addie R. Knight, on affidavit, procured from a justice of the peace, G. C. Hobbs, a criminal warrant, charging present plaintiff, Richard Brinkley, with entering on her land after being forbidden, etc., etc.; that said warrant was duly returned the following day before said justice, when, on affidavit of said Brinkley, the cause was removed before another justice, C. M. Manning, to be heard a few days later at the same place. At said date and place the parties were duly present with their witnesses, and, the justice having failed to appear, the constable, at the instance of counsel for Brinkley, made the announcement that, "if any one desired to prosecute Brinkley, they must do so or he would be released," and said constable then and there told Brinkley he was released. The present action was then commenced, as stated, on February 7, 1911. "On 11th of March Richard Brinkley moved in said original cause and served a notice upon Addie R. Knight that on the 15th day of March, 1911, he would move the court to tax the cost in that action, and that the defendant be formally discharged. On 15th of March, 1911, the justice of the peace, Manning, heard the motion and discharged the said Brinkley and taxed the cost against the defendant Addie R. Knight. Said Addie R. Knight appealed from said judgment, and the same was heard at the spring term, 1911, of Gates superior court, which was some time in April. At said term the cause was remanded to the justice of the peace, with the direction that he forthwith proceed to try the case or otherwise dispose of it. Subsequent to said time the said Manning, J. P., at the request of the said Addie R. Knight, taxed her with the cost of the action."

It is thus shown that the criminal prosecution on which the present action is predicated had not been terminated on February 7, 1911, the date of commencement of this suit, but was recognized by the parties as existent at least two months after that date and was so declared by the superior court to which the cause had been carried

by appeal of the prosecutrix on the question of costs. It is true that, in several of our decisions, notably in *Rice v. Ponder*, and *Murray v. Lackey*, supra, it was held that, when a defendant in a criminal prosecution had given bond to appear before the superior court and answer the charge and has so appeared and attended throughout the term, no further order or action having been taken in the cause, such prosecution may be considered as terminated within the meaning of the rule; but they were cases returnable to superior court, having stated terms, and in which the defendants had met every requirement of their bonds, and there was no longer any suit or process against them. But here was an action, as stated, of which the justice's court had final jurisdiction, in which the affidavit and warrant and order of removal before another justice were equivalent to an indictment pending, and, unless ended by order of the justice's court or some unequivocal act of the prosecutor or by lapse of time, it should not be considered as terminated. This was evidently the view taken by plaintiff and his counsel, for in their notice given in March, 1911, more than a month after action instituted, they notified the prosecutrix that they would move on March 15th, before the justice, to have the costs taxed against her and that the defendant therein be formally discharged, and, after appeal and order of superior court, remanding the cause, the present plaintiff was formally discharged from further prosecution of the criminal case. We are of opinion that on the record there was error in refusing the defendant's motion to nonsuit, and the same will be allowed.

Error.

M. H. WHITE & CO. v. WINSLOW & WHITE.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. CHATTEL MORTGAGES (§ 138*)—LIEN—SCOPE.

A tenant, having mortgaged his cotton crop to plaintiff to secure advances, subject to the landlord's lien for rent, purchased a horse from defendants on credit, on defendants' agreement to sell the horse to the tenant, provided the landlord would release his lien on one bale of cotton. This the landlord did. The tenant raised 13 bales on the land, one of which was delivered by the tenant to defendants at the landlord's direction. *Held*, that the landlord's release of his lien on the one bale was not a relinquishment of any part of his rent, nor an assumption of liability by him for any part of the price of the horse as an advancement to the tenant, and hence such release did not impair the lien of plaintiff's chattel mortgage, which thereupon became a first lien on the bale released.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. § 138.*]

2. LIENS (§ 13*)—TRANSFER—ASSIGNMENT OF DEBT.

While one having a lien may release it to one claiming an interest or junior lien on the property, the lien is so far an incident of the debt which it secures that it cannot be assigned without at the same time transferring the debt, or at least a part thereof which the lien secures.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. § 17; Dec. Dig. § 13.*]

Appeal from Superior Court, Perquimans County; Whedbee, Judge.

Action by M. H. White & Co. against Winslow & White. Judgment for defendants, and plaintiff appeals. Reversed.

This action was brought to recover the value of a bale of cotton, alleged to have been unlawfully converted by the defendant. These are the facts: William Maddrey leased a piece of land to Ferdinand Gregory for the year 1911, reserving a certain rent. The tenant mortgaged his crop to the plaintiff, M. H. White & Co., to secure advances made by them to him, and which constituted a second lien upon the crop, or, in other words, a lien subject to the rights of the landlord. The tenant then applied to the defendants, Winslow & White, to purchase a horse from them, and they agreed to sell him the horse if the landlord would sign the following release: "I hereby release to Winslow & White my claim under landlord and tenant act on the crops of Ferdinand Gregory, to be grown in the year 1911 on my lands, to the amount of one bale of cotton weighing not less than five hundred pounds." The release was executed by the landlord, William Maddrey, and the horse delivered to the tenant, Ferdinand Gregory. The latter made 13 bales of cotton on the land, and in the fall, he and his landlord had a full settlement, whereupon Maddrey directed his tenant to deliver one bale of cotton to the defendants which was done. The court held that plaintiffs could not recover, and they appealed.

P. W. McMullan, of Hertford, for appellants. Chas. Whedbee, of Hertford, for appellees.

WALKER, J. (after stating the facts as above). [1] It will be seen that the landlord never relinquished any part of his rent, nor did he assume any liability for the price of the horse as an advancement to his tenant. He merely released his lien to the extent of 1 bale of cotton, without specifying which one of the 13. The defendants looked solely to the tenant for payment of the price, though they may have relied upon any lien acquired by the transaction, but this lien was manifestly subject to the prior right of the plaintiffs. No title to the bale of cotton passed to defendants by virtue of the release of the landlord, nor did it vest any lien in them. Their lien, if any, was given by the tenant, and the landlord simply

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

released his prior lien, transferring it to the remaining 12 bales of cotton. This is the legal and actual nature of the transaction. It is perfectly evident that the landlord did not intend to part with any of his rent in favor of the defendants. All he did was to withdraw his lien from the 1 bale, and accept the 12 remaining bales as the only security for his rent. He did not impair the next prior right of plaintiffs, as second lien-ees, by merely removing his lien from the one bale of cotton, but, on the contrary, made it the first lien thereon. The principle of *Powell v. Perry*, 127 N. C. 22, 37 S. E. 71, therefore does not apply. In that case it was held that a lien may accrue for supplies, either paid for by the landlord, or advanced at his request and upon his credit. The whole theory of the defendants is based upon the wrong assumption that the landlord became, in any way, responsible for the price of the horse, so as to bring the case within the above decision. The distinction between releasing a lien and giving one must be very clear. Defendants acquired a lien by the delivery of the bale of cotton, but their right was derived from the tenant, and the landlord's release merely discharged his prior incumbrance, thereby making the second lien of plaintiffs effective.

[2] There is another view which occurs to us. A lien is so far an incident of the debt which it secures that it cannot be assigned without, at the same time, transferring the debt, or at least some part of it, which was not done here. 25 Cyc. 678. It was held in *Buckner v. McIlroy*, 31 Ark. 631, that "while a party holding a debt secured by lien cannot convey the lien to a stranger, without also assigning the debt, he may release the lien upon the property to one claiming an interest or junior lien on the property." The landlord surely has assigned no part of his debt for the rent.

It follows that defendant took the bale of cotton subject to plaintiffs' prior lien, and the court erred in not so holding.

Reversed.

SPRUILL v. BANK OF PLYMOUTH et al.
(Supreme Court of North Carolina. Sept. 10, 1913.)

1. BANKS AND BANKING (§ 154*)—ACTION BY DEPOSITOR—NECESSARY PARTIES DEFENDANT.

In an action by a depositor against a bank to recover the amount of a check, paid by the bank after notice not to do so, the payee of the check is not a necessary party, where plaintiff claimed no relief against him, and the bank alleged that it was not notified, and therefore paid the check properly, since if it paid the check properly it would have no cause of action against the payee.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. § 154.*]

2. APPEAL AND ERROR (§ 962*)—PARTIES (§ 51*)—BRINGING IN PROPER PARTIES—DISCRETION OF COURT.

If the payee of the check be considered a proper party, it was discretionary with the court whether he should be made a party at the instance of the bank, and the dismissal of the action as to the payee is not reviewable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3838; Dec. Dig. § 962;* *Parties*, Cent. Dig. §§ 77-82; Dec. Dig. § 51.*]

3. APPEAL AND ERROR (§ 79*)—DECISIONS REVIEWABLE—DISMISSAL OF CODEFENDANT.

An appeal from the dismissal of a codefendant, from whom appellant claimed relief, is premature, and must be dismissed, as appellant should have waited until the final determination of the case before appealing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 484-493; Dec. Dig. § 79.*]

Appeal from Superior Court, Washington County; Whedbee, Judge.

Action by Julian Spruill against the Bank of Plymouth and another, in which U. S. Jackson was joined as a defendant on application of the defendants. From a judgment dismissing the action as to Jackson, the defendants appeal. Appeal dismissed.

This action was commenced against the Bank of Plymouth and Clarence Latham, before a justice of the peace, to recover the sum of \$200. On the return day of the summons the defendant bank and Latham moved that U. S. Jackson be made a party, and that summons issue to Pitt county, the residence of said Jackson. The motion was granted, and the case continued. On the return day the defendant Jackson, through his counsel, entered a special appearance and moved to dismiss the action, for that the justice did not have jurisdiction over the defendant Jackson and the joining of Jackson was a fraud upon the jurisdiction. The justice reserved his ruling upon the motion until he heard the evidence. After hearing the evidence he overruled the defendant Jackson's motion, but dismissed the action upon the merits. Thereupon the plaintiff gave notice of appeal, and the case was heard by his honor, W. H. Whedbee, at the April term, 1913, of the superior court. Upon the calling of the case the defendant Jackson, through his counsel, renewed the motion to dismiss the action as to him, and thereupon his honor stated that he would hear the pleadings and the evidence before ruling upon the motion. Thereupon the pleadings were read, except the answer of U. S. Jackson. The plaintiff alleged that he had drawn a check for \$200 on the defendant bank in favor of U. S. Jackson, and that the bank paid the same after notice to its cashier, the defendant Latham, not to do so. The plaintiff stated in open court that he did not demand any relief against Jackson, and the defendants, the bank and Latham, denied liability to the plaintiff, upon the ground that the plaintiff had not given the notice to refuse payment of the check. The court held that no relief was demanded or cause of ac-

tion stated against the said Jackson, and thereupon dismissed the action as to Jackson, and signed the judgment set out in the record, to which ruling and judgment the defendants bank and Latham excepted and appealed to the Supreme Court.

W. M. Bond, Jr., of Plymouth, for appellant bank. Albion Dunn, of Greenville, for appellee.

ALLEN, J. [1] The settlement of the controversy between the plaintiff and the defendants—the bank and Latham—is dependent upon one fact, and that is whether the plaintiff notified the defendants to refuse payment of the check before it was paid, and the presence of Jackson in this action is not necessary to its determination.

It also appears that the plaintiff stated in open court that he demanded no relief against Jackson, and neither the bank nor Latham can recover against him upon the facts now presented, because they allege that they paid the check to him rightfully before notice not to pay, which, if true, would exonerate them from liability.

[2] We are therefore of opinion that Jackson is not a necessary party, and if a proper and not a necessary party, which is doubtful in view of the fact that the plaintiff makes no demand against him, and that the defendants cannot claim a liability on his part to them, except upon the ground that they wrongfully paid the check after notice not to do so, which they deny, it was discretionary with the judge to make him a party, and his action is not reviewable. *Alken v. Manf. Co.*, 141 N. C. 339, 59 S. E. 867.

[3] We are also of the opinion that the appeal is premature, and must be dismissed. *Lane v. Richardson*, 101 N. C. 181, 7 S. E. 710; *Emry v. Parker*, 111 N. C. 261, 16 S. E. 236; *Bennett v. Shelton*, 117 N. C. 103, 23 S. E. 95; *Gammon v. Johnson*, 126 N. C. 64, 35 S. E. 185.

Appeal dismissed.

FIDELITY TRUST CO. v. ELLEN et al.
(Supreme Court of North Carolina. Sept. 10, 1913.)

1. **BILLS AND NOTES (§ 497*)—BURDEN OF PROOF AS TO BONA FIDES.**

Where, in an action upon a negotiable note, there was allegation and proof tending to show that the execution of the note was procured by fraud, the burden was on plaintiff to show that it was a holder in due course.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.*]

2. **APPEAL AND ERROR (§ 994*)—REVIEW—CREDIBILITY OF EVIDENCE—QUESTION FOR JURY.**

The jury is the sole judge of the credibility of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

3. **APPEAL AND ERROR (§ 1005*)—DISCRETION OF COURT—NEW TRIAL—INSUFFICIENCY OF EVIDENCE.**

The appellate court has not the power to review the action of the trial court in refusing to set aside a verdict because against the weight of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

Appeal from Superior Court, Nash County; Justice, Judge.

Action by the Fidelity Trust Company against C. F. Ellen and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. B. Ramsey and E. B. Grantham, both of Rocky Mount, for appellant. Bunn & Spruill, T. T. Thorne, and Jacob Battle, all of Rocky Mount, for appellees.

CLARK, C. J. This is one of the numerous actions upon notes given to McLaughlin Bros. for the purchase of an "imported French coach horse," of which so many others are to be found in the reports of this state and also in those of other states. Attention is called to this in *Winter v. Nobs*, 19 Idaho, at page 28. Only one issue was submitted, "Are the defendants indebted to the plaintiff, and if so, in what amount?" The plaintiff did not tender any issues, nor except to this issue, nor for failure to submit other issues.

There were exceptions to evidence, but they do not require consideration, and indeed were not argued here. The plaintiff requested the court to charge that there was no evidence that the note was procured by fraud; and, if there was any, none that the plaintiff had notice of such fraud. These were properly refused upon the evidence.

[1] The plaintiff further requested the court to charge that, the action being upon a negotiable instrument he is presumed to be the holder thereof in due course, without notice of any equities or defenses of the defendants. This the court properly refused to give. There was allegation and proof tending to show that the execution of the note was procured by fraud, and hence the burden was thrown upon the plaintiff to show that it was a holder in due course; the credibility of the evidence being for the jury. *Mfg. v. Summers*, 143 N. C. 102, 55 S. E. 522; *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738; *Park v. Exum*, 156 N. C. 231, 72 S. E. 309; *Bank v. Walser*, 162 N. C. 63, 77 S. E. 1006; *Pell's Revisal*, § 2208.

[2, 3] The plaintiff further requested the court to charge the jury: "If you find the facts to be as testified to by all the witnesses, you will answer the issue as to the plaintiff being a bona fide holder for value and without notice in favor of the plaintiff." This instruction the court could not give upon the evidence. The court, however, did instruct the jury as follows: "The court in-

structs you, gentlemen, that if you believe all the evidence, and find the facts to be as testified by the witnesses, you should answer the issue, 'Yes, the amount of the note and interest after deducting the credits.' Otherwise you should answer the issue, 'Nothing.'" The jury answered the issue "No." Whatever objections the defendants might have raised to this charge need not be considered. It is the plaintiff who appeals, and we do not see how this court can help him. The jury evidently did not believe the testimony upon which the plaintiff relied, and of its credibility the jury were the sole judges. The presiding judge had the power, and it was his duty if he thought the interest of justice required it, to set aside the verdict because "against the weight of the evidence." He did not do so, and it is not in the power of this court to review his action in that respect. *Brink v. Black*, 74 N. C. 329. *Edwards v. Phifer*, 120 N. C. 405, 27 S. E. 79, citing many cases, and citations to latter case in *Anno. Ed.*

No error.

LASSITER v. NORFOLK SOUTHERN R. CO.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. COURTS (§ 489*) — CONFLICTING JURISDICTION—STATE AND UNITED STATES COURTS.

Where the purchasers of a railroad from the receivers appointed by a federal court agreed to pay all liabilities incurred by the receivers, a provision in the decree confirming the sale, which retained exclusive jurisdiction of the cause in the federal court to enforce the obligations assumed by the grantees, does not deprive the administrator of one killed by the negligence of the employes of the receivers of his right to sue the purchasers for damages in the state court, in view of Acts March 3, 1887, c. 373, § 3, 24 Stat. 554 (U. S. Comp. St. 1901, p. 582), which permits an action in the state court against receivers, without obtaining permission from the federal court which appointed them.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

2. RAILROADS (§ 258*)—SALE OF PROPERTY—LIABILITY OF PURCHASERS.

The earnings of a railroad while in the hands of receivers are first applicable to the tort and contract liabilities incurred during its operation, even in preference to prior mortgage liens, and the purchasing company is liable to one injured by the negligence of the receivers on equitable principles, as fully as if it had been the original owner, since the application of the funds to improvements would be a wrongful diversion thereof.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 799-801; Dec. Dig. § 253.*]

Appeal from Superior Court, Gates County; Long, Judge.

Action by J. R. Lassiter, as administrator, against the Norfolk Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. B. Rodman, of Washington, N. C., for appellant. Ward & Grimes, of Washington, N. C., Bond & Bond, of Edenton, and A. P. Godwin, of Gatesville, for appellee.

CLARK, C. J. This is an action for the negligent killing of Mattie Taylor, by an engine operated by the employes of the receivers of the Norfolk & Southern Railroad Company; the plaintiff alleging that the defendant, the Norfolk Southern Railroad Company, is liable therefor. The action was originally brought against the receivers of the Norfolk & Southern Railroad Company in Gates superior court. It was removed to the federal court, where a nonsuit was taken. Within one year thereafter, and after confirmation of the purchase of the property by and its delivery to defendant, this action was begun in the superior court of Gates against the purchaser of the property, the present defendant.

Upon the issues submitted, the jury found that the death of plaintiff's intestate was caused by the negligence of the receivers of the Norfolk & Southern Railroad Company as alleged in the complaint, that she did not contribute by her own negligence to cause said injury and death, and that the receivers by the use of reasonable care could have prevented said injury and death, and assessed the damages at \$1,000. As to these issues there is no exception.

The fourth issue was, "Is the defendant, the Norfolk Southern Railroad Company liable for the tort alleged to have been committed by the Norfolk & Southern Railroad Company while operated by the receivers, as alleged in the complaint?" This issue was answered by the court, as a matter of law, "Yes," and the defendant excepted.

[1] The Norfolk & Southern Railroad Company was sold under a foreclosure in the federal court. Paragraph 11 of said decree provided: "The purchaser or purchasers shall, as a part of the consideration for such sale, and in addition to the purchase price bid, take the property purchased." Here follows several provisions, among them: "(3) And upon the express condition that such purchaser or purchasers, his or their successors and assigns, shall pay, satisfy, and discharge any unpaid indebtedness and obligation or liabilities which shall have been contracted or incurred by the receivers in respect thereto, before the delivery or possession of the property sold." The decree of confirmation, after reciting and adopting as a part of the decree of confirmation the decree of foreclosure, contained, among other things, the following: "It is further ordered, adjudged, and decreed that this court reserve the exclusive jurisdiction of this cause, for the purpose of enforcing and executing the provisions of the said decree of foreclosure and sale entered October 14, 1909, and for the

purpose at all times of protecting said grantee or grantees, their successors or assigns, in the enjoyment of the property, assets, and franchises purchased under the said decree of foreclosure and sale, and to determine any and all controversies as to the character, extent, and validity of the possession of said grantee or grantees, their successors and assigns, acquired under the execution of said decree, and hereunder, and for the purpose of enforcing all the obligations and rights assumed by said grantee or grantees, their successors and assigns, under and by virtue of the said decree of foreclosure and sale, or any subsequent decree including this decree." The defendant earnestly contends that under this provision in the decree the plaintiff could not maintain this action in the superior court of Gates. We do not understand that the right which the plaintiff has under the federal and state statutes to bring this action in the state court can be impaired by this decree of the federal court, nor do we think that such decree was intended to have that effect.

[2] Inasmuch as an action can be brought in the state court against the receivers in the federal court, without obtaining permission of that court (U. S. Compiled Statutes, § 721[3], Acts March 3, 1887, c. 373, § 3, 24 Stat. 554), a fortiori an action can be brought in the state court against the purchaser, after confirmation of the sale and delivery of the property to such purchaser, without permission of the federal court. The liability of the purchaser is a matter of law which can be adjudicated in the state court. The earnings of the road, while in the hands of the receivers, are first applicable to the tort and contract liabilities incurred during their operation, even in preference to prior mortgage liens (which doctrine as to torts is a provision of the North Carolina statute also), and their application to improvements would be a wrongful diversion of the fund, and the purchasing company is liable to the plaintiff on equitable principles as fully as if it had been the original owner.

This matter is fully discussed in *Railroad v. Johnson*, 151 U. S. 81 at page 99, 14 Sup. Ct. 250 at page 255 (38 L. Ed. 81), in which case Chief Justice Fuller says: "The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings * * * had been diverted into betterments, of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute, * * * and, irrespective of the statute, on equitable principles applicable under the facts." That case is a full discussion of the points involved in this, and holds that the state court is authorized to try actions against the receivers of the purchasing company upon the facts similar to

those in this case. It was further held therein that where such plaintiff did not intervene in the federal court and collect its judgment before the property was turned over to the purchasing company, he is not precluded from bringing his action in the state court. That decision has been approved in numerous cases cited in 12 *Rose's Notes*, 479. To same effect, *Railroad v. Manton*, 164 U. S. 636, 17 Sup. Ct. 216, 41 L. Ed. 580, which holds that an action for damages for personal injuries, brought against the receiver and the railroad company, and pending after the restoration of the property, is not cut off, by failure to prosecute the claim by intervention in the receiver's proceedings, because of an order of the court requiring such claims to be presented by a specified date or be barred. For cases citing and approving this decision, 12 *Rose's Notes*, 916.

In *Railroad v. Crawford*, 88 Tex. 277, 31 S. W. 176, 28 L. R. A. 761, 53 Am. St. Rep. 752, it is held: "If a railroad in the hands of a receiver appointed by the United States Circuit Court, is sold by order of that court, but possession is retained by the receiver, one who claims damages for injuries received while the railroad was in the hands of the receiver may sue the receiver in the state court without the consent of the United States court, and after the circuit court has discharged the receiver and turned the property over, the jurisdiction of the federal court ceases, and the state court, though, the suit was commenced prior to such delivery, has the power to proceed to adjudicate the rights of the parties, and to enforce its own judgment according to the laws of the state." This case is there copiously annotated, and, among others, has the following citation: "The discharge of the receiver, and return of the property to the owner leaves the property subject to any claim or charge legally resting upon it; and this may be enforced by any court having jurisdiction. *Railroad v. Johnson*, 76 Tex. 421 [13 S. W. 463], 18 Am. St. Rep. 60." This was the case which was taken by writ of error to the United States Supreme Court, in which the opinion of Fuller, C. J., 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81, above cited, was rendered, affirming the action of the Texas court and holding: (1) Whether there was actionable negligence committed while the receiver was in charge is a question of general law for the state court to pass upon; (2) that a provision in the order of the United States court reserving the proceedings for the disposition of pending interventions, and such as might be filed within a time fixed, does not preclude one having a cause of action for the negligence of the receivers from bringing his action in any court of competent jurisdiction.

Our conclusion is that the superior court of Gates had jurisdiction of this cause of action under the statutes, state and federal, and that the provision of the decree of confirmation of the sale in the federal court

did not have the effect, and was not intended to have the effect to deprive the plaintiff of his right to maintain this action in the state court.

No error.

NEWBY & WHITE v. BOARD OF DRAINAGE COM'RS OF BEAR SWAMP DRAINAGE DIST. et al.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. DRAINS (§ 2*)—ESTABLISHMENT—STATUTES—VALIDITY.

The Drainage Act of 1909 (Pub. Laws 1909, c. 442) is not obnoxious to either the state or federal Constitution.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17; Dec. Dig. § 2;* Constitutional Law, Cent. Dig. § 884.]

2. DRAINS (§ 13*)—DRAINAGE DISTRICTS—ESTABLISHMENT—COLLATERAL ATTACK.

A drainage district established under Pub. Laws 1909, c. 442, is a quasi municipal corporation, and neither its existence nor the regularity of its proceedings can be collaterally attacked.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 4; Dec. Dig. § 13;* Corporations, Cent. Dig. § 9.]

3. DRAINS (§ 57*)—DRAINAGE DISTRICTS—INJURIES TO LAND—REMEDIES OF LANDOWNER.

The remedies provided by Pub. Laws 1909, c. 442, by which a landowner may recover damages resulting from the construction of drains under the act are exclusive.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.*]

4. DRAINS (§ 57*)—DRAINAGE DISTRICTS—CONSTRUCTION OF DRAINS—DAMAGE TO LANDOWNER—REMEDIES—DUTY TO ASSERT—ESTOPPEL.

Pub. Laws 1909, c. 442, § 11, requires the engineer and viewers to assess the damages sustained by any one for lands taken or for inconvenience imposed, and authorizes an appeal from the award to the superior court. *Held* that, where plaintiffs grantors were petitioners for the organization of a drainage district and for the construction of the drains, and took no steps under such section to recover damages for the destruction of timber on the land by the construction of the main canal, complainants, after acquiring the land, were estopped to claim damages for such loss in an action against the commissioners.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.*]

Appeal from Superior Court, Perquimans County; H. W. Whedbee, Judge.

Action by Newby & White against the Board of Drainage Commissioners of Bear Swamp Drainage District and others. Judgment was entered for plaintiffs against the defendant board, and denied as to the individual members, and defendant board appeals; plaintiffs also appealing from the denial of judgment against the members individually. Reversed and remanded.

In 1909 sundry landowners in Chowan and Perquimans counties filed before the clerk of the superior court of Chowan county a petition for the establishment of a drainage

district under chapter 442 of the Public Laws of 1909. J. P. and L. A. Goodwin were signers of this petition. Proceedings were had conformable to the provisions of the drainage act, and a preliminary report of the board of viewers was considered on the 11th day of September, 1909, and the decree entered establishing the district, to be known as Bear Swamp drainage district.

The final report of the board of viewers was considered on the 30th day of November, 1909, and duly confirmed. On the 3d day of January, 1910, the petitioners J. P. and L. A. Goodwin sold and conveyed to the plaintiffs herein the land described in the complaint, which land was embraced in the Bear Swamp drainage district. Subsequently the commissioners of the drainage district proceeded through a contractor to construct the canals and ditches called for in the survey and report of the board of viewers, and plaintiffs allege that in the construction of the main canal a large amount of valuable timber on the lands of plaintiffs described in the complaint was wrongfully and unlawfully destroyed, and that the cost of removing the balance of the timber had been greatly enhanced, and that by reason of these things the plaintiffs had been endamaged in a large sum.

Evidence was introduced by the plaintiffs tending to support these allegations, and at the close of the plaintiffs' testimony the defendant moved for a nonsuit. This motion was overruled, and the defendant board introduced in evidence the entire record in the proceedings for the establishment of the drainage district, and also evidence tending to show that plaintiffs had, in fact, sustained no damage. There was a verdict and judgment against the defendant board, from which judgment the board appeals to this court.

Pruden and Pruden, of Edenton, S. Brown Shepherd, of Raleigh, and W. S. Privott, of Edenton, for appellant. Bond & Bond, of Edenton, and P. W. McMullan, of Hertford, for appellees.

BROWN, J. (after stating the facts as above). [1] Upon the foregoing facts we are of opinion that this action was improvidently brought, and should be dismissed. There is no contention that the Drainage Act of 1909 is obnoxious to either the state or the federal Constitution. This question was settled by our decision in *Sanderlin v. Luken*, 152 N. C. 738, 68 S. E. 225.

[2] But, conceding the validity of the law, plaintiffs maintain that there has been no compliance with its provisions, and that the board of drainage commissioners were trespassers upon their lands. If, by this charge, plaintiffs mean to challenge the existence of a lawful drainage district, then they are in the anomalous position of insisting upon a

judgment against a body corporate that does not, in fact, exist. If the defendant board was without authority in entering upon the lands of plaintiffs, it is equally without authority to levy assessments for any purpose, and the judgment plaintiffs recovered below would be a thing of no value. But the conclusive answer to this suggestion is that a drainage district is a quasi municipal corporation, and neither its existence nor the regularity of its proceedings can be collaterally impeached.

In *Sanderlin v. Luken*, supra, it is held that these drainage districts are regarded as quasi public corporations, partaking to some extent of the character of a governmental agency. They are not unlike special road and school districts, and it is elementary that the validity of such districts cannot be collaterally attacked.

In 14 Cyc. 1029, it is said in the text that the legality of the organization of a drainage district cannot be attacked collaterally as in an action by it to enforce assessment. This must be equally true in an action against it for damages for assuming to exercise the rights and powers of a lawfully constituted drainage district.

In *Parker v. Harris County Drainage District*, 148 S. W. 360, the Texas Court of Civil Appeals says: "There can be, we think, no question that drainage districts organized under the act in question are public, or quasi public, corporations." *Fallbrook v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *People v. La Rue*, 67 Cal. 526, 8 Pac. 84. And continuing, the court says: "It is a firmly established doctrine that, when the law provides for the creation of such districts by the action of any public body, as the commissioners' court, in the present drainage law, the validity of such action in the creation and organization of such districts cannot be questioned except by district proceeding in quo warranto, at the suit of the state, for mere irregularities in, or failure to comply with, the prescribed procedure."

A case much in point is *Smith v. Claussen Park Drainage District*, 229 Ill. 155, 82 N. E. 278. In this case the court says: "The question whether the appellee drainage district had been legally organized did not and could not arise in the proceeding for the condemnation of a right of way for the ditch across the lands of the appellant company. * * * Whether it (the district) correctly exercised such power or jurisdiction could not be considered in this a collateral proceeding. * * * The legality of the organization of the drainage and levee district can be attacked and brought under judicial review only in a direct proceeding by quo warranto."

If plaintiffs concede that the defendant is a lawfully constituted drainage district, but attack the regularity of its proceedings, again, both reason and authority block the way.

[3] The statute affords ample opportunity

to every party in interest to assert his rights, and adequate machinery for maintaining them. Like a general practitioner of the olden time, the drainage act carries its remedies in its own saddle bags, and advertises that there are none other. "The remedies provided for in this act shall exclude all other remedies." Drainage Act, § 37.

[4] Section 11 of the act makes it the duty of the engineer and viewers to assess the damages claimed by any one for lands taken or for inconvenience imposed. It will be seen, therefore, that the grantors of plaintiffs had abundant opportunity to set up the very claims which they attempt to assert in this action. They were before the court; they were moving parties in the cause. If they had claimed damages, and had been dissatisfied with the amount awarded, they had their right of appeal to the superior court. They have had their day in court, and, "not having spoken when they could have been heard, they cannot now be heard when they should be silent." *White v. Lane*, 153 N. C. 16, 68 S. E. 896.

In courts of justice there comes a time when a man is called upon to speak or else forever thereafter hold his peace. The statute, in terms, declares that the order of the court confirming the final report of the viewers "shall be conclusive and final; that all prior proceedings were regular and according to law, unless they were appealed from." And this statutory declaration that the regularity of the proceedings shall not be subject to collateral attack is in line with the decisions of the courts and text-writers of good repute.

In discussing these drainage districts, *Farnham*, in *his work on Waters and Water Rights*, says: "An adjudication by the proper tribunal that the proceedings conform to the statute cannot be inquired into in a collateral proceeding; nor can the various steps which are taken in proceedings after jurisdiction has been acquired be questioned. That the lands in a reclamation district were swamp and overflowed, and that lands assessed for reclamation purposes would be benefited thereby, being jurisdictional facts, which the board of supervisors necessarily determine in approving the petition for the formation of the district, its judgment on those questions where all the parties were brought before it by proper notice is conclusive, and cannot be collaterally attacked." *People v. Wasson*, 64 N. Y. 167; *Wabash Eastern R. Co. v. East Lake Fork Special Drainage District*, 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285; *Auditor General v. Melze*, 124 Mich. 285, 82 N. W. 886; *Barker v. Vernon Twp.*, 63 Mich. 516, 30 N. W. 175; *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510; *Ithaca v. Babcock*, 36 Misc. Rep. 49, 72 N. Y. Supp. 519; *Jebb v. Sexton*, 84 Ill. App. 45; *Reclamation Dist. No. 542 v. Turner*, 104 Cal. 334, 37 Pac. 1038.

A case directly in point is *Oliver v. Monona*

County, *supra*, where it is held that the failure of a board of supervisors, in proceedings to establish a ditch for the drainage of a tract of land, to award and pay the damages to the property through which the ditch was to pass, before locating it, is not jurisdictional, and cannot be made the basis of a collateral attack.

The plaintiffs, of course, stand in the shoes of their grantors, who were parties to the proceeding for the establishment of the district, as a pendency of the proceeding is noticed with respect to all lands embraced in the district.

Upon consideration of the whole case we think the action should be dismissed, and it is so ordered. This disposes of both appeals.

EUREKA LUMBER CO. v. WHITLEY.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—TIME FOR REMOVAL—EXTENSION.

Under a contract for the sale of standing timber, which authorized removal within seven years from the date thereof, and provided for an extension of the time of removal for a term of three years at the option of the vendee, provided notice of intention to extend it should be given to the vendor before the end of the seven years, the vendee, to entitle it to the extension, was required to give the notice and make a proper tender of the consideration for the extension before the end of the seven years, since a unilateral contract of that kind, binding the owner of the land without any corresponding obligation or duty on the other party, and regarded in its essence as a mere option, is strictly construed, and exact compliance will be required.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—TIME FOR REMOVAL—EXTENSION.

Under a contract conveying standing timber, which authorized the vendee at its option to extend the time for removing it by giving notice to the vendor within the time originally specified, the vendee did not exercise due diligence, as a matter of law, to give such notice within the time required, by placing the consideration for the extension in the hands of the sheriff, with instructions to deliver it to the vendor.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Action by the Eureka Lumber Company against Major Whitley. Judgment for defendant, and plaintiff appeals. Affirmed.

This action was brought to compel the defendant to execute a deed for the renewal of a timber contract, which had expired. On January 2, 1905, William J. Cutlar, being the owner of a tract of land, conveyed to the plaintiff the timber thereon, with the privilege of cutting and removing the same within seven years from the date of the deed; that

is, on or before January 2, 1912. There was a clause for the extension of the time, at the option of plaintiff, for the term of three years, provided notice of the intention to extend it should be given to vendor or his assigns before the expiration of the seven years fixed by the original contract for cutting and removing the timber. Notice was not given until January 5, 1912, or three days after the last day allowed for giving it. Plaintiff alleges that he was excused from a strict compliance with the contract, because defendant had left Beaufort county, the place of his former residence, in November, 1911 and he could not find him to serve the notice. The defendant went to Rocky Mount, N. C., and made a short visit to Florence, S. C., returning to Rocky Mount about the middle of December, 1912. Horton Cutlar, agent of plaintiff having charge of the matter, had a deed of extension prepared for execution by defendant, and afterwards, in November, 1912, met the defendant, on a Sunday, but said nothing to him about executing the deed. On December 15, 1912, this agent was told by defendant's brother, B. H. Sheppard, that defendant was in Rocky Mount, but it does not appear that any steps were taken to have the contract renewed, or the time for cutting the timber extended. There was other evidence in the case. The jury returned the following verdict:

"(1) Was the plaintiff ready, able, and willing to pay the defendant the sum provided in the contract introduced in evidence for the extension of time in which to cut said timber, on the 2d day of January, 1912? Answer: Yes.

"(2) If so, was plaintiff's failure to do so, until January 5, 1912, due to its inability to find the defendant, after using due diligence? Answer: No."

The judge charged the jury fully as to what, in law, was due diligence, and left it to the jury as an open question of fact to decide, upon the issues, whether the plaintiff had exercised proper care and diligence, under the circumstances. Plaintiff appealed from the judgment upon the verdict.

Rodman & Bonner, of Washington, N. C., for appellant. Ward & Grimes, of Washington, N. C., for appellee.

WALKER, J. (after stating the facts as above). [1] There can be no doubt now that the plaintiff, in order to avail itself of the privilege to extend the time of cutting, must have given notice and made a proper tender of the consideration therefor, before the expiration of the first period allowed for cutting and removing the timber, and this is recently so decided in *Rountree v. Cohn-Bock Co.*, 158 N. C. 153, 73 S. E. 796. See *Bateman v. Lumber Co.*, 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615; *Powers v. Lumber Co.*, 154 N. C. 405, 70 S. E. 629; *Product*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

Co. v. Dunn, 142 N. C. 471, 55 S. E. 299. A unilateral contract of this kind, binding the owner of the land without any corresponding or correlative obligation or duty of the other party to him, and regarded in its essence as a mere option, is strictly construed, and exact compliance will be required. *Alston v. Connell*, 140 N. C. 486, 53 S. E. 292.

[2] The only question, therefore, is whether there has been such compliance. The court instructed the jury correctly as to what constituted due diligence, and the jury have found, upon the evidence, that there was not such diligence, and we think the verdict was the only one the jury could well have rendered in the face of the facts and circumstances. The plaintiff not only failed to show due diligence, but the evidence rather tended to prove the contrary. It is singular that the plaintiff should have been so remiss in caring for its interests, if it really intended to renew the contract for the extended period. Placing the money in the hands of the sheriff, with instructions to deliver it to defendant, does not alter the case, and was not, in itself, diligence as matter of law. The judge allowed it to be considered by the jury as a circumstance on the question of due diligence. There is nothing in the case, we think, but a pure question of fact, which the jury have settled against the plaintiff.

No error.

BASNIGHT et al. v. SMALL

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. FIXTURES (§ 21*)—“FIXTURE”—RAILROAD CONTRACT—LOGGING ROAD.

A logging road, constructed of ties partly embedded in the soil with rails spiked thereon, built for the better enjoyment of the land by rendering it easier to get out the timber thereon, is a “fixture” which passed by a conveyance of the land.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 47-56; Dec. Dig. § 21.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2831-2846; vol. 8, p. 7664.]

2. DEEDS (§ 117*)—VENDOR AND PURCHASER.

Between the vendor and purchaser the common-law rule that whatever is affixed to the freehold becomes a part of it and passes with it is observed in full vigor.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 336-341; Dec. Dig. § 117.*]

3. DEEDS (§ 143*)—CONSTRUCTION—PROPERTY CONVEYED—FIXTURE.

The fact that a grantor of land on which there was timber of various kinds large enough to cut reserved the pine timber does not indicate that it was not the intention of the parties that the logging railroad on the land should pass by the deed, but rather the express reservation of the timber refutes such an intention, under the maxim, “*Expressio unius exclusio alterius*.”

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 453-455, 465-468; Dec. Dig. § 143.*]

Appeal from Superior Court, Perquimans County; Whedbee, Judge.

Action by W. B. Basnight and another against P. H. Small. Judgment for defendant, and plaintiffs appeal. Reversed.

This is an action to recover damages for entering upon the land of the plaintiff and removing a logging road therefrom. On December 31, 1910, the defendant conveyed the land to the plaintiffs, reserving all the pine timber that would measure 10 inches across the stump when cut, provided the same was cut within 10 years. The plaintiff W. B. Basnight testified as follows: “I am one of the plaintiffs. Cason and I bought the land described in deed from Small for \$10,000. About one-third of it was woodland. Besides the pine reserved by Small, there was some poplar, and a good bit of gum and oak. At the time the bargain for the land was made, and when the deed was made, both, there was a logging road upon the land. This road started at the sound and ran back, through the woods on edge of the pasture and into the swamp, for about a mile. All of the road was on this tract of land, and was built for the purpose of getting out the timber on this tract. This road was just an ordinary logging road. First the ties were laid and then the rails. A few of the ties were entirely underground, others filled in with dirt, so as to make the road level. Road was made level enough for mules to walk upon. There were two trestles, one 30 and one 40 yards in length. The 30-yard one was about four feet high. On these trestles the ties were laid on posts or piling, right close together, joining so as to make it solid. The rails were 12-pound rails, and were fastened to the ties with spikes. Ties were pinesap pine, I think, and would have lasted four or five years. At the time of Small's deed to Cason and me, there was timber upon this tract, other than the pine reserved by Small, large enough to cut, and we could have used this road beneficially in getting out this other timber. Small moved this road. This after his deed to plaintiffs was made. Tore up the road and hauled the rails away. The land was worth \$1,500 less after the road was removed, than it was with the road there, as it was when plaintiffs bought it. Small moved but a few pines after plaintiffs bought land. Don't know whether he hauled them over road or in wagons. He used road for hauling pines before he sold land to me. After Small moved road, he sold me the pine timber (reserved in his first deed) for \$2,000. Don't remember whether this was before or after this suit was brought—some time in July or August last year.” Plaintiffs then introduced the following admissions: “It is admitted that Miles Goodwin, if present, subject to competency and relevancy, would swear that he has had much experience in cutting out rights of way through woods, similar to that spoken of in complaint, and that the cost of cutting

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

out such right of way and laying ties and iron on it, in making a timber road, would be from 25 cents to 30 cents per yard, in making a mile of road." Plaintiffs rested. At the conclusion of the plaintiffs' evidence, the defendant moved for judgment as of nonsuit, which was allowed. Plaintiffs excepted, and appealed to the Supreme Court.

Bond & Bond, of Edenton, and P. W. McMullan, of Hertford, for appellants. Ward & Thompson, of Elizabeth City, and Chas. Whedbee, of Hertford, for appellee.

ALLEN, J. [1] If there is any evidence that the logging road was a fixture, there was error in entering the judgment of nonsuit, because, if a fixture, it passed to the plaintiff by a conveyance of the land, and he would be entitled to recover damages for its removal, and we are of opinion there is such evidence. The logging road was annexed to the soil, and if the testimony of the plaintiff is true, it was built for the better enjoyment of the land, and was adapted to that purpose, thus meeting the rule stated by Justice Walker in *State v. Martin*, 141 N. C. 832, 53 S. E. 874, which, while correct as applied to the facts then being considered, is more favorable than the one adopted by our court, as applicable between vendor and vendee, which is the relationship of the plaintiffs and the defendant.

[2] In *Overman v. Sasser*, 107 N. C. 435, 12 S. E. 64, 10 L. R. A. 722, substantially all of the cases bearing directly on this question are collected by the present Chief Justice, and the court there adopts the rule laid down by Lord Ellenborough in *Elwes v. Mawe*, 3 East, 38, that as between vendor and vendee "the common-law rule that whatever is affixed to the freehold becomes a part of it and passes with it is observed in full vigor."

[3] The defendant contends, however, that, although this may be the rule usually applied between vendor and vendee, the fact that the logging road was built for the removal of the timber, and that the pine timber is excepted in the deed, takes this case out of the rule, and that when the character of the road is considered, it appears that it was not the intention of the parties that the logging road should pass by the deed. The answer is that if he built the road for the sole purpose of removing the timber, he was at that time the owner of the timber, and if he then made the road a part of the land by annexation, he could not afterwards change its character by selling the land, reserving the timber. It also appears from the evidence of the plaintiff, that there was other timber on the land, not reserved, large enough to cut, and that the plaintiffs could have used the road beneficially in getting out this timber. The reservation in the deed, instead of strengthening the contention of the

defendant, refutes it, upon the familiar maxim, "*Expressio unius exclusio alterius*." The conclusion is almost irresistible, that when the attention of the defendant was called to the reservations he wished to make by mentioning the pine timber, he would have also included the logging road if he had not intended it to pass by the deed.

There is error.

Reversed.

BEASLEY et al. v. BYRUM.

(Supreme Court of North Carolina. Sept. 10, 1913.)

TRESPASS (§ 7*)—ACTS CONSTITUTING TRESPASS.

The entry by defendant, armed with a shotgun, and killing plaintiff's dog, chained to a stake near the porch, in the presence of plaintiff's wife, and under her protest, was not only a trespass, but a forcible trespass, an indictable offense.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 6; Dec. Dig. § 7.*]

Appeal from Superior Court, Chowan County; Long, Judge.

Action for trespass by V. Beasley and others against O. C. Byrum. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded.

The issues submitted and the answers of the jury thereto were as follows:

"(1) Did defendant, Byrum, wrongfully and unlawfully enter on the premises of the plaintiff and trespass as alleged in complaint? Answer: No.

"(2) What damages, if any, is plaintiff entitled to recover on account of said alleged trespass? Answer: —."

The plaintiffs appealed.

E. F. Aydtlett, of Elizabeth City, and Bond & Bond, of Edenton, for appellants. Pruden & Pruden, of Edenton, S. Brown Shepherd, of Raleigh, and W. S. Privott, of Edenton, for appellee.

BROWN, J. The plaintiffs requested the court to charge the jury that if the evidence is believed to answer the first issue, "Yes." To the refusal to so charge plaintiffs excepted, and duly assigned error. We think that upon the evidence as presented the prayer should have been given. The action is brought to recover damages for a forcible and high-handed invasion of plaintiffs' home. The evidence, if believed, establishes a forcible trespass, an indictable offense.

The defendant entered upon plaintiffs' premises armed with a shotgun, and shot and killed the plaintiffs' dog when chained to the piazza, and in the wife's presence and against her protest. She offered evidence tending to prove that she was old, afflicted with heart disease, and that the alarm and shock caused by defendant's conduct had caused her great suffering. There is no evi-

dence in the record that the dog was a mad dog, or had been bitten by one within the purview of section 3305 of Revisal, and there is no evidence that his immediate destruction was necessary. 2 Cyc. 416. If such was the case, the owner could be compelled to destroy the dog, or subject himself to the possibility of fine and imprisonment, and under such conditions the dog could be destroyed by order of the justice issuing the warrant under said section. The dog at the time was safely chained up, and for the defendant to enter the home of plaintiffs with a shotgun and kill the dog almost at the wife's feet is not only a trespass, but well calculated to bring on very serious consequences. *Perry v. Phipps*, 52 N. C. 259, 51 Am. Dec. 387; *Wallace v. Douglas*, 32 N. C. 79.

New trial.

BONNER v. RODMAN.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. MORTGAGES (§ 338*)—CONDITIONS ON GRANTING.

Where, in an action for an accounting to ascertain the amount due under a deed of trust, plaintiff admitted there was due \$436, the court could require payment by plaintiff of the amount so admitted, as a condition of enjoying a sale under the deed of trust, since he who asks equity must do equity.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1026-1035; Dec. Dig. § 338.*]

2. APPEAL AND ERROR (§ 447*)—EFFECT OF APPEAL—INTERLOCUTORY APPEAL.

The denial of a motion for a restraining order for want of some material averment, or because the evidence is insufficient, does not prevent the renewal of the motion; but the motion cannot be made on the same facts after an appeal from the first order.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2207; Dec. Dig. § 447.*]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Action by D. D. Bonner against W. C. Rodman, trustee. From an order granting an injunction upon condition that plaintiff pay into court an amount admitted to be due, plaintiff appeals, and from an order granting an injunction upon the condition that plaintiff so pay into court, defendant appeals. Affirmed on plaintiff's appeal, and reversed on defendant's appeal.

This is an action for an accounting to ascertain the amount due under a deed of trust, executed by the plaintiff to the defendant, Rodman, on April 19, 1905. The trustee advertised the property conveyed in the deed of trust for sale, under the power in the deed, and the plaintiff, on May 15, 1913, applied for a restraining order, which was granted by Judge Whedbee; but he required the plaintiff to pay into court, on or before June 15, 1913, the amount he admitted to be due. The plaintiff failed to pay said amount, as provided in the order of Judge Whedbee, and

the trustee again advertised the property for sale, and the plaintiff again applied for a restraining order before Judge Bragaw, upon substantially the same facts presented before Judge Whedbee. Judge Bragaw granted the restraining order, but upon condition that the plaintiff pay into court the amount admitted to be due by October 1, 1913.

W. B. Rodman, Jr., of Washington, N. C., for appellant. Harry McMullan, of Washington, N. C., for appellee.

Plaintiff's Appeal.

ALLEN, J. [1] The plaintiff admitted that he owed the defendant \$436, and it was therefore within the power of the court, upon the facts appearing in this record, to require the payment of this sum within a reasonable time before granting equitable relief, upon the familiar principle that he who asks equity must do equity, although a case might arise in which the court could refuse to impose such a condition. An order similar to the one appealed from was approved in *Pritchard v. Sanderson*, 84 N. C. 299.

Affirmed.

Defendant's Appeal.

The appeal from the order of Judge Bragaw presents the question of the right of a party to renew his motion for a restraining order, upon substantially the same facts presented on his first application, and after he has appealed from the first order.

[2] The denial of a motion for a restraining order for want of some material averment, or because the evidence is insufficient, does not prevent the renewal of the motion (*Halcombe v. Com'rs*, 89 N. C. 346); but it has been uniformly held in this court that the motion cannot be made on the same facts after an appeal from the first order. *Jones v. Thorne*, 80 N. C. 72; *Pasour v. Lineberger*, 90 N. C. 161; *Penniman v. Daniel*, 91 N. C. 431; *Green v. Griffin*, 95 N. C. 50; *Henry v. Hilliard*, 120 N. C. 487, 27 S. E. 130; *Combes v. Adams*, 150 N. C. 70, 63 S. E. 186.

In the last case cited, which was an appeal from an order denying a second motion for a restraining order, after an appeal from the first order, Justice Hoke says: "While the court has held that an appeal from an interlocutory order leaves the action for all other purposes in the court below, the decision is also to the effect that the disposition of the interlocutory order and all questions incident to and necessarily involved in the ruling thereon are carried by the appeal to the appellate court, and the judge below therefore had no power to entertain or act upon appellant's motion."

We are therefore of opinion there is error. Reversed.

BROWN, J., not sitting.

POWELL v. FOSBURG LUMBER CO.

(Supreme Court of North Carolina. Sept. 10, 1913.)

LOGS AND LOGGING (§ 2*)—EXCEPTIONS—RESERVATIONS.

A grantor conveyed certain timber on her land with right to the grantee to enter, etc., within 10 years, with privilege of an extension for 5 more years, if desired by grantee. The grantor afterwards conveyed the land, but expressly excepted the timber previously conveyed, and referred to that deed. Before the expiration of the 10 years in which to remove the timber, and after she had parted with title to the land, she granted to the assignee of the original grantee of the timber the extension of 5 years as provided. *Held* that, as there was a reservation of the right, her grant of the extension was valid.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 1-5; Dec. Dig. § 2.*]

Appeal from Superior Court, Nash County; Lane, Judge.

Action by Samuel Powell against the Fosburg Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and injunction set aside.

W. E. Daniel, of Weldon, Jos. P. Pippen, of Littleton, and E. L. Travis, of Halifax, for appellant. Finch & Vaughan, of Nashville, and Jacob Battle, of Rocky Mount, for appellee.

CLARK, C. J. Mary E. Sumner July 3, 1901, conveyed to W. W. Cummer all the pine, oak, and poplar timber on a certain tract of land (duly described) measuring 10 inches in diameter when cut, with right to enter, etc., within 10 years from that date, with the privilege of an extension of 5 more years, if desired by the grantee, upon payment of a specified sum. Cummer conveyed his interest in said contract to the defendant. On November 29, 1901, Mary E. Sumner conveyed a part of said land to Solomon Arrington and the balance to Lewis Foreman; the deeds containing the following: "Excepting from this conveyance the timber sold by said Mary E. Sumner on said land and by her conveyed to W. W. Cummer by deed recorded, Book 122, page 21, Nash County Registry, to which reference is made." By mesne conveyances the plaintiff became the owner of the lands thus conveyed by Mary E. Sumner to Arrington and Foreman. Mary E. Sumner, before the expiration of the 10 years which was allowed W. W. Cummer in which to cut and remove the timber, granted to the defendant, Cummer's assignee, an extension of 5 years from July 3, 1911, in which to cut said timber, in consideration of the amount stipulated for in the deed to Cummer.

Upon these facts the continuance of the injunction to the hearing was improvidently granted. Mary E. Sumner, in her convey-

ance of the land, reserved the right to Cummer to have the timber for 5 additional years, and her grant thereof to the defendant, the assignee of Cummer, was valid. The cases relied upon by the plaintiff are not in point. In *Bateman v. Lumber Co.*, 154 N. C. 248, it was held that timber not cut within the time prescribed goes with the land, and that on expiration of the time limited the subsequent purchaser and owner in fee of the land becomes the owner of the timber. In that case the grantee of the timber did not procure an extension of time under his option, nor offer payment therefor till after his lease had expired. In *Hornthal v. Howcutt*, 154 N. C. 228, 70 S. E. 171, there was no extension clause or option reserved in the deed by the grantor, and it was held that the grantee of the land became the owner of the timber remaining uncut at the termination of the lease. In *Kelly v. Lumber Co.*, 157 N. C. 175, 72 S. E. 957, it was held that, when the conveyance reserves to the grantor the timber, without specifying in what time it is to be removed, the grantor must cut and remove it within a reasonable time after notice to do so given by the grantee of the land. And his grantee of the timber holds such reservation of the timber in the same plight as the grantor held it. But here the conveyance of the land reserved the timber in accordance with the terms of the deed to Cummer for the timber, which deed is specifically referred to. That reservation was for 10 years, with the option in Cummer of an extension for 5 years. This 5 years the grantor, Mary E. Sumner, granted to Cummer's assignee before the expiration of the 10 years. The grantee of the land had full notice of the terms of this reservation by his deed and the plaintiff holding by mesne conveyances under said grantee holds the land in the same plight. The injunction should be set aside.

Reversed.

COOPER et ux. v. FOSBURG LUMBER CO.

(Supreme Court of North Carolina. Sept. 10, 1913.)

Appeal from Superior Court, Nash County; Lane, Judge.

Injunction suit by A. W. Cooper and wife against the Fosburg Lumber Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

W. E. Daniel, of Weldon, Jos. P. Pippen, of Littleton, and E. L. Travis, of Halifax, for appellant. Finch & Vaughan, of Nashville, and Jacob Battle, of Rocky Mount, for appellees.

CLARK, C. J. The facts in this case are substantially the same as in *Powell v. Fosburg Lumber Co.*, supra, at this term, and this case is governed by the decision in that. The injunction must be set aside.

Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

GRISWOLD v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Sept. 24, 1913.)

TELEGRAPHS AND TELEPHONES (§ 37*)—DELIVERY OF MESSAGES—DELIVERY AFTER OFFICE HOURS.

When a telegram is received by an agent of a telegraph company after office hours, it is his duty to make reasonable efforts to deliver it, and if he cannot do so he must endeavor to notify the sender of its nondelivery.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. § 37.*]

Appeal from Superior Court, Chatham County; Daniels, Judge.

Action by J. M. Griswold against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The action is to recover damages for mental anguish for negligent failure to deliver a telegram reading: "Merrit Griswold, Bear Creek, N. C. Father died at 12 today. Burial tomorrow evening church. [Signed] Oscar Griswold."

The telegram was filed with the Postal Telegraph Company's agent at Wendell, N. C., on Sunday afternoon, February 4, 1912, at about 4 p. m. It was delivered by Oscar Griswold, nephew of plaintiff, and the agent explained to him that it was doubtful if the message could be gotten through. The agent sent the message off, closed his office, and never went back until Monday morning. The message was received at Bear Creek, N. C., about 6:15 p. m. of the same day by the agent of the defendant and was not delivered to the plaintiff until the forenoon of Monday. The agent at Bear Creek was in his office when call was made for him, though his Sunday hours were from 8 to 10 in the morning, and 1:30 to 3:30 in the afternoon, and he made no effort to deliver the same or send a service message until the next forenoon. The deceased was brother of the plaintiff and father of the sender of the message. He died about noon on February 4, 1912, and was buried at the church about 4 p. m. February 5, 1912, several miles in the country from Wendell.

There was evidence tending to show that plaintiff could and would have driven to Sanford the night of the 4th, caught a midnight train on the Seaboard for Raleigh, and reached the funeral and burial in time.

The defendant moved for judgment as in case of nonsuit at the close of the plaintiff's evidence, and at the close of the whole evidence renewed the motion. The motion was denied. The defendant also excepted to so much of his honor's charge as related to the duty of the defendant's agent at Bear Creek to use reasonable effort to deliver the message on Sunday evening after its receipt by him.

The exceptions taken by the defendant bear upon only one point, and that is what duty the defendant owed to the plaintiff to make any effort to deliver the message to him, after it had received the same at Bear Creek, N. C., several hours after the closing of the defendant's office at that point, in accordance with its office hours for Sunday.

Rose & Rose, of Fayetteville, and Hayes & Bynum, of Pittsboro, for appellant. H. A. London & Son, of Pittsboro, for appellee.

ALLEN, J. The appeal presents the single inquiry as to the correctness of the rule that when the telegram is received by the agent of the telegraph company, although outside of reasonable office hours, it is his duty to make reasonable efforts to deliver it, or if he cannot do so he must endeavor to send a message to the sender notifying him of nondelivery, and is controlled by *Carter v. Telegraph Co.*, 141 N. C. 374, 54 S. E. 274, *Suttle v. Telegraph Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631, and *Carswell v. Telegraph Co.*, 154 N. C. 112, 69 S. E. 782, 32 L. R. A. (N. S.) 611, which have been affirmed at this term in *Ellison v. Telegraph Co.*, 79 S. E. 277.

No error.

WATKINS v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Sept. 24, 1913.)

EVIDENCE (§ 471*)—OPINION EVIDENCE.

In an action against a railroad company for negligently burning timber by sparks from a passing engine, it was error to refuse to permit a witness, who had operated engines and had much experience in observing how far sparks would fly from them, to testify how far sparks would be thrown, since this was not opinion evidence but a statement of a fact by a person qualified to so testify.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

Appeal from Superior Court, Lee County; Bragaw, Judge.

Action by E. F. Watkins against the Seaboard Air Line Railway. From a judgment in favor of plaintiff, defendant appeals. Reversed.

McIver & Williams and A. A. F. Seawell, all of Sanford, for plaintiff. W. H. Neal, of Laurinburg, for defendant.

BROWN, J. Plaintiff sues to recover damages for negligently burning his timber by sparks escaping from a passing engine. The fire started off the right of way and, according to defendant's witness, 881 feet from the track. There was much evidence offered on both sides as to whether the fire originated from a spark from an engine.

Defendant offered one Holland, who testified that he reached the fire within five minutes after it started, at a point the above

distance from the track; train had passed about an hour previous; that he had operated engines, wood and coal burners, and had much experience in observing how far sparks would fly from them under similar conditions. The defendant asked the witness this question: "From what you saw, how far would you say sparks would be thrown from one of those locomotives?" The question was excluded. Defendant excepted.

The point is decided in *Caton v. Toler*, 160 N. C. 105, 75 S. E. 929, opinion by Justice Hoke, wherein the distinction between expert and nonexpert evidence is clearly pointed out and many authorities cited. In that case it was held competent for nonexpert witnesses, qualified from observation and experience, to testify as a statement of fact relative to the inquiry that burning lightwood stumps under the condition indicated were not dangerous and not likely to throw sparks any distance.

Deppe v. Railway Co., 154 N. C. 523, 70 S. E. 622, relied upon by the plaintiff, is easily distinguishable for the reason given in the above-cited case, viz.: "The answer sought was a deduction of the witness from facts in evidence and involving clearly an opinion of the witness on the very question the jury were called on to decide."

New trial.

STATE v. EVERETT.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—POWER OF COURT.

A court has power to suspend sentence upon one convicted or pleading guilty to a crime, upon reasonable terms and conditions imposed at the time sentence is suspended.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

2. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—PRESUMPTION.

Where a defendant is present in court at the time an order suspending sentence upon certain conditions is made, and does not object thereto, it will be presumed that the order was entered with his consent, if not at his request.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

3. CRIMINAL LAW (§ 1134*)—SUSPENSION OF SENTENCE—DURATION OF SUSPENSION.

Where the court suspended sentence upon one who had pleaded guilty to a charge of unlawfully selling intoxicating liquors, on condition that he pay the costs, and appear at each criminal term for two years and show that he demeaned himself as a law-abiding citizen, a contention that if the court could suspend sentence at all it might do so indefinitely need not be considered, since the suspension for two years was not an abuse of the court's discretion as to the time of suspension.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.*]

4. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—COMPLIANCE WITH CONDITIONS.

The payment of the costs in such a case does not amount to a compliance with the terms of the suspension, so as to deprive the court of the power thereafter to proceed to judgment when he ascertained that the defendant had again become a common retailer of intoxicating liquors.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

5. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—CONDITIONS.

The condition in an order suspending sentence on conviction of defendant, that he appear at each term and show that he had demeaned himself as a law-abiding citizen, did not render the judgment uncertain as an alternative judgment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

6. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—VIOLATION OF CONDITIONS.

Where the court suspended sentence on one convicted of the illegal sale of intoxicants, on condition that defendant appear at each criminal term for two years and show good behavior on his part, a sentence imposed at a subsequent term, at which the court ascertained, after hearing testimony on both sides, that the defendant had been again engaged in the unlawful sale of intoxicating liquors, was a sentence for the former offense and not for the subsequent conduct, which only was considered to show that the defendant was no longer entitled to clemency.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

7. JURY (§ 21*)—RIGHT TO TRIAL BY JURY—VIOLATION OF CONDITIONS OF SUSPENDED SENTENCE.

A defendant is not entitled to a jury trial to determine whether he had violated the conditions upon which sentence had formerly been suspended.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 134-142; Dec. Dig. § 21.*]

8. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—DISCRETION OF COURT.

The power to suspend judgment should be exercised fairly and reasonably, so as not to deprive the defendant of the right to assign errors and review the proceedings in the court below; but, where the court, with the consent of the defendant and for his benefit, suspended sentence upon a plea of guilty to a charge of unlawfully selling intoxicating liquors, conditioned upon payment of the costs and a showing of good behavior at each criminal term for two years, there was no abuse of the court's discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

Appeal from Superior Court, Edgecombe County; Cline, Judge.

D. E. Everett pleaded guilty to the unlawful sale of intoxicating liquor, and sentence was suspended by the court during good behavior. At a subsequent term the court, having satisfied itself that the defendant had again engaged in selling intoxicating liquor, imposed sentence upon the former plea of guilty, and the defendant appeals. Affirmed.

The defendant was indicted in three cases for unlawfully selling liquor, and pleaded guilty to each indictment at September term, 1911. Judgment was prayed by the solicitor, and the court adjudged that defendant pay a fine of \$150 and the costs in the first case, suspended judgment on payment of the costs in the second, and entered the following order in the third: "It is ordered that judgment be suspended on the payment of costs, and further that the defendant enter into a bond in the sum of \$200 for his appearance at each criminal term of this court for the next two years and show that he has demeaned himself as a good and law-abiding citizen." The defendant appeared from term to term of the court, and at March term, 1913, on the suggestion of the solicitor that the defendant had violated the terms imposed by the court for the suspension of judgment at September, 1911, by unlawfully selling liquor, the court, in the presence of defendant, heard testimony from both sides upon the accusation, and, on due consideration thereof, found as a fact that the defendant had engaged in the unlawful sale of liquor, in violation of the condition upon which the judgment of the court had been suspended. The court thereupon, and for the same cause, adjudged, in said case, that defendant be imprisoned in the county jail for the term of nine months, with directions that he be assigned by the county commissioners to work on the public roads, and from this judgment he appealed.

Jno. L. Bridgers, of Tarboro, for appellant. Attorney General Bickett and T. H. Calvert, of Raleigh, for the State.

WALKER, J. (after stating the facts as above). [1] The practice of suspending judgment upon convictions in criminal cases and upon reasonable terms has so long prevailed in our courts that we would be loath to disturb it, except for the most convincing reason, supported by the clearest authority showing its illegality. We are satisfied, after the most careful examination of the question, that no such reason can be presented, and that no such precedent can be found. Recent decisions of this court are strongly in favor of the power as existing in the court, when it is fairly and not unreasonably or oppressively exercised. In this case the learned and enlightened judge, who presided and imposed the sentence, proceeded with great caution after a final hearing of both sides, and we concur in his finding of fact and his conclusion that this was a proper case for the use of the power residing in him, in order to punish the defendant for a violation of the criminal law, which he had confessed in open court, and of which he had been adjudged guilty; he having shown himself no longer entitled to the clemency of the court.

Before discussing the general question as to the power of the court to suspend judg-

ment upon terms and conditions imposed at the time, it will be well to notice the objections made by the learned counsel for the defendant in his brief and argument. As we understand, they are the following: (1) If the court can suspend the judgment, it may do so indefinitely. (2) The suspension was really, and in law, conditioned upon the payment of costs only, and, when the costs were paid, the power of the court to proceed further was terminated, for the condition annexed was no part of the punishment. (3) The conditional terms imposed render the judgment uncertain, as in the case of alternative judgments. (4) The court has punished the defendant for what he has done since the suspension of the judgment, and not for the original offense, and for which he has not been tried upon indictment and convicted by a jury. We do not think any of these objections are tenable. It would be useless for us, in this case, upon a suspension for only two years, to inquire what would be the legal effect of an indefinite suspension, as there has been no such exercise of the conceded power.

[2] It must not be overlooked that the suspension of judgment, upon terms expressed therein, at September term, 1911, was entered with the defendant's implied assent at least; he being present and not objecting thereto. This court said in *State v. Crook*, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260, that such an order is not prejudicial but favorable to a defendant, in that punishment is put off, with the chance of escaping it altogether, and it is presumed that he was present and assented thereto, if he did not ask for it as a measure of relief from impending punishment. The court also expressed some surprise at the suggestion that the rights of a defendant are infringed or his interests impaired by allowing him to escape for the present the tolls of the law, by suspending immediate action and affording him an opportunity for reformation as a basis for permanent clemency, instead of requiring him at once to undergo the punishment of the law, for the offense of which he had been convicted. And we repeat that it is strange he should complain of the merciful consideration which the law thus extends to him.

The practice of suspending judgment upon terms prescribed has been sanctioned in our courts for a long time, and it seems to have been recognized in England, for in 4 Blackstone, 394, it is said that: "A reprieve (from *reprendre*, to take back) is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This may be, first, *ex arbitrio judicis*, either before or after judgment, as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy, or sometimes, if it be a small felony, or any favorable circumstance appear in the criminal's character, in order to give

room to apply to the crown for either an absolute or conditional pardon." And to the same effect we find the law thus stated in Chitty's Cr. Law, 75: "The more usual course is for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs, of common right, to every tribunal which is invested with authority to award execution. And this power exists even in cases of high treason, though the judge should be very prudent in its exercise." "At common law every court invested with power to award execution in criminal cases has inherent power to suspend the sentence." Clark's Cr. Pro. 496. In *Com. v. Dowdican's Bail*, 115 Mass. 133, it was held to be proper and within the power of the court, after conviction in a criminal case, "when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file, and this practice has been recognized by statute. * * * Such an order is not equivalent to a final judgment, or to a nolle prosequi or discontinuance, by which the case is put out of court, but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein. Neither the order laying the indictment on file, nor the payment of costs, therefore, in any of the four cases, entitled the defendant to be finally discharged." Sometimes the judge reprieves, said Lord Hale, "as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy. Also when favorable or extenuating circumstances appear, and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished, and this by reason of common usage." 2 Hale, P. O. c. 58, p. 412. Our courts, of course, can only act in such matters during their sessions and not in vacation. The power of suspending or respiting the sentence belonged of common right to every tribunal invested with authority to award execution in a criminal case. *People v. Court of Sessions*, 141 N. Y. 292, 36 N. E. 386, 23 L. R. A. 856, citing 1 Chitty, Cr. Law (1st Ed.) 617, 758; *Bishop's New Cr. Pro.* § 1299; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; 2 *Hawkin's Pleas of the Crown*, p.

657, § 8. It was held in *Fults v. State*, 2 Sneed (Tenn.) 232, that the courts have control of their judgments in criminal cases, so far as to suspend the execution thereof on sufficient reason appearing. And if such suspension be had upon application of defendant, it constitutes no error of which he can take advantage. The courts will be presumed to have exercised such discretion in a proper case.

We have already seen that there is a presumption that the order of suspension was made with the defendant's consent, if not at his request. The record here evidently implies that the order in question was made at defendant's solicitation, as an act of mercy to him, so that he might qualify himself by his good behavior to receive further clemency from the court, and thus avoid the rigor of the law. *Allen v. State*, 8 Tenn. (Mart. & Y.) 294; *State v. Addy*, 43 N. J. Law, 113, 39 Am. Rep. 547. In the case last cited, the court said: "It would seem that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment upon a conviction of crime, unless some legal proceeding for review be interposed. Considerations of public policy may induce the court to stay its hand." The case of *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011, does not controvert these views, but is in perfect harmony with them. The capital distinction between the two cases is that in *Hilton's Case* the court had previously investigated the conduct of the defendant, and, after finding as a fact that he had fully complied with the condition of the suspension, he was discharged, while here, unfortunately for the defendant, the court has found the other way, after hearing both sides, that is, it has declared, after hearing the evidence, that the defendant has sold liquor unlawfully, in clear violation of the terms of suspension, to which he agreed. In the *Hilton Case*, the court fully recognized the existence of a valid power in the court to suspend judgment on condition that the good behavior of the defendant, and his obedience to the law, be shown by him from term to term, for a reasonable period, citing many authorities to sustain the ruling by which it approved the long-standing practice of our tribunals in this respect. Justice Hoke, for the court, thus comments upon this method of procedure in our criminal courts: "In this state, as shown in *State v. Crook*, 115 N. C. 760 [20 S. E. 513, 29 L. R. A. 260] the power to suspend judgment and later impose sentence has been somewhat extended in its scope, so as to allow a suspension of judgment on payment of costs, or other reasonable condition, or continuing the prayer for judgment from term to term to afford defendant opportunity to pay the cost or to make some compensation to the party injured, to be considered in the final sentence, or requiring him to appear from term to term, and for a reasonable period of time, and offer testimony to show good faith

in some promise of reformation or continued obedience to the law. These latter instances of this method of procedure seem to be innovations upon the exercise of the power to suspend judgment as it existed at common law, and, while they are well established with us by usage, the practice should not be readily or hastily enlarged and extended to occasions which might result in unusual punishment or unusual methods of administering the criminal law." He refers to the cases hereinbefore cited, and also to *State v. Bennett*, 20 N. C. 170; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; *Gibson v. State*, 68 Miss. 241, 8 South. 329; *Ex parte Williams*, 26 Fla. 310, 8 South. 425; *Revisal of 1905*, §§ 1293, 1294. See, also, *State v. Whitt*, 117 N. C. 804, 23 S. E. 452; *State v. Crook*, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260; *State v. Sanders*, 153 N. C. 624, 69 S. E. 272.

[3] There was no indefinite suspension of judgment in this case, but only for a definite time with the consent of the defendant, upon a condition which he impliedly promised to perform, but which he most flagrantly disregarded. We need not, therefore, decide upon the lawfulness of an indefinite suspension, for we have no such case. There was no abuse of the court's discretion, and this is a sufficient answer to the first contention.

[4] Nor has the second any greater force. The payment of the costs was not a full compliance with the terms of the suspension, and did not take away the power of the court to proceed to judgment, if it found that the defendant had not complied with the condition, but on the contrary had become, since the date of the judgment, a common retailer of liquors, in open violation and defiance of the law.

[5] The next contention, that the condition rendered the judgment uncertain, as in the case of alternative judgments, cannot be sustained. The judgment is certain and definite in its terms, and does not impose alternative duties or obligations.

[6] Nor can it be well argued that the judge had, by the judgment, punished the defendant for his subsequent conduct. This is a misapprehension of its legal effect. He has simply punished him for the crime he had confessed, because he has violated the terms upon which clemency was impliedly promised. But this is merely the reason for awarding punishment in the original case, and is no part of the offense for which it was inflicted. This very point was urged in the similar case of *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954, where the defendant was indicted for the illegal sale of liquor, and the mittimus was ordered to be stayed "while he does not sell liquor," and it was held that "the enforcement of the judgment of mittimus was not a punishment for subsequent offenses, or for breach of the condition on which execution was stayed."

[7] It must be clear that the defendant

was not entitled to a jury trial to determine whether or not he had violated the conditions upon which the judgment had been suspended. He was not on trial for any new offense, nor for any offense whatever. When the judgment was suspended the defendant assumed the obligation of showing, to the satisfaction of the court, from time to time, that he had demeaned himself as a good citizen and was worthy of judicial clemency. Whether or not he had so demeaned himself was not an issue of fact to be submitted to a jury, but a question of fact to be passed upon by the court. It was a matter to be determined by the sound discretion of the court, and the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here.

The case of *State v. Sanders*, 153 N. C. 627, 69 S. E. 272, cited by the defendant in support of the position that the defendant must have been convicted of the subsequent offense, and that the record of conviction is the only competent evidence of the violation of the condition, is not in point. The court, in that case, was deciding as to the forfeiture of a recognizance given for a defendant's appearance, where the statute prescribes the method of proving a breach, that is, by the record of a conviction. It was not a proceeding to enforce a former suspended judgment by punishing the defendant.

[8] The power to suspend judgment exists, but should be exercised fairly and reasonably, so as not to deprive the defendant of the right to assign errors and review the proceedings in the court below, if he desires to do so, and with due regard to his other rights. He must not be oppressed or unduly burdened by the suspension. There was no abuse of discretion in this case, nor did the court exceed its authority. The suspension was made with the consent of the defendant, and for his benefit, and he has now no reason to complain, having violated his own voluntary promise to demean himself as a good citizen should do.

No error.

ELLISON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF COMPANY.

In an action against a telegraph company for mental anguish caused by delay in the delivery of a message notifying plaintiff of the death of her foster mother, evidence held sufficient to warrant the jury in finding that the company negligently delayed sending the message, and that plaintiff was thereby prevented from taking an earlier train to her foster mother's home.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—PRESUMPTION—DELAY IN TRANSMISSION.

After the receipt by a telegraph company of a message for transmission is shown, there is a presumption of negligence from a delay in transmitting it extending from 5:30 p. m. until noon the next day, in the absence of a satisfactory explanation of the delay by the company.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

3. TELEGRAPHS AND TELEPHONES (§ 73*) — DAMAGES FOR MENTAL SUFFERING — DELAYED MESSAGE ANNOUNCING DEATH.

Where there is no blood relationship between the person to whom a message is addressed and the one of whose death the message gives information, so that the law will not presume mental anguish from a delay in delivery of the message, but there is evidence of actual mental anguish, it is proper to submit the question of damages for such anguish, suffered after the receipt of the message, to the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

4. TELEGRAPHS AND TELEPHONES (§ 38*)—DELAY IN DELIVERY—CONTENTS OF MESSAGE.

A message reading: "W. is dead. Come on the night train"—is of such a character as to inform the telegraph company that it was of great importance and that mental anguish would probably result from negligence in failing to transmit it with reasonable promptness, even though the company had no knowledge of the relationship existing between the parties.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

5. TELEGRAPHS AND TELEPHONES (§ 38*)—DELAY IN DELIVERING MESSAGE — COLLECT MESSAGE.

Where the agent of a telegraph company did not ask for prepayment of a message, the right of prepayment was waived and cannot be urged as a defense to an action for delay in delivery of the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

6. TELEGRAPHS AND TELEPHONES (§ 38*)—DELAY IN DELIVERY OF MESSAGE — MESSAGE RECEIVED AFTER HOURS.

Where the agent of a telegraph company actually received a message and undertook to transmit it, the company cannot defend an action for delay in the delivery of the message on the ground that it was received by the agent after regular office hours.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

7. TELEGRAPHS AND TELEPHONES (§ 38*)—DELAY IN DELIVERING MESSAGE — DUTY TO NOTIFY SENDER.

It is the duty of a telegraph agent, when he finds that he cannot deliver a message, to notify the sender at once so that an attempt may be made to transmit it in some other way.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

8. TELEGRAPHS AND TELEPHONES (§ 38*)—DELAY IN DELIVERING MESSAGE—DEFENSES.

It is no defense, to an action against a telegraph company for delay in transmitting a message, that the agent of the company was also the agent of the railroad company and was busy with his railroad duties, since it is the du-

ty of the company to have sufficient employees to discharge properly the duties it assumes with regard to the transmission of messages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

9. TELEGRAPHS AND TELEPHONES (§ 73*)—REVIEW—VERDICT OF JURY—CONCLUSIVENESS.

Where the evidence is conflicting as to whether a telegraph agent accepted a message unconditionally, that question was for the jury in the trial court.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

10. TRIAL (§ 139*)—TAKING CASE FROM JURY — MOTION FOR NONSUIT.

A motion for nonsuit will be denied where there is evidence which, if believed by the jury, is sufficient foundation for a verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

11. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY INSTRUCTIONS.

Where evidence which was erroneously admitted was fully eliminated by the court in its charge, the error was cured.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

12. TELEGRAPHS AND TELEPHONES (§ 66*) — ACTIONS FOR DAMAGES — ADMISSIBILITY OF EVIDENCE.

In an action for mental anguish caused by delay in delivering a message notifying the recipient of the death of her foster mother, evidence of an arrangement between the sender and the recipient whereby the latter was to be notified if the foster mother became worse is admissible, even though the company had no knowledge thereof, to show that the recipient would have taken an earlier train if the message had not been delayed.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

13. APPEAL AND ERROR (§ 928*)—PRESUMPTIONS—INSTRUCTIONS.

Where the charge is not in the record, it will be presumed that it correctly stated the law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

Appeal from Superior Court, Washington County; B. F. Long, Judge.

Action by Aline Ellison against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This and the case of *Harrison v. Telegraph Co.*, 79 S. E. 281, involving practically the same questions and arising out of the same transaction, were consolidated in this court and argued together.

There was evidence for the plaintiffs, Aline Ellison and Annie Harrison, that they were adopted by Sue Wright as her daughters and reared and educated by her; Annie being her niece and Aline her husband's niece. They lived in her home from a very tender age, three and seven years, respec-

tively, and were treated as her children and lived there as sisters. In January, 1911, Sue Wright became very ill, and Aline went from her home in Jamesville to her foster mother's home in Plymouth to see her. As her condition was improved on January 25, 1911, Aline returned to her home in the afternoon of that day and arrived at Plymouth about 4:30 o'clock the same day; the two places being only 15 miles apart. Shortly after she left, Sue Wright grew worse and died about 5 o'clock. A little after 5 o'clock p. m. Annie Harrison asked Bettie Ellis, wife of Henry Ellis, to go to the defendant's office and send this message to Aline Ellison: "Sue Wright is dead. Come on the night train." Bettie Ellis asked her husband, who was employed at the railroad station, to give the message to the operator, who was also agent of the railroad company, and he did so at once. This was about 5:30 p. m. The message was not sent that evening and not until after 10 o'clock the next morning and was not received by Aline Ellison until 12 o'clock, at the time she heard the mill whistle blow for that hour. She left by the first train but did not reach Plymouth until 4:30 p. m. If the message had been sent when it was received by the operator, on that afternoon, she would have received it in time to have taken the 7 o'clock p. m. train and would have reached Plymouth at 7:30 p. m. on January 25th, and she would have taken that train if she had received the message in time. There was an understanding and arrangement between Annie and Aline that the former would wire the latter if their foster mother's condition grew worse, and that Aline would come to Plymouth, but there was no evidence that this was known to the defendant's operator, except such notice of it as he could derive from the message. The agent knew that Annie Harrison lived with Sue Wright.

The agent, J. A. Griffin, testified that he accepted the message after office hours and promised to send it as a matter of accommodation and if he found that it could be sent that evening, but that the office at Plymouth closed at 6 o'clock p. m. and he might not be able to get an answer from the operator, though he would try to do so. He tried the wires and the telephone connecting the two places but failed to get any response. The next morning he told Henry Ellis that he would destroy that message and send a new one, which he did, it being the one received by Aline Ellison at 12 o'clock the next day. He was both agent of the railroad company and operator of the telegraph company, but as operator he was not required to be in his office after 6 o'clock p. m., though as agent of the railroad company he was required to be in his office until 7:30 o'clock p. m., when the train arrived from Plymouth, and the agent of the railroad company at Plymouth, who was also telegraph operator, was required to be in his office un-

til 7 o'clock p. m., when the train from Rocky Mount leaves Plymouth for Jamesville. J. A. Griffin denied that he knew where Annie Harrison lived. This witness was not corroborated by Henry Ellis, though the latter did not positively contradict him, but merely stated that he did not recollect that the transaction was as related by the operator. The railroad and telegraph offices were the same. The defendant read in evidence the seventh section of the Harrison complaint, in which it is alleged that the plaintiff sent the message after 4 o'clock p. m. on January 25th and told the defendant's agent of the facts and agreement between her and Aline Ellison and requested the agent to send the message to her at Jamesville, notifying her of the death of Sue Wright, and that she paid the toll for the same, but this is not important, as the case is viewed by the court.

It is stated in the record "that the court charged the jury fully on the law of the case, and no exception was taken to the charge. At defendant's request, the court gave the following instructions:

"(1) The plaintiff is not entitled to recover any damages because of any delay in getting the coffin, or casket, from Jamesville, and the jury will not consider this in making up their verdict on the second issue.

"(2) The plaintiff cannot recover any damages because of the offensive condition of the corpse at or before the burial, and the jury will not consider this in making up their verdict as to damages.

"(3) There is no evidence that the defendant had any notice of any arrangement between plaintiffs that Aline Ellison should furnish coffin, and no damages can be given by the jury on account of that.

"(4) Henry Ellis, in having the message prepared and offered for transmission, if you find he did so, was the agent of the plaintiff and not of the defendant, and defendant cannot be held responsible because of any damage or hurt suffered by his negligence, if you find he was negligent.

"(5) The jury can give no damages by way of punishment to the defendant."

The defendant, also in writing, further requested the court to charge the jury as follows:

"(6) Upon all the evidence introduced, the jury should answer the issues in favor of defendant."

This instruction the court declined to give, and defendant excepted. There was a verdict for the plaintiff in each case, and judgment having been entered thereon, defendant appealed.

Pruden & Pruden, of Edenton, and S. B. Shepherd, of Raleigh, for appellant. Winston & Matthews, of Windsor, for appellee.

WALKER, J. (after stating the facts as above). [1] It appears that there was sufficient evidence of negligence on the part of

the defendant in failing to send the message on the afternoon of January 25th. It was shown that both agents were in their offices until 7 o'clock p. m.; and, while the operator at Plymouth testified that he called the office at Jamesville and failed to get any response, this was not conclusive upon the jury, and they could find upon all the facts and circumstances that no effort was made to send the message. It is a suspicious circumstance, which they might consider, that the agent at Jamesville was not called by the defendant to corroborate the Plymouth operator.

[2] The burden was upon the defendant to account for the delay, after the receipt of the message for transmission was shown. It was solely within its power to do so, and there must be a presumption of negligence raised by so long a delay, in the absence of any sufficient or satisfactory explanation. *Hoaglin v. Telegraph Co.*, 161 N. C. 390, 77 S. E. 417. It was held in *Sherrill v. Telegraph Co.*, 116 N. C. 655, 21 S. E. 429, that when the plaintiff shows the delivery of a message to the telegraph company, "with the charges prepaid (and it would have been the same if the defendant had accepted the message with charges to be collected), and the failure to deliver the message, a prima facie case was made out and the burden rested on the defendant to show matter to excuse its failure"—citing *Thompson on Electricity*, § 274, and cases; *Bartlett v. Telegraph Co.*, 62 Me. 209, 16 Am. Rep. 447; *Pearsall v. Telegraph Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662. It is not necessary that we should discuss the evidence, as there was plainly enough to satisfy the jury, if they accepted it as true, that the defendant had negligently delayed to send the message, and that this prevented the plaintiff, Aline Ellison, from leaving on the earlier train.

[3] The court properly confined the assessment of damages to mental anguish suffered after the message was actually delivered to her. There was affirmative evidence that mental anguish had been caused to both plaintiffs by the negligence of the defendant.

[4] In *Harrison v. Telegraph Company*, 143 N. C. 147, 55 S. E. 435, 10 Ann. Cas. 476, we stated the rule to be that there can be no recovery of damages for mental suffering in such cases, unless it is shown "that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty to transmit correctly, or that it had extraneous information which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff." The message in this case was of a character sufficient to inform the defendant of its great importance, and that mental anguish would probably result from its negligence in failing to transmit it with reasonable promptness. "It has repeatedly been decided by this court, in cases where the relationship of the par-

ties was not disclosed and the special purport of the message could not possibly have been understood, that it was not necessary for the company to know the relation between the sender and sendee from the terms of the message, or to know anything more than that the message is one of importance, and that this should always be inferred from the fact that it relates to the illness or death of a person. When this is the case, it is sufficient to put the company on notice that a failure to deliver will result in mental suffering for which damages may be recovered. *Lyne v. Telegraph Co.*, 123 N. C. 129 [31 S. E. 350]; *Sherrill v. Telegraph Co.*, 109 N. C. 527 [14 S. E. 94]; *Hendricks v. Telegraph Co.*, 126 N. C. 310 [35 S. E. 543, 78 Am. St. Rep. 658]." We further said in the *Bright Case*, 132 N. C. 317, 43 S. E. 841: "The law does not regard so much the technical relation between the parties or their legal status in respect to each other as it does the actual relation that exists and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood; but, if mental suffering does actually result from the failure to deliver a message where there is only affinity between the parties, it may be shown and damages recovered." But here, as we have shown, there was actual proof of mental anguish, and the case was submitted to the jury upon that proof. Not only is the *Bright Case* an authority sustaining the validity of the rulings in regard to mental anguish, but *Harrison v. Telegraph Co.*, 143 N. C. 147, 55 S. E. 435, 10 Ann. Cas. 476, is directly in point, and there we said: "There is no presumption of mental anguish growing out of the relation of stepmother and son, but under our decisions it is a fact the plaintiff may prove, if she can, to the satisfaction of the jury, for the state of the mind is as much susceptible of proof as the condition of the stomach." See, also, *Cashion v. Telegraph Co.*, 123 N. C. 267, 31 S. E. 493. In our case there was blood relationship between the plaintiff, Annie Harrison, and the deceased, but none between the latter and Aline Ellison, and, if the relation the parties actually sustained did not raise any presumption of mental anguish, the proof supplied its place.

[5] We have seen in *Sherrill v. Telegraph Co.*, supra, cited already for another purpose, that the prepayment of the charge for sending the message is not a condition precedent to the right of recovery. The agent could have demanded payment of the toll in advance, but not having done so, and electing to trust the sendee for the payment of it, the defendant cannot now avail itself of his failure to do so as a defense to the action. The right to prepayment was clearly waived. *Miller v. Telegraph Co.*, 159 N. C. 502, 75 S. E. 795.

[6] The defense that the message was not tendered to the defendant's agent during of-

office hours is equally untenable. The agent received it and undertook, and actually attempted, as he testified, to send it over the wires and by telephone. It did not occur to him, at the time he was doing so, that the office hours had closed and he was not bound to transmit the message. If the provision as to office hours was available to defendant, under the circumstances of this case, it was waived by the conduct of its agent. *Bright v. Telegraph Co.*, supra; *Hood v. Telegraph Co.*, 135 N. C. 622, 47 S. E. 607; *Carter v. Telegraph Co.*, 141 N. C. 374, 54 S. E. 274; *Suttie v. Telegraph Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631. We held in *Carter's Case*, supra: "Where a message on its face appears to be urgent, the fact that it is offered for transmission after office hours will be no defense to the company if the agent accepted it without reserve"—or, in other words, without insisting on the exemption from the service at the time. And in the *Suttie Case* it was said: "When the agent of a telegraph company receives a message for transmission, and undertakes with the sender to deliver it at a time not within its reasonable office hours at its destination, the benefit of the office hours is waived."

[7] If the agent was not able to transmit the message, it was his plain duty, under the law, as we have so often declared it, to notify the sender, Annie Harrison, of the fact, so that she could have taken steps to communicate to her foster sister in some other way. Its failure to do so was evidence of negligence. *Hendricks v. Telegraph Co.*, 126 N. C. 311, 35 S. E. 543, 78 Am. St. Rep. 658; *Hood v. Telegraph Co.*, 135 N. C. 622, 47 S. E. 607; *Cogdell v. Telegraph Co.*, 135 N. C. 431, 47 S. E. 490; *Woods v. Telegraph Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *Hoaglin v. Telegraph Co.*, 161 N. C. 395, 77 S. E. 417.

[8] It was no excuse for the delay in sending the message that its operator was also agent of the railroad company and had other duties to perform for it. If the defendant employs an agent on joint account with the railroad company, it must abide the consequences of a conflict of duty upon the part of the agent. The contract of the telegraph company is for prompt delivery. It is no defense that its agent had other duties to attend to as agent for another company any more than it would be an excuse that it had so much business of its own that one agent or the messengers it had could not promptly and properly handle it. In both cases the defendant is negligent if it does not have sufficient employees to discharge properly the duty it contracts to do and is chartered and paid to do. *Kernodle v. Telegraph Co.*, 141 N. C. 438, 54 S. E. 423, 8 Ann. Cas. 469; *Mott v. Telegraph Co.*, 142 N. C. 532, 55 S. E. 363; *Carter v. Telegraph Co.*, supra; *Dowdy v. Telegraph Co.*, 124 N. C. 522, 32 S. E. 802.

[9] We cannot assent to the position that there was no evidence of the agent's acceptance of the message for transmission, even his unconditional acceptance of it for that purpose. It was for the jury to settle any conflict in the evidence, and they have done so in this instance favorably to the plaintiffs.

[10] Nor can we sustain the motion for nonsuit, for there was ample evidence, if found to be true, upon which to base the verdict.

The court carefully distinguished, in its charge, between mental anguish and mere grief or regret at the death of plaintiffs' relative and foster mother, and its instructions are fully supported, in this respect, by *Dayvis v. Telegraph Company*, 139 N. C. 83, 51 S. E. 898, and *Hancock v. Telegraph Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403, cases relied on by the defendant.

[11] The evidence as to the ability of Annie Harrison to purchase a coffin, and all the testimony on that subject, if it was erroneously admitted, was fully eliminated by the court in its charge, and the error, if any, was cured.

[12] It was competent to show the arrangement between Annie Harrison and Aline Ellison, before the latter left Plymouth, that she should be notified by wire if Sue Wright should become worse, not as charging defendant with any knowledge of it, for there was no such evidence, but as tending to show that Aline Ellison would have come to Plymouth on the 25th of January if she had received the message.

[13] The charge is not in the record and we must presume, in the absence of it, that it correctly stated the law.

Upon a review of the entire case and a careful consideration of the several exceptions, we have not been able to discover any error in the trial.

No error.

BROWN, J., did not sit.

HARRISON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Sept. 10, 1913.)

Appeal from Superior Court, Washington County; B. F. Long, Judge.

Action by Annie Harrison against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Pruden & Pruden, of Edenton, and S. Brown Shepherd, of Raleigh, for appellant. Winston & Matthews, of Windsor, for appellee.

WALKER, J. This case is governed by *Ellison v. Telegraph Company*, 79 S. E. 277. They were argued and considered together, and the facts and principles presented in the two cases are substantially the same. It follows that there was no error in this appeal.

No error.

BROWN, J., did not sit.

**BRYANT LUMBER CO. v. COPPOCK-
WARNER LUMBER CO.**

(Supreme Court of North Carolina. Sept. 10, 1913.)

COMPROMISE AND SETTLEMENT (§ 2*)—DEMANDS NOT INCLUDED.

Where an amount is tendered in full payment of a claim, its acceptance by the creditor is a settlement of that claim, but it has no application where the amount accepted does not purport to cover the amount in controversy, or when it is transmitted under circumstances showing that it was not the purpose to pay an amount admitted by the party charged to be due, but to make a payment on an indebtedness which was thereafter to be adjusted by the parties.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 1-4; Dec. Dig. § 2.*]

Appeal from Superior Court, Wilson County; Cline, Judge.

Action by the Bryant Lumber Company against the Coppock-Warner Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action is to recover \$829.71, alleged to be due the plaintiff for lumber delivered and services rendered to the defendant.

By consent the issues raised were tried by a referee, who filed the following report:

"(1) That on or about the 1st of July, 1910, plaintiff and defendant had a settlement and adjustment of their mutual accounts, except as to the 'Booth cars' hereinafter noted and explained.

"(2) That at the time of said settlement and adjustment, the defendant owed the plaintiff the sum of \$910.85 (not including the 'Booth cars'), and paid to plaintiff at said time the sum of \$900, leaving a balance due to plaintiff of \$10.85.

"(3) That thereafter defendant became indebted to plaintiff as follows:

July 18. Work on lumber.....	\$ 18 24
July 20. Work on lumber.....	30 93
July 21. Work on lumber.....	37 39
July 21. Car lumber, No. 18104....	286 28
July 21. Car lumber, No. 23157....	232 95
July 22. Car lumber, No. 26268....	231 68
July 27. Car lumber, No. 4441....	228 96
July 30. Car lumber, No. 70121....	354 10
Freight advanced	15 00
Amount previously due and unpaid..	10 85

Total indebtedness for above items \$1,446 95

"(4) That on account of the above, defendant paid to plaintiff as follows:

July 28. Check for.....	\$773 01
Sept. 28. Check for.....	162 40
Freights admitted by plaintiff in evidence.....	202 40
	\$1,137 81

Leaving balance due to plaintiff on above..... \$ 309 14

"(5) That as to the 'Booth cars,' defendant owes plaintiff therefor the sum of \$340.95. As to these cars, the referee finds in connection therewith that these cars, not containing the quality of lumber ordered and

bought by defendant of plaintiff, plaintiff agreed with defendant that they might sell same to the best advantage they could, and pay the net proceeds thereof to plaintiff, and the referee finds the net proceeds thereof to be \$340.95, and this sum is now due by defendant to plaintiff on account thereof.

"Conclusions of Law.

"(1) That the check of September 28, 1910, from defendant to plaintiff for \$162.40, was in full settlement of all sums due by defendant to plaintiff (except the 'Booth cars') to that date, and, being accepted by plaintiff, was, as a matter of law, full payment as stated. *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243, and citations.

"(2) That defendant is indebted to plaintiff only for the sum of \$340.95, the net proceeds of the 'Booth cars,' with interest thereon and costs."

The check for \$162.40, referred to in the first conclusion of law, and which is the payment referred to in finding of fact No. 4, was inclosed in a letter, which is as follows: "Bryant Lumber Company, Wilson, N. C. September 28, 1910. Gentlemen: We beg to inclose herewith our statement and check for \$162.40, balance due you on this statement. According to our books, this includes all the shipments which you have made since we squared up your old account the latter part of March. This statement also includes the cars on which we paid you \$900 when you were here on July 1st. Of course, when we say this takes in all your cars to the present date, we mean with the exception of the two Booth cars. We paid you on account of one of the Booth cars, amounting to \$150, and we applied this amount on car No. 20020, which you billed us on June 15th. This latter car is included in this statement. Kindly go over this statement very carefully, and if same does not agree with your books, advise us, and we will take the matter up with you later. Yours truly, Coppock-Warner Lumber Company." The statement referred to in said letter was not inclosed in the letter, nor was there any evidence that the books mentioned therein included the items in finding of fact No. 3.

The plaintiff excepted to the first conclusion of law, which was sustained, and the defendant excepted and appealed from the judgment rendered.

Finch & Connor, of Wilson, for appellant. Daniels & Swindell and W. A. Lucas, all of Wilson, for appellee.

PER CURIAM. So far as the record discloses, the defendant does not deny that it owes the plaintiff \$850.09, the amount of the judgment appealed from, but it says it cannot be compelled to pay \$309.14 of this amount, made up of the items in finding of

fact No. 3, because the plaintiff accepted the check of \$162.40, inclosed in the letter of September 28, 1910. The principle relied on, as illustrated by *Petit v. Woodlief*, 115 N. C. 125, 20 S. E. 208; *Kerr v. Sanders*, 122 N. C. 638, 29 S. E. 943, and *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243, is well settled, but it has no application when the amount accepted does not purport to cover the amount in controversy, or when it is transmitted under circumstances showing that it was not the purpose to pay an amount admitted by the party charged to be due, but to make a payment on an indebtedness which was thereafter to be adjusted by the parties. In the record before us, as the statement referred to in the letter of September 28, 1910, was not inclosed, and the books were not introduced in evidence, there is nothing to show that the check of \$162.40 purported to cover the items in finding of fact No. 3, nor is there anything that would justify us in denying to the plaintiff the right to recover \$309.14, which the referee finds the defendant owes the plaintiff, to which finding the defendant does not except. Again, the latter part of the letter of September 28th shows that the check was not sent in adjustment of account, or in payment of balance due, but "on account," the amount actually due to be thereafter adjusted by the parties.

We have carefully examined the record, but it was not necessary to do so, as the appeal might be dismissed for failure to assign errors.

Affirmed.

LEWIS v. NORFOLK SOUTHERN R. CO.

(Supreme Court of North Carolina. Sept. 10, 1913.)

1. RAILROADS (§ 419*)—INJURY TO ANIMALS ON TRACK—SIGNALS.

A railroad company was negligent in failing to sound the alarm whistle when turkeys were on the track which were seen, or should have been seen, by the engineer in time to sound the whistle.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1489-1500; Dec. Dig. § 419.*]

2. RAILROADS (§ 446*)—QUESTION FOR JURY—PROXIMATE CAUSE OF INJURY.

Evidence, in an action against a railroad company for running over and killing turkeys, held sufficient to take to the jury the question whether defendant's failure to sound the alarm whistle was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

3. TRIAL (§ 165*)—NONSUIT—DETERMINATION.

Upon motion for a nonsuit the evidence must be taken in the light most favorable to the plaintiff and with all the inferences which may be reasonably drawn therefrom in his favor.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

Appeal from Superior Court, Washington County; Whedbee, Judge.

Action for damages by G. V. Lewis against the Norfolk Southern Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Gaylord & Gaylord, of Plymouth, for appellant. W. M. Bond, Jr., of Plymouth, for appellee.

CLARK, C. J. [1, 2] It was in evidence that "about midday the defendant's train passed plaintiff's house, which was about 60 yards from the track. The train was 20 minutes late and going extra fast. The engine ran over and killed 6 of plaintiff's turkeys which were 250 yards further down the track. Those in charge of the train could have seen the turkeys a distance of 500 yards. No whistles were blown and the train made no other noise than that usually made in running. The engine did not let off any steam. There were no obstructions on the track to prevent the turkeys being seen." Upon this evidence it was error to grant a nonsuit. From the known characteristics of turkeys, a flock of them feeding on or crossing a track might not notice that the train was approaching or attempt to fly. But as when a gun is discharged close by, if there had been the sharp blow of the whistle, the turkeys would doubtless have taken to wing or have run. They are very timid, if alarmed, but they are not alert to perceive danger.

It has been repeatedly held that it is error not to sound the whistle when cattle or horses are on the track, which are seen by the engineer in time, or which should have been seen by him in time, to give warning by the whistle. Turkeys would be much less likely to notice the approach of a train than cattle or horses and would be more likely to save themselves by flight when a whistle is sounded. As already said, they have less intelligence to perceive the danger of an approaching train and would be more easily frightened by the sudden sharp blow of the whistle. They can escape, too, more quickly by the use of wings. It cannot be denied that there was evidence of negligence in failing to sound the whistle when the turkeys were seen, or should have been seen. It is true it is necessary for the jury to find not only negligence on the part of the defendant but further that such negligence was the proximate cause of the injury, and that if the whistle had been blown the turkeys would probably have flown in time. From the well-known characteristics of these fowls, the jury would have been justified in inferring from this evidence that the failure to blow the whistle was the proximate cause of their being killed, and that they would have removed themselves promptly by flight if the whistle had been sharply blown.

[3] Upon a nonsuit, the evidence must be taken in the light most favorable to the

plaintiff and with all the inferences which may be reasonably drawn therefrom in his favor.

In *Railroad v. Wilson*, 28 Kan. 641, it is said: "The idea is not tolerable that an injury may be inflicted which by ordinary care and diligence may be avoided. This is the rule in the ordinary affairs of life and is as applicable to corporations as to individuals. *Railroad v. Cauffman*, 38 Ill. 425; *Railroad v. Lewis*, 58 Ill. 49; *Railroad v. Phillips*, 20 Kan. 9; *Railroad v. Rice*, 10 Kan. 426. Although the drove of cattle could have been seen from the train approaching the crossing, no attempt was made by sounding the whistle to frighten the cattle and make them run away, and no attempt was made to slacken the speed of the train or prevent it from running into the drove. Therefore there was evidence to go before the jury as to the negligence and careless operation of the train by the railroad company, and also evidence that the helper was thrown from the track through the result of such negligence." This and many other cases to same effect are cited. 3 Elliott, R. R., § 1207.

In *Moore v. Electric Co.*, 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470, relied upon by the defendant, it was held that "the killing of a dog by a street railroad is not prima facie evidence of negligence"; the court saying that dogs are of superior intelligence and "are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse or a cow or a hog or any of the lower animals would be killed or injured by dangerous agencies, the dog would extricate himself with safety." The use of a whistle is more necessary and would be more effective with a drove of turkeys than with a drove of cattle or hogs.

The case should have been submitted to the jury together with such evidence, if any, as the defendant may see fit to offer in rebuttal.

Reversed.

STATE v. HYMAN.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. INDICTMENT AND INFORMATION (§ 3*)—NATURE OF OFFENSE—"FELONY" OR MISDEMEANOR.

Const. art. 1, § 12, declares that no person shall be put to answer a criminal charge, except as hereinafter allowed, but by indictment, presentment, or impeachment; and section 13 provides that the Legislature may provide other means of trial for petty misdemeanors, with the right of appeal. Revisal 1905, § 3291, provides that a "felony" is a crime which is or may be punishable by death or imprisonment in the state's prison, and that any other crime is a misdemeanor. Section 3615 styles perjury as a misdemeanor, but provides that it may be punished by fine not exceeding \$1,000 and imprisonment not more than 10 years in the state's

prison. *Held*, that perjury, being punishable by imprisonment in the state's prison, is a felony, and not a petty misdemeanor, and is therefore triable only on indictment of a grand jury.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 9-23; Dec. Dig. § 8.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2736-2744; vol. 8, p. 7662.]

2. CRIMINAL LAW (§ 27*)—OFFENSES—NATURE AND CHARACTER—FELONY OR MISDEMEANOR.

While the Legislature may prescribe different punishments for the same offense in different counties, and may reduce the punishment for all offenses, including those punished capitally, to an extent that would make any offense a petty misdemeanor, calling an offense a petty misdemeanor does not make it so, when the punishment imposed makes it a felony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 29-31; Dec. Dig. § 27.*]

3. CRIMINAL LAW (§ 13*)—OFFENSES—NATURE AND CHARACTER—MISDEMEANOR OR FELONY.

The Constitution not having defined petty misdemeanors, it was competent for the Legislature to define the offenses which should be so classified, provided the punishment prescribed therefor was not that prescribed for felonies.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.*]

4. CRIMINAL LAW (§ 90*)—COURTS—JURISDICTION.

Perjury, being punishable by imprisonment in the penitentiary as provided by Revisal 1905, § 3615, was a felony, and therefore was not within the jurisdiction of the recorder's court of Edgecombe, under Pub. Loc. Laws 1911, c. 472, providing that such courts should have exclusive original jurisdiction of all other criminal offenses committed within the county below the grade of felony, which are declared to be petty misdemeanors.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 129-136; Dec. Dig. § 90.*]

Appeal from Superior Court, Edgecombe County; Cline, Judge.

Levi Hyman was convicted of perjury, and he appeals. Judgment arrested.

The Attorney General and T. H. Calvert, Asst. Atty. Gen., for the State. G. M. T. Fountain & Son, of Tarboro, for appellant.

CLARK, C. J. The defendant was convicted of perjury in the recorder's court of Edgecombe. On appeal to the superior court he was tried on the original warrant and again convicted. The defendant excepted, on the ground that he could not be tried for this offense, except upon a bill of indictment found by a grand jury. He relies upon the provision in Const. art. 1, § 12: "No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment." Section 13 of the same article, which guarantees the right of trial by jury, is complied with by a jury trial being given on appeal. *State v. Lytle*, 138 N. C. at page 742, 51 S. E. at page 68. The requirement of an indictment, presentment, or impeachment is not dispensed with, "except as hereinafter allowed," in section 13 in these words: "The Legislature may, how-

ever, provide other means of trial for petty misdemeanors, with the right of appeal."

[1] The question presented, therefore, is whether perjury is a petty misdemeanor in Edgecombe county. Pub. Loc. Laws 1911, c. 472, provides that the recorder's court "shall have exclusive original jurisdiction of all other criminal offenses committed within the county, below the grade of felony, * * * and the same are hereby declared to be petty misdemeanors." Revisal, § 3291, defines the line between felonies and misdemeanors as follows: "A felony is a crime which is or may be punishable by death or imprisonment in the state's prison. Any other crime is a misdemeanor." The state, however, relies upon Revisal, § 3615, which styles perjury a misdemeanor, though it further provides that it may be punished "by a fine not exceeding \$1,000 and imprisonment not more than 10 years in the state's prison." There is a palpable contradiction in the two sections, and while the Revisal must be construed together, yet if one provision leads to a conflict with the Constitution, and the other does not, we must take the latter.

At common law perjury and forgery were misdemeanors, it is true; but there was no imprisonment in the state's prison prescribed. Revisal, § 3615, is a statute which was enacted in 1791, and conformed to the common law, which at that time made perjury a misdemeanor, and the words "state's prison" were written into this section in Code 1883, § 1092. The statute which is now Revisal, § 3291, defining the line between felonies and misdemeanors, was enacted in 1891, just 100 years later, and is the latest expression of the legislative will. The words in section 3615 making perjury a, "misdemeanor," which was enacted in 1791, evidently retained that definition in Revisal, § 3615 by inadvertence, notice not being taken of the fact that imprisonment in the state's prison, which had been added to the punishment in 1883, made it a felony under Revisal, § 3291.

In *State v. Shaw*, 117 N. C. 765, 23 S. E. 246, the court recognized that under Laws 1891 (now Revisal, § 3291) any offense "punishable by death or imprisonment in the state's prison" was a felony, and hence that the word "feloniously" should be used in the indictment for such crimes. In *State v. Harris*, 145 N. C. 458, 59 S. E. 116, Hoke, J., held that the word "feloniously" was not necessary in an indictment for perjury, not because perjury was not a felony, but because the Legislature had prescribed in Revisal, § 3247, a form of indictment for perjury, in which that word was omitted; and *Walker, J.*, held to the same purport, and on the same ground, in *State v. Cline*, 146 N. C. 640, 61 S. E. 522.

In *State v. Fesperman*, 108 N. C. 770, 13 S. E. 14, we held that the measure of punishment is the test of jurisdiction, and that

the Legislature could not confer upon a justice of the peace exclusive jurisdiction of certain offenses, unless it restricted the punishment for such offenses to the limit allowed a justice of the peace. That case has been repeatedly cited with approval. See citations to 108 N. C. 772, in Anno. Ed. For the same reason, while the Legislature can reduce any offense whatever to a misdemeanor, or even to a petty misdemeanor, it can only do so effectively by reducing the punishment to that allowed for such offenses. It cannot authorize punishment by imprisonment in the state's prison for 10 years and yet declare such offense to be a petty misdemeanor.

In *State v. Holder*, 153 N. C. 606, at page 610, 69 S. E. 46, at page 68, chiefly relied upon by the state, it is held that perjury was "still a felony," though the word "feloniously" was dispensed with by statute in any indictment for that offense. It was further held that as to the offense charged in that case (throwing stones at a train) the word "feloniously" was not essential. The ruling in substance was that, when the statute has styled an offense a misdemeanor which is yet punishable by imprisonment in the state's prison, the effect is to dispense with the word "feloniously" in the indictment; but it was not held in that case, nor has it been held in any other, that when the Legislature styles an offense a misdemeanor, but leaves it punishable by imprisonment in the state's prison, that the constitutional requirement of an indictment by a grand jury is dispensed with. Dispensing with the word "feloniously" in no wise impinges upon any constitutional requirement.

[2, 3] The Legislature may prescribe different punishments for the same offense in different counties, and it may reduce the punishment for all offenses, even those now punished capitally, to an extent that would make any offense a "petty misdemeanor." But calling an offense a petty misdemeanor does not make it so, when the punishment imposed makes it a felony. In *State v. Lytle*, 138 N. C. 738, 51 S. E. 66, the court held: "The Constitution not having defined 'petty misdemeanors,' it was competent for the Legislature to define the offenses which should be so classified, *provided the punishment therein is not that of felonies.*" We now reaffirm this. In that case (on page 743 of 138 N. C., page 68 of 51 S. E.) the court states that misdemeanors at common law were divided into two classes: "(1) Those which, by reason of their heinous nature, might be punished corporally; and (2) those that could not be so punished." It is then held that the latter can be termed petty misdemeanors, but that the former could not be so held, unless the punishment was reduced by statute to what would be the punishment for petty misdemeanors. The court said (page 744 of 138 N. C., page 69 of 51 S. E.): "The General Assembly can reduce the punishment of any and all offenses

es, and leave no offense above the grade of petty misdemeanors; but the punishment must not be that of felony, for the punishment controls the definition. *State v. Fesperman*, 108 N. C. 770 [13 S. E. 14]. That case has been cited and approved in *State v. Jones*, 145 N. C. 460, 59 S. E. 117, in *State v. Shine*, 149 N. C. 480, 62 S. E. 1080, in *State v. Dunlap*, 159 N. C. 491, 74 S. E. 626, and in several other cases. In the last-named case the Legislature had made the larceny of goods "less than \$20 in value" punishable "not to exceed imprisonment in the county jail, or on the public roads, not more than one year," and the court held that a statute making such offense a petty misdemeanor and putting it within the jurisdiction of the recorder's court was constitutional, for the punishment was that of a petty misdemeanor.

[4] We are therefore of opinion that, the offense of perjury being punishable in the county of Edgecombe by imprisonment in the state's prison, it is not an offense "below the grade of felony," and that the statute (Pub. Loc. Laws 1911, c. 472) does not declare it to be a "petty misdemeanor." Hence the recorder's court had no jurisdiction thereof, and on appeal to the superior court the defendant could not be tried, unless a bill had been found by a grand jury.

Judgment arrested.

WALKER and ALLEN, JJ., concur in result.

SEDBURY v. SOUTHERN EXPRESS CO. (Supreme Court of North Carolina. Sept. 17, 1913.)

1. SUBMISSION OF CONTROVERSY (§ 7*)—SUFFICIENCY OF STATEMENT—RIGHT OF ACTION—ELEMENTS.

In an action against an express company to recover money alleged to have been lost from a valise while in the hands of the express company for transportation, a judgment for plaintiff could not be sustained, where the agreed facts on which the case was submitted contained no finding that the money was taken while the valise was in defendant's care or control.

[Ed. Note.—For other cases, see *Submission of Controversy*, Cent. Dig. § 8; Dec. Dig. § 7.*]

2. JUDGMENT (§ 1*)—WHAT CONSTITUTES.

In its ordinary acceptation, a "judgment" is the conclusion of the law on facts admitted or in some way established.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1, 3, 4; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

Appeal from Superior Court, Edgecombe County; Lyon, Judge.

Action by Edna B. Sedbury against the Southern Express Company to recover \$13 and interest, money alleged to have been lost from a valise intrusted to defendant carrier for shipment from Fayetteville to Tarboro,

N. C., and for a penalty for failure to adjust the claim within the time required by Laws 1911, c. 139. In the superior court the action was submitted on an agreed case, and judgment rendered for plaintiff for claim and penalty, and defendant appeals. Remanded.

F. S. Spruill, of Rocky Mount, for appellant. G. M. T. Fountain & Son, of Tarboro, for appellee.

PER CURIAM. [1, 2] We are unable to determine the questions at issue in this cause, for the reason that the facts agreed upon contain no finding that the money was taken while the valise was in the care or control of defendant company. In its ordinary acceptation, a judgment is the conclusion of the law upon facts admitted or in some way established, and, without this essential fact, the court is not in a position to make final decision on the rights of the parties. *Bryant v. Insurance Company*, 147 N. C. 181, 60 S. E. 983. The cause will be remanded, that the determinative facts may be established. The costs will be equally divided between the parties.

Remanded.

WARRICK v. TAYLOR.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. LOGS AND LOGGING (§ 3*)—TIMBER DEED—RIGHTS CONVEYED.

Plaintiff conveyed all the pine and oak timber of certain dimensions on a tract of land to defendant's intestate by deed dated June 20, 1899, under which the right to remove the timber expired June 20, 1906. Intestate contemporaneously executed a written license authorizing plaintiff to cut scattering pine timber on 2½ acres of the land, and on November 7, 1901, conveyed "all the standing timber" on the land to C. On July 9, 1902, plaintiff executed a deed to C., confirming the original conveyance of the timber, and extending the right to cut and remove the same to June 20, 1908, and during the period as so extended C. cut and removed all the timber, including the scattering pine on the 2½ acres covered by the license. Held that, since all the timber was cut and removed by C. after the time limit in the deed from plaintiff to intestate and from him to C. had expired, C.'s authority to cut the timber rested on plaintiff's deed to C., and, intestate never having cut any timber from the land, his personal representative was not liable for the cutting of the scattering timber, on the theory that intestate's conveyance to C. included the timber reserved by the license.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. NEW TRIAL (§ 108*)—GRANT BY SUPREME COURT.

The Supreme Court will grant a new trial for newly discovered evidence only where it is very probable that substantial injustice has been done by reason of the unavoidable failure to produce the evidence at the trial, and it also appears probable that on a new trial a different result will be reached and right prevail.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 226, 227; Dec. Dig. § 103.*]

Appeal from Superior Court, Northampton County; Cooke, Judge.

Action by H. T. Warrick against Mollie L. Taylor, as administratrix of L. L. Taylor, deceased. From a judgment of nonsuit on plaintiff's first cause of action, he appeals, and moves for a new trial on the second cause of action for newly discovered evidence. Judgment affirmed, and motion denied.

W. H. S. Burgwyn, of Woodland, and Mason, Worrell & Long, of Jackson, for appellant. Peebles & Peebles and Gay & Midgett, of Jackson, for appellee.

BROWN, J. [1] The facts pertinent to the first cause of action are these: Plaintiff conveyed to L. L. Taylor, the intestate, by deed dated June 20, 1899, all the pine and oak timber of certain dimensions on a tract of land, to be cut and removed within seven years. This deed was duly recorded July 22, 1899. The said Taylor then gave to the plaintiff the following paper: "I, L. L. Taylor, do hereby give H. T. Warrick permission to cut the scattering pine timber on the hill on 2½ acres of his land lying on the southeast corner of his house, where he has been cutting cordwood, near a pond or drain in said woods. L. L. Taylor. Witness: J. L. Harris." This was recorded April 4, 1913. On November 7, 1901, L. L. Taylor conveyed all said standing timber to the Camp Manufacturing Company by deed recorded January 7, 1902. Under the deed from plaintiff to Taylor, the time within which the timber must be cut and removed expired June 20, 1906; but on July 9, 1902, the plaintiff executed a deed to the Camp Manufacturing Company, confirming the original conveyance, and conferring upon said company the right to cut and remove all the timber until June 20, 1908. This deed was recorded July 19, 1902. During the extended period of two years, between June 20, 1906, and June 20, 1908, the Camp Company cut and removed all the said timber, including "the scattering pine timber on the hill on 2½ acres," described in the paper writing given by Taylor to Warrick, *supra*, numbering some 19 sticks.

Upon these facts, the motion to nonsuit was properly sustained. The evidence shows that all the timber was cut and removed by the Camp Manufacturing Company after the time limit in the deed from plaintiff to Taylor and Taylor to Camp had expired. None of it was cut by the defendant's intestate, Taylor. The authority of Camp to cut the timber was plaintiff's deed to Camp, dated July 9, 1902, extending the time authorizing the cutting for two years. Had plaintiff not executed this instrument, all the timber, including the "scattering pine timber on the hill," would have reverted to him. It is difficult to conceive, upon this state of facts, why plaintiff should recover against Taylor.

[2] There is no assignment of error by the plaintiff as to anything that occurred at the trial of his second cause of action, and he relies solely upon his motion for a new trial for alleged newly discovered testimony as to said second cause of action, which said motion is made for the first time in this court. Motions for a new trial, founded upon alleged newly-discovered evidence, are carefully scrutinized, and we are not disposed to grant them, except for substantial cause, in cases that come strictly within the established rules of law applicable to them. *Simmons v. Mann*, 92 N. C. 16. This court will not grant a new trial for newly-discovered evidence for light causes and considerations. It will do so only in cases where it is very probable that substantial injustice has been done by reason of the unavoidable failure to produce the evidence on the trial, and when also it is probable that upon a new trial a different result will be reached and the right will prevail. Evidence merely cumulative is generally considered as insufficient. *Simmons v. Mann*, *supra*.

We have examined carefully the affidavits in support of the motion, and the same is denied.

The judgment of the superior court is affirmed.

AREY DISTILLING CO. v. MUTUAL AID BANKING CO. et al.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. TRIAL (§ 141*)—DIRECTED VERDICT—WHEN PROPER.

In an action against a banking company to recover the amount of drafts collected by it for plaintiff, where the testimony of plaintiff's former bookkeeper as to the amount not remitted or accounted for was not controverted or denied, and there was no attempt to impeach him by cross-examination, plaintiff was entitled to a directed verdict for such amount.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

2. BANKS AND BANKING (§ 165*)—COLLECTIONS—LIABILITY—ILLEGAL TRANSACTIONS.

That drafts collected by a bank for plaintiff were for shipments of liquor did not defeat plaintiff's right to recover from the bank the amount collected, since, where an agent receives money to his principal's use, it is immaterial whether it was paid on a legal or illegal contract.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 571-573, 583-585; Dec. Dig. § 165.*]

Appeal from Superior Court, Beaufort County; Long, Judge.

Action by the Arey Distilling Company against the Mutual Aid Banking Company and others. From the judgment, plaintiff appeals. New trial ordered.

Civil action tried at February term, 1913, upon this issue: "What part of the amount collected and received by the defendants to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the use of the plaintiff have defendants failed to account for and pay over to the plaintiff? Answer: \$108.05."

Upon this trial before the jury, plaintiff offered the witness E. A. Allenach, who testified: "I was bookkeeper for D. L. Arey Distilling Company, but am not with them now. The total amount of drafts sent by plaintiff to defendants in this case amount to \$11,105.50. Of that amount, including such drafts as defendants returned, the sum of \$10,528.45 was remitted or accounted for; the difference between the two items being \$577.05. These transactions occurred in 1910. I have been through and over the drafts and bills which were introduced in evidence before the referee, and they show a balance due by defendants to plaintiff of \$518.05. This amount does not correspond with the amount shown in the other statement, for the reason that it did not include the draft on J. W. Stallings and New Bern Pottery Company. The balance due by defendants to plaintiff is \$577.05."

Plaintiff also offered in evidence the drafts and statements referred to by the witness. No other evidence was introduced by plaintiff or defendants. Plaintiff requested the court to charge the jury that, if they found the facts to be as testified to, they should answer the issue, "\$577.05, with interest." The court declined to give this instruction, and the plaintiff excepted and appealed.

Small, MacLean & Bryan, of Washington, N. C., for appellant.

BROWN, J. [1] The plaintiff, a manufacturer of distilled whiskies, located in the city of Baltimore, Md., shipped whisky to parties living in the city of New Bern, N. C., and sent drafts with bills of lading attached to the defendant in New Bern for collection. This suit was brought by plaintiff to recover from the defendants the balance of the money which they had collected, but not remitted to plaintiff. A compulsory reference was ordered at the May term, 1911, to which plaintiff excepted, and to the report of the referee plaintiff again excepted, and demanded a jury trial. The referee reported that defendants had in their hands a balance due plaintiff of \$108.55, but that plaintiff could not recover same, because the transaction was immoral. Upon the trial in the superior court, plaintiff offered evidence that the total amount of drafts sent by plaintiff to defendants was \$11,105.50, of which \$10,528.45, including drafts returned, was remitted or accounted for, leaving a balance due of \$577.05. This evidence was not controverted or denied in any way. The testimony of Allenach, the only witness introduced, was not even attempted to be impeached by cross-examination. His honor erred in refusing the prayer.

[2] It is immaterial that the drafts col-

lected by defendant bank for plaintiff as its agent were drawn on persons to whom plaintiff had shipped liquor. The defendant was not so highly moral that it refused to collect and receive such money. Having collected it, the law will not allow the defendant to appropriate it to its own use. *State v. Fisher*, 77 S. E. 121; *Jewelry Co. v. Joyner*, 159 N. C. 644, 75 S. E. 993. This subject is fully discussed in this last case, and the leading authorities are collected and cited, universally holding, in the language of Justice Buller in *Farmer v. Russell*, 1 Bos. & P. 296: "When it appeared that the agent had received money to the plaintiff's use, it is immaterial whether the money was paid on a legal or illegal contract."

New trial.

In re CHERRY'S WILL.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. WILLS (§ 292*)—PROBATE PROCEEDINGS — ADMISSIBILITY OF EVIDENCE.

On the trial of a caveat filed to a will offered for probate, evidence that the propounders were claiming under the alleged will property which was given thereby to the caveators was properly excluded.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 665; Dec. Dig. § 292.*]

2. WILLS (§ 292*)—PROBATE PROCEEDINGS — ADMISSIBILITY OF EVIDENCE.

On the trial of a caveat filed to an alleged will offered for probate, evidence that one of the caveators had paid a physician for attending deceased, and had also paid for a monument for deceased, was properly excluded.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 665; Dec. Dig. § 292.*]

3. WILLS (§ 123*)—EXECUTION—ATTESTATION BY WITNESSES.

While the testator must sign a will in the presence of two witnesses, who must in his presence sign as attesting witnesses, it is not necessary that he must see the paper at the instant that the witnesses sign, if they are in such a position that he could see them sign, if he so desired.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 321-331; Dec. Dig. § 123.*]

4. WILLS (§ 120*)—EXECUTION—ATTESTATION BY WITNESSES.

A testator need not expressly ask the witnesses to sign their names as witnesses thereto, if the will is executed under such circumstances as to indicate that he intended the paper writing that he signed to take effect as his will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 314-317; Dec. Dig. § 120.*]

5. WILLS (§ 52*)—PROCEEDINGS FOR PROBATE — BURDEN OF PROOF.

Where it is shown that a will was properly executed, the law presumes that the testator had the power to make it, and the burden is on the caveators to show lack of mental capacity, and, if the jury are not satisfied that the testator lacked mental capacity, they must find such capacity in accordance with such presumption.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 101-110; Dec. Dig. § 52.*]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Issue of *deviseavit vel non* upon a caveat filed by V. R. Cherry and others to an alleged will of Alonza Cherry. From a judgment in favor of the propounders, the caveators appeal. Affirmed.

Just before charging as complained of in exceptions 5 and 7, the court charged that the burden was on the propounder to satisfy the jury as to the formal execution of the will; that she must satisfy them that deceased either signed the will himself, or made his mark to it, that he made it in the presence of two witnesses, and that they in his presence and in the presence of each other, at his request, signed their names as attesting witnesses.

The paper propounded contains the following: "I give and bequeath to my wife, Claudia Cherry, all of my property of every description, personal, real and mixed, except such as I may inherit from my father's estate, which will go to my half brothers and sisters." The testator had no half brothers and sisters, but had three brothers of the whole blood and one half-sister, who are the caveators. The propounders are M. G. Singleton and wife, Claudia, née Cherry. The testator could read and write, but his signature appears by mark. The paper was dictated by Mr. Burbank and written by the witness Stancill away from the testator's presence and hearing, and was a few hours before his death, which followed an illness of several months' duration. Caveators alleged that said paper was not valid as a will, because (1) it was not attested and declared in the form prescribed by law; (2) the testator lacked the necessary mental as well as physical capacity to make a will, and (3) it was procured by undue influence. The jury found for the propounders, and the caveators appealed.

(1) Exceptions 1, 2, and 3. Caveators offered to prove that the propounders were not only claiming under the paper offered for probate the Wiley Cherry place and all personal property of the deceased, but that they were also claiming the land on which R. C. Cherry lived, and referred to in the will as "his father's estate," and offered to introduce the deeds for said land. The court excluded this evidence, and the caveators excepted, assigning the same as error.

(2) Exceptions 4. Caveators further offered to prove by Mrs. Singleton, the propounder, on her cross-examination, and by Macon Cherry, one of the caveators and brother of Alonza, that the said Macon Cherry had paid Dr. S. T. Nicholson for attending his brother, and had also paid for the monument to his brother's grave. The court excluded this evidence, and the caveators excepted, assigning the same as error.

(3) Exceptions 5 and 7. Upon the question of the formal execution of the will, the court charged the jury: "When I say 'in his presence' I do not mean that he must have necessarily seen the paper at the instant, and attested the signature. I mean by 'in his presence' in such a position that he could have seen them do it, if he so desired. I do not mean that he should have called them, and said, 'Come here and sign your name as a witness to my will,' but she must satisfy you that it was done under such circumstances as he intended the paper writing that he signed to take effect as his will." Caveators excepted to this instruction, and assigned the same as error, upon the ground that it is erroneous in law, and is not justified by the evidence. Exception 7 is substantially to the same effect.

(4) Exceptions 6 and 8. Upon the question of execution, as she also upon the question of testamentary capacity and burden of proof, the court charged the jury: "If you are satisfied from this evidence, by its greater weight, that Alonza Cherry signed this paper writing in the presence of Mr. Parvin and Mr. Stancill, and that they signed their names as attesting witnesses in the presence of each other, bearing in mind what I have defined as the meaning 'at his request' and 'in his presence,' then upon that phase the propounders would have met the proof, and nothing else appearing it would be his will, because the law presumes that every man has the power to make a will. Therefore, if you find that the will was executed as I have charged you, then the burden shifts to the caveators to satisfy you that he did not have sufficient mental capacity to execute a will at the time this paper writing purports to have been executed"—and that: "If you are not satisfied that he lacked mental capacity, but are satisfied that it was executed according to the forms of law, the law presumes that he had the mental capacity, and you will answer it, 'Yes.'" To these instructions caveators excepted, and assign the same as error, upon the ground that they are erroneous in law and contrary to the evidence.

Small, MacLean & Bryan, of Washington, N. C., for appellants. Ward & Grimes, of Washington, N. C., for appellees.

PER CURIAM. [1-5] We have examined the record and the four assignments of error, and are unable to find any error which necessitates another trial.

The case was made to turn upon the due execution of the will and the mental capacity of the testator. In his rulings his honor followed the well-settled decisions of this court. No error.

LAMM et al. v. LAMM et al.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. REFORMATION OF INSTRUMENTS (§ 45*) — DEGREE OF PROOF REQUIRED.

Where relief is sought on the ground of mutual mistake or mistake of one party and fraud of the other, or on the ground that an instrument intended as a mortgage or deed of trust was by mistake drawn as an absolute deed, or where it is sought to establish a resulting trust based on a verbal agreement to buy for another or to set up a lost deed, the facts showing the right to such relief must be established by clear and convincing proof and by evidence dehors the deed and inconsistent with it.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

2. REFORMATION OF INSTRUMENTS (§ 45*) — DEGREE OF PROOF REQUIRED.

In an action against a wife by the children of her husband for relief against a deed to defendant from a third person, on the ground that the land was purchased by the husband and deeded to her as a result of her fraud and undue influence, plaintiffs were required to establish the issue submitted only by the greater weight of the evidence, since the action was not to correct the deed as made by the third person nor to establish any claim as against him, but to correct it as to the name of the grantee therein on the ground that its execution was obtained by fraud or undue influence of such grantee, and the allegations of fraud need be proved only so as to produce a belief of their truth in the minds of the jury.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

3. EVIDENCE (§ 121*)—ADMISSIBILITY — RES GESTÆ.

In an action against a second wife for relief against a deed to her from a third person on the ground that the land was purchased by her husband, plaintiffs' father, but was deeded to her as a result of her fraud and undue influence, facts and circumstances in the association between the husband and wife tending to show the extent of her influence over him and the objectionable means by which it was acquired were admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.*]

4. LIS PENDENS (§ 7*)—PURCHASERS PENDING SUIT.

Purchasers of land pending a suit to correct a deed thereto on the ground that it was obtained by fraud and undue influence and after a complaint, fully describing the property which was situated in the same county, had been filed, held the property subject to the results of the suit.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 13, 14, 22; Dec. Dig. § 7.*]

Appeal from Superior Court, Edgecombe County; Lyon, Judge.

Action by Dock Lamm and others against Florence Lamm and others. Judgment for plaintiffs, and the defendant H. R. Hinton appeals. Affirmed.

The action was instituted by plaintiffs, the heirs at law and children by a former wife of Matthew T. Lamm; that their mother having died, the father intermarried with

defendant Florence Lamm, and on December 21, 1908, said Matthew Lamm, having sold a piece of land in Wilson county, purchased the land in controversy lying in Edgecombe county from W. J. Taylor and wife, and the deed therefor was made from said Taylor to Florence Lamm, the second wife; and that said deed was so made by reason of the fraud and undue influence exercised by said Florence. The allegations were denied by defendant. After action commenced and complaint and answer filed, fully describing the land, defendant Florence sold and conveyed the land to George T. Dawes, to wit, in January, 1912, and thereafter and pending the controversy, said Dawes sold and conveyed it to H. R. Hinton, who was made party and filed his answer asserting ownership of the property in December, 1912. The jury rendered the following verdict: "Did Florence Lamm by undue influence and fraud induce her husband, Matthew T. Lamm, to have deed from W. J. Taylor and wife made to her? Answer: Yes."

E. B. Grantham, M. V. Barnhill, and T. T. Thorne, all of Rocky Mount, for appellant. Finch & Connor, of Wilson, and Gilliam & Gilliam, of Scottsville, Ky., for appellees.

HOKE, J. (after stating the facts as above). In *Harding v. Long*, 103 N. C. 11, 9 S. E. 445, 14 Am. St. Rep. 775, Associate Justice Avery, delivering the opinion, classifies cases of this kind in reference to the degree of proof required to establish the determinative issues as follows:

"The rule governing the quantum and quality of proof required to sustain allegations of fraud, undue influence and mistake, in the execution of written instruments, and to establish resulting trusts, is as follows:

[1] "(1) In cases in which relief is sought on the ground of mutual mistake, mistake of one party, and fraud on the part of the other, or that a deed was drawn by mistake an absolute deed, when it was intended as a mortgage or deed of trust, or it is sought to establish a resulting trust, based on a verbal agreement to buy for another, or to set up a lost deed, in all these cases such allegations, of the party seeking relief, as are necessary to show his right to it, must be established by clear and convincing proof; and evidence dehors the deed and inconsistent with it must be shown.

[2] "(2) But where it is sought to have a deed declared void because its execution was obtained by false and fraudulent representations or undue influence, or because it was executed with intent to hinder, delay, or defeat creditors, the allegations material to establish the fraud must be proven so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The case before us comes within the second of these classifications, and the court committed no error in holding that plaintiffs were only required to establish the issue submitted by the greater weight of the evidence. It is true that the judgment declares Hinton the holder of the legal title, in trust for the claimants, and directs him to convey; but this was not to correct the deed as made by Taylor nor to establish any claim as against him, but the rights of these parties accrued by reason of the fraud and undue influence on the part of the defendant Florence. That was the determinative question involved in the issue, and the judgment was the correct method of establishing the right of plaintiffs as against said Florence, the beneficiary of the fraudulent deed, and this, as we have seen, may be properly shown by the greater weight of the evidence.

[3] The objection to the rulings of the court as to the admission of testimony are without merit. They were chiefly facts and circumstances in the association between Matthew Lamm and the defendant Florence, his wife, and, tending as they did to show the extent of her influence over him and the objectionable means by which they were acquired, were all part of the *res gestæ* or relevant facts in the *res gestæ* and were very properly admitted. *Fraley v. Fraley*, 150 N. C. 501, 64 S. E. 381.

[4] Defendant Hinton and his immediate grantor, Dawes, having bought and received their title pending the controversy and after complaint filed fully describing the property situate in the same county, hold the same subject to the results of the suit. *Lee v. Giles*, 161 N. C. 548, 77 S. E. 852; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351.

There is no error in the record; and the judgment entered is affirmed.

No error.

SPENCER v. SPENCER et al.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. WILLS (§ 269*)—PROBATE OF CODICIL—NOTICE OF APPLICATION—"CODICIL."

Revisal 1905, § 3123, providing that, if the executor does not probate the will within 60 days after testator's death, then any devisee or legatee, or any person interested in the estate, may make application upon 10 days' notice to the executor, applies to the probate of a codicil as much as to a will, since a codicil is a supplement or addition to a will and a part thereof; hence the probate of a codicil by a legatee named therein, more than a year after the probate of the original will by the executor, without the required notice to the executor, was void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 620-625; Dec. Dig. § 269.*

For other definitions, see Words and Phrases, vol. 2, pp. 1240, 1241.]

2. WILLS (§ 99*)—CODICIL.

A letter written by testator to his brother immediately after he had executed his will and

just before his departure on a European trip, in which he stated: "If I die I want you to have your part of the five thousand insurance I took out for Spencer Bros. I have written to Bro. George to see that you get it"—was not a codicil because not made *animo testandi*.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 287; Dec. Dig. § 99.*]

3. WILLS (§ 6*)—PROPERTY SUBJECT—INTEREST OF PARTNERS IN PARTNERSHIP PROPERTY.

A partner cannot bequeath or devise his undivided interest in any specific article belonging to the firm, since each has a joint interest in the whole but not a separate interest in any particular part of the partnership property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 5-10; Dec. Dig. § 6.*]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Action by A. G. Spencer against Geo. A. Spencer and another. From a judgment of nonsuit, plaintiff appeals. Affirmed.

The action is brought to recover one-sixth of an insurance policy for \$5,000, payable to a copartnership known as Spencer Bros., of Washington, N. C., composed of George A. and Jones Spencer. At one time the plaintiff owned a one-sixth interest in said copartnership. Defendants answered denying the ownership of plaintiff in said policy or any part of it.

Plaintiff offered the following evidence: Copy of the policy of insurance referred to in the pleadings. Plaintiff offered section 4 of the answer of G. A. Spencer down to and including the word "time" in the sixth line. Plaintiff offered a certified copy from the office of the clerk of the superior court of Craven county, under his hand and official seal, of the will of the late Jones M. Spencer and the alleged codicil thereto attached as appears to have been probated. Upon objection by each of the defendants to the introduction of the copy of the alleged codicil, plaintiff's counsel stated that they had no information that any written notice was ever given to the executor of Jones M. Spencer of the motion to probate the said letter as a codicil to the will of the said Jones M. Spencer, and that plaintiff had no evidence to offer that such notice was given. Defendants severally object and except to the admission of said paper. Plaintiff introduced bill of sale from the plaintiff to J. M. Spencer and George A. Spencer, Book 156, p. 66. Conveyance from K. Eula Spencer to G. A. Spencer, dated June 15, 1909.

A. G. Spencer was sworn and testified: "I am the A. G. Spencer referred to in the paper writing which we call a codicil, consisting of a letter from Jones M. Spencer. I was the brother of Jones Spencer and came out of the firm of Spencer Bros. at the time of the execution of the deed or bill of sale which has been read. I have never been paid any part of the proceeds of the policy referred to in this case. George A. Spencer told me the policy had been paid. (Admitted only against G. A. Spencer.)" Cross-examina-

tion: "I do not recognize the firm ledger; can't see well enough to. The best I can see, I think it is in the handwriting of George Hepinstall. When I was a member of the firm we carried in this ledger what we called a stock account. That account represented the proportionate interest of each member. At the time I sold out to J. M. and G. A. I do not exactly remember the relative interests in the firm, but they were about 10 for Jones, 7 for George, and 3 for me. I think Jones died in 1909, some time in March. He returned from his trip to Europe some time in the fall before that, several months, but not as much as six. George Spencer told me he had collected the policy. I did not know about the debts the firm owed at the time of the death of my brother. Never heard George Spencer say how much the debts were. He told me there was a very big trade; that they had a big sale and raised about enough to get them out of debt. That was just before Jones died. My interest in the partnership would be about one-sixth. I think Jones' was just about as much as George's and mine put together, and George and I were pretty near the same. There was a little difference between George and my shares up until just a short time before I drew out."

Plaintiff introduced a bill of sale from the plaintiff to J. M. and G. A. Spencer, dated January 6, 1904, and duly recorded, conveying to the said J. M. and G. A. Spencer, as copartners, all the right, title, interest, and estate of plaintiff, whatever the same may be, in and to all of the partnership assets and all of the partnership property of the said firm of Spencer Bros., and all accounts and every article of property of whatsoever kind, nature, or description, wherever the same may be situated, which belonged to the firm of Spencer Bros., or in which they had any interest, including the right to carry on business under the firm name of Spencer Bros., which bill of sale also conveyed to the said Spencer Bros., all of the interest of the plaintiff, as a member of the said firm, in said insurance policy. Plaintiff also introduced in evidence a conveyance from K. Eula Spencer, as executrix and devisee of J. M. Spencer, dated June 15, 1909, and duly recorded, conveying all of the right, title, and interest whereof the said J. M. Spencer died seised and possessed, in and to all of the property and assets of every kind and description belonging to or connected with the business and firm of Spencer Bros., composed of the said J. M. Spencer and G. A. Spencer, with a provision that the said G. A. Spencer should assume and pay all debts of the said firm.

Section of Insurance Policy.

"In the sum of five thousand dollars, and promises to pay at its home office, in the city of Philadelphia, unto the firm of Spencer Bros. (comprised of Jones M., George A., and

Alexander G. Spencer), its successors or assigns, the said sum insured, upon receipt of due proof of the death of the insured, during the continuance in force of this policy, upon the following conditions, namely."

Will of J. M. Spencer.

"I, J. M. Spencer, being of sound mind and good health, make this my last will and testament, I bequeath to my beloved wife K. Eula Spencer, my entire estate, real and personal property, and appoint her my executrix. Witness my hand and seal this Sept. 17th, 1903. J. M. Spencer. Witnesses: Carrie W. Cole; J. A. Jones."

Copy of Letter to A. G. Spencer.

"New York, 6-16-08.

"Bro. Alex: I am sorry you had to go under. I hope you will save something out of it. If I die I want you to have your part of the five thousand insurance I took out for Spencer Bros. I have written to Bro. George to see that you get it. We will sail for Southern Italy tomorrow, and will go up through the different countries to London and then home. Will be gone ten weeks. Give my love to Mame and Bettie. Goodbye, Your Bro., Jones."

This letter was offered for probate, without notice to the executrix, and probated as a codicil to the above will.

Plaintiff rested.

Each defendant severally moved for judgment of nonsuit. Motion allowed as to each. The plaintiff duly excepted and appealed.

Ward & Grimes, of Washington, N. C., for appellant. A. D. MacLean, of Washington, N. C., and A. D. Ward, of New Bern, for appellees.

BROWN, J. The plaintiff claims title to a portion of the insurance money by virtue of the alleged codicil to the will of Jones Spencer. The record contains no evidence that the letter offered as a codicil was ever duly probated in any court having jurisdiction, and, if it was so probated, it is admitted in the record that it was done some time after the probate of the will and without any notice to the executrix.

[1] Revisal, § 3123, provides: "If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days' notice thereof to the executor."

A codicil is a supplement or an addition to a will made by the testator, and to be taken as a part of the testament, and so intended by him at the time of making it. The formalities to be observed in the execution of wills and codicils, and the methods of probating them, are for the most part governed by statutory enactments; but it is generally agreed that a codicil must be executed with the same

formalities as a will, and the requirements of the statute must be strictly observed. 6 Am. & Eng. 176. We think the provisions of section 3123 apply to the production and probate of codicils as much so as to the original will, for to be a codicil it must be testamentary in form and intended by the testator to form a part of his testamentary dispositions.

The wisdom of the statute, and the cogent reasons for making it applicable to codicils, are illustrated here. In this case the will of J. M. Spencer had been probated, the executrix had qualified and executed the conveyance to her codefendant, G. A. Spencer, more than a year before the alleged codicil purports to have been probated, and she had no notice thereof whatever.

[2] We agree with the learned judge of the superior court that the letter in evidence cannot be permitted to operate as a codicil to the will dated September 17, 1903. The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper writing must appear to be written *animo testandi*. It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will or as a codicil to it.

In the case at bar, the testator had made his will in New York City on the eve of his departure for a European trip. This so-called codicil is a letter written to his brother immediately after he had executed his will and makes no reference to it. It is scarcely probable that the testator regarded or intended such a letter to be in any sense a part of his will. 1 Redfield on Wills, p. *174, and notes; *St. Johns Lodge v. Callender*, 26 N. C. 335; *Simms v. Simms*, 27 N. C. 684.

The case of *Alston v. Davis*, 118 N. C. 203, 24 S. E. 15, is relied upon by plaintiff. We admit that it sustains plaintiff's position, but we are unwilling to follow it as a precedent. It is weakened as such by a brief but expressive and forceful dissent and by the further fact that another member of the court took no part in the decision.

If the letter in question was duly probated in Craven county, as a codicil to the will, we doubt if it can be attacked in this collateral manner. Possibly the executor should proceed to have the record and judgment of probate set aside in the court where it was made. This point, however, is not made by the learned counsel for plaintiff, and therefore we have considered the case, as it was presented, on its merits.

[3] The third and last contention of the defendants appears to us conclusive of this case. The insurance policy in question was the property of the copartnership, a part of its assets, and was in no sense owned by the individual copartners.

The bill of sale, or assignment, dated January 6, 1904, executed by plaintiff to J. M.

and George A. Spencer, conveyed to them all of plaintiff's interest in the firm's property and assets, including this policy, and it became the property of the firm as a copartnership and *not the property of Jones Spencer as an individual*. At the date when the letter was written, the plaintiff owned no part of said policy, as he had conveyed it to his two associates.

J. M. Spencer, in using the words "your part of the five thousand dollars," did not undertake to give to his brother his (Jones') part. In fact, Jones Spencer could not convey or bequeath by will his interest in an isolated and distinct item of the partnership property. It is well settled that a partner cannot transfer his undivided interest in any specific article belonging to the firm (22 A. & E. Enc. p. 104), and this is so because each partner is possessed *per my et per tout*; or, in other words, each has a joint interest in the whole but not a separate interest in any particular part of the partnership property (22 A. & E. Enc. p. 95; *American Digest* [Cent. Ed.] vol. 33, § 143 [c]).

It is also held that an action cannot be maintained on an assignment of the interest of one partner in a partnership claim, unsupported by proof of the dissolution of the firm, or that the partner's interest was entire (30 Cyc. 495), and that property payable or transferable to others at the death of the testator may not be disposed of by will (40 Cyc. 1050).

The judgment of nonsuit is affirmed.

PENDER v. NORTH STATE LIFE INS. CO.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. APPEAL AND ERROR (§ 1003*)—REVIEW—QUESTIONS OF FACT.

Where there is sufficient evidence in law to support the finding of the jury, but it is claimed that the verdict is against the weight of the evidence, the only remedy is by an application to the trial judge to set aside the verdict, since under Const. art. 4, § 8, providing that the Supreme Court shall have jurisdiction to review decisions of the court below upon any matter of law or legal inference and that its jurisdiction over questions of fact shall be the same exercised by it before the adoption of the Constitution of 1868, the Supreme Court cannot review findings of fact in a case tried by a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

2. APPEAL AND ERROR (§ 979*)—REVIEW—QUESTIONS OF FACT.

The Supreme Court will not review the ruling of the trial judge on a motion to set aside the verdict as against the weight of the evidence unless it clearly appears that there has been a gross abuse of his discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. INSURANCE (§ 137*) — VALIDITY OF CONTRACT — PAYMENT OF PREMIUM — GIVING CREDIT.

Where insured received the policy as an ordinary applicant having no confidential relation with the company, and not as its agent, as claimed, and the company trusted him to pay the premium, the policy was then delivered and in force, since the company may waive the prepayment of the first premium and give credit therefor, although the contract requires prepayment, and this waiver may be shown by direct proof or may be inferred from circumstances such as the absolute delivery of the policy without payment of the premium under circumstances justifying an inference that credit is to be given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.*]

4. INSURANCE (§ 665*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on an insurance policy, where there has been an actual delivery and nothing else appears, the production of the policy by the beneficiary makes a prima facie case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1553, 1707-1728; Dec. Dig. § 665.*]

5. INSURANCE (§ 670*)—ACTION ON POLICY—FINDINGS—CONSISTENCY.

In an action on a life insurance policy, findings of the jury that the policy was delivered to insured and became a consummated contract between him and the insured on December 6, 1906, and that it was delivered to him and became a consummated contract between him and the insurer on May 10, 1907, were not inconsistent; the jury evidently meaning that the policy was delivered on December 6th and continued in force until and including May 10th, but that, if they were mistaken in law as to its being in force on December 6th, then upon the facts as they found them to be it took effect on May 10th.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1785-1787; Dec. Dig. § 670.*]

3. INSURANCE (§ 392*)—VALIDITY—DELIVERY—WAIVER OF REQUIREMENTS.

Where a rule of a life insurance company prohibited agents delivering policies sent to them for delivery more than 60 days after their issuance unless the applicant furnished a new physical examination or health certificate by a physician, but the company wrote its agent having possession of a policy which had been issued for more than 60 days calling for the payment of the premiums or the return of the policies but not insisting upon a new physical examination, and the applicant gave his note for the first premium, which was sent to the company unaccompanied by a new medical examination and retained by it, it waived the requirement as to a new physical examination and could not set it up to defeat a recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.*]

Appeal from Superior Court, Edgecombe County; E. B. Cline, Judge.

Action by James Pender, administrator, against the North State Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This case was before us at fall term, 1910, and under the name of Powell v. Insurance Co. is reported in 153 N. C. 124 et seq., 69 S. E. 12. Since that time the former admin-

istrator of the beneficiary under the policy has died, and the present plaintiff, as his successor in the administration of the estate of H. D. Teel, has taken his place in the record. The facts of the case are somewhat changed from those we then considered, as will appear by the following verdict of the jury: "(1) Did H. D. Teel, in his application for the policy, represent that he did not then have, and never had any habit of taking opium, or any of its preparations, or any narcotics? Answer: Yes. (2) Did H. D. Teel, on the date of said application, have any habit of taking opium, or any of its preparations, or any narcotics? Answer: No. (3) Was said representation a material inducement to the issuing of the policy by the defendant? Answer: Yes. (4) Was said Teel agent and manager of defendant at Tarboro, on December 6, 1906? Answer: No. (5) Was said policy delivered to said Teel, and did it become a consummated contract between him and defendant on December 6, 1906? Answer: Yes. (6) Did said Teel, on May 10, 1907, have the habit of taking opium or any of its preparations, or any narcotics? Answer: No. (7) Was there a material change for the worse in the health of said Teel, prior to May 10, 1907? Answer: No. (8) Was the said policy delivered to said Teel, and did it become a consummated contract between said Teel and the defendant on May 10, 1907? Answer: Yes." The other facts necessary to an understanding of the case are stated in the opinion. The court rendered a judgment upon the verdict for the plaintiff, and the defendant appealed, after duly noting exceptions to the rulings of the court.

Rouse & Land, of Kinston, for appellant. F. S. Spruill, of Rocky Mount, and W. O. Howard, of Tarboro, for appellee.

WALKER, J. (after stating the facts as above). The answers to the first and third issues were not seriously contested by the plaintiff, and could not well have been resisted, but they have become immaterial by reason of the answer to the second issue in favor of the plaintiff.

[1, 2] Whether the deceased was addicted to the habitual use of opium in any of its forms, or of any other narcotic, was a pure issue of fact to be determined by the jury upon the evidence, which was conflicting. There was sufficient evidence, in law, to support the finding of the jury, and, when this is the case and it is claimed that the jury have given a verdict against the weight of all the evidence, the only remedy is an application to the trial judge to set aside the verdict for that reason. We will not review his ruling upon such a motion, except where it clearly appears that there has been a gross abuse of his discretion, which, of course, will be of exceedingly rare occurrence, and so much

so that in our procedure it may be considered as almost a negligible quantity. There was no such abuse in this instance.

Under the fourth and fifth issues, the jury, by their answers thereto, have evidently found as facts that H. D. Teel was not agent or manager of the defendant company on December 6, 1906, when the policy was sent to him from the home office, and that the company did not require payment of the premium in advance, but delivered the policy to H. D. Teel and trusted him for the payment of the premium; the understanding being that the policy should immediately become effective upon its delivery and without prepayment of the premium as a condition upon which it should take effect. We cannot escape this conclusion after a careful perusal of the evidence and the charge of the court, and considering them in connection with the issues 4 and 5, as answered by the jury. The defendant offered strong evidence to show that H. D. Teel was the defendant's agent and local manager on December 6, 1906, but there was some evidence on the other side of the question, introduced by the plaintiff, and, while it may not be very convincing or even satisfactory, we are not willing to say that it was altogether destitute of probative force, but we do not mean to say that it was weak or insufficient to warrant the finding of the jury. It was some evidence and was properly submitted to the jury, and the defendant having failed to have the verdict set aside by the judge below, because it was against the weight of the evidence, must abide by the result as final and beyond our control. We can review by appeal "any decision of the courts below upon any matter of law or legal inference"; but in jury trials, at least, our jurisdiction ends when that is done. We cannot review findings of fact in such cases. Const. art. 4, § 8. And what we have said applies equally to the sixth and seventh issues. There was conflicting evidence which carried the questions to the jury, and we are concluded by their findings.

[3] Returning to the fifth issue for further consideration, we find that the court instructed the jury, if they found that H. D. Teel received the policy from the insurance company, not as its agent or manager, but as an ordinary applicant for insurance having no such relation to it, and he was trusted to pay the first premium, instead of paying it in advance, they should answer the fifth issue, "Yes," but if the insurance company sent the policy to H. D. Teel, he then being its agent or manager, to hold the policy for the company until the premium was paid, and not to deliver it to himself until it was paid, or if H. D. Teel received the policy, not as agent or manager, and laid it aside until he could pay the premium, and it was not paid by him on December 6, 1906, they should answer the issue, "No." We see no valid objection the defendant can make to

this instruction. There was evidence of the facts it embodied, sufficient to support either hypothesis stated in it, and the jury manifestly found that H. D. Teel was not agent at the time, and received the policy as an ordinary applicant having no confidential relation with the company, and that the latter had trusted him to pay the premium. If that be the case, the policy was delivered and in force on December 6, 1906.

[4] If there had been an actual delivery of the policy, nothing else appearing, the production of it at the trial by the plaintiff, who is the beneficiary, makes a prima facie case for him. *Perry v. Insurance Co.*, 150 N. C. 143, 63 S. E. 679, citing *Kendrick v. Insurance Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592; *Grier v. Insurance Co.*, 132 N. C. 542, 44 S. E. 28; *Rayburn v. Casualty Co.*, 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548; *Waters v. Annuity Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805. That the company may waive the prepayment of the premium and give credit for the same is but to state a self-evident principle, and this waiver may be shown by direct proof that credit was given, or may be inferred from the circumstances as well. *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566. No man is bound to insist upon his rights, and an insurance company may disregard the provision requiring prepayment of the premium as a condition of imparting vitality to the policy, and agree, either expressly or impliedly, that it will accept the promise of the applicant to pay on demand or at a future day. The doctrine is thus clearly stated in *Vance on Insurance*, at page 178: "Even though the parties may have expressly agreed that the contract shall not be deemed complete until payment of the premium in cash and in full, this stipulation may be waived by the insurer or any of its agents having competent authority. As a general rule, any agent having power to execute and issue contracts on behalf of the insurer has power to waive a condition of prepayment. And an absolute delivery of the policy by such an agent, without payment of the premium, under such circumstances as will justify an inference that credit is to be given, will constitute a waiver of a condition of prepayment. It seems that an intention to give credit may be inferred from the mere fact of unconditional delivery without requiring present payment. Nor do the courts show great readiness to find that a delivery was made subject to a condition of immediate payment." The cases in this court, already cited, are substantially to the same effect.

The sixth and seventh issues involved matters of fact alone; there being, in our opinion, evidence on both sides of the questions submitted to the jury in them. Our remarks as to the second issue are generally applicable to these two issues. We are concluded by the verdict.

[5] In regard to the eighth issue, it was urged before us by the learned counsel for the defendant that the verdict upon the fifth and eighth issues was inconsistent, as the policy could not have been delivered and become effective on two different dates. But we think the answers to these two issues are reconcilable, if it is necessary to bring them into harmony in order to sustain the verdict. It would seem to be immaterial on which of the two dates it took effect. If on either of them, it is valid and enforceable in view of the special facts of this case. But they are consistent, as the jury evidently meant that the policy was delivered on December 6, 1906, and continued in force until and including May 10, 1907, but if they were mistaken in law, for any reason, as to its being in force on December 6, 1906, then, upon the facts as they found them to be, it took effect on May 10, 1907. It is true that there is evidence that H. D. Teel was the agent of defendant on May 10, 1907, though there is no special finding of the fact. We will assume it to be true. In this connection, there was evidence that H. D. Teel, on May 10, 1907, gave his note to the agents of the company for \$69.35, the amount of premium on this policy, and it was assigned by them to the company and mailed to the company on the same day. It was received by the company without objection, and has been retained ever since, so far as appears.

[6] The defendant contends, though, that there was a rule of the company, in force at the time of these transactions, forbidding an agent to deliver a policy sent to him for delivery, if more than 60 days since it was issued have elapsed, unless the applicant for the policy has furnished the company with a new physical examination or health certificate, given by a physician. If we concede, for the sake of illustration and argument, that this point is properly raised by the prayer for instruction, the rejection of which is the subject of the twenty-eighth exception, the prayer not being addressed to any particular issue, nor any finding asked in regard to it on the eighth issue, which is sufficient to embrace the question intended to be raised, we do not think it defeats the plaintiff's right of recovery. If there was no such examination, and the rule has been established in such a way as to have bound H. D. Teel to its observance, and the policy, therefore, was issued in violation of the rule, it appears that the company, in February and April, 1907, wrote letters to their agents at Tarboro, N. C., having possession of this and other policies which had been issued for more than 60 days, and called for the payment of the premiums or the return of the policies, but not insisting upon a new physical examination. These letters were introduced by the defendant at the trial. When we consider these facts and the failure of the defendant to return the premium

note and insist upon a compliance with the rule requiring H. D. Teel to furnish to it an examination as to the then state of his health, the doctrine of waiver is again applicable. The note of H. D. Teel recited that it was given for the first premium (\$69.35) due on the policy of insurance issued to him. The company must have known that there had been no new medical examination, as he was required to furnish it to the company and failed to do so. Under the circumstances it would not be right for the company to retain the premium note, with knowledge that the alleged rule had not been complied with, and then, after the loss, to insist that the policy was not valid for that reason. And it is this element in the transaction that induces the law to declare a waiver of the condition or to hold the company estopped to set it up in defense of an action upon the policy. It is partly based upon the eminently just maxim that, if a party is silent when he should speak, he will not be permitted to speak when justice demands that he should be silent. He will not be allowed to take two chances, when he should be entitled to only one. If we put the case concretely, it is this: The law will not allow the company to hold the premium upon the chance that there may be no loss, and, if there is a loss, to deny its liability upon the policy. Acceptance and retention of the premium, with knowledge of the facts, express or to be inferred, shows that it elected to consider the policy in force. *Rayburn v. Casualty Co.*, 133 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548.

Brief reference to the authorities and precedents will be sufficient to show the state of the law upon this question: "The acceptance by an insurance company, with knowledge of facts authorizing a forfeiture or avoidance of the policy, of premiums or assessments which were in no degree earned at the time of such forfeiture or avoidance, constitutes a waiver thereof. This waiver is based on the estoppel of the company to declare void and of no effect insurance for which, with knowledge of the facts, full compensation has been received. This rule is particularly applicable where the company's claim is based on a right of cancellation and return of premiums, rather than on a distinct forfeiture." 3 *Cooley's Briefs on the Law of Insurance*, pp. 2683, 2684, 2686, and the numerous cases cited in the notes. It is said in *Phoenix M. Life Ins. Co. v. Rad-din*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644: "The only question upon the instructions of the court to the jury, which is open to the defendant on this bill of exceptions, is whether, if insurers accept payment of a premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be

no doubt that it is. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens. *Insurance Co. v. Wolff*, 95 U. S. 328 [24 L. Ed. 387]; *Wing v. Harvey*, 5 D. M. & G. 265; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio [N. Y.] 154 [49 Am. Dec. 234]; *Bevin v. Connecticut M. L. Ins. Co.*, 23 Conn. 244; *Insurance Co. v. Slockbower*, 26 Pa. 199; *Viele v. Germania Ins. Co.*, 26 Iowa, 9 [96 Am. Dec. 83]; *Hodson v. Guardian L. Ins. Co.*, 97 Mass. 144 [93 Am. Dec. 73]."

The other questions raised by the defendant, which are subsidiary to those we have discussed and dependent upon them, require no separate consideration.

This case has been tried three times in the court below and heard twice in this court. It has been very ably and learnedly presented to us by counsel, and we have given to it a most patient and thorough examination. After doing so, we have not been able to discover any error in the trial and proceedings below.

No error.

STATE v. WHITE et al.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. RECOGNIZANCES (§ 1*)—DEFINITION.

A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act. It need not be executed by the parties, but is sufficient if it is acknowledged by them, and a minute of the acknowledgment entered by the court. It binds accused to appear and answer either a specified charge or to such matters as may be objected, to stand and abide the judgment of the court, and not to depart without leave of the court.

[Ed. Note.—For other cases, see Recognizances, Cent. Dig. §§ 1-19; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6001-6005; vol. 8, p. 7781.]

2. BAIL (§ 75*)—FORFEITURE—DEFENSES.

Since a recognizance to secure accused's appearance binds him not to depart without leave of court, it was no defense to the surety's liability that the departure of accused without leave occurred after he had pleaded guilty, and during a period of two days before sentence, while the court had the question of punishment under advisement.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 309-312, 315-321; Dec. Dig. § 75.*]

3. APPEAL AND ERROR (§ 914*) — REVIEW — PRESUMPTION — GENERAL OR SPECIAL APPEARANCE.

Where, in an action on a forfeited recognizance, the case stated that the surety entered an appearance, without more, it would be presumed that a general appearance sufficient to waive the service of process was intended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3693-3698; Dec. Dig. § 914.*]

4. APPEARANCE (§ 9*)—GENERAL OR SPECIAL APPEARANCE—RELIEF.

Where, in proceedings to forfeit a recognizance, the surety entered an alleged special appearance, and sought to be released, and to have the deposit returned, on the ground that accused had appeared, pleaded guilty, and then departed, while the court held the cause under advisement for the determination of the punishment, such petition affected the merits, and the appearance was, in legal effect, a general one.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

Appeal from Superior Court, Hertford County; Lane, Judge.

Scire facias by the State against M. T. White, Jr., and the Southern Distributing Company, to forfeit a certified check deposited by the Distributing Company as bail for defendant White's appearance to answer a criminal charge. From a judgment forfeiting the bail, the Distributing Company appeals. Affirmed.

The defendant was recognized by a justice of the peace to appear at the next term of the superior court. In lieu of bond a certified check for \$200 was deposited by his surety, the Old Dominion Distributing Company. The defendant appeared before the superior court and pleaded guilty. The judge did not immediately dispose of the case; but a day or two later the defendant was called for the purpose of being sentenced, when it appeared that he had left the court and the state. Judgment nisi was entered, and a sci. fa. issued against the defendant and the Southern Distributing Company. Upon the return of the sci. fa., the Old Dominion Distributing Company, the surety, filed a petition, on which appears the following "special appearance on part of surety."

The petition sets out the facts fully, and says, among other things:

"(5) Your petitioner is informed and believes, and so avers, that his honor, Judge Webb, did not impose sentence at the time of the plea or during said day, though the defendant was in court, but permitted said matter to remain undisposed of until Wednesday or Thursday of said court, when the defendant left the court and returned to his home in Virginia, without the sentence of the court having been pronounced against him, as should have been done.

"(6) Your petitioner is informed and believes that after said defendant had been permitted by the court to remain in and at the bar for so long a time, without having pronounced sentence against him, and after defendant having left the court, as before set out, and his said bail declared forfeited.

"(7) Your petitioner is informed and believes that, when said defendant came into court, waived bill of indictment, and entered a plea of guilty, and by so doing, he put himself in custody, and said waiver and plea was accepted by the court, and he by said acts complied with the law and the terms and

conditions of the said bail, and said bail was thereby discharged.

"Wherefore your petitioner prays the court: (1) That the former order of forfeiture be reversed by this court; (2) that said bill be discharged, and the deposit heretofore made by your petitioner be returned to him."

The case on appeal states that the surety entered an appearance.

Roswell C. Bridger, of Winton, for appellant. Attorney General Bickett and T. H. Calvert, of Raleigh, for the State.

ALLEN, J. [1] A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act. *State v. Smith*, 66 N. C. 620. It need not be executed by the parties, but is simply acknowledged by them, and a minute of the acknowledgment is entered by the court. *State v. Edney*, 60 N. C. 471. It binds the defendant to three things: (1) To appear and answer either to a specified charge or to such matters as may be objected. (2) To stand and abide the judgment of the court. (3) Not to depart without leave of the court. *State v. Schenck*, 138 N. C. 562, 49 S. E. 917, 3 Ann. Cas. 928.

[2] It follows, therefore, upon these well-settled principles that the judgment nisi is regular and valid, as the defendant and his surety entered into the recognizance, and the defendant departed without leave of the court. The surety contends, however, that no final judgment can, in any event, be entered condemning the deposit, because it entered a special appearance, and it has not been served with process.

[3, 4] The answer to this position is two-fold. In the first place, the case states that the surety entered an appearance, which, nothing else appearing, would mean a general appearance, and would be a waiver of the service of process, and in the next place, if the appearance had been entered special, it was in legal effect general, because the motion of the surety affected the merits. *Scott v. Life Ass'n*, 137 N. C. 517, 50 S. E. 221.

It is said in *Grant v. Grant*, 159 N. C. 531, 75 S. E. 734, that it was held in the *Scott Case* "that a special appearance cannot be entered except for the purpose of moving to dismiss for want of jurisdiction, and that, if the motion affects the merits, the appearance is general," and the court then quotes from the same case with approval, as follows: "The test for determining the character of an appearance is the relief asked; the law looking to its substance rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc. pp. 502, 503. The question always is, what a party has done, and not what he intended to do. If the relief prayed affects the merits, or the motion involves the merits, and a motion to vacate a judgment is such a mo-

tion, then the appearance is in law a general one."

We are therefore of opinion there is no error.

Affirmed.

RAWLS et al. v. MAYO.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. JUDGMENT (§ 478*) — CONCLUSIVENESS OF ADJUDICATION—PERSONS CONCLUDED.

A judgment in which the proceeds of land were adjudicated to be real estate assets is binding upon all the parties thereto and could not be attacked collaterally in a subsequent action, but the only remedy was by appeal.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 912; Dec. Dig. § 478.*]

2. INFANTS (§ 112*)—JUDGMENT—COLLATERAL ATTACK.

The fact that parties to a suit in which a consent decree was entered were infants only renders the decree voidable and not void and hence cannot be attacked collaterally.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 320; Dec. Dig. § 112.*]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Suit by S. P. Rawls and others against James L. Mayo. From a judgment in favor of plaintiffs, defendant appeals. **Affirmed.**

On March 17, 1908, L. R. Mayo and wife gave to James L. Mayo an option to purchase the land he bought of E. Tuthill at any time on or before July 15, 1908, for \$6,000. At that time Mayo's ownership of said tract was subject to an agreement with Whilden Springer made May 7, 1904, and duly recorded November 21, 1907. In April, 1908, L. R. Mayo died, leaving a last will and testament.

James L. Mayo in apt time brought suit against the personal representative, heirs at law and devisees of L. R. Mayo, to enforce his option. Judgment was rendered at October court, 1908, declaring him entitled to a deed conveying said land upon the payment of \$6,000 to the administrator.

Whilden Springer brought suit against the personal representative, heirs at law and devisees of L. R. Mayo (James L. Mayo was son of L. R. Mayo and a devisee under his will), to enforce his contract made with L. R. Mayo on May 7, 1904. The cause was heard at December term, 1910, and judgment entered dividing said lands between James L. Mayo and Whilden Springer.

It seems to have been agreed by the heirs at law (those of them that were over 21 years of age) that, as James L. Mayo only got a title to a half interest in the land on account of L. R. Mayo's agreement with Springer, he should pay only one-half, or \$3,000.

The plaintiffs were parties to both of said actions, but some of them were infants. In the second of said actions the following

judgment was entered: "It is now by consent of the parties and their said attorneys adjudged and decreed by the court as follows." Then follow seven paragraphs, which it is not necessary to set out, and then the following: "It is further adjudged that the proceeds of sale of said land to Jas. L. Mayo shall be treated as real estate assets accounted for by said administrator as such."

The defendants claim that J. L. Mayo has paid the sum of \$3,000 due by him to the devisees under the will of L. R. Mayo, but this is not found as a fact. The will of L. R. Mayo bequeathed to his wife \$1,000 in cash, and to his son Samuel \$500 in cash, and to his son John B. Mayo \$2,000 in cash. These legacies have not been paid, and the administrator has no funds with which to pay them and refuses to sell real estate to make assets with which to pay them; all the personal estate having been exhausted.

This suit is brought to compel the administrator to collect said money from James L. Mayo and out of same to pay these legacies, and it is admitted that the plaintiffs are entitled to recover if the purchase money from James L. Mayo is not personal property. The court was of opinion that the purchase money from the said James L. Mayo, even if it should be paid the administrator, would not be subject to the payment of these legacies, and at close of plaintiffs' evidence on defendants' motion nonsuited the plaintiffs, and they excepted and appealed.

Ward & Grimes, of Washington, N. C., for appellant. Small, MacLean & Bryan, of Washington, N. C., for appellees.

ALLEN, J. [1] It is admitted that the plaintiffs cannot recover if the purchase money in the hands of J. L. Mayo is not personalty, and it appears in the record that a judgment has been rendered in an action, to which the plaintiffs were parties, adjudging it to be real estate, from which there has been no appeal. If this adjudication was wrong, it is because it was based on the erroneous application of legal principles, and the remedy to correct the error was by appeal. *Stafford v. Gallops*, 123 N. C. 21, 31 S. E. 265, 68 Am. St. Rep. 815; *McLeod v. Graham*, 132 N. C. 475, 43 S. E. 935.

[2] Nor can the fact that the plaintiffs were infants at the time of the adjudication, and that the judgment was by consent, benefit the plaintiff, if it be conceded that the part adjudging the purchase money to be real estate was by consent, which is not beyond dispute, because if treated as the contract of infants, which is the most favorable view for the plaintiffs, it would be voidable and not void (*Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496) and cannot be attacked collaterally (*Earp v. Minton*, 138 N. C. 204,

50 S. E. 624). The plaintiffs have not sought to impeach the judgment by motion or action but treat it as void, which, as we have seen, is not a correct view to take of it, and we must hold that it precludes a recovery.

Affirmed.

BLOUNT v. ROYAL FRATERNAL ASS'N, Inc.

(Supreme Court of North Carolina. Sept. 17, 1913.)

I. INSURANCE (§ 815*)—POLICY — STATUTORY REGULATIONS—COMPLIANCE — BURDEN OF PROOF.

Revisal 1908, § 4773a, provides that it shall be unlawful for any insurance company to issue any policy for less than \$500 until the forms have been approved by the insurance commissioner, etc. Held that, in an action on a benefit certificate for \$500, containing a provision that in case of death of the member not more than one-fifth of the amount otherwise due should be payable for each full year of membership, etc., the burden was on plaintiff, seeking to be relieved from such limitation of liability, to both allege and prove that the certificate had not been approved by the insurance commissioner.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.*]

2. INSURANCE (§ 138*)—LIFE POLICY—AMOUNT — APPROVAL BY INSURANCE COMMISSIONER—STATUTES—CONSTRUCTION.

Revisal 1908, § 4773a, providing that it shall be unlawful for any insurance company to sell any policy in an amount less than \$500 until the forms have been approved by the insurance commissioner, deals with the insurance company and not with the contract of insurance; and hence a policy containing a provision limiting the liability of the company in case of death to less than \$500 is not void or unenforceable in the absence of a showing that it had been so approved.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246-249; Dec. Dig. § 138.*]

Appeal from Superior Court, Washington County; Whedbee, Judge.

Action by Sarah J. Blount against the Royal Fraternal Association, Incorporated. Judgment for plaintiff for less than the relief demanded, and she appeals. Affirmed.

This action is to recover the amount of a certificate of insurance for \$500, containing the following provision stamped on its face, above the signatures of the officers of the defendant executing the same: "This certificate is issued with the provision that in case of death of the member not more than one-fifth of the amount otherwise due will be payable for each full year of membership." And with the following stipulation indorsed thereon: "The death benefit due on this certificate will be increased 10 per cent. per annum of the amount written within for each expired year of membership in force, to continue for a period of ten years, or until the amount written is doubled by such increase." The insured died after one year's full membership, and the only controversy is the amount the

plaintiff is entitled to recover. The plaintiff contends that the burden is on the defendant to show that the insurance commissioner has approved the issuing of a certificate for less than \$500, as provided in Revisal 1908, § 4773a, and that, having failed to offer any evidence of this fact, the provision stamped on the certificate is void, and she is entitled to recover the face of the certificate, \$500, increased by 10 per cent., according to the indorsed stipulation, or a total of \$550. The defendant contends that the certificate is valid as a whole, and that the plaintiff is entitled to recover \$110, which is the amount admitted to be due if effect is given to all the terms of the certificate, including the provision stamped thereon. His honor rendered judgment in accordance with the contention of the defendant for \$110 and costs, and the plaintiff excepted and appealed.

Gaylord & Gaylord and P. H. Bell, all of Plymouth, for appellant. T. T. Thorne, of Rocky Mount, for appellee.

ALLEN, J. [1] There is neither allegation nor proof that the certificate of insurance, containing the provision reducing the amount of insurance to less than \$500 in certain contingencies, has not been approved by the insurance commissioner; and, as the validity of the provision is not affected by the fact that it was stamped on the certificate, it is a part of the contract.

In *Waters v. Annuity Co.*, 144 N. C. 671, 57 S. E. 440, 13 L. R. A. (N. S.) 805, there was a paster on the policy and entries on the application, and the court said of them: "It is urged upon our attention that some of the entries, by means of which the application was made to accord with the policy and the paster, were made on the margin of the application and written longitudinally, and that such entries so made, and even the paster itself, are presumptive evidence of a change in the contract after the application had been first signed. But neither the authorities nor the known usage in the making of such contracts are in support of the position to the extent contended for. We know that these policies, as well as the applications, are gotten up on printed forms designed to meet the average and general demand in contracts of this nature, and frequently changes are made to meet special circumstances; that these are ordinarily noted on the margin, and a slip is then pasted on the face of the policy to express the contract as affected by these changes. In the absence, therefore, of some special circumstances tending to cast suspicion on such entries, there should be no presumption of any alteration."

The presumption is in favor of the validity of all contracts (*Loyd v. Loyd*, 113 N. C. 189, 18 S. E. 200), and this presumption is aided in this case, as the plaintiff declares on the contract, without alleging the fact upon which she now relies to destroy a part of

it, and she also introduced the contract in evidence in its entirety.

We are therefore of opinion, if the contention of the plaintiff as to the legal effect of Revisal, § 4773a, is sound, that, as the presumption is that the contract and every part thereof is valid, nothing to the contrary appearing on the face of it, the burden was on the plaintiff to allege and prove that the insurance commissioner did not approve the certificate, and, having failed to do so, she cannot recover more than the sum of \$110 awarded here.

[2] If, however, the fact appeared affirmatively that the insurance commissioner had not approved the certificate, we would not give our assent to the position of the plaintiff that this would avoid the effect of the provision stamped on the certificate, leaving other parts of the certificate in force.

The section of the Revisal relied on reads as follows: "It shall be unlawful for any insurance company, association or order or society doing business in this state, to issue, sell or dispose of any policy, contract or certificate for less than five hundred dollars, or use applications in connection therewith, until the forms of which have been submitted to and approved by the insurance commissioner of North Carolina, and copies filed in the insurance department." The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company. It does not say a policy for less than \$500 shall be void unless approved by the insurance commissioner, but that it shall be unlawful for the company to issue such policy, and the reason for the language used is obvious. Those who apply for policies of less than \$500 usually have little experience in the forms of insurance, or other contracts, and it was thought wise for the insurance commissioner to have special supervision over their contracts for their protection, but it was not intended to relieve the company from the contract made.

If the position of the plaintiff should prevail, a policy for \$300 would be unlawful unless approved by the insurance commissioner, and no recovery could be had on it, except possibly upon the idea that the insured would not be in pari delicto with the company.

The case of *Ober v. Katzenstein*, 160 N. C. 440, 76 S. E. 477, is in point. There the plaintiff sued upon a contract for the sale of fertilizer, and the defendant contended that the contract was illegal because the plaintiff had failed to comply with the requirements of the statute as to domestication, and was therefore doing business in the state unlawfully; but the court said: "But the statute does not invalidate either the express contract made between the plaintiff and the defendant, nor, indeed, the implied contract raised by the receipt of the goods of the former by the defendant. This point has

been recently adjudicated. Tobacco Co. v. Tobacco Co., 144 N. C. 352 [57 S. E. 5]. If the state, in addition to the penalty, had desired to render invalid the contract and to deny a recovery thereon, it would have so enacted, as it has done in regard to gambling and other illegal contracts."

We are therefore of opinion there is no error.

Affirmed.

HARRINGTON v. GRIMES.

(Supreme Court of North Carolina. Sept. 17, 1913.)

VENDOR AND PURCHASER (§ 129*)—TITLE OF VENDOR—ESTATES TAIL—STATUTORY PROVISIONS.

Under Revisal 1905, § 1578, providing that estates tail shall be converted into fee-simple estates and that a conveyance in fee made by a tenant in tail shall convey the fee-simple estate, a deed to the grantee and her bodily heirs conveys a fee-simple estate where there was nothing in the deed to indicate an intention to create a life estate with a remainder to the heirs, and the purchaser could not refuse to perform on the ground that the vendor's chain of title contained such a deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238-244, 249; Dec. Dig. § 129.*]

Appeal from Superior Court, Chatham County; Bragaw, Judge.

Action by C. C. Harrington against Alston Grimes. Judgment for the plaintiff, and defendant appeals. Affirmed.

On the hearing it appeared that plaintiff, having contracted to sell defendant a certain tract of land for the sum of \$2,500, said defendant declined to carry out the agreement, alleging that the title offered was defective. The plaintiff held the land by deed from T. T. Buckner and wife, N. J. Buckner, and N. J. Buckner had acquired the same under a deed from Willis Byrd and wife to said N. J. Buckner; this deed being in terms as follows: "This deed made this the 22d day of June, 1904, by Willis Byrd and wife, Lucy Byrd, of Chatham county and state of North Carolina, of the first part, to N. J. Buckner and her bodily heirs of Chatham county and state of North Carolina, of the second part, witnesseth: That said Willis Byrd and wife, Lucy Byrd, in consideration of \$100.00 to them paid by N. J. Buckner, the receipt of which is hereby acknowledged, have bargained and sold and by these presents do hereby bargain, sell and convey to said N. J. Buckner and her bodily (heirs) a certain tract or parcel of land in Chatham county, state of North Carolina, adjoining the lands of R. J. Yates, T. L. Lasater heirs and others, bounded as follows: Beginning at the fork of the Pittsboro and Mill road running with said Mill road west 24 chains and 50 links to a stake and pointers Lasater and Yates corner;

thence with Yates' line north 2 east 28 chains to the county gate on the Pittsboro road, thence down the said road 39 chains to the beginning, containing (40) forty acres more or less. To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said N. J. Buckner and her bodily heirs and assigns to their only use and behoof forever. And the said Willis Byrd and wife Lucy Byrd covenant with the said N. J. Buckner and her bodily heirs and assigns that they are seised of said premises in fee; and have right to convey the same in fee simple; that the same are free and clear from any and all incumbrances and that they will warrant and defend the said title to the same against the claims of all persons whomsoever," etc. The defendant, insisting that the deed in question only conveyed to N. J. Buckner a life estate in the property, declined to accept the title offered or to pay for same. The court below being of opinion that the deed conveyed to plaintiff a fee simple, judgment was entered for plaintiff, and defendant excepted and appealed.

Ward & Grimes, of Washington, N. C., for appellant. Hayes & Bynum, of Pittsboro, for appellee.

HOKE, J. (after the facts as above). Under the old law, the deed in question would have conveyed to N. J. Buckner an estate in fee tail, converted by our statute into a fee simple (Revisal, § 1578), and his honor correctly ruled that plaintiff could make a good title. Decisions in support of this construction of the deed will be found in *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 507; *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687; *Jones v. Ragsdale*, 141 N. C. 200, 53 S. E. 842; *Whitfield v. Garriss*, 134 N. C. 24, 45 S. E. 904; and many others could be cited. The well-considered cases of *Acker v. Pridgen*, 158 N. C. 337, 74 S. E. 335, and *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15, cited and relied upon by defendant, in no way militate against this position. In those cases it was held that, on a perusal of the entire instrument and by reason of the language in which same was expressed, a deed in the one case and a will in the other, it plainly appeared to be the intent of the grantor to convey only a life estate to the first taker, and that the words "bodily heirs" and "heirs of the body" did not refer to these persons as inheritors of such taker, but were used only as a descriptio personarum, carrying to them an estate in remainder and as purchasers from the grantor. But no such intent can be gathered from this instrument, nor does it contain any words or expressions to qualify or affect the ordinary meaning of the words "bodily heirs" in connection with the estate limited to N. J. Buckner, and the deed as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stated has been properly held to convey to such grantee an estate in fee simple.

There is no error, and the judgment of the superior court is affirmed.

Affirmed.

BRADSHAW et al. v. STANSBERRY.

(Supreme Court of North Carolina. Sept. 17, 1913.)

1. APPEAL AND ERROR (§§ 631, 764*)—RECORD AND BRIEF—FAILURE TO PRINT—DISMISSAL OF APPEAL.

An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2766-2770, 2997; Dec. Dig. §§ 631, 764.*]

2. DEEDS (§ 132*)—CONSTRUCTION—"SURVIVING CHILDREN."

Where a husband conveyed a tract of land to his wife by deed to her sole use and benefit for life, and at her death to the "surviving children" of the grantor and grantee, their heirs and assigns forever, the term "surviving children" meant children living at the death of the life tenant and did not include grandchildren.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 366, 367, 372, 373; Dec. Dig. § 132.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6825-6832.]

Appeal from Superior Court, Halifax County; Lane, Judge.

Action by Ellen G. Bradshaw and others against Cynthia Stansberry. Judgment for defendant, and plaintiffs appeal. Dismissed.

In 1874 Wm. E. Webb and Annie E. Webb, his wife, executed a deed for a certain tract of land to the three children which they then had, Felix, Richard, and Cynthia, reserving to themselves a life estate therein. On the same day Wm. E. Webb executed to his wife a deed to another tract containing 250 acres, conveying the same to "her sole use and benefit during her natural life, and at her death to the surviving children of the said Wm. E. and Annie E. Webb, their heirs and assigns forever." This was all the land which they then or ever afterwards owned, and these deeds were intended in the nature of a will. After their execution another child was born, named Effie M. Webb. All four of the children survived Wm. E., but after his death, and before the death of his widow, Felix and Richard died intestate without issue, and Effie M., the after-born child, died intestate, leaving the plaintiff, Ellen G. Bradshaw; the controversy being whether Ellen G. Bradshaw, the grandchild, takes anything under the second deed, or whether the whole tract goes to the defendant, Cynthia Stansberry, as the only child who outlived the widow.

E. L. Travis, of Halifax, and J. M. Picot, of Littleton, for appellants. Jos. P. Pippen, of Littleton, R. C. Dunn, of Enfield, and Elliott Clark, of Halifax, for appellee.

PER CURIAM. [1] The motion of the appellee to dismiss the appeal for failure to print the record and briefs in accordance with the rules of this court is allowed. The number of appeals has been increasing year by year under conditions heretofore existing, and with the additional facilities for trials in the superior courts, brought about by four new judicial districts, we may reasonably expect a further increase of from 15 to 20 per cent. It is therefore necessary to have rules of procedure and to adhere to them, and, if we relax them in favor of one, we might as well abolish them.

[2] We have, however, examined the record and are of opinion no error was committed on the trial. The term "surviving children," in the deed under which the plaintiff claims, means children living at the death of the life tenant and would not include the plaintiff, a grandchild, under *Lee v. Baird*, 132 N. C. 755, 44 S. E. 605.

Appeal dismissed.

PIERCE et al. v. STALLINGS et al.

(Supreme Court of North Carolina. Sept. 24, 1913.)

FRAUDULENT CONVEYANCES (§ 172*) — WHO MAY AVOID—HEIRS OF GRANTOR.

The heirs of a grantor cannot maintain an action to set aside a deed executed by him with intent to defraud his creditors; they are concluded by the deed of their ancestor, and as to them the grantee acquired a good title.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 523-529, 542; Dec. Dig. § 172.*]

Appeal from Superior Court, Johnston County; Carter, Judge.

Action by Luther Pierce and others against Julia Stallings and another to set aside a deed. From a judgment for defendants, the plaintiffs appeal. Affirmed.

Abell & Ward, of Smithfield, for appellants. F. H. Brooks, of Smithfield, for appellees.

HOKE, J. The complaint alleged, in substance, that on 1st day of June, 1909, D. F. Pierce, owning several tracts of land, conveyed same to his then wife, Julia Pierce, since intermarried with defendant Stallings, and that said conveyance was made with intent to delay, hinder, and defraud the creditors of the grantor; that, said grantor having died, the plaintiffs, his children and heirs at law, instituted the present action to set aside said deed by reason of said fraudulent purpose. There is no allegation nor suggestion in the complaint that the plaintiffs are creditors of the grantor or purchasers for value, etc.; they claim only as heirs at law, and, this being true, plaintiffs are concluded by the deed of their ancestor; as to them, the defendant acquired a good title. *Saunders v. Lee*, 101 N. C. 3, 7 S. E. 590; *Ellington v. Currie*, 40 N. C. 21; *Waite on*

Fraudulent Conveyances, § 121; Reynolds v. Faust, 179 Mo. 21, 77 S. W. 855; Campbell et al. v. Ross, 187 Ill. 553, 58 N. E. 596. In the citation from Waite, supra, the author says: "The heir of a grantor cannot impeach his ancestor's deed on the ground that it was made in fraud of creditors, for he can claim no right which the ancestor was estopped from setting up." And in Saunder's Case, supra, it was held: "A conveyance made with an intent to defraud creditors is, nevertheless, valid against the maker and all others, except creditors and those who purchase under a sale made for their benefit, and, until the title thus conveyed is divested by some proceeding instituted by the creditors, it is sufficient to support an action for the recovery of the land and damages for its detention."

There is no error, and the judgment sustaining the demurrer is affirmed.

Affirmed.

MONDS v. TOWN OF DUNN.

(Supreme Court of North Carolina. Sept. 24, 1913.)

1. MUNICIPAL CORPORATIONS (§ 790*)—DEFECTS IN STREETS—NOTICE OF—EVIDENCE.

Evidence that the witness told a day laborer employed by a town to trim street lights and do other work that the witness had received a shock at an electric street light, near which plaintiff's intestate was subsequently found dead, was inadmissible, as notice to a day laborer is not notice to the town.

[Ed. Note.—For other case, see Municipal Corporations, Cent. Dig. §§ 1645, 1646; Dec. Dig. § 790.*]

2. MUNICIPAL CORPORATIONS (§ 818*)—DEFECTIVE STREETS—EVIDENCE.

Evidence that, four days before plaintiff's intestate was found dead 35 feet from an electric street light, the witness had reached up to take hold of the light and received a shock was inadmissible where notice was not given the town and there was no evidence that the light was any lower the night deceased met his death.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

3. EVIDENCE (§ 474*)—OPINION EVIDENCE—PERSONAL KNOWLEDGE.

The superintendent of a city's light department during a period of two or three years, though disclaiming to be an expert, could testify that he had received a 110-volt electric shock and it was not deadly, and that he had examined a certain transformer and it was all right, as these were matters of personal experience and observation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

4. MUNICIPAL CORPORATIONS (§ 818*)—DEFECTIVE STREETS—EVIDENCE.

Testimony was admissible that the witness saw deceased, alleged to have been killed by a shock from an electric light wire, before he was moved and there were no wires about his feet, that the light and pole near where the death occurred were all right two or three days before, and the transformer was all right the next day, which was as soon as it could be inspected, and that the primary wire was not touching

the secondary wires the next day, which was as soon as he noticed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

5. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error, if any, in excluding testimony of an electrician as to how much voltage the wires carried to a certain arc light and what voltage it would take to operate it was cured by the subsequent admission of testimony of the same witness that in his opinion it would take 1,100 volts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

6. MUNICIPAL CORPORATIONS (§ 763*)—DEFECTIVE STREETS—CARE REQUIRED.

A town operating an electric light plant is not required to use the "latest improved method" of suspending arc lights to avoid injuring persons coming in contact with its wires, without regard to whether such methods are in general use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.*]

7. MUNICIPAL CORPORATIONS (§ 818*)—DEFECTIVE STREETS—EVIDENCE.

Evidence as to whether the voltage on an electric light wire, by which deceased was alleged to have been killed, would not have been greater than 110 volts if the insulation on the primary wire had been defective was inadmissible, where there was no evidence that the insulation was defective.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

8. MUNICIPAL CORPORATIONS (§ 819*)—DEFECTIVE STREETS—BURDEN OF PROOF.

Plaintiff was required to show by the greater weight of evidence that the defendant town failed to exercise proper care in the performance of its legal duties to plaintiff's intestate, whose death was alleged to have been due to a shock from an electric light wire, and that such negligent breach of duty was the proximate cause.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.*]

9. MUNICIPAL CORPORATIONS (§ 852*)—DEFECTIVE STREETS—CARE REQUIRED.

A town operating an electric light plant must use that degree of care that a reasonably prudent man would use under like circumstances to avoid injuring persons coming in contact with electrically charged wires, and it is charged with a continuous duty of taking reasonable precaution to keep its appliances in proper condition.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1809; Dec. Dig. § 852.*]

10. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY FOR REQUEST.

Where the court has given a proper instruction on a particular subject, if a party desires more specific instructions he must ask for them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

11. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

An instruction stating that the degree of care required of a town operating an electric light plant was merely reasonable care, if error, was without prejudice, where there was no

evidence whatever showing any negligence of the town which would have brought the electric light wire, from which deceased was alleged to have received a fatal shock, to the ground or within reach or so low as to be unsafe.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

12. MUNICIPAL CORPORATIONS (§ 822*)—DEFECTIVE STREETS—INSTRUCTIONS.

There was no error in instructing that defendant contended that plaintiff's intestate himself lowered the electric street light and wires near which he was found lying dead, and that if the intestate did, by meddling with the chain, lower the light and received a fatal shock from the wires, plaintiff could not recover.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.*]

Appeal from Superior Court, Harnett County; Carter, Judge.

Action by N. H. Monds, Administrator, against the Town of Dunn to recover damages for the alleged negligent killing of plaintiff's intestate. From a judgment for the defendant, plaintiff appeals. Affirmed.

E. F. Young and R. J. Godwin, both of Dunn, for appellant. Clifford & Townsend, of Dunn, for appellee.

CLARK, C. J. The plaintiff's intestate was found dead near a street crossing in the town of Dunn on a rainy night in December; his head and body submerged to the waist in the water in a ditch 4 feet deep, his feet and legs being on the bank. His feet were near an electric light post which was on the edge of the street, across the ditch from the sidewalk. On the pole were the electric light wires of the defendant town which were owned by the town. An arc light was suspended over the center of the street crossing about 35 feet from where the body was found. There was a chain connected therewith, by means of which the lamp was lowered and raised. This chain was out of the reach of persons passing along the street, as the witness Freeman, who was 6 foot tall, had to reach up to get it. Late in the afternoon before the body was found, the lamp was suspended in its place as usual. At the time the body was found, about 9 o'clock at night, the lamp was lying on the ground in the middle of the street. One of the secondary wires, which it was testified carried a voltage of 110, was found detached therefrom.

This action is brought to recover damages for the alleged negligent killing of the plaintiff's intestate alleged to have been caused by the defendant's electric wires which were found down on the street as above set forth. Upon this evidence the court might well have directed a nonsuit. There was slight, if any, evidence, beyond mere conjecture, that the death of the intestate was caused by coming in contact with the wire 35 feet off or that there was any negligence of the defendant which caused the contact, if any had been

shown. He was not found in contact with the wire but 35 feet away.

[1] The first exception is to the exclusion of the evidence of the witness Lynch, who testified that a short time prior to the death of the deceased he told one Freeman that he had received a shock there on the Monday previous. Freeman having later testified that he was hired by the day by the town to trim lamps and do other work by the superintendent employed by the city, the court directed the jury: "You will not consider any evidence to the effect that P. Y. Lynch gave any notice to Mr. Freeman." It cannot be that a remark to a day laborer was a notice to the town. Such evidence is only competent as actual notice to the town, when it is given to an officer whose duty and interest it is to inform the town authorities, or who has authority himself to act in the matter. A notice to a day laborer on the street of New York or London that there is a defect in the pavement certainly could not be construed as fixing the town with liability by reason of such notice. The same rule of law applies to the town of Dunn. It might be that the town should have taken notice of the defect, if there was one. But certainly it was not competent to show that it had actual notice by reason of a remark made to a day laborer employed by the town. 28 Cyc. 1397-1399.

[2] The witness further testified that on Sunday night, before the plaintiff's intestate was killed, he crossed at that place and the lamp was not giving any light. He thought he would shake it and reached up high to shake it and when he did got a considerable shock. He did not tell any of the town commissioners about it, that he remembers. The shock gave him a peculiar feeling. This evidence was stricken out by the judge at the conclusion of the testimony; there being nothing to show that the wire was any lower on Thursday night or connecting the intestate in any way with being struck by reason thereof. According to Lynch's testimony the wire was out of his way and he received the shock only because he, a very tall man, reached up and grasped the light.

[3, 4] Bizzell, the city superintendent of the defendant's light and water department, testified that the lamp was suspended in the middle of the street by a cable. He said that, while the voltage on the primary wire was 2,300, the voltage on the secondary wire from the transformer to the lamp was 110, and that such voltage was not dangerous and would not give much of a shock; that he had received a shock from a 110-volt current and it was not much of a shock. The plaintiff excepted because the witness was allowed to testify that 110 volts was not considered a deadly current. But the witness stated that he spoke on his own experience. The plaintiff also excepted because Bizzell

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testified that the primary wire did not come in contact with the secondary wires but were above them; that he did not notice the wire on that day but did so on the next day. This witness further testified that the dead man had not been moved when he got there; that there were no wires about his feet; that he inspected this light and pole two or three days prior to the time; and he also examined the transformer on that pole the next day, which was as soon as it could be done, and found them all right. The plaintiff excepted to this testimony. The witness stated that he had not taken any course in electricity and did not profess to be an expert, and all the experience he had had was being in charge of the electric light business of this town for two or three years past. We do not see any error in admitting the testimony which was a matter of observation on the part of the witness who was in charge of the business and had been for two or three years past. There was other evidence that there were no wires found in contact with the body of the defendant and none to the contrary that the light in question was hanging in its usual position late in the afternoon before the body of the deceased was found that night. In the reply there was testimony tending to show that the plaintiff's right hand was burned on the inside as if he has taken hold of something and that there was a blister.

[5] C. W. Thompson, witness for the plaintiff, testified that he was an electrician but he had not examined the entire line of poles from the crossing where the body was found to the power plant; that he had been over a part of the line. He was asked: How much voltage do these wires carry to the arc light as described by Mr. Bizzell in his testimony, and how much voltage would it take to operate an arc light as described by Bizzell and as they are usually suspended? This evidence was excluded, and the plaintiff excepted. But the witness was allowed further to testify that he could form an opinion satisfactory to himself as to how much voltage it would take to operate such an arc light as was described by Mr. Bizzell; that in his opinion it would take 1,100, though it could be operated on 110-volt current if a rheostat was cut in on one side; that he had never known a street arc light operated on 110-volt current; that, if the primary current is 2,300 volts, it would be an exceptional transformer that would cut it down to 110 at one step but it could be cut down to 1,100. If there had been error in excluding the previous questions to Mr. Thompson, it was fully cured by the admission of this testimony by him.

[6, 7] The court excluded a request by the plaintiff to Mr. Thompson to explain to the jury the "latest improved method" of suspending arc lights. In this we do not see any error. *Witsell v. Railroad*, 120 N. C.

557, 27 S. E. 125. The witness further stated that he had not taken any course in a technical school nor at college and his experience was mainly acquired by work at the business. It would seem that his qualifications as expert were about the same as those of Mr. Bizzell. This witness was further asked: "If the insulation on the primary wire had been defective and the light had been out of proper care, would it not have caused a larger voltage?" There was no evidence that the insulation on the primary wire was defective, and the hypothetical question was properly excluded.

[8, 9] The court charged the jury that the plaintiff was required to show by the greater weight of evidence that there was a failure to exercise proper care in the performance of legal duties which the defendant owed to the plaintiff (i. e., that degree of care which a reasonably prudent man should use under like circumstances), and that such negligent breach of duty was the proximate cause of the injury (explaining correctly what was "proximate cause"), and that persons in control of electric appliances are charged with a continuous duty of taking reasonable precaution to keep their appliances in proper condition. This is substantially the charge approved in *Ramsbottom v. Railroad*, 138 N. C. 38, 50 S. E. 448.

[10, 11] If the plaintiff desired more specific instructions, he should have asked for them. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. Besides, the plaintiff could not have been prejudiced as there was no evidence whatever showing negligence of the defendant which would have brought the wire to the ground or in reach of the intestate, nor that the wire hung lower than was safe or usual.

[12] The court further charged the jury; "The defendant contends that there is such an extent of mystery introduced in the case by evidence tending to show a burn in both hands and foot that upon all the evidence they should not be convinced that the death of the plaintiff's intestate was caused from wires being down in the first instance but rather that the plaintiff's intestate himself brought the wire down." After stating this contention, the court added: "Of course it is hardly necessary for me to tell you that, if the plaintiff's intestate came to his death by meddling with the chain and then received the shock from the wires which he had himself brought down, he would not be entitled to recover, and upon such finding of fact it would be your duty to answer the first issue 'No.'" The plaintiff excepted to the above instructions, but we find no error.

The whole charge is not sent up, and it does not appear that there were any instructions asked and refused. Upon the whole case, we find no error entitling the plaintiff to a new trial. There was no evidence tending to show that the wires were down by any

negligence of the defendant. Indeed, the evidence was scarcely sufficient to justify submitting the case to the jury. They have, however, found the issue in favor of the defendant.

No error.

McCULLERS et al. v. CHEATHAM et al.
(Supreme Court of North Carolina. Sept. 24, 1913.)

1. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDING BY REFEREE.

A referee's findings of fact, approved by the trial judge, will not be reviewed on appeal when there is some evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

2. ESTOPPEL (§ 67*)—CLAIM UNDER CONTRACT—SUBSEQUENT CLAIM OF RESCISSION.

A tenant, after having contracted to sell his share of a crop of tobacco to his landlord, joined with his mortgagee in an action for the tobacco and seized the same under a requisition. Upon the landlord's request, however, the tobacco was later surrendered to him and sold by him. *Held*, that the landlord was estopped on an accounting, after accepting the tobacco and selling it, to assert that he was liable only for the value of the tobacco and not for the contract price in that the contract of sale to him by the tenant was rescinded by the bringing of the action, since he had elected not to treat it as a rescission.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 163, 164; Dec. Dig. § 67.*]

Appeal from Superior Court, Johnston County; Carter, Judge.

Action by D. H. McCullers and others against Claude Cheatham and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

This was originally an action for the recovery of a lot of leaf tobacco raised by El. T. Parham on defendant's farm, known as the "Widow Whitley's place." Parham was the tenant of defendants in 1910, cultivating the farm on shares. Plaintiff, D. H. McCullers, made advances to him in money and supplies, under a contract between them. Defendants bought Parham's one-half share of the tobacco raised on the farm for \$400 but never took possession of it. Plaintiff seized it under the process but surrendered it to defendants in a short while, and the latter accepted it. Parham had given plaintiff D. H. McCullers a mortgage on the crop for the advances and afterwards assigned his interest in the crop to him. This action was finally turned into one for an accounting between the parties and was referred for that purpose. The referee found the facts in favor of plaintiffs and reported that defendants were indebted to plaintiff D. H. McCullers in the sum of \$270.88. This report was approved and confirmed by the court, upon exceptions thereto filed by the defendants, save as to two items allowed the plaintiff by the

referee, which were stricken from the amount found by the referee to be due, and reduced the said amount to \$196.39. There was judgment for this amount and costs, including one-half of the referee's fee.

T. T. Hicks, of Henderson, for appellants. Abell & Ward, of Smithfield, and Jas. H. Pou, of Raleigh, for appellees.

WALKER, J. (after stating the facts as above). [1] The misfortune of the defendants in this case is that the referee has found all the essential facts against them, and when these findings were reviewed and approved by the judge, upon consideration of the report and the exceptions, there being evidence to warrant them, we are precluded from changing the report in this respect but must decide the case upon the findings of fact, as made by the referee and approved by the court. We recently stated the rule of practice in this respect: "We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them. *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346; *Harris v. Smith*, 144 N. C. 439, 57 S. E. 122, and cases cited; *Thornton v. McNeely*, 144 N. C. 622, 57 S. E. 400; *Frey v. Lumber Co.*, 144 N. C. 759 [57 S. E. 464]." *Thompson v. Smith*, 160 N. C. 256, 75 S. E. 1010. The assignments of error in the case are nearly all addressed to the findings of fact, and, as there is no question of law or legal inference involved in them, there is nothing that we can review or reverse.

[2] The defendants do contend, though, that, by seizing the tobacco under the requisition issued in this case, the plaintiffs rescinded the sale of it by Parham to them, and consequently that they are liable only for the real value of the same instead of \$400, the contract price and the amount charged against them in the account by the referee for the tobacco. But not so as we view the facts. The sale of the tobacco was a cash transaction, as appears, and defendants had not paid for it nor taken possession of it. The title, therefore, had not vested in them. They had merely a contract of sale. *Millhiser v. Erdman*, 98 N. C. 292, 3 S. E. 521, 2 Am. St. Rep. 334; a. c., 103 N. C. 27, 9 S. E. 582; *Railroad Co. v. Barnes*, 104 N. C. 25, 10 S. E. 83. Besides, the defendants elected not to treat the plaintiff's action as a rescission of the contract. Plaintiffs instructed the sheriff to deliver the tobacco to defendants, and this was done and it was received by them without any objection. They did not think at that time to insist on a rescission and to refuse to take the property but rather elected to stand by it and avail themselves of it. Having done so, we cannot hear them, when they now take the opposite position, by repudiating what they then chose to do and

rely upon the rescission of the sale. When a party is given a choice between inconsistent rights, he must make his election once for all. We said of this principle in *Norwood v. Lassiter*, 182 N. C. 52, 48 S. E. 509: "When a party has the right to ratify or reject, he is put thereby to his election, and he must decide, once for all, what he will do, and, when his election is once made, it immediately becomes irrevocable. This is an elementary principle. *Austin v. Stewart*, 126 N. C. 525, 36 S. E. 37. He could not accept the money derived from the sale and at the same time reserve the right to repudiate the sale. *Kerr v. Sanders*, 122 N. C. 635, 29 S. E. 943; *Mendenhall v. Mendenhall*, 53 N. C. 287. It is familiar learning that, when two inconsistent benefits or alternative rights are presented for the choice of a party, the law imposes the duty upon him to decide as between them which he will take or enjoy, and after he has made the election he must abide by it, especially when the nature of the case requires that he should not enjoy both, or when innocent third parties may suffer if he is permitted afterwards to change his mind and retract." The same is substantially stated in *Austin v. Stewart*, supra. "Where a person has taken possession of or exercised acts of ownership over property under a claim of title or right, he is estopped to set up a claim inconsistent with that under which he has acted." 16 Cyc. 803, citing numerous authorities in note 18 to support this text.

It would prejudice the plaintiff D. H. McCullers if defendant should now be permitted to act in repudiation of his claim of ownership, when he received and appropriated the property as his own, with the consent of the other parties, who ordered it to be delivered to him by the sheriff, conceding his right to it under the contract. He did not have the full title at first but acquired it by the delivery of the tobacco to him afterwards, and, having taken it as owner under the contract, he must pay the stipulated price and not merely its value. As plaintiffs appear not to have been in the wrong originally, the claim of damages for a wrongful seizure of the tobacco cannot be sustained. We have so far treated the case as if the bringing of this suit for the tobacco was a repudiation of the contract of sale, as contended by the defendant, but this position may be seriously questioned. It takes two to make a contract, and the consent of both is required to unmake it. The defendants never abandoned their right, but on the contrary, as appears by their answer, first begged plaintiff for the possession of the tobacco, asserting their title to it, and, when this entirely failed, they threatened plaintiffs with a lawsuit if it was not surrendered to them, and finally received it as their property under the contract, claiming it as their own. Subsequently they sold it in market. Not only is this

true, but in their answer they actually claim damages for the seizure as violative of their rights to its possession. The referee finds that defendants contracted to buy Parham's one-half interest in the tobacco, so that their real right to the tobacco was derived from the contract of sale and not as landlords. They could not assert any legal claim to it in the latter capacity. Defendants knew of the contract of sale and must be held to have acted in accordance with their true right under it. They could not claim as landlord, so long as the contract stood, which changed the relation of the parties. If plaintiff's conduct amounted to a repudiation of the contract of sale and defendants had acquiesced in it, the result might, perhaps, be different, but they cannot claim under the contract and against it or occupy two inconsistent positions.

Our conclusion is that the case was correctly decided.

No error.

HUFFMAN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Sept. 24, 1913.)

1. CARRIERS (§ 283*)—PASSENGERS—CONDUCTOR INSULTING PASSENGER.

A railroad company is responsible for the acts of a conductor who, while in charge of a train, collecting tickets and acting within the scope of his authority as the company's vice principal, addressed insulting remarks to a lady passenger who had failed to purchase a ticket for her child.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1119-1124, 1140, 1141; Dec. Dig. § 283.*]

2. CARRIERS (§ 319*)—INSULT TO PASSENGER—EXEMPLARY DAMAGES.

In an action against a railroad company for insulting remarks addressed by a conductor to a lady passenger who had failed to purchase a ticket for her child, the plaintiff is entitled to punitive damages if the conductor maliciously, willfully, and wantonly insulted the plaintiff.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1338-1343; Dec. Dig. § 319.*]

Appeal from Superior Court, Wayne County; Carter, Judge.

Action by Annie L. Huffman against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. L. Barham, of Goldsboro, for appellant.

BROWN, J. The jury found that defendant's conductor did maliciously, willfully, wantonly, and rudely mistreat and humiliate plaintiff while a passenger on its train. The only exception necessary to consider relates to the issue as to damage.

The plaintiff was a passenger on the defendant's train, having her child over nine years old with her, but no ticket for the child. The conductor rightfully demanded payment of the child's fare. As to what

occurred then, there is a marked conflict of evidence. Plaintiff testifies that she reached down in her purse to get the child's fare, when the conductor publicly and without cause wantonly insulted her by telling her that "she was nothing but a cheap, common scalawag of a woman, or otherwise she would have purchased a ticket for the child." Plaintiff says this "got her dander up" and that she retaliated by calling conductor a dirt dobber and saying: "She would whip him in 20 minutes but for the disgrace; that the conduct of the conductor and his remarks made her sick; that she had never had her feelings hurt so bad; that she had never been so insulted in her life; that there were a great many ladies and gentlemen on the train; and that they looked at her hard."

The conductor testified that he asked plaintiff for the child's fare, and she emphatically refused to pay it; that he told her he had no right to pass a nine year old child free; that plaintiff then said that she would pay it, but she knew why he was so persistent; that he wanted to put it into his pocket and put it to his own use; that he then told her that she was a woman and a cheap skate and that he would not say anything more to her about it; and that she abused him all the way, calling him a rascal, scoundrel, and many other epithets.

[1] The contention that the defendant is not liable for the conductor's conduct, whatever at the time it may have been, cannot be maintained. He was in charge of the train, collecting tickets, acting within the scope of his authority, and a vice principal representing defendant. Under the facts of this case, ratification was not necessary to render defendant responsible for his act. *Stewart v. Lumber Co.*, 146 N. C. 47, 59 S. E. 545; *Sawyer v. Railroad*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Ann. Cas. 440.

[2] Upon the issue of damage, the judge stated the evidence and contentions of both sides fully, and instructed the jury that, in order to warrant the awarding of punitive damages in their sound discretion, they must previously find that the conductor first maliciously, willfully, and wantonly insulted the plaintiff. His honor followed the well-settled decisions of this court. *Holmes v. Railway Co.*, 94 N. C. 321, and cases cited in notes.

No error.

CORPORATION COMMISSION v. BANK OF JONESBORO.

(Supreme Court of North Carolina. Sept. 24, 1913.)

BANKS AND BANKING (§ 112*)—MISAPPROPRIATION OF FUNDS—LIABILITY TO CORRESPONDENT BANK.

The fact that the president of a banking company misappropriated funds of a correspondent bank, of which he was cashier, did not

charge such banking company with knowledge of the misappropriation so as to preclude recovery of an indebtedness from the correspondent bank, since its president, in misappropriating the funds, acted independently and adversely to its interests.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 271, 272; Dec. Dig. § 112.*]

Appeal from Superior Court, Lee County; Daniels, Judge.

Contest between creditors over the distribution of assets in the hands of A. A. F. Seawell, receiver of the Bank of Jonesboro. The receiver finds and allows a debt due the Banking Loan & Trust Company in the sum of \$15,867.85, and in a subsequent report filed allowed said debt in the sum of \$16,581.10 to share pro rata in distribution of assets in his hands. Under agreement of parties that the court should find the facts and enter judgment thereon, it rendered judgment accordingly. The creditors, other than the Banking Loan & Trust Company, excepted and appealed. Affirmed.

McIver & Williams, of Sanford, and H. A. London & Son, of Pittsboro, for Banking Loan & Trust Company. Hayes & Bynum, of Pittsboro, U. L. Spence, of Carthage, and Hoyle & Hoyle, of Sanford, for exceptors.

PER CURIAM. The controlling facts are that A. W. Huntley was cashier of the Bank of Jonesboro and president of the Banking Loan & Trust Company; that the said A. W. Huntley paid all checks drawn on the Bank of Jonesboro by its depositors, and forwarded to the Bank of Jonesboro for payment by out of town banks, by checks drawn upon the correspondent banks of the Banking Loan & Trust Company, in its name, and upon its check forms, and signed by the said A. W. Huntley, as its president; that the said Huntley made remittance for all collections made by the Bank of Jonesboro by exactly similar checks; that the money so paid amounted to \$16,581.10; that the said Huntley misappropriated the funds of the Bank of Jonesboro, and caused it to become insolvent; and that none of the officers of the Banking Loan & Trust Company, except Huntley, had any knowledge of such misappropriation.

The knowledge of Huntley, if material, would not be imputed to the Banking Loan & Trust Company, because he was acting in his own interest and adversely to his principal. *Bank v. Burgwyn*, 110 N. C. 267, 14 S. E. 623; *Bank v. School Committee*, 118 N. C. 383, 24 S. E. 792. These cases were cited with approval in *Brite v. Penny*, 157 N. C. 114, 72 S. E. 965, and the court there says: "We recognize the general doctrine held by all courts that a corporation is not bound by the action or chargeable with the knowledge of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf, and does not act in

any official or representative capacity for the corporation."

But in any event it appears that the money of the Banking Loan & Trust Company was used to pay checks drawn on the Bank of Jonesboro by its depositors, and to cover remittances for collections made by the bank, which we must hold constituted a valid indebtedness.

It was within the power of the judge, under the terms of submission to him, to correct the finding as to the amount due, and, if necessary, the pleadings would be amended in this court to conform to the finding.

We find no error.

Affirmed.

GOSSETT et al. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Sept. 8, 1913.)

1. TRIAL (§ 256*)—REQUEST FOR INSTRUCTIONS—NECESSITY.

Where the charge to the jury as a whole is free from error, the defendant should present requests to charge, if it desires more specific instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

2. TRIAL (§ 241*)—INSTRUCTIONS—READING STATUTE.

In an action for mental anguish, caused by the failure to deliver promptly a telegram announcing the death of plaintiff's father, it was not error for the court, in charging the jury, to read Civ. Code 1912, § 3330, allowing recovery in such cases.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. § 241.*]

Appeal from Common Pleas Circuit Court of Anderson County; S. W. G. Shipp, Judge.

Action by Alice Gossett and another against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appealed. Affirmed.

Geo. H. Fearons, of New York City, John Gary Evans, of Spartanburg, and Bonham, Watkins & Allen, of Anderson, for appellant. A. H. Dagnall, of Anderson, for respondents.

WATTS, J. This was an action by plaintiffs against defendant for mental anguish, caused by failure to deliver promptly to plaintiff's husband a telegram announcing the death of her father. The action was both for actual and punitive damages. The cause was heard by his honor, Judge Shipp, and a jury, at the February term of the court, 1913, and at the close of the evidence the plaintiffs withdrew from the jury the question of punitive damages. The jury found for the plaintiffs \$1,500 and the judge granted a new trial, unless the plaintiffs would remit \$500 of this amount, which they did. After entry of judgment, the defendant appealed, and asks reversal of the same by nine ex-

ceptions, eight of which impute error to his honor in his charge to the jury.

[1] The judge's charge, as a whole, is free from error, and if the appellant desired more specific instructions it should have presented requests to charge.

[2] His honor read to the jury what is known as "the Mental Anguish Act" (section 3330, Code of Laws, 1912), and his charge is sustained by the cases of *Mercer v. Southern Railway Co.*, 66 S. C. 247, 44 S. E. 750; *Hughes v. Telegraph Co.*, 72 S. C. 517, 52 S. E. 107; *Tinsley v. Telegraph Co.*, 72 S. C. 350, 51 S. E. 913; *Fall v. Telegraph Co.*, 80 S. C. 207, 60 S. E. 697, 61 S. E. 258; *Bennett v. Street Railway Co.*, 92 S. C. 75, 75 S. E. 277; *Roberts v. Telegraph Co.*, 73 S. C. 524, 53 S. E. 985, 114 Am. St. Rep. 100. These exceptions are overruled.

The ninth exception complains of error on the part of his honor in not granting a new trial. This exception cannot be sustained, as there was sufficient evidence to sustain the verdict.

Judgment affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

STATE ex rel. BATES et al. v. PATTERSON, County Sup'r, et al.

(Supreme Court of South Carolina. Sept. 24, 1913.)

CONVICTS (§ 10*)—EMPLOYMENT—STATUTES—CONSTRUCTION—"CONNECTION."

County authorities, in the construction of a road, contracted to prepare the road for top covering, the latter to be laid by contractors. The county, in preparing the substructure, used prisoners composing a chain gang, working them only about half a block in advance of the contractors' employes. Held a violation of Civ. Code 1912, § 957, providing that the chain gang shall not be worked in connection with or near any road contractor or overseer; the word "connection" meaning the state of being connected or joined, union by junction, by an intervening substance or medium, by dependence or relation, or by order in a series.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 19, 20, 22-29, 32; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1434, 1435.]

Petition by the State, on relation of H. G. Bates and others, against Andrew Patterson, Jr., as County Supervisor of Richland County and Chairman of the Board of County Commissioners, and others, for an injunction. Writ granted.

De Bohl & McLaughlin, of Columbia, for petitioners. Clarkson & Clarkson and Melton & Belser, all of Columbia, for respondents.

FRASER, J. This is a proceeding in the original jurisdiction of this court to enjoin the county authorities of Richland county from using the chain gang of Richland coun-

ty in the construction of a highway within what was formerly the town of Shandon, now a part of the city of Columbia. There are several questions involved in the hearing on the merits, but one is sufficient for the purposes of this motion.

It is conceded by the county authorities that the road is being built under contractors. The county is to prepare the road for a top covering, or bitulithic covering, and the bitulithic covering is to be put on by the employes of the contractors. It is further conceded that the chain gang is kept only a half block in advance of the contractors' employes. The Code of 1912 (section 957) contains this proviso: "Provided, that said chain gang shall not be worked in connection with or near *any road contractor or overseer.*" The Century Dictionary defines "connection": "1. The state of being connected or joined; union by junction, by an intervening substance or medium, by dependence or relation, or by order in a series."

Where one is laying the substructure and the other the superstructure, the parties are working in connection with each other. On the face of the statute it appears to be forbidden. The effect of the several statutes on each other cannot be settled until the exact status of the Codes under the Constitution is determined. That question is now before the Supreme Court, and ought not to be decided by one member. On the face of this statute, the collaboration of the chain gang and the employes of a contractor is forbidden, and the respondents ought not to proceed in this way until the question can be heard by the full court.

It is therefore ordered that the respondents be, and they are hereby, enjoined from using the chain gang in connection with the employes of the contractors in the building and construction of the road mentioned in the petition herein, until the hearing of the proceeding in open court and the determination thereof by its judgment herein.

DU PRE v. COLUMBIA, N. & L. R. CO.
(Supreme Court of South Carolina. March 10, 1913. On Petition for Rehearing, Sept. 20, 1913.)

On Petition for Rehearing.

COMMERCE (§ 8*)—POWERS REMAINING TO STATE—LIABILITY OF TERMINAL CARRIER.

The Carmack Amendment June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307) to the Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), imposing a liability for damage to goods shipped upon the initial carrier, and providing that it shall not deprive the owner of any right which he had under the existing law, does not deprive a consignee of his right to a penalty for failure of the terminal carrier to pay the damages to a shipment or to inform the consignee of which carrier caused the damage, given by Act Feb.

15, 1910 (26 St. at Large, p. 717, Civ. Code 1912, § 2572), since the two statutes refer to the liability of different carriers.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

Appeal from Common Pleas Circuit Court of Richland County; Geo. W. Gage, Judge.

Action by M. B. Du Pre against the Columbia, Newberry & Laurens Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed, and petition for rehearing dismissed.

Lyles & Lyles, of Columbia, for appellant. Rembert & Monteth, of Columbia, for respondent.

HYDRICK, J. This action was brought against defendant, the terminal carrier of an interstate shipment, to recover the penalty provided by statute (26 Stat. 717, Civil Code 1912, § 2572) for failure to pay the damages to a shipment, or trace it and inform the consignee when, where, and by which carrier it was damaged, within 40 days after notice thereof. Defendant admits liability for the penalty if the statute imposing it is not in conflict with the federal statute regulating interstate commerce.

In *Meetze v. Sou. Express Co.*, 91 S. C. 379, 74 S. E. 823, it was held that, as to initial carriers of interstate commerce, the state statute was superseded by the federal statute, because the purpose of the state statute was to find out which carrier is liable, and the federal statute answers that question as to initial carriers by making them liable at all events. The same reasoning, however, does not apply when it is sought to enforce the state statute against intermediate or terminal carriers, because their liability to the owner of the goods is not affected by the federal statute. The proviso to the Carmack amendment reads: "That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." If, therefore, the owner finds it to his advantage to pursue the carrier who actually lost or damaged his goods, the same not being the initial carrier, it is as necessary now, as it was at the time of the adoption of the Carmack amendment, that he have the information which the statute requires the carriers to furnish, which they can usually and readily do. The federal statute does not cover the same field as the state statute, when applied to the intermediate or terminal carriers; and therefore, as to these, there is no conflict.

It has been settled by repeated decisions of this court and of the Supreme Court of the United States that statutes like this are within the power of the states, in the absence of federal legislation on the same subject. *Winslow v. Railroad Co.*, 79 S. C. 344, 60 S. E. 709, and cases cited; *Richmond &*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Co. v. Patterson Tob. Co., 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759; Atlantic C. L. R. Co. v. Mazursky, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411.

Affirmed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

On Petition for Rehearing.

HYDRICK, J. The petition for rehearing in this case is based upon the ground that, since the filing of the opinion herein, the Supreme Court of the United States has held, in the case of Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, filed January 6, 1913, that the proviso to the Carmack amendment, which saves to the holder of the bill of lading "any remedy or right of action which he has under existing law," must be construed as saving only remedies and rights which he had under existing federal law, and that therefore that proviso cannot be held to save to the holder of the bill of lading the right and remedy given him by the statute of this state, under which defendant was penalized, for failing to furnish the consignee the information required by the statute. It is also contended that the statute is in conflict with the Carmack amendment, as the amendment was interpreted and applied by the Supreme Court in the Croninger Case.

In the case of Varnville Furniture Co. v. C. & W. C. R. Co., 79 S. E. 700, we attempted to show that the language of the Supreme Court in the Croninger Case, properly construed, did not have the effect of limiting the proviso to the Carmack amendment to the saving of rights and remedies existing only under federal law, but that the court gave it the same construction which had been given a similar provision in the act of 1887 to regulate commerce in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, to wit: "That it was 'evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act or by state statute or common law, *not inconsistent with the rules and regulations prescribed by the provisions of this act.*'" (Italics added.)

What we said in the Varnville Case is applicable in this case, because that decision is rested upon the ground that there is no federal legislation upon the subject covered by the state statute, and for the same reason we hold that the statute assailed in this case is valid. The principle upon which we decided that case is so clearly and cogently stated in Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284 (decided January 6, 1913), that we quote it as there stated. After having shown that

Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act by imposing a specific duty to furnish them for interstate traffic upon reasonable request therefor, and by giving remedies for the violation of that duty, the court proceeded: "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent but only permissive power. Southern R. Co. v. Reid, 222 U. S. 424 [32 Sup. Ct. 140] 56 L. Ed. 257."

Clearly, therefore, until Congress takes possession of the field covered by this statute, its validity remains unimpaired, and there is no conflict either as to the exercise of the power over the subject or in the regulation affecting it. The vital question, then, is: Has Congress legislated upon the same subject? Certainly the Carmack amendment does not deal with it. In the Varnville Case we showed that the subject of the Carmack amendment was "the liability of the carrier under a bill of lading which he must issue." We believe the legislation of Congress will be searched in vain to find any provision which even indirectly deals with the same subject that is covered by this statute (the requiring of intermediate and terminal carriers to inform the shipper when, where, and by which carrier in the route his goods were lost or damaged), if they can furnish that information by the exercise of reasonable diligence, a duty which in no wise affects the liability under the bill of lading. In Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108, and in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 200, 31 Sup. Ct. 164, 55 L. Ed. 180, 37 L. R. A. (N. S.) 7, and in other cases, the Supreme Court has pointed out the fact and made it a ground of decision that "the business association of such carriers affords to

each facilities for locating primary responsibility as between themselves which the shipper cannot have."

In *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690, decided March 10, 1913, the court held that a stipulation in a bill of lading limiting to 90 days the time within which an action can be brought against the carrier to enforce liability for loss or damage en route is valid, and that it supersedes state laws to the contrary. The reason is therefore the greater why carriers should furnish the shipper the information required by this statute.

If the carrier is allowed to say to the shipper, "You must bring your action for loss or damage within 90 days from the happening thereof, and you can recover only against the carrier on whose line the injury occurred, unless you sue the primary carrier, under authority of the Carmack amendment," certainly the shipper should have the right to say to the carrier who delivers his goods to him in a damaged condition, or fails to deliver them at all, "Then you must tell me when, where, and by which carrier in the route the damage was done, if you can get that information by the exercise of reasonable diligence."

For the foregoing reasons, the petition is dismissed. But, inasmuch as counsel for appellant have asked that the remittitur be further stayed to give them time and opportunity to apply to the Supreme Court of the United States for a writ of error, it is ordered that the remittitur be further stayed for a period of 30 days from the filing of this order.

GARY, C. J., and FRASER, J., concur.

WATTS, J. I gave my views in reference to the matters involved in this petition in my dissenting opinion in the case of *Varnville Furniture Co. v. C. & W. C. R. R. Co.*, but a majority of the court decided otherwise and I am bound by that decision, and for this concur in dismissing the petition herein.

STATE v. VAUGHN.

(Supreme Court of South Carolina. June 28, 1913. On Petition for Rehearing, Sept. 20, 1913.)

1. CRIMINAL LAW (§ 1152*)—APPEAL—REVIEW—DISCRETION OF COURT—IMPANELING JURY.

Exceptions to the rejection or acceptance of jurors in the trial of a criminal case cannot be sustained where the defendant fails to show an abuse of the trial court's discretion in making such rulings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.*]

2. JURY (§ 110*)—OBJECTIONS—WAIVER OF ERRORS.

Where a defendant, during the course of a trial, voluntarily withdrew his plea of not

guilty and entered a plea of guilty which was submitted to the jury to determine whether or not they would recommend mercy, the right to assign error to the rulings of the court in impaneling the jury was waived.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.*]

3. CONSTITUTIONAL LAW (§ 203*)—CRIMINAL LAW (§ 1206*)—"EX POST FACTO" LAW—CHANGE OF PUNISHMENT—MANNER OF INFLECTING DEATH PENALTY.

Act Feb. 17, 1912 (27 St. at Large, p. 702), changing the manner of inflicting the death penalty from hanging to electrocution, is not disadvantageous to one committing a crime for which the penalty is death prior to the enactment of the law, and therefore the law is not ex post facto as applied to him.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 584-590; Dec. Dig. § 203.* Criminal Law, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2527-2533; vol. 8, p. 7657.]

4. CRIMINAL LAW (§ 847*)—WAIVER OF ERRORS—CONDUCT OF TRIAL.

Where a defendant charged with rape, after the trial had been progressing two days, through his attorneys, voluntarily withdrew his plea of not guilty and entered a plea of guilty and thereafter made a full statement of the facts to the jury, who were instructed by the court that they should determine on his plea of guilty and statement whether they would recommend him to the mercy of the court or not, the charge, to which no objection was made, fully stating the effect of a simple verdict of guilty as well as that of a recommendation to mercy, the defendant waived his right to object that he did not enter the plea of guilty in person, that his statement was not a confession of a crime, and that the court failed to advise him of the nature and consequences of his plea.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 847.*]

5. CRIMINAL LAW (§ 895*)—TRIAL—WAIVER OF IRREGULARITIES—"WAIVER."

"Waiver" is a voluntary election to dispense with something of value or forego some advantage which the party waiving it might at his option have demanded, and a defendant in a criminal case may waive a constitutional as well as a statutory provision intended for his benefit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2116; Dec. Dig. § 895.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381.]

Appeal from General Sessions Circuit Court of Greenville County; R. O. Purdy, Special Judge.

T. U. Vaughn pleaded guilty to a charge of rape and was sentenced to death by electrocution, and he appeals. Affirmed, and petition for rehearing dismissed.

The defendant was placed on trial, under an indictment containing three counts, the first charging him with rape upon Etta Jackson, the second with intent to ravish her, and the third with carnal knowledge of her; she being a woman child under 14 years of age.

After the trial had proceeded from the 24th until the 26th of October, 1912, the record shows that the following took place: "Mr. Martin: May it please the court, after

consultation with the solicitor and the gentlemen representing the state, and with the defendant himself, we have reached an agreement that at this stage the defendant will withdraw his plea of 'not guilty' and enter a plea of 'guilty' with the understanding that he may go on the stand and make a full statement of such statement as he may desire, to the court and the jury, and the only question which we will submit to the jury, without argument, is the question of a recommendation to mercy. Mr. Bonham: With the understanding that this is not accepted by the state as a compromise at all, but that it will shorten affairs and prevent the necessity of offering further testimony along this line and save the other little girls of the embarrassment of going on the stand and testifying, we are willing to submit the matter to the jury, 12 fair-minded men, as to what punishment shall be inflicted upon this man. We want it understood that this is no compromise at all. We consider that all the jury wants to know is the truth, and we only agree to this in order that the case may be determined without going over into next week." T. U. Vaughn, the defendant, then took the stand as a witness and on cross-examination of the solicitor thus testified: "Q. Now you have pleaded guilty to these charges and have thrown yourself on the mercy of the court and jury. You don't want to conceal anything from the jury? A. No, sir. Q. You want them to know the entire enormity of your offense out there? A. Yes, sir; there is nothing hidden in my heart. Q. Then you do not deny that Etta Jackson is not the only little girl out there that you ruined? A. (To his counsel: Must I answer that? Mr. Martin: Yes, tell the truth.) Yes, I do not deny it. Q. You had intercourse with Della Cooper? A. Not at the home. Q. But you had intercourse with her? A. Yes, sir. Q. You had intercourse with Beulah Dunnoway? A. Yes, sir. Q. You had intercourse with Sadie Craig? A. Yes, sir. Q. You had intercourse with Mamie Corbin? A. No, sir. Q. You had intercourse with Blanche Flower? A. Yes, sir. Q. Five little girls out there, with whom you bore the relationship of parent and child, and whom you ruined? A. Yes, sir; to my shame I must admit it. Q. Mr. Vaughn, you are here asking for the mercy of this court and jury. Did you at the time you were having intercourse with these little girls realize that your act blighted their lives? A. I didn't; I couldn't have realized it; now I do." At the close of his testimony, the record shows that the following took place: "By Mr. Patton, Foreman of the Jury: Q. You said that you had intercourse with these girls, I want to know if they consented to what you did? A. I will say this: That actually no force was ever used. I assume full responsibility for what was done in that I stood in the attitude of a father to them. I hate to say that, but there was never anything done with-

out their consent. Q. What age were they? A. I don't know. I suppose from 14 to 15 years old, and on up."

His honor, the presiding judge, in charging the jury, thus explained the nature and the force and effect of the defendant's plea: "After the state had offered a number of witnesses, on the charges brought against the defendant, and after their testimony had been taken in open court, the defendant appeared before you in open court and withdrew his plea of 'not guilty' with the understanding that he be allowed to make a full statement before you, with the right of cross-examination on the part of the state. In other words, he was to go on the witness stand as a witness and make his statement, which he did make to you, and then withdrew his plea of 'not guilty' and entered a plea of 'guilty.' While it is out of the usual order of things, yet counsel thought that by taking this method they would stop further inquiry on the part of the state and stop the necessity of taking further testimony before you. Had this case gone on in the usual manner and come before you at the conclusion of all the testimony, it would have been my duty to charge you that you should consider each count in the indictment separately. In other words, if you believed that the testimony beyond a reasonable doubt warranted a conviction as to rape, then you can find the defendant guilty, with or without recommendation to mercy. Or, if not guilty of that, you should consider the other charges made against him, and if found guilty you should convict him in accordance with the testimony. If found not guilty, you should say so. It would have been my duty to call your attention to those various counts and to have instructed you that, if you did not convict on one count, you could convict on either of the other two counts, and that your verdict should say on what charge you convicted him. If you found him not guilty, you should say 'not guilty.' Now all the aspect of the case is changed. He has withdrawn his plea of 'not guilty' and entered a plea of 'guilty.' So that now, gentlemen of the jury, it is for you to consider all the facts and circumstances surrounding the case and determine whether or not you should recommend him to mercy of the court. That is the whole issue for you. Because the plea of guilty carries with it a plea of guilty to the highest offense charged in the indictment, and that is the whole question for you. It is for you to say whether the death penalty shall be inflicted. If you should come in and say 'guilty,' that would mean that in due time the defendant would be taken to the electric chair and there suffer the penalty of death. If you say that you will recommend him to the mercy of the court and you understand that his plea is entered with the understanding that you shall consider his case, it will be my duty to sentence the defendant to hard labor in the penitentiary for

a period of not less than 5 years nor more than 40 years. You have heard the testimony; you have heard his statement. You are just as capable of understanding the nature of this case as I. His plea has been made in open court, and it is for you to consider all the facts and circumstances, as you have heard them brought out on the stand, and it is for you to say whether you will write your verdict 'guilty' or whether you will recommend him to the mercy of the court."

The jury found a verdict of "guilty," and the court imposed upon the defendant the sentence of death by electrocution on the 20th of December, 1912, whereupon he appealed upon the following exceptions:

"(1) Because his honor erred, it is respectfully submitted, in rejecting the proposed juror, N. B. Rector, there being no sufficient evidence in law of bias or other disqualifications, and error in refusing motion for new trial upon this ground.

"(2) Because his honor erred, it is respectfully submitted, in rejecting the proposed juror, J. B. Brockman, there being no sufficient evidence in law of bias or other disqualifications, and error in refusing motion for new trial upon this ground.

"(3) Because his honor erred, it is respectfully submitted, in rejecting the proposed juror, G. W. Morrow, there being no sufficient evidence in law of bias or other disqualifications, and error in refusing motion for new trial upon this ground.

"(4) Because his honor erred, it is respectfully submitted, in accepting the juror, Avery Patton, against defendant's objection since he should have been excluded for bias, and error in refusing motion for new trial upon this ground."

The fifth and sixth exceptions were abandoned:

"(7) Because his honor erred, it is respectfully submitted, in sentencing defendant to electrocution in the state penitentiary, under the direction of the superintendent of that institution, in accordance with act of 1912 (27 St. at L. 702), since as to the case at bar said act was unconstitutional in that it is an ex post facto law and therefore contravenes article 1, § 8, of the South Carolina Constitution of 1895, and also article 1, § 9, of the United States Constitution, and is therefore void.

"(8) Error of his honor in charging, in substance, that the plea of not guilty was withdrawn and a plea of guilty substituted, when defendant did not and was not required to enter such plea in person, either orally or by sign of assent, as required by law in a capital case, especially since his statement on the stand was a denial of guilt, and both the court and defendant's counsel erred in construing such statement as a confession of guilt; it was a confession of guilt of great moral wrong but not of rape or other charge of this indictment.

"(9) Because his honor erred in failing to charge that the issue as to whether defendant was guilty or not guilty was one of the issues in this case: (a) Because he had not personally entered a plea of guilty as required by law; (b) because his sworn testimony not only did not amount to a confession of any offense charged in the indictment but contradicted the plea of guilty as to each and every offense.

"(10) Error of his honor, the presiding judge: (a) In failing to advise the prisoner of the nature and consequence of his plea; and (b) in failing to have it affirmatively appear that the alleged plea of the confession was voluntary, as the law requires in capital cases."

McCullough, Martin & Blythe, of Greenville, for appellant. P. A. Bonham and J. J. McSwain, both of Greenville, for the State.

GARY, C. J. The first, second, third, and fourth exceptions will be considered together.

[1, 2] There are two reasons why these exceptions cannot be sustained: (1) The appellant's attorneys have failed to show an abuse of discretion on the part of his honor, the presiding judge; and (2) the right to insist upon the errors assigned was waived when the defendant withdrew his plea of "not guilty."

[3] The fifth and sixth exceptions will not be considered for the reason that they were abandoned. The recent case of *State v. Malloy*, 78 S. E. 995, which was decided by this court, shows that the seventh exception cannot be sustained.

[4] The eighth, ninth, and tenth exceptions will be considered together, conceding that the defendant would have been entitled to all the rights claimed in these exceptions, if he had insisted upon them, in the manner provided by the rules of practice; nevertheless it clearly appears that he waived said rights in expectation that the jury would recommend him to the mercy of the court, thereby enabling him to escape the death penalty. At the time he withdrew his plea of "not guilty" he had no reasonable ground for supposing that the jury would render any other verdict than that of "guilty"; and the method which he adopted, it would seem, might naturally have been expected to increase his chances of appealing to the sympathy of the jury and thereby induce them to recommend him to the mercy of the court. There is no doubt that the defendant had the right to waive compliance with the technical features of law as to the manner in which his plea should be accepted.

[5] "Waiver is voluntary and implies an election to dispense with something of value, or forego some advantage, which the party waiving it might at his option have demanded or insisted upon. A waiver takes place when a man dispenses with the performance of something which he has a right to exact.

A party may waive a constitutional as well as a statutory provision for his benefit, as a trial by jury, though that mode is guaranteed to him by the Constitution; and, when waived by such party, he will be estopped from setting them up or claiming them." *Herman on Estoppel and Res Judicata*, vol. 2, p. 954. The same author at page 958 says: "A defendant has a constitutional right to a speedy trial. Yet he may waive this provision by obtaining a continuance. He may plead guilty, which generally dispenses with a jury trial. * * * A defect in the Constitution or organization, which does not prevent the presence of 12 competent jurors, by whose votes the indictment is found, and which could have been cured if the attention of the court had been called to it at the time or promptly remedied by the impaneling of a competent grand jury, is waived if the defendant treats the indictment as sufficient, pleads not guilty, and goes to trial on the merits of the charge. There is good sense in this conclusion. The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the occasion. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which he has been presented, the source from which it proceeds, and have these matters promptly and properly determined, or, waiving them, he may put in issue the truth of the accusation and demand the judgment of his peers on the merits of the charge. If he omits the former and chooses the latter, he ought not, when defeated on the latter when found guilty of the crime charged, to be permitted to go back to the former and inquire as to the manner and means by which the charge was presented."

The foregoing language and that from *Herman on Estoppel and Res Judicata* were quoted with approval in the case of the *State v. Faile*, 43 S. C. 52, 20 S. E. 798, in which there was an appeal from the sentence of death.

Nothing was omitted during the trial of which the defendant has just cause of complaint. He, his attorneys, the presiding judge, and the jury unquestionably understood fully the nature, force, and effect of the plea made by the defendant; he was represented by exceedingly able counsel; the plea was not interposed until two days after the commencement of the trial; the presiding judge clearly stated the nature, force, and effect of the plea, to which neither the defendant nor his counsel made any objection; the testimony which had then been introduced indicated that there were no reasonable grounds for hoping that the jury would render any other verdict than that of guilty.

These exceptions are therefore overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed and that the case be remanded to that court for the purpose of having another day assigned for carrying into execution the sentence of death imposed upon the defendant.

HYDRICK, WATTS, and FRASER, JJ., concur.

On Petition for Rehearing.

PER CURIAM. After careful consideration of the petition herein, this court is satisfied that no material question of law or of fact has either been overlooked or disregarded. It is therefore ordered that the petition be dismissed but that the remittitur be stayed until the further order of the court in order that the petitioner may apply for a writ of error to the Supreme Court of the United States if so advised; notice having been given of such intention.

STATE v. SPEARS.

(Supreme Court of South Carolina. Aug. 28, 1913.)

1. CRIMINAL LAW (§ 778*)—INSTRUCTION—HOMICIDE—BURDEN OF PROOF.

Where there were no witnesses to a homicide, and no testimony as to how it occurred except defendant's, a charge that, if the evidence showed beyond a reasonable doubt that defendant killed deceased, then the burden shifted to defendant to explain it, because, nothing else appearing than that one man has killed another, the presumption is the killing was unlawful, was not erroneous when applied to the facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.*]

2. HOMICIDE (§ 340*)—APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION.

Where, under the undisputed evidence, a homicide was either in self-defense, or was murder, erroneous charges as to manslaughter were harmless.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

3. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTION—CHARGE ON FACTS.

Where it was undisputed that defendant killed deceased, and also that the killing was either in self-defense or murder, a charge that the law of self-defense arises out of necessity, "and right there is the pivotal point in the case," was not erroneous as a charge upon the facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

Appeal from General Sessions Circuit Court of Marlboro County; Geo. W. Gage, Judge.

Wilson Spears was convicted of murder, and he appeals. Affirmed. Rehearing denied.

J. K. Owen, of Bennettsville, for appellant. Solicitor J. Monroe Spears, of Darlington, for the State.

HYDRICK, J. This is an appeal from sentence upon conviction of murder, with recommendation to mercy. The testimony is very meager and indefinite as to the details of the quarrel between the defendant and the deceased, which seems to have arisen immediately before the fatal encounter, and to have led up to it. As well as we can gather from the testimony, there was a frolic at the house of a negro woman, named Milly Kelly, which was attended by the defendant, the deceased, and others. The deceased and Abram Mack got into a row in the house, and they and Oscar Mack, Abram's father, went out to settle their difficulty. While they were so engaged, the defendant approached them, and asked the deceased for a match. The deceased replied, with an oath, that he had no match. After some bandying of words and oaths at each other about the match, each went home and got his gun and returned. The defendant's home was about half a mile away. When they met again, on their way back to the Kelly house, each shot the other. The defendant testified that, as he stepped into a certain path on the way back, the deceased called upon him to "Halt"; that he looked and saw deceased holding up his gun to shoot, and he did shoot; and that he (defendant) threw up his gun as quickly as he could, and shot. He explained his returning to the Kelly house by saying that he left his sister there, and went back to escort her home, and that he carried his gun to protect himself.

[1, 2] The first exception assigns error in the following instruction: "If the testimony satisfies you beyond a reasonable doubt that Spears killed Thomas, then the burden shifted on Spears to explain it, and to satisfy the jury that the law excuses him. Because, nothing else appearing, and it appearing that one man killed another, the presumption is the killing was unlawful." While it may not be true, as an abstract proposition, applicable under all circumstances, that the mere fact that one man has killed another will raise the presumption that the killing was unlawful, yet the charge of a trial judge must always be construed as applicable to the facts of the case on trial. When so applied, there was no error in the instruction above quoted. The killing was done with a deadly weapon. There was no legal provocation in the first encounter of words, which could have reduced the killing to manslaughter. If there had been, there was ample cooling time. Therefore, in no possible view of the evidence would the jury have been warranted in finding a verdict of manslaughter. Under the undisputed evidence, the defendant either killed the deceased in self-defense, and was entitled to acquittal, or he was guilty of

murder. That being so, and the jury having found a verdict of murder, the assignments of error in the charge as to the law of manslaughter are immaterial, and need not be considered.

[3] On the law of self-defense, the court charged: "The law of self-defense arises out of necessity, actual or presumed. Right there is the pivotal question in the case." The error assigned is that this was a charge on the facts, in that it directed the minds of the jurors solely to the defense, and left out of view all questions relative to the state's case, including the question of malice. The undisputed evidence warranted the charge. Under the evidence, there was no reasonable ground for any contention as to the fact that defendant had killed the deceased, and, as we have shown, there was no legally possible ground for any other than a verdict of murder or of acquittal on the plea of self-defense. Therefore the judge was clearly right, when he said that was the pivotal point in the case. In fact and law, it was the only point in the case.

Judgment affirmed.

GARY, C. J., and FRASER, and WATTS, JJ., concur.

On Petition for Rehearing.

PER CURIAM. After careful consideration of the within petition, we have failed to discover that any material question of law or of fact has been overlooked or disregarded. It is therefore ordered that the petition be dismissed and that the stay of the remittitur heretofore granted be revoked.

ALDRICH v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. Sept. 12, 1913.)

1. CARRIERS (§ 32*)—INTERSTATE COMMERCE—RATES.

An interstate carrier can charge no more and no less than the rate filed with and approved by the Interstate Commerce Commission and published as the lawful rate, and a greater or less charge cannot be justified on the ground of mistake.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

2. CARRIERS (§ 36*)—CARRIAGE OF GOODS—ACTIONS FOR REFUSAL TO CARRY.

In an action against a carrier for damages for refusal to carry goods at the rate filed with and published by the Interstate Commerce Commission, the question, whether the carrier refused to transport the goods except at an excessive rate *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

3. TRIAL (§ 343*)—VERDICT—EFFECT.

The verdict must be construed as resolving all inferences in favor of the successful party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. § 343.*]

4. APPEAL AND ERROR (§ 209*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where not raised below, a carrier, in an action for damages for refusal to transport freight at the regular interstate rate, cannot contend on appeal that there was no evidence of such refusal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290-1298, 1300, 1303; Dec. Dig. § 209.*]

5. COURTS (§ 489*)—INTERSTATE COMMERCE—JURISDICTION OF STATE COURTS.

Where an interstate carrier refused to carry freight at the regular interstate rate, the state courts have jurisdiction of an action by the shipper for damages, the remedy being the ordinary common-law one, which was preserved by section 22 of the act to regulate interstate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 387 [U. S. Comp. St. 1901, p. 3170]), which declares that nothing shall in any way abrogate or alter the remedies now existing at common law or by statute, but the provisions of this act shall be cumulative.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

6. APPEAL AND ERROR (§ 930*)—INSTRUCTIONS—PRESUMPTIONS.

In an action by a shipper for damages suffered by reason of an interstate carrier's refusal to transport a shipment of goods at the rate published by the Interstate Commerce Commission, the carrier cannot successfully contend on appeal that a judgment in favor of the shipper should be reversed because damages were recoverable only if there was notice to the carrier of the number of cars that were to be shipped, where the court by its charge limited the consideration of the jury to the damages arising out of the carrier's refusal to transport two cars which had already been ordered, for it must be assumed that the jury followed the charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

7. CARRIERS (§ 36*)—FAILURE TO TRANSPORT GOODS—MEASURE OF DAMAGES.

Where an interstate carrier refused to transport goods at the regular interstate rate, the measure of damages was not the mere difference between the correct rate and the quoted rate where, by reason of the higher quotation, the shipper was forced to forego the shipment and sell the goods at a loss.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

8. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

In an action against an interstate carrier for damages for refusal to transport a shipment at the regular interstate rate, the admission of letters of the general freight agent to plaintiff, quoting an incorrect rate, was harmless where the correct rate was proven by undisputed evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

9. CARRIERS (§ 36*)—INTERSTATE COMMERCE—RATES—ACTION FOR DAMAGE.

As the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) merely provides that the certificate of the secretary of the Interstate Commerce Commission shall be prima facie evidence of the correctness of the rates certified, the actual rate prescribed may be proven by other evidence, and so letters of an interstate car-

rier's general freight agent, quoting an incorrect rate, are admissible in an action by a shipper to recover damages for the refusal of the carrier to transport a shipment upon payment of the lawful charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

10. EVIDENCE (§ 474*)—OPINIONS—MARKET VALUE.

In an action by a shipper to recover damages sustained by reason of the refusal of an interstate carrier to transport goods at the rate fixed by the Interstate Commerce Commission, where the shipper, by reason of the excessive rate, was forced to forego the shipment and sell the goods at a loss, he may testify as to their market value at the place of destination, having stated that he knew what their market value was, by reason of information gained on visits to that point and the reports of persons engaged in the sale of the goods shipped.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

Appeal from Common Pleas Circuit Court of Barnwell County; W. B. De Loach, Special Judge.

Action by Alfred Aldrich against the Southern Railway Company and the Southern Railway, Carolina Division. From a judgment for plaintiff, defendants appeal. Affirmed.

Harley & Best, of Barnwell, for appellants. R. C. Holman, of Barnwell, and W. H. Townsend, of Columbia, for respondent.

HYDRICK, J. For several seasons prior to 1909-10, the plaintiff had engaged in buying cotton seed and shipping them to Mexico, over the Atlantic Coast Line Railroad, for sale for planting purposes. Defendant's agent at Barnwell solicited the business, and plaintiff told him that, if defendant would give him better rates than the Coast Line, he would ship over defendant's road.

It appears from the evidence that it is quite difficult, if not impossible in some cases, for the local railroad agents to figure out, from the schedule of rates filed and published, the correct rate applicable to interstate shipments; and it is specially difficult, when the matter is complicated, as it was in this case, by the fact that the units of weight and value in the two countries are different and the rate of exchange between them is variable. Hence the defendant's local agent referred the matter to the general freight agent, who testified that he was employed especially for that purpose.

On October 18, 1909, he wrote plaintiff that the rate on seed in car load lots, from Barnwell, S. C., to Torreón and Gómez Palacio, Mexico, was 90½ cents per hundred pounds. According to the schedule of rates filed with the Interstate Commerce Commission at that time and published, the correct rate was 97½ cents per hundred pounds. Some time after receiving this letter, plaintiff made requisition on defendant's local agent for a number of empty cars to be loaded for shipment. On October 26th or 27th, after plaintiff had

loaded two cars and was loading the third, defendant's local agent informed him that an error had been made in quoting the rate, and that it was 10 cents a hundred more than the rate quoted. That would have made the rate 100½ cents per hundred. Plaintiff told the agent that he could not use that rate, and thereafter he shipped the seed in the two cars, which he had already bought and paid for, to an oil mill in Columbia, S. C., and sold them at a loss. Thereafter, on October 30th, but after plaintiff had sold the seed which he intended to ship to Mexico, defendant's general freight agent informed plaintiff that the correct rate was 97½ per hundred. Plaintiff would have paid the correct rate if he had been informed what it was before he had sold the seed.

This action was brought to recover damages for lost profits on the sale of 25 car loads of seed contemplated and contracted for. Plaintiff testified that he paid not exceeding \$24 per ton for the seed he bought, and that they were worth \$37.50 per ton in Mexico. He also testified that he actually bought and paid for only the two car loads mentioned, and that the persons with whom he had contracted to buy other seed released him from liability on his contracts. He claimed damages for the loss of profits on 25 car loads; but the court instructed the jury that he could recover only the damages which he actually sustained. The verdict was in his favor for \$390. In view of the evidence of the plaintiff above stated, and the instructions above stated, and the amount of the verdict, we conclude that the jury awarded damages only for the loss of profits on the two car loads of seed which plaintiff actually bought and paid for and tendered to defendant for shipment.

[1] According to the undisputed evidence, the court ruled and instructed the jury that 97½ cents, the rate which had been filed with and approved by the Interstate Commerce Commission and published, was the lawful rate and the only rate which defendant could lawfully charge or collect; that defendant was bound by law to charge and collect that rate, no more and no less; and that if defendant refused to receive and transport the seed, except upon payment of a higher rate, it was liable to plaintiff for the resulting damages. We think the court was right in this ruling and instruction. No error in quoting a rate which has been filed with the Commission and published will be allowed to prevent a carrier from collecting the correct rate applicable to an interstate shipment. *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; *Texas, etc., R. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Texas & C. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. Such an error is not binding upon either carrier or shipper, because both are presumed to know the correct rate. *United States v. Miller*, 223 U. S.

599, 32 Sup. Ct. 323, 56 L. Ed. 569; *Chicago, etc., R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 814, decided January 6, 1913; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, decided March 10, 1913. Nor does such an error subject a carrier to liability for damages resulting from any action taken by an intending shipper in reliance upon the quoted rate. *Illinois Central R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290, decided January 6, 1913. In the *Carl Case* the court said: "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. *Texas & C. R. Co. v. Mugg*, supra. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. *Illinois C. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441 [33 Sup. Ct. 176, 57 L. Ed. 290], decided January 6, 1913. Nor can a carrier legally contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally open to all. *Chicago & C. R. Co. v. Kirby*, supra." It follows, therefore, that, if plaintiff's right to recover had depended solely upon defendant's error in quoting the rate and on the action which he claims to have taken on the faith of the quoted rate, his complaint should have been dismissed.

But the allegations and the evidence involve something more, to wit, the refusal of defendant to receive and carry the shipment, except upon the payment of an unlawful charge. If the fact be that defendant did so refuse, it incurred liability for the resulting damages. *Avinger v. S. C. R. Co.*, 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716; 5 A. & E. Enc. L. (2d Ed.) 158. In the *Abilene Case* the Supreme Court of the United States said: "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. * * * As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition, we concede that we must be guided by the principle that repeals by im-

plication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy—in other words, render its provisions nugatory." (Italics added.) That case and the others above cited hold that the rate filed and published is presumed to be reasonable, and that no other can be lawfully exacted.

[2-4] Under the circumstances detailed, the loading of the seed into cars furnished by defendant, with the intent of both parties that they were to be shipped to Mexico over defendant's road, was sufficient to warrant the inference of a tender of them for such shipment; and the quotation of an excessive rate, even though it was done under the belief that it was the lawful rate, was enough to justify the inference of a refusal to transport the seed, except upon payment of the rate quoted. Whether, under all the circumstances, such inferences should have been drawn were questions of fact which were properly submitted to the jury; and, under the charge, the verdict must be construed as resolving them in plaintiff's favor and as establishing the fact that plaintiff's recovery was based upon defendant's refusal to receive and transport the seed, except upon payment of an unlawful exaction. Moreover, defendant is concluded from contending in this court that there was no testimony tending to show such refusal, because that point was not made in the circuit court.

[5] We think there can be no doubt that the circuit court had jurisdiction of the action. It was based on the violation of a common-law duty. In the Abilene Case, after stating the principles above quoted, the court proceeded to show that the remedy invoked by the shipper was so inconsistent with the provisions, purpose, and intent of the act to regulate commerce that, if allowed, it would prove to be destructive of it. In construing section 22 of that act, which says that "nothing in this act contained shall in any way abrogate or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," the court said: "This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress

of the particular grievance or wrong dealt with in the act." In this case not only does the common law afford a remedy for the particular grievance complained of but it is entirely consistent with the provisions of the act regulating commerce, and therefore, by the express terms of section 22, it was preserved to the shipper. *Gibson v. Railroad Co.*, 88 S. C. 365, 70 S. E. 1030; *Hardaway v. Railway Co.*, 90 S. C. 475, 73 S. E. 1020; *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352; *Mondou v. New York, etc., R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Louisville & C. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; *Galveston, etc., R. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 517; *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Copp v. L. & N. R. Co.*, 43 La. Ann. 511, 9 South. 441, 12 L. R. A. 725, 26 Am. St. Rep. 198; *Loughin v. McCauley*, 186 Pa. 517, 40 Atl. 1020, 48 L. R. A. 33, 65 Am. St. Rep. 872, and notes.

In *Galveston, etc., R. Co. v. Wallace*, supra, the railroad company was sued in the state court, as the "initial carrier," under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. 1801, p. 1307]), for a loss which occurred on a connecting line. Objection was made to the jurisdiction of the state court on the ground that section 9 of the original act to regulate commerce provided that persons damaged by a violation of the statute "might make complaint before the commission * * * or in any District or Circuit Court of the United States." But the court said that "damage caused by failure to deliver goods is in no way traceable to a violation of the statute and is not, therefore, within the provisions of sections 8 and 9 of the act to regulate commerce." With regard to the matter of jurisdiction, the court also said: "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them and under which they had the power to hear and determine causes of action created by federal statute."

This case does not fall within the principle of the *Reid Case*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257. In that case the state court undertook to enforce a state statute which imposed a penalty on common carriers for refusal to receive and transport goods when tendered. At the time the goods were tendered for shipment, the carrier had not filed and published a through rate as

required by the act to regulate commerce, which also provided that no carrier should engage in interstate transportation until such schedule of rates was filed and published, and penalized the violation of the inhibition. It clearly appeared, therefore, that the state statute was in conflict with the federal statute and commanded the doing of that which the latter forbade. Necessarily the state statute was held to be void on the principle that, when Congress assumes control of any subject of interstate commerce, all conflicting state laws on the same subject are superseded. This is a necessary consequence of the supremacy of an act of Congress over the subject. For the same reason, a statute of Minnesota, which penalized interstate carriers, for failure to furnish cars on demand for the initiation of interstate shipments, was held void in *Chicago, etc., R. Co. v. Hardwick Farmers' Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, decided January 6, 1913.

This case rather falls within the principle announced in *Missouri P. R. Co. v. Larabee Flour Mills Co.*, supra, in which the Supreme Court of Kansas was sustained in compelling a carrier by mandamus to transfer and return loaded and unloaded cars from the line of a connecting carrier to the flour mill of the shipper, on demand and payment of the customary charges therefor, although both carriers were engaged in interstate commerce, and three-fifths of the output of the mill was shipped out of the state. The court held that the state court had jurisdiction to compel the performance of the duty, which was a common-law duty, in the absence of regulation of the same subject by congressional authority. There is nothing in the act to regulate commerce which exempts a common carrier of interstate commerce from the common-law liability for damages for refusing to receive and transport a shipment properly tendered, and there is nothing in the action of the state court enforcing that liability which conflicts with any provision of that act. Therefore, under the authorities above cited, and the cases following, there was no error in overruling the objection to the jurisdiction of the court. *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878.

[6] Under the view which we have taken of the case, the objection that plaintiff could not recover damages because there was no notice to the defendant of the number of cars that he intended to ship and of the amount of the damages that he would sustain as the result of defendant's delict (it being contended by defendant that the damages sued for are special damages) need not be considered, because we have seen that, under plaintiff's testimony and the judge's charge, which we are bound to assume the jury obeyed, no damages could have been allowed, except for the loss of

profits on the two car loads of seed which plaintiff had bought and paid for, and the amount of the verdict shows that none other were awarded. And as to those two cars, defendant certainly had notice of the circumstances and the purpose of the shipment. We must not be understood, however, as conceding, by these remarks, that the damages recovered were, in fact, special damages or that it would have been necessary to the recovery of such damages that the carrier should have had notice of the number of cars intended to be shipped or of the amount of the damages which would result from any delict on its part with regard to the shipment.

[7] Defendant's contention that the measure of damages was only the difference between the correct rate and the quoted rate cannot be sustained. 5 A. & E. Enc. L. (2d Ed.) 388; *Hope Cotton Oil Co. v. Texas R. Co.*, 10 Interst. Com. R. 696.

[8] In view of the fact that the correct rate was proved by undisputed evidence and the jury were correctly instructed what it was, we cannot see how defendant could have been prejudiced by the admission of the letters of the general freight agent to plaintiff, quoting an incorrect rate.

[9] We do not concede, however, that the letters were improperly admitted. We think they were competent. The fact that the certificate of the secretary of the Interstate Commerce Commission is made prima facie evidence of the correctness of the rates certified implies that the rate may be proved in some other manner and by some other evidence.

[10] There was no error in allowing the plaintiff to testify as to the market value of seed in Mexico. He testified that he knew what the market value was and, as a basis of his knowledge, said that he had been to Mexico and had also sold seed there through others and had received and accepted the report of sales made by them, which was a fundamental and practical test of the market value. 16 Cyc. 1143.

Judgment affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

MARTIN v. HALL.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. EVIDENCE (§ 419*) — PAROL EVIDENCE — DEEDS—CONSIDERATION.

While the recital in a deed of the amount of consideration and its payment is prima facie evidence thereof, it may be shown by parol evidence that the actual consideration paid or promised was different from that stated, or that it has not been paid, if such evidence does not alter or contradict the legal import of the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

2. EVIDENCE (§ 419*) — PAROL EVIDENCE — DEEDS—CONSIDERATION.

Where a deed recited a money consideration of \$600, the receipt of which was acknowledged by the grantor, it could be shown by parol evidence that while, as a matter of form, \$600 passed from the grantee to the grantor, it was immediately returned, and that the real consideration was the support and maintenance of the grantor during his life; this not altering or in any way affecting the legal import of the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

3. DEEDS (§ 19*)—FAILURE—CONSIDERATION—RELIEF.

Where the consideration for a conveyance of land was the support and maintenance of the grantor for life, and the grantee not only failed to support and maintain the grantor, but denied that she was under any legal obligation to do so, the consideration failed, and the grantor was entitled to have the conveyance rescinded by a court of equity, there being no adequate remedy at law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. § 19.*]

Appeal from Circuit Court, Bedford County.

Suit by Matthew V. Hall against Martha Bell Martin. From a decree for plaintiff, defendant appeals. Affirmed.

S. S. Lambeth, Jr., and Landon Lowry, both of Bedford City, for appellant. Sale & Withers, of Bedford City, and S. V. Kemp, of Lynchburg, for appellee.

BUCHANAN, J. The object of this suit was to set aside and annul a deed by which the appellee conveyed to the appellant a tract of land containing about 130 acres. The relief prayed for was granted by the circuit court, and from that action this appeal was allowed.

The material question involved in the case is whether or not parol evidence was admissible to show that the real consideration for the land conveyed was the support and maintenance of the grantor during his life by the grantee, instead of the money consideration stated in the deed.

The deed, omitting formal parts, is as follows:

"Witnesseth, that for and in consideration of the sum of six hundred dollars in hand paid by the said party of the other part, the receipt whereof is hereby acknowledged, the said party of the first part has bargained and sold, and by these presents does sell, release, and convey with special warranty unto the said party of the other part, all right, title, and interest in and to a certain tract or parcel of land lying in the south side of Bedford county, on the head waters of Ashwell's Mill creek, adjoining the lands of Melissa J. Kennett, Allen A. J. Hall, and others, and being the same land purchased from John Hall's estate, containing 132½ acres, be the same more or less."

[T] The statement in the deed as to the consideration is a mere recital of the amount

and that it had been paid; but, while such recital is prima facie evidence of the facts recited, the true consideration for the conveyance may be inquired into, and it may be shown by parol evidence that the actual consideration paid or promised was different from that stated in the deed, and also to contradict the recital in the deed that the consideration had been paid, provided such evidence does not alter or contradict the legal import of the deed. See McKee v. Bunting McNeal Real Est. Co., 77 S. E. 515, decided at the March term, 1913, of the court, and authorities there cited.

[2, 3] The parol evidence offered and considered by the trial court did not alter or in any way affect the legal import of the deed. It satisfactorily shows that while, as a matter of form, \$600 passed through the hands of the grantee to the grantor, it was immediately returned to the grantee's father, and that the real consideration for the conveyance was the support and maintenance of the grantor during his life by the grantee. The parties seem to be quite ignorant, and the evidence tended to show that they had the impression that, although the true consideration for the deed was the support and maintenance of the grantor it was necessary, to give validity to the deed, that it should recite or state that a money consideration had passed. Pursuant to the real agreement between the grantor and the grantee, the latter did support and maintain the former after the execution of the conveyance in 1904 for about two years. Then differences arose between them. The grantee refused to wash the grantor's clothing, or to have it done for him, and he had to get it done elsewhere and pay for it. On account of unkind treatment, the grantor left the premises for a time. The parties afterwards tried to adjust or have their differences adjusted, but were unable or failed to do so. Just previous to the institution of this suit the grantor went to the premises which he had conveyed to the grantee to talk with the grantee about their matters, when she ordered the grantor to leave the premises and denied that she was under any obligation to support and maintain him, claiming then, as she does now, that the consideration for the conveyance was money, and not support and maintenance.

No good purpose could be subserved by discussing in detail the evidence in the case. It will be sufficient to say that it satisfactorily shows that the real consideration for the conveyance sought to be set aside was the support and maintenance of the grantor for life by the grantee; that the latter has not only failed to support and maintain the grantor, but before the institution of this suit, as well as in her answer to the bill and in her deposition, denied that she was under any legal obligation to do so. The consideration of the

conveyance for support and maintenance having thus failed, the grantor was entitled, under the decisions of this court in *Wampler v. Wampler*, 30 Gratt. (71 Va.) 454, *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17, and *Keister v. Cubine*, 101 Va. 768, 45 S. E. 285, to come into a court of equity, because he had no adequate remedy at law, and have the conveyance rescinded.

The decree complained of must therefore be affirmed.

Affirmed.

DRAPER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. HUSBAND AND WIFE (§ 813*) — NONSUPPORT—EVIDENCE.

In a prosecution of a husband for total nonsupport of his wife, evidence that accused had two small children by a former marriage dependent on him for support was inadmissible.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. § 813.*]

2. HUSBAND AND WIFE (§ 305*)—NONSUPPORT—DEFENSES.

That a wife, after separation because of her husband's fault, took service and supported herself was no defense to a prosecution for nonsupport.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1103; Dec. Dig. § 305.*]

3. HUSBAND AND WIFE (§ 305*) — NONSUPPORT—PROSECUTION—MOTIVE OF COMPLAINANT.

A prosecution of a husband for nonsupport of his wife being by the commonwealth, the wife's motive in testifying against him is immaterial.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1103; Dec. Dig. § 305.*]

Error to Corporation Court of Roanoke.

James Draper was convicted of desertion and nonsupport, and he brings error. Affirmed.

Hairston & Willis, of Roanoke, for plaintiff in error. The Attorney General and Samuel W. Williams, of Richmond, for the Commonwealth.

WHITTLE, J. This writ of error brings under review the judgment of the corporation court of Roanoke city of conviction of the accused, James Draper, under Va. Code, § 3795c, for desertion and nonsupport of his wife.

The evidence sustains both allegations of the indictment; and therefore, if a motion to direct a verdict in favor of the accused were permissible at all under our procedure, it was properly overruled in this instance.

[1] The other errors assigned by the accused which demand notice are these: (1) The refusal of the court to admit evidence to show that the accused had two small children by a former marriage dependent upon him for support.

Such evidence is inadmissible where the

nonsupport of the wife, as in this case, was total.

[2] (2) The second instruction asked by the accused and refused by the court amounts to this: That a husband cannot be found guilty of nonsupport of his wife when, after a separation between them caused by his misconduct, the wife takes service and supports herself. In other words, that such action on the part of the wife operates a condonement of the offense. To state the proposition is to answer it.

[3] (3) The last instruction, which the court also refused, told the jury: "That if they believed from the evidence that the wife * * * caused this indictment to be made because of her ill will and hatred for her husband, and not because of his alleged desertion and neglect, then they must find the defendant not guilty."

There is no evidence to sustain this instruction. But, if there had been, this is a prosecution by the commonwealth against the accused for violation of the criminal law of the state, and whatever motive may have actuated the wife to testify against him is immaterial.

In any view of the case, the judgment is plainly right and must be affirmed.

Affirmed.

C. L. RITTER LUMBER CO., Inc., v. COAL MOUNTAIN MINING CO.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. APPEAL AND ERROR (§ 503*)—JURISDICTION—BURDEN OF PROOF.

The burden of showing the existence of appellate jurisdiction is on the appellant, which jurisdiction must affirmatively appear from the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2310, 2311; Dec. Dig. § 503.*]

2. APPEAL AND ERROR (§ 150*)—APPELLATE JURISDICTION—PARTY SECONDARILY LIABLE—STATUTES.

Where a grantee of the timber on certain land was decreed only secondarily liable in a suit to enforce a vendor's lien for the balance of the purchase price, and then only to the extent of the deficiency after a sale of the land, such grantee, prior to such sale, was not entitled to appeal under Code 1904, § 3454, giving a party the right of appeal from an interlocutory decree adjudicating the principles of a cause.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 934-946; Dec. Dig. § 150.*]

3. APPEAL AND ERROR (§ 150*) — RIGHT OF APPEAL — PARTY SECONDARILY LIABLE — STATUTES.

Code 1904, § 3455, provides that no petition shall be presented for appeal from or writ of error or supersedeas to any final judgment, decree, or order of any court, where the controversy is for a matter less in value or amount than \$300, unless there be drawn in question a freehold or franchise, or the title or bounds of land, or the order of the State Corporation

Commission, or some matter not merely pecuniary. *Held* that, where a grantee of the timber on certain land was decreed only secondarily liable for a deficiency occurring on a sale of the land in satisfaction of a vendor's lien, such grantee, prior to such sale, when only it could be ascertained that a deficiency in excess of \$300 remained, could not appeal from such decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934-946; Dec. Dig. § 150.*]

Appeal from Circuit Court, Tazewell County.

Suit by the Coal Mountain Mining Company against R. A. Ayers and others. From a decree in favor of complainant, but holding the C. L. Ritter Lumber Company, Incorporated, secondarily liable only for a balance due on the sale of certain land to satisfy complainant's vendor's lien, the Lumber Company appeals. Dismissed.

Geo. W. St. Clair, of Tazewell, for appellant. Greever & Gillespie, of Tazewell, for appellee.

WHITTLE, J. The appellee, the Coal Mountain Mining Company, conveyed to R. A. Ayers 183.60 acres of land situated in Buchanan county for \$2,754, \$688.50 of which was paid in cash and the residue was divided into three credit installments of \$688.50 each. Notes were taken for the deferred payments, and a vendor's lien reserved on the face of the deed to secure the unpaid purchase money. R. A. Ayers afterwards conveyed the land to the Empire Coal Land Corporation, and that corporation sold the merchantable standing timber on the tract to the appellant, the C. L. Ritter Lumber Company, Incorporated, which cut and removed timber therefrom of the value of \$1,018.50. The appellee then filed a bill in equity against R. A. Ayers, the C. L. Ritter Lumber Company, Incorporated, and others, to recover of Ayers the amount of unpaid purchase money and to subject the land to sale to satisfy the vendor's lien. The bill further prayed that, if the proceeds of sale of the property should prove insufficient to discharge the lien, the plaintiff might recover of the C. L. Ritter Lumber Company, Incorporated, the balance of the amount due under the deed, provided such balance did not exceed \$1,018.50, the value of the timber cut and removed from the land by that company. From a decree in accordance with the prayer of the bill, the C. L. Ritter Lumber Company, Incorporated, appealed.

We are met at the threshold of the case with a motion to dismiss the appeal on the ground that it was improvidently awarded. In respect to that motion it must be observed that the decree against the appellant is not absolute, but is conditioned upon the failure of the land, the primary subject for payment of the debt, when exposed to sale, to produce an amount sufficient to discharge

in whole or in part the vendee's lien resting upon it. Until such sale the decree against the appellant is not enforceable, and then it is only enforceable for such amount as may remain unpaid after applying the proceeds of sale to the original debt. It is therefore obvious that the ultimate liability of the appellant is at present wholly conjectural, and cannot be ascertained until the land, the primary subject for the payment of the debt, has been sold.

Section 3455 of the Code declares that "no petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree, or order, * * * of any court * * * when the controversy is for a matter less in value or amount than three hundred dollars, * * * unless there be drawn in question a freehold or franchise or the title or bounds of land, or the action of the State Corporation Commission or some matter not merely pecuniary."

[1] The rule is settled in Virginia that the "burden of showing the existence of jurisdiction to hear the appeal is on the plaintiff in error, and such jurisdiction must affirmatively appear from the record." Notes to sections 3454, 3455, of the Code, citing *Commonwealth v. Chaffin*, 87 Va. 545, 12 S. E. 972; *Southern Fertilizing Co. v. Nelson*, 6 Va. Law J. 162.

In *Williamson v. Payne*, 103 Va. 551, 49 S. E. 660, the court quotes with approval the statement of the law from 2 Cyc. 555, that: "Generally speaking, the value or amount in controversy must be made to appear affirmatively. If it cannot be ascertained, the appeal will be dismissed, and the burden is on appellant to establish the jurisdiction."

The following qualification of the general rule does not affect this case, namely, that "on the other hand, when the original demand is pecuniary and in excess of the jurisdictional amount, but is alleged by the appellee to have been reduced below that amount by payment, the onus rests upon him to make that fact appear." *Fink Bros. & Co. v. Denny*, 75 Va. 663; *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235. The principle announced in *Williamson v. Payne*, supra, is followed in *Lamb v. Thompson*, 112 Va. 134, 70 S. E. 507.

In *Marchant v. Healy*, 94 Va. 614, 27 S. E. 464, it was held that, where the difference between the debt asserted by the plaintiff in the lower court and the amount paid thereon by the sale of the debtor's land is less than the jurisdictional amount, no appeal lies.

[2] It will be further noted that this case is not controlled by the provision of section 3454, giving a party the right of appeal from an interlocutory decree "adjudicating the principles of a cause."

[3] The application for appeal is not amenable to objection because the decree does not adjudicate the principles of the cause, but

because, as we have endeavored to show, that it does not now appear, nor can it be made to appear until there has been a sale of the land, that the liability of the appellant, which is merely pecuniary, will ultimately amount to \$300.

If the land, when sold, should bring enough to satisfy the vendor's lien, there will be no liability on the appellant, and consequently it will not have been aggrieved by the decree appealed from. And if, on the other hand, the land, when sold, should come within \$300 of paying off the vendor's lien, then the appellant, though aggrieved to the extent of the deficit, would have no redress by way of appeal.

Our conclusion is that the appeal must be dismissed as having been improvidently awarded, but without prejudice to appellant's right to apply for another appeal, if warranted by future developments in the case.

Appeal dismissed.

MULLINS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. INDICTMENT AND INFORMATION (§ 87*)—FORM AND REQUISITES—ALLEGATION OF TIME—SURPLUSAGE.

Where an indictment charged that accused on the _____ day of _____, in the year 19____, and within the last two years, did unlawfully sell, by retail, whisky, etc., without a license, it sufficiently charged that the sale was within the two-year statutory period of limitations; the balance of the allegation as to the time being meaningless and surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.*]

2. CRIMINAL LAW (§§ 281, 282*)—PLEADING—PLEA—RIGHT TO DEMURRER OR REPLY.

Where a plea in abatement is filed to an indictment, the commonwealth may demur or reply, but it cannot do both.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 652, 653; Dec. Dig. §§ 281, 282.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—PRE-SUMPTION—WITHDRAWAL OF PLEA IN ABATEMENT.

Accused having pleaded in abatement, the commonwealth demurred to the plea, and, the demurrer having been overruled, the commonwealth offered to reply, to which accused objected on the ground that the commonwealth was entitled to only one answer to the plea. This objection having been overruled, the court permitted the commonwealth to reply, to which ruling accused excepted but joined issue on the replication which was tried to the court. Held that, under such circumstances, the demurrer would be treated as having been withdrawn, so as to afford the commonwealth the right to reply, though the record did not show that fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

4. GRAND JURY (§ 34*)—PROCEEDINGS—PRESENCE OF ATTORNEY FOR COMMONWEALTH.

Code 1904, § 3988, provides that it shall be unlawful for any attorney for the commonwealth to go before any grand jury during its deliberations, except when duly sworn to testify as a witness, that he may advise the foreman or any member in relation to the discharge of their duties. Held that, where a commonwealth's attorney did not advise the grand jury to return the indictment in question against the defendant, and did not know of it until the presentment was made, and was not in the room when the jury was deliberating thereon, the validity of the indictment was not affected by the fact that such attorney went into the grand jury room to consult with the jury in response to their call, though not as a witness, when the jury was in session and during their deliberation.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 73, 85; Dec. Dig. § 34.*]

5. INTOXICATING LIQUORS (§ 134*)—“LIQUOR.”

The term “liquor,” in its limited sense and in its more common application, implies spirituous fluids, whether fermented or distilled, such as brandy, whisky, gin, beer, and wine (citing 5 Words and Phrases, 4181, 4182).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*]

6. INTOXICATING LIQUORS (§ 216*)—ILLEGAL SALE—INDICTMENT—“WHISKY.”

“Whisky” is a spirit distilled from grain, barley, maize, wheat, rye, etc., and the use of the term “whisky” in an indictment charging the defendant with selling intoxicating liquor, to wit, whisky, is sufficient to show the sale of fermented or distilled liquor, within the statute prohibiting the sale thereof (citing 8 Words and Phrases, 7445).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 230-233; Dec. Dig. § 216.*]

7. INTOXICATING LIQUORS (§ 223*)—UNLAWFUL SALE—“CORN LIQUOR”—VARIANCE.

Evidence that prosecuting witness purchased “corn liquor” from accused was sufficient to sustain a conviction under an indictment charging the unlawful sale of “whisky, brandy, gin, beer, malt liquors, and mixtures thereof.”

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 263-274; Dec. Dig. § 223.*]

8. INTOXICATING LIQUORS (§ 132*)—SALE WITHOUT LICENSE—GENERAL REVENUE LAW—LOCAL OPTION LAW—OFFENSES—JURISDICTION.

Act March 25, 1902 (Acts 1901-02, c. 307), prohibiting the sale of liquors, either wholesale or retail, in certain named counties, did not render the general revenue law and the Byrd Liquor Law, making the sale of liquors without a license an offense punishable in the circuit court, inapplicable to such counties.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 141; Dec. Dig. § 132.*]

Error to Circuit Court, Dickenson County.

Melvin Mullins was convicted of selling whisky without a license, and he brings error. Affirmed.

Sutherland & Sutherland, of Clintwood, for plaintiff in error. The Attorney General, for the Commonwealth.

CARDWELL, J. The refusal of the trial court to sustain the demurrer to the indictment is assigned as error.

[1] The indictment was found and returned into court on July 13, 1912, and sets forth "that Melvin Mullins on the — day of —, in the year one thousand nine hundred and —, and within the last two years in said county, did unlawfully sell by retail whisky, brandy, wine, beer, malt liquors, and mixtures thereof without a license so to do as required by law, against the peace and dignity of the commonwealth."

It is contended on behalf of the accused that the averment in the indictment as to the time when the offense was committed is meaningless, and that it does not charge the date of the sale nor such facts as show that the sale was made within two years prior to the indictment, the statutory period for the prosecution of such offenses.

In the recent case of Shiffett v. Commonwealth, 77 S. E. 606, the charge in the indictment was "that Marcus Shiffett within 12 months on the last preceding 191—, in said county, did unlawfully sell ardent spirits without having obtained license to do so," etc.; and the opinion of the court, by Buchanan, J., citing ample authority for the ruling, holds that words in an indictment, which "are meaningless, * * * may be treated as surplusage and rejected if the indictment is thereby made sensible. * * * Courts of justice are disposed to treat as surplusage all erroneous and improper averments in complaints and indictments where the residue of the allegations sets out the offense charged in technical language and with substantial certainty and precision;" that "after rejecting the words 'on the last preceding 191—,' following the words 'within 12 months,' as meaningless, 'the indictment states that the grand jury attending the circuit court of Greene county, at its December term, 1912, 'upon their oath present that Marcus Shiffett within 12 months * * * in the said county did unlawfully sell ardent spirits without having a license to do so.' These were apt and sufficient words to show that the offense charged was committed within the statutory period;" and "therefore the demurrer" to the indictment "was properly overruled."

So in the case now before us, after rejecting as surplusage and because meaningless the words in the indictment, "on the — day of —, in the year one thousand nine hundred and —, and," the residue of the allegations, in apt and sufficient words, set out the offense charged against the accused "in technical language and with substantial certainty and precision," showing that the offense charged was committed within the statutory period, and the demurrer to the indictment was rightly overruled.

When the case was called for trial, the accused, Melvin Mullins, tendered his plea in abatement to the indictment to the effect that

"the grand jury that found and returned the indictment was an illegal body, and the deliberations of said body in returning said indictment was contrary to law for this, to wit: W. G. L. Long, the attorney for the commonwealth, after the grand jury was sworn and retired to their room to deliberate on the said indictment, went before the said grand jury during their deliberation, and the said attorney for the commonwealth was not at the time he went before the said grand jury, and while they were deliberating on this indictment, duly sworn to testify as a witness before the said grand jury, and by reason of the illegal conduct of the said attorney for the commonwealth and of the said grand jury this defendant has been injured and prejudiced, and said indictment returned. * * * Wherefore, for the reason that the attorney for the commonwealth was before said grand jury at the time and under the circumstances aforesaid, he prays judgment of said indictment that the same be quashed."

The attorney for the commonwealth demurred to said plea and the accused joined in the demurrer, which the court overruled; and thereupon the attorney for the commonwealth offered to reply to the said plea, to which the accused objected, because he (the attorney for the commonwealth) had demurred, and he was only allowed one answer to said plea; but the court overruled said objection and permitted the attorney for the commonwealth to reply to the plea, to which action and ruling of the court the accused then and there excepted, whereupon the accused joined in said replication, and issue was joined thereon, which issue was, by consent of parties, tried by the court without the intervention of a jury, and, to sustain in his behalf the issue on the plea, the accused called as his witness the attorney for the commonwealth, who after being sworn testified as follows:

"After the grand jury was sworn and retired to their room for deliberation, I went in and was in the grand jury room at the July term of this court, the term at which this indictment was found, several times. I was called in there by the grand jury to consult and was not called as a witness; the grand jury was in session; and it was during their deliberation when I was in there.

"I did not advise the grand jury to return this indictment against the defendant, and did not know of it until the presentment was made, and was not in the room when the jury had under consideration or deliberation of said indictment or the presentment upon which said indictment was found."

This being all the evidence introduced in support of the said plea, the court, finding that the evidence did not sustain the plea, overruled it and gave judgment respondent ouster, to which ruling the accused then and there excepted.

The contention of the accused is that,

when the demurrer to the plea in abatement was overruled, judgment should have been entered for the accused; that the commonwealth's attorney should not have been permitted to have two answers to the same plea, and, having demurred to the plea, he was not entitled to reply to it.

[2, 3] There is no merit in this contention. It is true that, while the attorney for the commonwealth had the right to demur or reply to the plea, he had no right to do both; but as said in the opinion of this court in *Ches., etc., R. Co. v. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449: "Although the record does not show that the demurrer was withdrawn, the court and parties must have so considered it; otherwise the replication could not have been filed and a trial had upon the issue of fact raised by it. The demurrer having been treated in the trial court as waived or withdrawn, it must be so considered here."

We are of opinion that the trial court did not err in overruling the accused's plea in abatement or in refusing to quash the indictment.

[4] Section 3988 of the Code of 1904 does declare it unlawful for any attorney for the commonwealth to go before any grand jury during their deliberations except when duly sworn to testify as a witness, with the qualification that "he may advise the foreman of the grand jury or any members thereof in relation to the discharge of their duties." It is unquestionably the policy of the statute, as has been the practice in this jurisdiction, to keep the grand jury, independent of all outside interference, free and untrammelled in the deliberations; and, while it is highly reprehensible for any attorney for the commonwealth to violate in any degree either the terms or the policy of the statute, it would be a strained construction of it, upon the facts in this case, to say that there has been such a disregard thereof as was or might have been injurious and prejudicial to the accused and calling for a dismissal of the indictment against him, upon the ground that it was returned by the grand jury because the attorney for the commonwealth went before the grand jury while they were in session at the July term of the court, 1912, at which term this indictment was found and returned into court. It will be observed that the attorney for the commonwealth, introduced as a witness for the accused, testified: "I did not advise the grand jury to return this indictment against the defendant, and did not know of it until the presentment was made, and was not in the room when the jury had under consideration or deliberation of said indictment or the presentment upon which said indictment was found."

The remaining assignment of error requiring consideration relates to the ruling of the trial court refusing to set aside the verdict of the jury because the same was without

evidence to support it, and its refusal to dismiss the case because the court was without jurisdiction to try it.

The only evidence in the case is that given by A. K. Lambert, introduced as a witness on behalf of the commonwealth, who testified that in June, 1911, he was coming from McClure and wanted some liquor, and he came to a place on Crane's Nest in Dickenson county and asked a woman, whom he did not know, where the man of the house was, and she said he was up at the barn, which was about 50 yards from the house. "I went up there and the defendant, Melvin Mullins, was up there. I knew him well. I told him I wanted a fruit jar and he said perhaps he could get one at the house. We went to the house and we went into the main room where I stopped, and he and his wife went into the kitchen, and he came back in a few moments. Then I went into the kitchen and on the table set a half gallon can of liquor. I laid down \$2.20 and picked up the can and left. The can had corn liquor in it. * * * I saw the defendant, his wife, and some others there; I don't know who they were; I took it they were their children. * * * I do not recall seeing any grown people there except the defendant and his wife. I did not stay but a few minutes and was never there before or after I left the \$2 there for the liquor and the \$.20 for the can; I do not know who got the money or whether any one got it or not; I did not tell any one where I put the money, but it was on the table in the kitchen where I found the liquor."

The only point made as to the insufficiency of this evidence to warrant the jury in finding the accused guilty of selling "whisky, brandy, wine, beer, malt liquors, and mixtures thereof, without a license so to do as required by law," is, that proof of a sale of "corn liquor" is not proof of a sale of "whisky," etc., in violation of the statute. To sustain this contention two cases are cited: *Barker v. State*, 117 Ga. 428, 43 S. E. 744, and *Donithan v. Commonwealth*, 109 Va. 845, 64 S. E. 1050. In the first-named case the court was construing a certain section of the Penal Code of Georgia and merely held that as the sale of corn whisky was not prohibited by that section, under which the defendant was indicted, the verdict of the jury finding him guilty of a sale of corn whisky should have been set aside.

In *Donithan's Case*, supra, the indictment was for the unlawful sale of "spirituous and malt liquors, whisky, brandy, wine, ale, beer, or mixtures thereof," and the ruling of this court was that, as cider is not a spirituous liquor and does not belong to any of the other classes enumerated in the statute, therefore the verdict of the jury finding the defendant guilty upon proof only of the sale of cider which produced intoxication could not be sustained.

[5] In the case at bar the witness speaks

of the article purchased by him of the accused as "corn liquor." The term "liquor," in its limited sense and in its more common application, implies spirituous fluids, whether fermented or distilled, such as brandy, whisky, gin, beer, and wine, and the like fluids in great variety, so that, where a witness in describing what liquor had been sold uniformly describes it merely as "liquor," it would be proper for the jury to assume that he was speaking of that class of liquor specifically referred to in the second definition given by Webster, viz., "alcoholic or spirituous fluid either distilled or fermented, as brandy, wine, whisky, beer," etc. 5 Words and Phrases, 4181, 4182, and authorities there cited.

[6] Whisky is a spirit distilled from grain, barley, maize (corn), wheat, rye, etc., and the use of the term "whisky" in an indictment charging the defendant with selling intoxicating liquor, to wit, one quart of whisky, is sufficient to show the sale of fermented or distilled liquor, within the meaning of a statute prohibiting the sale of such liquor. 8 Words and Phrases, 7445, and authorities cited.

[7] In *State v. Williamson*, 21 Mo. 498, the opinion of the court says: "The courts take notice that whisky is a spirit distilled from grain." And in *Aston v. State* (Tex. Cr. App. 1899) 49 S. W. 385, the court said: "It is common information that whisky is a spirituous liquor, distilled from corn and vegetables, and is highly intoxicating."

In *Commonwealth v. White*, 10 Metc. (Mass.) 14, the indictment was under the Revised Statutes of Massachusetts and charged the defendant with selling "one gill of spirituous liquor," etc. The proof was that the liquor sold was in the form of gin and brandy mixed with sugar and water, so as to make what was called "toddy" or "sling"; the objection taken being that the proof did not show a sale of spirituous liquor but only a sale of mixed liquor, part of which was spirituous. Held, that the objection was not well taken on the ground that, although the article sold might have been properly described as a mixed liquor, part of which was spirituous, it was also well described as spirituous liquor, and the proof adduced was sufficient to sustain a conviction for a violation of the statute providing that "if any person shall sell any wine or spirituous liquor, or any mixed liquor, part of which is spirituous, * * * without being duly licensed, * * * he shall forfeit for each offense \$20." See, also, *Commonwealth v. Morgan*, 149 Mass. 314, 21 N. E. 369.

In *State v. Brittain*, 89 N. C. 574, the opinion of the court says, "Most generally the term 'liquors' implies spirituous liquors;" and it was therefore held that proof that the defendant sold liquors is sufficient to show, in the absence of adverse testimony, that he sold spirituous liquors.

It is a matter of common knowledge that

"corn whisky" and "corn liquor," or "rye liquor" and "rye whisky," are terms interchangeably, alternately, and indifferently used, respectively, to indicate the grain out of which the liquor spoken of was distilled, so that, when the witness in this case spoke uniformly of the contents of the can he purchased of the accused as "corn liquor," it was entirely proper for the jury to assume that he was speaking of that class of liquor which is alcoholic or spirituous, distilled from corn, and which comes within the terms of the statute prohibiting the sale of whisky, etc., without being duly licensed to do so, and it was not error in the court to refuse to set aside the jury's verdict finding the accused guilty as charged in the indictment and imposing upon him the punishment authorized by the statute.

[8] The ground upon which the contention is made by the accused that the trial court was without jurisdiction to try him for the offense charged in the indictment is that the general revenue laws and what is known as the "Byrd Liquor Law" do not apply to the county of Dickenson for the reason that the act of the Legislature approved March 25, 1902 (Acts 1901-02, p. 321), was still in force and provides, in substance, that no license shall be granted for the sale of ardent spirits, either by wholesale or retail, in certain named counties, including Dickenson. In other words, the contention is that, in the counties named in the act of 1901-02, the general revenue laws are not in force, and that there can be no prosecution for a violation thereof in this case, but that, if the accused has been guilty of the illegal sale of liquor in the county of Dickenson, he can only be prosecuted and punished for the offense under the said act prohibiting the granting of a license to sell ardent spirits in that county, which is a misdemeanor of which the justices of the peace in the county have sole and exclusive jurisdiction.

The conditions created by this special statute in the counties to which it applies are practically the same that result in any county in which, under the local option laws, a local option election has been held, and the vote has resulted in favor of local option; that is, in favor of prohibiting the licensing of the sale of ardent spirits in the county or locality in which the election was held.

In *Fletcher v. Commonwealth*, 106 Va. 840, 56 S. E. 149, substantially the same contention was made for the accused as is made in this case, viz., that the county of Warren having voted in favor of local option, and the indictment charging the defendant Fletcher with a violation of the general revenue laws and with selling intoxicating liquors unlawfully in said county, the circuit court was without jurisdiction to try the case for the reason that there could be no violation of the revenue laws in any county in which a license to sell ardent spirits could not be lawfully granted; that is, the indictment did

not charge a violation of the revenue laws within the meaning of the statute conferring jurisdiction upon the circuit courts to try and determine that class of cases. In the opinion of the court by Keith, P., in that case, after stating the facts, it is said:

"We do not perceive that the character and nature of the offense charged is affected by the fact that it was committed in a local option district. The charge is that the defendant did 'unlawfully sell and deliver intoxicating liquors.' If he did it unlawfully, whether with or without a license, he was guilty of an offense against the law. That he also violated the local option law can have no influence upon the nature of the act. Webster's Case, 89 Va. 154, 15 S. E. 513. He has done that which the law says he shall not do without having first obtained a license, and it does not lie in his mouth to say: 'It is true I did not have a license, but the act was committed in a local option district where it was impossible under the law to obtain a license.'"

"It was forcibly urged by the Attorney General that no reason of public policy can be suggested why the court should be given jurisdiction of the offense of unlawful sale of intoxicating liquors where the sale takes place in a district where such traffic may be licensed and denied such jurisdiction where committed in local option territory, and we concur with him in the view expressed that the unlawful sale of liquor in a local option district is 'a more serious offense, more injurious to public morals, and a graver infraction of civic duty than a sale in a licensed district without a license, for it is both a violation of the revenue law (that is, it is the conduct of a business free from any burden of taxation, which can be legally conducted only upon paying the taxes imposed upon it, and which others lawfully engaged in it pay), and it is a sale also in flagrant defiance of the law, sanctioned by the votes of a majority of the qualified voters of the community which prohibits any such traffic, and not only makes it illegal but criminal.'"

"We are of opinion that the offense against the commonwealth here charged consists in the unlawful sale of intoxicating liquors; that it is none the less a violation of the revenue laws of the commonwealth because it happens that the offense charged was committed in a local option district; and it follows, therefore, that the circuit court has concurrent jurisdiction with the justices of the peace for the trial of such offenses."

This case cannot be differentiated from the Fletcher Case. In this case the special act so much relied on by the accused as taking from the circuit court of Dickenson county jurisdiction to try and determine cases of violation of the revenue laws itself proprio vigore prevents the licensing of the sale of

ardent spirits in said county and brought about exactly the same condition in that county as existed in Warren county when Fletcher was indicted and convicted for selling ardent spirits without a license so to do; therefore the principle resting upon authority and sound reasoning applied to the Fletcher Case is equally applicable to this and controls it.

The judgment of the circuit court here complained of is affirmed.

Affirmed.

ARMOUR & CO. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
Sept. 9, 1913.)

LICENSES (§ 40*)—CRIMINAL PROSECUTIONS—DOING BUSINESS AS MERCHANT WITHOUT LICENSE.

The conviction of defendants for doing business without a license was proper, where defendants were, contrary to law, doing business as merchants without a license, though defendants contended that the commissioner of revenue proceeded on a wrong basis in estimating the amount of their sales, for the purpose of determining the amount to be paid for a license.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 79-83; Dec. Dig. § 40.*]

Error to Corporation Court of Danville.

Armour & Co. were convicted and fined for doing business in the city of Danville as merchants without a license, and they petition for writ of error. Affirmed.

Hall & Woods, of Roanoke, for petitioners. The Attorney General, for the Commonwealth.

PER CURIAM. A warrant was issued against Armour & Co. for doing business in the city of Danville as merchants without having first obtained a license as provided by law. Upon a hearing the justice found Armour & Co. guilty and assessed against them a fine, and from this judgment an appeal was taken to the corporation court for the city of Danville, where the judgment was affirmed; and Armour & Co. thereupon applied to this court for a writ of error.

The contention of the plaintiff in error is that the commissioner of the revenue proceeded upon a wrong basis in estimating the amount payable for a merchandise license in this case; that its Danville house disposes of merchandise not manufactured by it, the purchase price of which was less than \$1,000; while upon the part of the commonwealth it was contended that the sale value of the articles sold by plaintiff in error, and upon which the amount of the license was to be estimated, was as much as \$30,000.

In the view we take of the case, the inquiry into the amount properly payable by Armour & Co. in order to secure a license, and the basis upon which the estimate as to the amount due to the commonwealth for a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

license was to be made, are wholly immaterial. However that question may be decided, it remains that Armour & Co. were doing business as merchants in the city of Danville without having first obtained a license from the proper authorities of the state of Virginia to conduct such business. We are therefore of opinion that the judgment of the corporation court of Danville is plainly right, and that the writ of error should be refused, and the judgment complained of affirmed.

SALEM LOAN & TRUST CO. v. KELSEY.

(Supreme Court of Appeals of Virginia.

Sept. 11, 1913.)

1. APPEAL AND ERROR (§ 80*)—DECISIONS REVIEWABLE—"FINAL ORDER."

Under Code 1904, § 3454, authorizing writs of error to review final orders, a "final order" is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause, save to superintend ministerially the execution of the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-509; Dec. Dig. § 80.*

For other definitions, see Words and Phrases, vol. 3, p. 2802.]

2. APPEAL AND ERROR (§ 110*)—DECISIONS REVIEWABLE—FINAL ORDER.

Where, in a proceeding on three notes, there was a verdict for defendant, which was set aside and a new trial awarded as to two of them, an order denying the motion to set aside the verdict as to the third note was not a "final order," and could not be reviewed on error, since it showed on its face that the issues as to the larger portion of the demand sued for were still undetermined, and that as to that portion there was to be a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740-748; Dec. Dig. § 110.*]

Error to Law and Chancery Court of City of Roanoke.

Proceeding by the Salem Loan & Trust Company against one Kelsey. To review an order setting aside a verdict for defendant in part and denying such relief in part, plaintiff brings error. On motion to dismiss the writ of error. Motion sustained.

A. E. King and Poindexter & Hopwood, all of Roanoke, for plaintiff in error. C. S. McNulty, of Roanoke, for defendant in error.

BUCHANAN, J. The defendant in error moves to dismiss this writ of error as improvidently awarded, upon the ground that no final judgment has been rendered in this case.

This is a proceeding under section 3211 of the Code to recover judgment upon three negotiable notes. Upon the trial of the cause there was a verdict for the defendant. Upon motion of the plaintiff, that verdict was set

aside as to two of the notes, and a new trial awarded as to them; but the motion to set aside the verdict as to the other note was overruled, and an order entered that the plaintiff take nothing by his motion as to that note, and that the defendant recover his costs.

[1] While by statute an appeal may be taken from certain interlocutory orders, as well as from final decrees, a writ of error does not lie, except where there has been a final order or judgment in the cause. Pollard's Code, § 3454; Gillespie v. Coleman, 98 Va. 276, 36 S. E. 377, and cases cited.

The general doctrine as to what constitutes a final order, says Judge Lewis, in Postal Tel. Cable Co. v. N. & W. R. Co., 87 Va. 349, 351, 12 S. E. 613, 614, is well stated by Prof. Minor, who says "that such an order is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order." 4 Minor's Inst. 860.

This statement of the general doctrine as to what constitutes a final judgment, order, or decree seems to be fully sustained by text-writers and adjudicated cases. See 4 Am. & Eng. Enc. of Law & Pr. 65, 66, and cases cited in note; 23 Cyc. 672, 673.

In Burch, Mayor, v. Hardwicke, 23 Grat. (64 Va.) 51, it was said by Judge Bouldin, in delivering the opinion of the court, that whether a judgment or decree is final "must always be ascertained, not by inquiry as to what ought to have been done by the court, but by inspecting the terms of the judgment or decree, and learning from its face what has been done. If it appears upon the face of the judgment or decree that further action in the cause is necessary to give completely the relief contemplated by the court, then the decree (or judgment) is to be regarded, not as final, but interlocutory."

[2] Tested by these well-settled principles, it is clear that the order to which this writ of error was awarded is not final. It appears from the face of the order that the issues as to the larger portion of the demand sued for are still undetermined, and that as to that portion there is to be a new trial.

It was held in Wells v. Jackson, 3 Munf. (17 Va.) 458, that a plaintiff cannot appeal from a judgment in favor of all the defendants except one in a joint action of trespass until the suit has been abated, dismissed, or decided as to that defendant. If this be true, it is manifest that a sole plaintiff cannot appeal from a judgment in favor of a sole defendant upon an issue as to the latter's liability on the other two notes remaining undetermined, and as to which a new trial has been awarded. If he could,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

then, instead of there being one final judgment in a law case, there could be as many final judgments as there are separate items in the demand sued for.

The motion to dismiss the writ of error as improvidently awarded must be sustained. Writ dismissed.

NESBIT v. WEBB.

(Supreme Court of Appeals of Virginia.
Sept. 11, 1913.)

1. NEGLIGENCE (§ 32*)—INJURIES TO THIRD PERSON—DANGEROUS PREMISES—USE OF PREMISES—INVITEE.

Defendant, having contracted to construct a new roundhouse for a railroad company on the site of an existing roundhouse, the work to be done in sections so as not to necessitate a discontinuance of the use of the house, excavated a foundation ditch across a pathway habitually used by the railroad company's employes. Plaintiff, a locomotive engineer, returning early in the morning from his run, put his engine away and started on his usual route along the pathway and traveled until he suddenly fell into the ditch and received injuries for which he sued. He did not know that the ditch had been dug and encountered no obstruction along the route prior to his fall. *Held*, that plaintiff was using the premises while in the discharge of his duties as an employe of the railroad company and not for his own convenience, and that the court properly refused to charge that if the railroad company had turned over the possession of the premises to defendant for the purpose of rebuilding the roundhouse, and plaintiff was not required to go on the premises for any purpose in the performance of his duties as an engineer of the railroad company, and he went thereon for his own convenience, he had no legal right on the premises and defendant owed him no duty to keep the premises in a safe condition, but that plaintiff assumed the risk arising from the condition of the premises by reason of the work going on there.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

2. TRIAL (§ 252*)—ABSTRACT INSTRUCTIONS.

Where a locomotive engineer, while leaving the railroad premises, fell into a ditch excavated by a contractor and was injured, an instruction that, if the jury believed that plaintiff had no legal right on the premises, then the only duty that the defendant contractor owed him was not willfully to injure him while on the premises was abstract and properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse one of defendant's requests to charge where the jury was liberally instructed on every phase of defendant's theory of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. RAILROADS (§ 355*)—PERSONS ON TRACK—CARE REQUIRED.

While a railroad company is entitled to a clear track and is not ordinarily liable for injuries to persons on its track, yet if it knows, or by the exercise of ordinary care could know, that persons are in the habit of or have been for some time using its track for a footpath, so that it has no right to expect a clear track, then it is

its duty to exercise reasonable care to prevent injury to persons so on the track at such place. [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

5. APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE.

Where an action for injuries was properly submitted to the jury on conflicting evidence, a verdict in favor of plaintiff would not be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error to Corporation Court of Roanoke.

Action by J. E. Webb against J. C. Nesbit. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Woods, of Roanoke, for plaintiff in error. Jackson & Henson, of Roanoke, for defendant in error.

HARRISON, J. This action was brought by J. E. Webb to recover of J. C. Nesbit damages for injuries alleged to have been occasioned by the negligence of the defendant. The trial resulted in a verdict and judgment in favor of the plaintiff, which we are asked by the defendant to review.

The petition assigns two grounds of error:

(1) That the court erred in giving and refusing instructions; and (2) that it erred in overruling the motion for a new trial.

Viewed from the standpoint of a demurrer to the evidence, the pertinent facts appear to be that the defendant, a building contractor, was engaged in constructing a roundhouse for the Norfolk & Western Railway Company in its West Roanoke yards. The roundhouse was to be constructed on the site of an old one, consisting of 21 stalls, which was to be taken down in sections of 6 stalls at a time, so that the railway company could continue its use until the new roundhouse was ready. The new house was to be much larger than the old one; the outer wall thereof being located from 25 to 30 feet distant from the outer wall of the old house. Stalls 17, 18 and 19 were among those included in the first six that were turned over to the defendant. From these stalls there were tracks running, which extended outside the walls of the old roundhouse, through arches cut therein, for some distance in an easterly direction. These tracks, together with a passageway through the roundhouse, were constantly used day and night by the employes of the company with its full knowledge and consent as a convenient passway in going to and returning from their work. This passway led to the street and was not only a convenient way for the numerous employes using it, especially those living in Southeast Roanoke, but it is shown to have been their safest route, on account of moving trains and shifting engines likely to be encountered by them in traveling the most feasible route other than this one. This was the situation on the 1st

day of July, 1912, when the defendant commenced the execution of his contract for building the new roundhouse. Prior to the accident the defendant had dug a ditch 4 feet wide and about 6 feet deep immediately across the pathway habitually used by the employes. This ditch was to be continued as the foundation for the new roundhouse. At 1:30 on the morning of July 5, 1912, the plaintiff, a locomotive engineer, came in from his run, put his engine away, and started on the usual route traveled by himself and other employes, which was pursued until he suddenly fell headlong into the ditch which the defendant had dug and thereby received the injuries for which he seeks damages in this suit. The plaintiff did not know that the ditch had been dug and encountered no obstruction along the route traveled by him. There was sufficient light on the inside and outside of the roundhouse to enable one to travel with reasonable safety in the absence of concealed danger.

The theory of the plaintiff, as stated in his declaration, was that the employes of the railway company had been accustomed to use the way traveled by him on the night of the accident, both before and after the defendant dug the ditch in which he fell, and that the defendant knew, or in the exercise of reasonable care should have known, that fact, and that it was his duty in making an excavation across such passway to exercise reasonable care not to injure persons so in the habit of using such way.

In addition to a general denial, the defendant interposed the defense of contributory negligence on the part of the plaintiff, contending that the plaintiff had no right to be at the place where the accident happened; that he was a trespasser, or at most a bare licensee, and the defendant owed him no duty, except not to wantonly and willfully injure him.

The defendant complains of the action of the court in refusing instructions A and B offered by him.

[1] Instruction A tells the jury: "That if they believe from the evidence that the Norfolk & Western Railway Company had turned over to the defendant the possession of said premises for the purpose of tearing down the roundhouse located thereon and rebuilding the same, and that the plaintiff was not required to go on said premises for any purpose in the performance of his duties as an engineer of the Norfolk & Western Railway Company, and that the plaintiff went thereon at the time he was injured for his own convenience, then the plaintiff had no legal right on said premises, and the defendant owed him no duty to keep said premises in a safe condition; and, in going upon said premises, the plaintiff assumed all risks of danger arising from the condition of the premises by reason of work done thereon by defendant in the performance of his contract with the Norfolk & Western Railway Company to

tear down and rebuild the roundhouse located thereon."

This instruction was properly refused. There is no evidence that the plaintiff was on the premises where the accident happened for his own convenience; on the contrary, the uncontradicted evidence shows that the plaintiff was using the premises while in the discharge of his duties as an employe of the railway company. He was returning from his completed task by the usual route that he had pursued for 15 years prior to the night of the accident. The defendant was only in possession of a small portion of the roundhouse for certain purposes, the rest of the premises having been retained for the time by the railway company for the uses to which they had always been put, and the plaintiff was using such premises in the discharge of his duties, without any knowledge that they had been rendered dangerous by the defendant, while the defendant knew, or by the exercise of reasonable diligence should have known, that the premises were being used by the employes of the company, and that they were likely to be injured unless the ditch dug across their pathway was reasonably safeguarded.

[2] Instruction B tells the jury: "That, if they believe from the evidence that the plaintiff had no legal right on said premises, then the only duty that the defendant owed to him was not willfully to injure him while on said premises."

[3] This is an abstract proposition that could have been of no help to the jury in determining the questions at issue. Apart from these considerations, the jury was by other instructions abundantly and liberally instructed upon every phase of the defendant's theory of the case, and he could not possibly have suffered any prejudice from the court's action in refusing to give these two instructions. It is clear from the authorities that the plaintiff was not a trespasser or mere licensee but was using the premises by implied invitation.

In *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, Mr. Justice Harlan, speaking for the court, says that the rule founded in justice and necessity and illustrated in many adjudged cases in the American courts is: "That the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons (they using due care) for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such invitation."

[4] The rule that is applied to a railroad in this state is that it has the right to a clear track and is not liable for injury to persons received upon its track; but if the company knows, or by the exercise of ordinary care

should know, that persons are in the habit of, and have been for some time, using its track as a footpath, so that it has no right to expect a clear track, then it is the duty of the company to exercise reasonable care to prevent injury to persons so on the track at such place. *O. & O. Ry. Co. v. Corbin*, 110 Va. 700, 67 S. E. 179.

The rule applicable to railroads is applied generally. *Orme v. City of Richmond*, 79 Va. 86; *N. & W. Ry. Co. v. De Board's Adm'r*, 91 Va. 700, 22 S. E. 514, 29 L. R. A. 825; *Henry v. Disbrow Mining Co.*, 144 Mo. App. 350, 128 S. W. 841; *De Tarr v. Ferd. Heim Brewing Co.*, 62 Kan. 188, 61 Pac. 689.

In *Henry v. Disbrow Mining Co.*, *supra*, the rule is thus stated: "If a person knows that people are using property as a right of way and have been using same for such length of time that the presence of persons upon the same is to be expected, then it is his duty in making excavations across such pathway, or putting obstructions thereon, to exercise reasonable care and not negligently injure persons so in the habit of using such pathway."

In *De Tarr v. Ferd. Heim Brewing Co.*, *supra*, the rule is stated in the first syllabus in the following language: "Where the public has passed over private property, for a long time with the implied permission of the owner or of persons in control of the same, and where it may be said that a portion of the property is temporarily devoted to a public use, persons using the way are not deemed to be trespassers or mere licensees, and the owner or those in control cannot, without liability, make excavations or leave unprotected openings, so close to the line in such way as to render travel thereon unsafe."

The objection to instruction No. 1, given for the plaintiff, is not well taken. In the light of the foregoing authorities that instruction clearly and accurately states the law applicable to the plaintiff's theory of the case and has abundant evidence for its support.

The petition for a writ of error contends that the condition of the premises, resulting from beginning the work of dismantling the stalls, was at the time of the accident sufficient to warn the plaintiff of the danger of using the route he did, and that in using such route he assumed the risk of injury and cannot charge the result to the defendant. The defendant had only worked on the premises for three days prior to the accident, and there is a conflict in the evidence as to what had been done prior thereto and the aspect the premises presented at the time of the accident. The evidence, however, is overwhelming that there was no obstruction whatever to the passway over which the plaintiff traveled between the exit from the stall and the point where he fell into the ditch. This question, involving the conten-

tion that the plaintiff was guilty of contributory negligence, was submitted to the jury under instructions which stated the law as fully as could be desired, and their verdict is conclusive on the point.

[5] Without further detail it is sufficient to say in conclusion that we have carefully examined the entire record and find that the evidence upon most of the vital issues was conflicting, and that the case was fairly submitted to the jury under the instructions given. The jury having decided that conflict in favor of the plaintiff, and the judge of the trial court having approved their verdict, this court will not, upon well-settled principles, interfere with that finding.

The judgment complained of must be affirmed.

Affirmed.

MARSTELLER v. WARDEN et al.

(Supreme Court of Appeals of Virginia.)

Sept. 11, 1913.)

EVIDENCE (§ 417*)—PAROL EVIDENCE—WRITTEN CONTRACT—OMISSIONS.

Plaintiffs offered to furnish stone and erect a parish house for a specified price and to supply the stone and complete an unfinished tower on a church building according to specifications and drawing, "walls to be one foot six inches thick," for a specified further sum. The offer was accepted and a written contract executed which did not specify the thickness of the walls of the tower but provided that they should "correspond with the walls of the church." The original pencil sketch of the tower work, on which the bid was predicated, having been mislaid, plaintiffs called for plans and specifications, and these, being furnished, called for tower walls 26 inches thick. *Held*, that the provision that the walls of the tower should conform to the walls of the church should be construed as referring to quality, finish, and appearance of the material only, and that the contract was incomplete as to the thickness of the walls, so that parol evidence was admissible to show the actual agreement of the parties on that question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.*]

Error to Law and Chancery Court of City of Roanoke.

Action by J. K. Warden and another against J. H. Marsteller. Judgment for plaintiffs, and defendant brings error. Affirmed.

A. E. King and Poindexter & Hopwood, all of Roanoke, for plaintiff in error. Jackson & Henson, of Roanoke, for defendants in error.

WHITTLE, J. J. K. Warden and A. J. Hailey recovered a judgment for \$2,000 against J. H. Marsteller (doing business as Marsteller Granite Works) in an action of assumpsit on a building contract.

The trustees of St. Paul's Episcopal Church in Lynchburg, Va., made a contract with J. P. Pettyjohn for the erection of a parish house and the completion of an unfinished

tower on the main building. The building was constructed of "Peak Creek" stone, taken from quarries in Pulaski county, Va. Pettyjohn sublet the principal part of the work to the defendant, Marsteller, who in turn let the stone work to the plaintiffs, who were owners of a "Peak Creek" stone quarry and experienced workmen. The defendant's chief place of business was in Roanoke, but a branch establishment was maintained in Lynchburg under the management of C. G. Loving. Negotiations were opened between Loving and the plaintiffs touching this work, which culminated on September 16, 1910, in a written offer by the plaintiffs to furnish "Peak Creek" stone and erect the parish house for \$7,459, and to supply the stone and complete the tower, according to specifications and drawing, of the following dimensions: "32 feet high, 20x20 feet, walls to be 1.6 [one foot six inches] thick"—for \$3,099. On October 17, 1910, there was a written acceptance of this proposition by Loving. Two days later the attorney for the plaintiffs undertook to reduce the agreement to writing, and the paper prepared was duly signed by the parties. The plaintiffs promptly commenced work on the parish house, and, after having completed that building, were ready to proceed with work on the tower. To that end they had already gotten out and delivered on the ground a quantity of stone suitable for the tower, when they discovered that the original pencil sketch of the work upon which their bid was predicated had been mislaid. Thereupon the plaintiffs called for plans and specifications for the completion of the tower, which were made and furnished by the defendant about June 10, 1911. An examination of these plans showed that they called for tower walls 26 inches thick, while, as stated, the written proposal of the plaintiffs, which was accepted by the defendant, provided for an 18-inch wall. This discrepancy seems to have been the origin of the misunderstanding and bone of contention between the parties. No mention was made in the written contract of the thickness of the tower walls, and therefore the insistence of the plaintiffs was that the instrument was incomplete on its face, and that parol evidence was admissible to show the true agreement of the parties on the subject.

The countervailing theory of the defendant is that the stipulation in the contract "that the walls of the tower should correspond with the walls of the church" covered the point in dispute as to the thickness of the tower walls; that the contract in that respect was complete on its face; and consequently that the alleged omitted language that the walls were to be 18 inches thick could not be read into it. This pretension on behalf of the defendant pervades the entire

case and was urged at every stage of it by demurrer to the declaration, by objection to the admissibility of evidence, and by instructions to the jury.

The law and chancery court resolved the proposition in favor of the plaintiff and tried the case on that theory; and that ruling, in its various phases, is assigned as error and is relied on to reverse the judgment. It constitutes the controlling question in the case and, if correctly decided by the trial court, renders the discussion of subordinate assignments, which could in no event affect the general result, unnecessary.

The language relied on and quoted by the defendant as showing the thickness of the tower walls, namely, "that the walls of the tower should correspond to the walls of the church," in the connection in which it occurs, was evidently intended to apply to and control the quality, finish, and appearance of the material to be used so as to maintain uniformity of aspect between different portions of the same structure; but it plainly does not supply the omitted stipulation that the tower walls were to be 18 inches thick. The overwhelming weight of the evidence shows that the true contract between the parties called for an 18-inch wall, and that the omission of that provision from the contract was the result of inadvertence on the part of the scrivener. Besides, the verdict of the jury has settled that question and all other controverted issues of fact in favor of the plaintiffs.

The principle of law applicable to the question under consideration is well settled.

In *Farmers' Manufacturing Co. v. Woodworth*, 109 Va. 596, at page 601, 64 S. E. 986, at page 988, the court observes: "The rule of exclusion of parol evidence has no application where it is apparent from the writing itself that it does not embody the entire agreement. In such case, the writing being incomplete, it must be supplemented by other evidence, not to contradict or vary its terms, but to establish the real contract between the parties."

It does not involve the doctrine of reformation of contracts, of which courts of equity alone have cognizance, but applies where the contract is partly in writing and partly parol. The jurisdiction of courts of law in the latter class of cases is unquestioned. *Grove v. Lemley*, 114 Va. 202, 78 S. E. 305.

Considering the last assignment as upon a demurrer to the evidence, the verdict of the jury cannot be disturbed upon the ground that it is excessive. The bill of particulars filed with the declaration is largely in excess of the damages awarded, and the amount and correctness of the items claimed are dependent upon conflicting views of the evidence and have been settled by the jury.

Judgment affirmed.

**TATTERSON v. FIDELITY & DEPOSIT
CO. OF MARYLAND.†**

(Supreme Court of Appeals of Virginia. Sept. 11, 1918.)

**PRINCIPAL AND SURETY (§ 183*)—RIGHTS OF
SURETY AGAINST PRINCIPAL — BUILDING
CONTRACT.**

Where a contractor for the construction of a building abandoned his contract before completion, and the surety company which had given the contractor's bond, although notified of the abandonment, did not complete the building or employ others to do so, but instead the owners of the building entered into a contract with another contractor, who frequently completed contracts for the surety company and who agreed to complete the building for the balance due the first contractor and gave a bond executed by the same surety company, the surety company could not hold the estate of the first contractor liable for the loss sustained by the second contractor and which it voluntarily paid to him.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 539-544; Dec. Dig. § 183.*]

Appeal from Court of Law and Chancery of City of Norfolk.

Suit by the Fidelity & Deposit Company of Maryland against Lizzie M. Tatterson, as executrix of the estate of Albert Tatterson, deceased, to establish a claim against the said estate and subject thereto certain property held by the executrix. Decree for the plaintiff, and defendant appeals. Reversed and remanded.

R. R. Hicks, of Norfolk, for appellant. J. W. Happer and Frank L. Crocker, both of Portsmouth, for appellee.

CARDWELL, J. On the 9th day of June, 1909, Elbert Tatterson, a general contractor doing business in the city of Norfolk, Va., entered into an agreement with the building committee of the Young Men's Christian Association of said city by which he agreed to erect and complete for said association a building at a certain designated point in the city at the price of \$126,332. Article 5 of the contract provided, among other things, as follows:

"Should the contractor at any time refuse or fail to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the Young Men's Christian Association should be at liberty, after three days' written notice to the contractor, to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient grounds for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose

of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor, the contractor shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner."

The building committee of the Young Men's Christian Association required Tatterson to give a bond in the sum of \$63,166, conditioned for the faithful performance by him of the contract, and accordingly, on July 3, 1909, he made application to the Fidelity & Deposit Company of Maryland (hereafter spoken of as the bonding company) to become surety on his bond for that amount. Pursuant to the rules and regulations of the bonding company, Tatterson filed with his written application a statement of his assets, which statement showed that among other property he owned real estate in the city of Norfolk at the corner of certain designated streets which he valued at \$10,000, subject to a deed of trust for \$1,400.

On the faith of this statement, it is claimed, the bonding company became surety on his said bond, which was made payable to the Young Men's Christian Association of Norfolk, Va., and was conditioned for the faithful performance of Tatterson's contract to erect and complete said building.

Tatterson entered upon the performance of his contract and continued the work thereon until about December 27, 1910, on which date he wrote a letter to the Building Committee of the Young Men's Christian Association, which is as follows:

"Gentlemen: Owing to ill health, which, as you know, has for some weeks kept me confined to my room, and fearing that it will be some time before I will be able to get out and go to work again, I have concluded that I ought to abandon the contract for the construction of the Young Men's Christian Association building, at the corner of Granby and Freemason streets in this city, and accordingly thereby abandon the same.

"This is without prejudice to either your right or mine as to the various questions which have been raised by each side during the construction of this building."

On the receipt of this letter the building committee replied by letter, saying that they acknowledged that he (Tatterson) had abandoned the contract upon the conditions stated in his letter, and on the same day the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

bonding company was notified by a letter of the attorney for the Young Men's Christian Association that Tatterson had abandoned his contract, and called upon the bonding company to comply with the terms of their bond and to make the necessary arrangements for the completion of the building. Before this, as it also appears, the chairman of the building committee on December 6, 1910, had written to the bonding company, advising it that the work on the building had been at a standstill for some time, and notifying it that unless the work progressed more rapidly they would exercise the right they had under the contract to direct Tatterson to cease work on the building and call upon the bonding company to complete the contract.

Upon receipt of the letter from the counsel for the Young Men's Christian Association of date December 27, 1910, the bonding company sent its representative to Norfolk, who made an investigation of the situation, and among other things it was ascertained that there would be a balance of \$52,384.53 due Tatterson on the completion of the building, which balance was subject, however, to the claims of various mechanics and supply men who had filed liens or were about to do so. The bonding company had theretofore been advised that the building could not be completed with the balance that would be due Tatterson as per the contract. The bonding company did not, in accordance with its right under the terms of the bond, take charge of the building and complete it, nor did it sublet the contract, but after some negotiations with the authorities of the Young Men's Christian Association, on January 18, 1911, a contract was entered into between Morrow Bros., contractors of Baltimore, Md., and the Young Men's Christian Association, whereby Morrow Bros. agreed to complete the building for the amount which would have become due to Tatterson on the completion thereof, viz., \$52,384.53, and furthermore agreed to assume the payment of all valid claims for which liens could be filed against the building. In addition to this Morrow Bros., contemporaneously with the execution of the said contract, executed a bond in the penal sum of \$54,000 to the Young Men's Christian Association, conditioned upon the faithful performance of their duties under the contract, with the said bonding company as surety, which bond was similar in its provisions to that executed by Tatterson above referred to. It further appears that Morrow Bros. were contractors who sometimes represented the bonding company in completing buildings which had been abandoned by contractors for whom the bonding company might be surety when the bonding company took charge of the work of completing the building, and that the bonding company would reimburse them for any losses.

The building was completed by Morrow

Bros. at a total cost of \$73,169.26, and after crediting on this the amount of \$52,716.25 which they had received from the Young Men's Christian Association, and which Tatterson would have received had he completed the building, their net loss was \$20,453.01.

It further appears that on April 1, 1909, Lizzie M. Tatterson, the wife of said Elbert Tatterson, executed a deed, which she acknowledged before a notary public on April 14, 1909, whereby she conveyed to her said husband five lots of land in the city of Norfolk and fully described in the deed, which it is claimed by the bonding company was executed by her for the purpose of enabling Tatterson to obtain the bonding company as surety on his bond for the performance of his contract with the Young Men's Christian Association, and the real estate conveyed thereby is the same described as part of his assets in his written application to the bonding company to become his surety. The said deed from Lizzie M. Tatterson to her husband was never recorded, but when Charles A. Morrow, of the firm of Morrow Bros., came to Norfolk and took charge of the work of completing the building of the Young Men's Christian Association, he saw the deed on three different occasions in Tatterson's safe, which was in his office in the Dickson Building. It is claimed that Tatterson knew that Morrow Bros. were representing the bonding company in the completion of said building, and after Charles A. Morrow had entered upon this work he went over to Tatterson's house and endeavored to induce him to give the bonding company some surety for the loss that would be sustained in completing the building, which, as it would seem from Charles A. Morrow's statement, Tatterson agreed to do, and furthermore agreed to give a deed of trust on the specific real estate which his wife had conveyed to him to secure the bonding company against possible loss, or to raise money with which to pay such loss, but this was never consummated.

Tatterson died at his home in Norfolk on February 25, 1911, and a day or so after his death the said deed referred to was missing from the safe in his office. In June, 1911, the attorney for the bonding company had an interview with Mrs. Tatterson and requested her to deliver up the deed in question so that it could be recorded and the property conveyed thereby subjected to the payment of the loss sustained by the bonding company in completing Tatterson's contract; but she, though admitting that she had the deed, declined to have it recorded or to reimburse the bonding company for the loss sustained by it. Thereupon the bill in this cause was filed by the bonding company against the said Lizzie M. Tatterson, in her own right and as executrix of the last will and testament of her deceased husband and others, for the purpose of establishing the claim asserted by the com-

plainant against the estate of Tatterson for the amount of the loss alleged to have been sustained in the completion of said building and of subjecting for its partial satisfaction the property conveyed to him from his wife by said deed.

Upon a hearing of the cause on the pleadings and the evidence adduced by the respective parties, the court below entered its decree of April 12, 1912, establishing the claim of the bonding company against the estate of Tatterson for \$20,453.01, and adjudging that Tatterson died seised and possessed of the real estate mentioned and described in the deed in question from Lizzie M. Tatterson, his wife, to him, and that this real estate was assets for the payment and satisfaction of the claim of the bonding company. From this decree Lizzie M. Tatterson, in her own right and as executrix of her deceased husband, has taken this appeal.

The contentions of the appellant are: First, that the bonding company sustained no damages by reason of its suretyship for Elbert Tatterson, her husband, because Elbert Tatterson partially erected the building of the Young Men's Christian Association, and Morrow Bros. agreed to complete it for the unpaid contract money, so that Elbert Tatterson's contract was absolutely fulfilled, and, if the bonding company lost anything, it was by reason of its suretyship for Morrow Bros. rather than its suretyship for Elbert Tatterson; second, that, even if the claim asserted by the bonding company be valid, still the real estate sought to be subjected to its satisfaction was never the property of Elbert Tatterson and therefore is not assets of his estate for the payment of his debts.

In the view we take of the case, it is only necessary to consider appellant's first contention, since, if there be no liability upon the estate of Elbert Tatterson, deceased, for the claim asserted by appellee, there can be none therefor upon the individual property of appellant sought to be subjected to the partial satisfaction of said claim.

As has been observed, the appellee, the bonding company, did not in accordance with its right under the bond executed by Tatterson to the Young Men's Christian Association take charge of the partially completed building in question and complete it, nor did it sublet the same; on the contrary, Morrow Bros., on January 18, 1909, after full investigation as to the condition of the work on the building and ascertaining that there was a balance of \$52,384.53 due Tatterson on its completion, which balance was subject, however, to the claim of various mechanics and supply men, who had either filed liens or were about to do so, entered into a new and independent contract with the Young Men's Christian Association, similar in all its details to the contract between Tatterson and the Young Men's Christian Association, by which Morrow Bros. agreed

to complete said building at the price of \$52,384.53, and furthermore agreed to assume the payment of all valid claims for which liens could be taken against the building. Contemporaneously with the execution of the contract, Morrow Bros. executed a bond in the penal sum of \$54,000 to the Young Men's Christian Association, conditioned upon the faithful performance of their duties under the contract with the appellee as surety. With the making or entering into this contract Tatterson had nothing to do, and in fact knew nothing of it, so far as the record discloses. There is some evidence that Tatterson, in an interview with one of the firm of Morrow Bros. and Attorney Shultice, recognized that, as he had abandoned his contract, there was a liability upon him for a possible loss that might be sustained by appellee if it undertook to complete the contract, and expressed a willingness to provide indemnity against such loss, but nothing was done in furtherance of this suggested course, and instead Morrow Bros. agreed with the Young Men's Christian Association and appellee to take up the work of completing the building of the former as per the terms of Tatterson's contract and for the contract price remaining unpaid by the Young Men's Christian Association, and for the faithful performance of this contract on the part of Morrow Bros. appellee became their surety. The fact that Morrow Bros. lost instead of making money on their contract, which loss appellee chose to make good, does not alter the case. The Young Men's Christian Association, as appellant contends, had no right against appellee, save such as accrued out of the surety's bond, executed to it by Tatterson. They were entitled to and needed no other contract than the one they already had upon which they are asserting no claim; and, when Morrow Bros. undertook to complete the building for the amount of money that would have gone to Tatterson had he completed it, they did so, not only with the assent of the Young Men's Christian Association and appellee, but after careful inquiry and investigation and in the belief that they could profitably complete the building at that price. Had it cost Morrow Bros. less to complete the building than the price agreed on between them and the Young Men's Christian Association, they would have realized a profit as they had expected, and it would have been theirs, and no one could have sustained a claim on behalf of Tatterson's estate for any part thereof. The profit on their contract, if it had been realized by Morrow Bros., would have been theirs, and the loss sustained by them they must, of course, bear so far as Tatterson's estate is concerned; and the fact that appellee volunteered, as it appears, to make good this loss to Morrow Bros. gives it no right whatever to recover the amount so

paid of Tatterson's estate for which it is not in any respect liable.

We are of opinion, therefore, that the decree appealed from, in so far as it establishes the claim asserted by appellee as a liability upon the estate of Elbert Tatterson, deceased, and adjudges that certain real estate of the appellant, held in her own right, is liable for the partial payment of the said claim, is erroneous, and the decree in this respect is reversed and annulled, with costs to appellant; and the cause, which has, upon petitions filed therein by certain creditors of Elbert Tatterson, deceased, become a general creditor's suit for the settlement of his estate, is remanded for further proceedings therein not inconsistent with the views expressed in this opinion.

Reversed in part, and remanded.

VIRGINIA COAL & IRON CO. v. HYLTON et al.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. MINES AND MINERALS (§ 55*)—TENANCY IN COMMON (§ 8*)—SEVERANCE FROM SURFACE—JOINT TENANTS.

The general owner or owners of land may grant all the minerals therein or any particular species of them, while still retaining title to the surface, or they may grant the land and reserve the minerals, thus creating a separate estate in the minerals, distinct from the land in which they are found; but, where the land is owned by joint tenants, a conveyance by less than all does not effect a severance of the mineral interest from the surface, but makes the grantee, if he be a stranger, a tenant in common with the joint tenant who did not unite in the conveyance.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55;* Tenancy in Common, Cent. Dig. § 20; Dec. Dig. § 8.*]

2. TENANCY IN COMMON (§§ 44, 45*)—CONVEYANCE BY COTENANT.

While a tenant in common has capacity to transfer his individual share in the land, he has no right to convey any part of the land by metes and bounds, or to convey the mineral and reserve the surface to the prejudice of his co-owners.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 93, 94; Dec. Dig. §§ 44-45.*]

3. TENANCY IN COMMON (§ 44*)—CONVEYANCE OF INTEREST BY ONE—EFFECT.

Where one tenant in common cannot make any conveyance to the prejudice of his cotenants, yet such deed is not void, but is effectual to pass the interest conveyed, making the grantee a tenant in common with his grantor's cotenants, as provided by Code 1904, § 2419.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 133, 134, 136, 137; Dec. Dig. § 44.*]

4. TENANCY IN COMMON (§ 15*)—CONVEYANCE BY A COTENANT STRANGER—OUSTER.

Where a stranger to the title accepts a conveyance of the whole estate in a tract of land from a cotenant, and under such conveyance enters into exclusive possession of the land, claiming title to the whole, such convey-

ance and possession is an ouster of the other cotenants, and the grantee so entering and claiming title may sustain a claim by adverse possession, if continued for the statutory period.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

5. TENANCY IN COMMON (§ 15*)—POSSESSION OF COTENANT—ADVERSE POSSESSION.

While the entry and possession of one cotenant is ordinarily the entry and possession of all, which presumption will prevail until some notorious act of ouster or adverse possession is brought to the knowledge of the others, yet a tenant in common may enter adversely and claim in severalty, and where he does so the statute of limitations will run in his favor as against his cotenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

6. TENANCY IN COMMON (§ 15*)—CONVEYANCE UNDER WARRANTY DEED—ADVERSE POSSESSION.

Where a tenant in common, after partition of a part of the common property, received a deed to a specified part, purporting to convey the fee, and entered, not as a tenant in common, but as an owner of the entire property, and there was nothing to show that either he or those claiming under him ever acknowledged that the title was anything other than as appeared from the face of the deed, it will be presumed that he entered under the title which the deed purported to convey, both as to the boundary of the land and the nature of his title, and he and his successors, having held the land for more than 30 years, and paid taxes thereon as the owners of the fee, acquired title as against the other cotenants by adverse possession, both as to the surface and subjacent mineral.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

7. MINES AND MINERALS (§ 49*)—COLOR OF TITLE—MINERAL INTEREST.

Where defendants and their grantors, since 1880, had held possession under a deed purporting to convey the entire fee with covenants of general warranty, which deed constituted color of title, they acquired title to the surveys and to the underlying minerals by adverse possession as against claimants under a prior deed of an undivided mineral interest in the land from the common grantor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135; Dec. Dig. § 49.*]

Appeal from Circuit Court, Wise County.

Suit by the Virginia Coal & Iron Company against George W. Hylton and others. Judgment for defendants, and complainant appeals. Reversed in part, and affirmed in part.

Bullitt & Chalkley, of Big Stone Gap, for appellant. Vicars & Peery, of Wise, and Henry & Graham, of Tazewell, for appellees.

BUCHANAN, J. This suit was instituted by the appellant, the Virginia Coal & Iron Company, for the purpose of obtaining partition of the coal and other minerals in and under a 700-acre tract of land lying in Wise county. The appellant claimed an undivided

four-fifths interest in the mineral under a conveyance to J. D. Price and A. J. Steinman from the wife and three of the four children of James M. Gibson made in the year 1874. The appellant by regular conveyances acquired the title of Price and Steinman to the said mineral interest. After the conveyance to Price and Steinman, the children of James M. Gibson, including Tabitha, who was not a party to that deed, made a parol partition of the 700-acre tract of land. The land was divided into three parcels—the share of Tabitha, the wife of George W. Hylton, and the share of C. W. Gibson, her brother (who had sold or contracted to sell his share to George W. Hylton), being laid off as one parcel. Afterwards H. F. Gibson and W. B. Gibson exchanged the parcels allotted to each of them. The owners of the mineral interests, other than Hylton's wife, were not parties to that partition, and so far as the record shows had no notice of it.

One of the defenses set up by the present owners of the Hylton parcel of land and the W. B. Gibson parcel, known in the record as the Van Buren Bolling land, is that they are the owners of the mineral by adversary possession. The appellant insists that the conveyance to Price and Steinman of the mineral embraced in their deed operated as a severance of the mineral interest from the surface. This is denied by the appellees. They claim that, in order for a conveyance of the mineral in land to effect a severance of the mineral interest from the surface, the grantor in the deed must be the owner of the legal title, and that, as the grantors in the deed to Price and Steinman were not, as the appellees claim, the owners of the legal title when they conveyed the mineral interest, such conveyance did not effect a severance.

Whether the grantors were or were not the owners of the legal title at that time, or whether or not it be true as contended by the appellees that a severance of the mineral interest from the surface is not effected by the conveyance of the mineral and a reservation of the surface, unless the grantor in such conveyance be the owner of the legal title, need not be determined in this case, for, if it were held that the grantors in that deed were clothed with the legal title, or that the conveyance by the owner or owners of the equitable title would effect a severance as well as a conveyance by the owner of the legal title, there was no severance in this case.

[1] It is well settled that the general owner or owners of land may grant all the minerals in the land, or any particular species of them, as coal, iron, or lead, etc., and remain the owner of the surface, etc., or may grant the land and reserve the minerals or any particular species of them, and thus create a separate estate in the minerals, or mineral, reserved distinct from the land in which they are found. *Va. Coal & Iron Co.*

v. Kelly, 93 Va. 332, 336, 24 S. E. 1020; *Interstate Coal & Iron Co. v. Clintwood, etc.*, 105 Va. 574, 54 S. E. 593; *Morison v. American Association*, 110 Va. 91, 65 S. E. 469; *Adams v. Briggs*, 7 Cush. (Mass.) 361, 366, 367; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Barringer & Adams on Mining, etc.*, 35, 36. Yet such a conveyance by less than all the joint tenants where land is so owned does not effect a severance of the mineral interest from the surface, but makes the grantee, if he be a stranger, a tenant in common with the joint tenant who did not unite in the conveyance.

[2] While a joint tenant has capacity to transfer his undivided share in the land, he has no right to convey by metes and bounds any part of the land, or to convey the mineral and reserve the surface to the prejudice of his co-owners. 1 *Minor's Real Prop.* § 889, and authorities cited; *Freeman on Cotenancy*, §§ 196-198.

The reason for this doctrine is stated by Chief Justice Shaw in *Adam et al. v. Briggs Iron Co.*, 7 Cush. (Mass.) 361, 368, and by Allen, P., in *Robinet v. Preston*, 2 Rob. (41 Va.) 273, 276-278.

In this case, if the grantors in the conveyance to Price and Steinman had conveyed their entire undivided interest in the land, the surface as well as the minerals, it would not, no matter how that interest was described, have effected a severance of their interest in the land from that of their sister, Mrs. Hylton, but would have made their grantees tenants in common with her. *Robinet v. Preston's Heirs*, supra; *Cox v. McMullin*, 14 Grat. (55 Va.) 82; *Buchanan v. King*, 22 Grat. (63 Va.) 422; *Woods v. Early*, 95 Va. 307, 312, 313, 28 S. E. 374; *Freeman on Cotenancy*, §§ 194-196. A fortiori, a like conveyance of their undivided mineral interest only could not operate as a severance of their mineral interest from the surface.

[3] In some jurisdictions a conveyance by less than all of joint tenants of their interest in the land by metes and bounds, or of their mineral interest only, seems to be regarded as void against their cotenant (*Adam, etc.*, *v. Briggs*, supra; *Freeman on Cotenancy*, 198-203), but with us, while one joint tenant cannot make any conveyance to the prejudice of his cotenants, yet the deed is not void, but would, especially under our statute, be effectual to pass the interest conveyed, making his grantee a tenant in common with his grantor's cotenants (*Code*, § 2419; *Robinet v. Preston's Heirs*, supra; *Cox v. McMullin*, supra; *Buchanan v. King*, supra; *Woods v. Early*, supra; *Freeman on Cotenancy*, supra).

The next question to be considered is whether or not Hylton or those claiming under him acquired title to the mineral interests claimed by the appellant in that portion of the 700-acre tract allotted in the parol partition as the shares of Hylton's

wife and her brother, C. W. Gibson, by adversary possession. This partition, as before stated, was made after the sale and conveyance of said mineral interest to Price and Steinman by the children of James M. Gibson, who seem to have considered their mother as having a mere dower interest in the land. At least they divided the land into four shares, laying off Mrs. Hylton's and C. W. Gibson's shares together as one parcel: Hylton at the time of the partition having purchased or contracted to purchase the interest of C. W. Gibson. So far as the record shows, neither the wife nor either of her children have ever questioned the validity of said partition, and it seems to have been acquiesced in by all of them. In the year 1877, after the partition, the wife and children of James M. Gibson, other than Hylton's wife, executed a deed to Hylton, in consideration (as recited therein) of \$200, by which they conveyed to him "a certain tract or parcel of land," describing it by metes and bounds, with covenants of general warranty. The parcel of land it is conceded, or at least is clearly shown, to be the same parcel allotted as the shares of Hylton's wife and C. W. Gibson in the parol partition; but no reference is made in the deed to the partition. In October, 1880, after James M. Gibson had obtained a conveyance from the heirs of Wm. Boggs, from whom the appellees claim that James M. Gibson purchased the 700-acre tract, or at least a part thereof (but had not fully paid the purchase price and obtained a conveyance), Gibson executed a deed to Hylton in consideration of \$600, as recited therein, by which he conveyed the same land embraced in the said conveyance of 1877 (though no reference is made to that deed), with covenants of general warranty. Both deeds were duly recorded. The appellees claim that Hylton took actual possession of the land under the conveyance of 1877, and has ever since in person or by tenants been in possession thereof, claiming it in fee. The appellant claims that Hylton and his wife went into possession of the surface of the land after that deed was made, and that they and those claiming under them have continued in the possession of the surface down to the present. But it denies that such possession gave Hylton possession of the minerals under the facts and circumstances of this case.

[4] It is well settled in this state that, where a purchaser, if he be a stranger to the title, takes a conveyance of the whole estate in a tract of land, although his grantor was only a tenant in common with others, and in pursuance thereof enters into the exclusive possession of the land, claiming title to the whole, it is an ouster of the other cotenants, and the grantee so entering and claiming title may rely upon his adversary possession, if continued the statutory

period. *Johnston v. Va. Coal & Iron Co.*, 96 Va. 153-163, 31 S. E. 85; *Preston, etc., v. Va. Min. Co.*, 107 Va. 245, 248, 57 S. E. 651; *Freeman on Cotenancy*, § 197.

[5] It is also well settled that, as between tenants in common and others claiming privity, the entry and possession of one are ordinarily deemed the entry and possession of all, and this presumption will prevail in favor of all until some notorious act of ouster or adversary possession is brought home to the knowledge of the others. Until there is notice, actual or constructive, that the possession is hostile, it will be deemed amicable, notwithstanding the tenant's possession may have been wholly adversary. *Stonestreet v. Doyle*, 75 Va. 356, 378, 379, 40 Am. Rep. 731, and cases cited; *Pillow v. Southwest, etc., Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804. Yet a tenant in common may enter adversely and claim in severalty, and where he does the statute of limitations will run in his favor and against his tenants in common. See *King v. Carmichael*, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; *Clymer v. Dawkins*, 3 How. 674, 11 L. Ed. 778; *Bradstreet v. Huntington*, 5 Pet. 402, 438-440, 8 L. Ed. 170; *Ricard v. Williams*, 7 Wheat. 59, 5 L. Ed. 398; *Caperton v. Gregory*, 11 Grat. (52 Va.) 505; *Tyler on Ejectment*, 882; *Joyce v. Dyer*, 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. 603; *Greenhill v. Biggs*, 85 Ky. 155, 2 S. W. 774, 8 Ky. Law Rep. 825, 7 Am. St. Rep. 579; *Johnson v. Toulmin*, 18 Ala. 50, 52 Am. Dec. 212; *Crawford v. Mels*, 123 Iowa, 610, 99 N. W. 186, 68 L. R. A. 154, 101 Am. St. Rep. 337.

[6] In considering the question whether or not Hylton's entry and possession was adversary and hostile, the familiar principle must be borne in mind that when one enters upon land he is presumed to enter under the title which his deed purports upon its face to convey, both as to the boundary or extent of the land and the nature of his title. The deed to Hylton from the wife and children of James M. Gibson in the year 1877 purported to convey the fee in the whole. It is not contravened that he entered and took possession of the land under that deed, and, in the absence of anything to the contrary, he is presumed to have entered under a claim of title to the whole in fee. This is not a case where a tenant in common, being or entering into possession as such afterwards, attempts to claim that his possession was adverse to his tenants in common. Hylton did not enter as tenant in common. From the first he is presumed, indeed he is proved, to have claimed under his deed, and there is nothing to show that he or those who claim under him ever acknowledged that the title to the land was anything other than as it appeared upon the face of his deed.

If Hylton had been in possession of the land under the parol partition as the vendee

of C. W. Gibson, or perhaps in right of his wife, a different question would be presented; but taking a conveyance, which was duly recorded, of the whole land in fee, with covenants of general warranty, and under such deed entering into the actual possession thereof, claiming title to the whole, must, we think, be regarded as an ouster of the other tenants in common, and give Hylton the right to rely upon his adversary possession, which if continued the statutory period would bar the other tenants.

The evidence clearly shows that Hylton was in the exclusive possession of the land from the year 1877, when he entered under the conveyance of that date, claiming title to the whole tract in fee, until the institution of this suit, a period of 30 years or more. He paid taxes on it throughout these years as the fee-simple owner, resided upon it the greater portion of the time, conducted mercantile operations upon it, built upon it, cleared portions of it, and mined coal for his domestic purposes and small quantities for sale. Whether his coal operations during that period would have been sufficient to have given him title to the coal, if the mineral interest had been severed from the surface, need not be considered, since, as we have seen, there was no such severance; but unquestionably his acts of adversary possession were sufficient to create in him a complete title to the land in fee, mineral as well as surface, for his deed covered both.

It follows from what has been said that there was no error in the circuit court's action in reference to the Hylton portion of the 700-acre tract.

The action of the circuit court in holding that the appellant was the owner of a four-fifths mineral interest in the Van Buren Bolling parcel of the 700-acre tract of land, and decreeing a partition of the mineral interest therein, is assigned as cross-error.

[7] When W. B. Gibson conveyed his undivided mineral interest in the 700-acre tract of land to Price and Steinman, he was only about 19 years of age. After his maturity he sold, as he claims, the surface in the share of the 700-acre tract (which he acquired under the parol partition and by exchange with his brother, H. F. Gibson) to William Merricks, and directed his father, James M. Gibson, whom he seems to have thought was the holder of the legal title, to convey the same to Merricks. His father in 1880 executed a conveyance to Merricks, by which he conveyed or undertook to convey the said parcel in fee, with covenants of general warranty. This conveyance, it is claimed, was a disaffirmance of the conveyance made by W. B. Gibson to Price and Steinman, since

it made no reservation of the mineral interest theretofore sold them. Gibson testified that Merricks knew that he had sold the mineral interest, and that he was only selling and intending to sell him the surface. This is denied by Merricks, who testified that he purchased the land in fee in accordance with the terms of the conveyance made to him by J. M. Gibson. Whether or not the deed made by the father by the parol direction of the son, under the facts disclosed by the record, would make out a case of disaffirmance of the conveyance of the mineral made by W. B. Gibson to Price and Steinman, in the view we take of the case, need not be considered, for if it did not Merricks and those who claim under him have acquired complete title to the land under color of title by adversary possession. Merricks went into possession of the land under his purchase from W. B. Gibson. He conveyed the same in fee simple, with covenants of general warranty, in the year 1884 to Ephraim Brock. Brock conveyed it, with like covenants, to J. H. Stallard in the year 1886, and in 1887 Stallard conveyed it, with like covenants, to Van Buren Bolling. It is not controverted, as we understand the record, that Merricks and those who claim under him have, since the year 1880, been in the actual and uninterrupted possession of the surface of the land, claiming it as their own.

The contention of the appellant is that neither Merricks nor any of those who claim under him ever entered upon the coal or other minerals on or under the land. There is no evidence that they ever mined or used the coal or other minerals in any way, and, if there had been a severance of the mineral interest from the surface, no case of title to the minerals by adversary possession would be proved; but, as there was no severance of the minerals, and the conveyance to Merricks was in fee without any reservation of the minerals, the conveyance to him and the conveyance to those who claim under him was color of title to the whole tract, mineral as well as surface. Merricks and those claiming under him having been in the adversary possession of the land, claiming title to the whole fee for more than the statutory period, the claim of the appellant to the mineral interest therein was barred, and the circuit court erred in not so holding.

The court is of opinion that, in so far as the decree of the circuit court holds that the appellant has any interest in the mineral on the Van Buren Bolling land, and directs partition thereof with costs, it is erroneous, and must be reversed, and in other respects affirmed.

Reversed in part; affirmed in part.

STONEGAP COLLIERY CO. v. KELLY & VICARS.†

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. LANDLORD AND TENANT (§ 37*) — CONSTRUCTION OF LEASE — CONSTRUCTION AGAINST LESSOR.

The language of a lease is to be construed most strongly against the lessor.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 98; Dec. Dig. § 37.*]

2. LANDLORD AND TENANT (§ 37*) — CONSTRUCTION OF LEASE — INTENT OF PARTIES.

The intention of the parties to a lease must be ascertained by reference to the entire instrument and not to disjointed parts of it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 98; Dec. Dig. § 37.*]

3. MINES AND MINERALS (§ 62*) — LEASE — PURPOSE OF USE — RESTRICTIONS IN LEASE.

Where certain contiguous tracts of land were leased to a company for the purpose of mining coal and manufacturing coke thereon, and the lease provided that all the rights which had been granted to the lessors by the grantors of the several tracts for any land, coal, surface, or mining rights and privileges not excepted or reserved should pass to the lessee, the lessee could, under the lease, construct thereon buildings for the future use of its employes and, pending such use, lease the buildings to another company without accounting to the lessors for the rent thereof.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. § 62.*]

4. LANDLORD AND TENANT (§ 134*) — PURPOSE OF USE — IMPLIED RESTRICTIONS.

Equity will not raise by implication a covenant in restraint of a beneficial use of leased premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 482-485; Dec. Dig. § 134.*]

5. LANDLORD AND TENANT (§ 134*) — PURPOSE OF USE — IMPLIED RESTRICTIONS.

A covenant that premises shall be used for a specified purpose does not impliedly forbid their use for a similar lawful purpose which is not injurious to the rights of the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 482-485; Dec. Dig. § 134.*]

6. MINES AND MINERALS (§ 62*) — LEASE OF MINE — PURPOSE OF USE — INCIDENTAL USE.

Where a lease of premises limits the use to coal mining, the right to use the premises in all ways which are customary in carrying on those operations is necessarily incidental to the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. § 62.*]

7. MINES AND MINERALS (§ 62*) — LEASE — PURPOSE OF USE — INTENTION OF PARTIES.

Where the lessees of premises for the purpose of coal mining required the lessors to purchase certain tracts of land adjacent to the premises and include those tracts in the lease, although there was neither coal nor timber thereon, that fact indicates that it was the intention of the parties that the use of the premises was not to be limited to strictly mining operations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. § 62.*]

Appeal from Circuit Court, Wise County.

Suit by Kelly & Vicars against the Stonegap Colliery Company. Decree for the plaintiffs, and defendant appeals. Reversed, with directions to dismiss the bill.

Bond & Bruce, of Wise, Bullitt & Chalkley, of Big Stone Gap, and White & Case, of New York City, for appellant. Geo. C. Peery and E. M. Fulton, both of Wise, for appellees.

HARRISON, J. This controversy involves the construction and proper interpretation of a certain mining lease entered into between the parties thereto on the 17th of July, 1902. The bill was filed by the appellees seeking to enjoin the appellant from using any of the leased premises for any purpose other than that of mining coal, making coke, and selling the same, and that the appellant be especially enjoined from collecting rents from the Currier Lumber Corporation, such rents being claimed by the appellees, and that the appellant be compelled to account to the appellees for all rents, issues, and profits that it had theretofore received from the leased premises by uses foreign to the purpose of the lease.

In the progress of the voluminous proceedings which followed, the prayer of the bill was granted, perpetually enjoining the appellant from making the uses of the leased premises complained of, and a final decree was entered awarding a money recovery against the appellant for rents it had collected from the occupants of certain houses on the leased premises.

In the view we take of the case, we will not stop to consider the demurrer to the bill, which was overruled, but will proceed at once to consider the merits of the controversy.

It appears that in July, 1902, the appellant leased from the appellees a contiguous boundary of land, containing approximately 5,700 acres, for the purpose of mining coal, making coke, and selling the same. This body of land is made up of numerous smaller tracts acquired by the lessors at different times, and much of it has no mineral value, but is only valuable for its uses in connection with that part where the mining operations are carried on. It further appears that, in order to provide in an economical way against the increasing demand for tenement houses expected to result from the development of the mines, appellant in November, 1905, entered into an agreement with R. L. Benson, trustee, who had large timber and stave mills on an adjacent tract of land, by which it leased to him 5.84 acres of the leased premises and permitted him to erect thereon a number of houses, to occupy the same for a period of ten years, paying a nominal rent therefor of \$25 per year, and at the end of said period the land and houses to revert to the appellant. In September, 1908, the Cur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 4, 1913.

rier Lumber Corporation, successor to R. D. Benson, trustee, leased from appellant a number of these houses for a period of eight months at \$10 each per month. The right of appellant to make these contracts and derive the benefit flowing from them is the question involved in this litigation.

[1, 2] The deed of lease is to be regarded in the light of the following well-known rules of construction: (1) The language of the contract is to be construed most strongly against the grantor; and (2) the intention of the parties must be ascertained by reference to the entire instrument and not to disjointed parts of it. 2 Min. Inst. 1056, 1058.

In *Chamberlain v. Brown*, 141 Iowa, 549, 120 N. W. 338, the court says: "There is another familiar rule applicable to cases of this kind that, if the meaning and effect of the lease be fairly capable of two constructions, that will be adopted which is most favorable to the lessee."

[3] "Those things which are appurtenant to a mine will pass under a lease of the mine as a necessary part thereof, although not mentioned in the lease." 27 Cyc. 700. See, also, *Devlin on Deeds*, § 863.

In *City of New York v. Interborough R. T. Co.*, 125 App. Div. 437, 109 N. Y. Supp. 885, the court says: "This is a recognition of the right of the lessee to use the demised premises for such collateral purposes as such property might be customarily used. A lessee of real property is entitled to the exclusive use of demised premises for any purpose not prohibited by the lease, not amounting to waste or destruction of the subject-matter. This is the general rule."

"The grant of a thing passes the incident as well as the principal, though the latter only is mentioned; and this effect cannot be avoided without an express reservation. * * * A grant of a thing will include whatever the grantor had power to convey, which is reasonably necessary to the enjoyment of the thing granted." *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388.

The first clause of the lease provides as follows: "The lessors hereby lease to the lessee, its successors and assigns, for the purpose of mining coal and manufacturing coke thereon and therefrom, and selling said coke and coal, the following tracts or boundaries of coal lands or coal rights and surface rights owned by the lessors near the town of Wise, Wise county, Virginia." Then follows the description of 86 different tracts or parcels of land, some of which were owned in entirety by the lessors and as to others they only owned the coal and other minerals, together with certain mining rights and privileges, and as to others they only owned the surface. This description of the several properties is followed by the following clause: "All of the rights and privileges which have been granted by the various grantors hereinbefore named to either the said Kelly or said Vickers, or by any other grantor or grantors,

to them or either of them for any of the land, coal, surface, or mining rights and privileges, hereinbefore specifically described and not herein excepted or reserved, and which the said lessors now own, shall pass to the lessee under this lease; but it is understood that the said lessors have heretofore sold and conveyed divers tracts, pieces or parcels of surface to various persons, which were conveyed to them by the aforesaid grantors, and all of which are reserved from the operation of this lease."

[4, 5] These provisions of the lease constitute all that is essential to be considered in its construction. It seems clear that under these provisions the surface rights owned by the lessors are granted to the lessee, certainly all of such rights passed from the lessors. In other words, the whole of the properties owned by the lessors passed to the lessee, together with all rights and privileges appurtenant thereto. If it was the intention of the parties that the lessee should have, for the purpose of its operations, all of the property, rights, and privileges owned by the grantors, more apt language to accomplish that purpose could hardly have been employed than that of the two provisions of the deed which have been mentioned. There are no covenants in the deed restraining the beneficial use of the premises granted, and it is obviously inconsistent with the principles upon which a court of equity acts to raise by implication a covenant in restraint of a beneficial use of property. A covenant that premises shall be used by a lessee for a particular specified purpose does not impliedly forbid that they may be used for a similar lawful purpose which is not injurious to the landlord's rights, unless such other use is expressly forbidden. *Reed v. Lewis*, 74 Ind. 433, 39 Am. Rep. 88; *San Antonio Brewing Asso. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368.

The law on the subject is stated as follows in 24 Cyc. 1046, citing numerous cases: "The general rule is that by the lease of a building everything which belongs to it, or is used with and appurtenant to it, and which is reasonably essential to its enjoyment, passes as incident to the principal thing and as a part of it unless specially reserved."

And again at page 1061: "Where the contract of lease is silent on the subject, the lessees have, by implication, the right to put the premises to such use and enjoyment as they please, not materially different from that in which they are usually employed, to which they are adapted, and for which they are constructed. The law, however, implies an obligation on the part of the lessee to use the property in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission, and not to put them to a use or employment materially different from that in which they are usually employed or apparently violative of the spirit and purpose of the

lease as such spirit and purpose is evidenced by the recitals therein."

[6] Appellees rely on the alleged implied restriction that the premises are not to be used for any purpose except "for mining coal, and manufacturing coke, and selling such coal and coke"; the contention being that this disjointed sentence raises an implication that the use to be made of the premises, and especially the use to be made of the surface, is so limited that the lessee cannot make the use thereof that is denied to it in this case by the appellees.

If it were permissible for a court of equity, in the light of the principles we have cited, to raise by implication a covenant restraining the beneficial use of property, it would be necessary, the deed being silent on the subject, to inquire as to the manner in which premises leased for such purposes are usually employed. The record shows that the uses to which such premises are necessarily put are so extended as to be difficult of mention in detail. It abundantly appears from the testimony of numerous coal operators, men of wide experience in this and other coal fields in West Virginia and Pennsylvania, that it is usual and customary for the lessee to have the possession, control, and use of the surface of the leased premises, and especially that adjacent to the operation, for all purposes. This is necessary, as shown, for many reasons, both affirmative and negative. It is necessary for coal operators to build numerous tenement houses for their employes, stores, warehouses, office buildings, hospitals, supply houses, hotels, and boarding houses, tipples for loading coal, crushing plants, side tracks, tram roads motor roads; to erect tanks, dig wells, lay pipes; to have gardens and pastures both for themselves and employes; and many other rights and privileges depending on local conditions. Control of the surface is necessary to enable the operators to keep off persons engaged in selling whisky, to keep off as far as possible disreputable women and labor agitators. These, among others too numerous to mention in detail, are the purposes to which the coal operator must put the leased premises, and the right to so use such premises is necessarily incidental to the lease. Jones on Landlord & Tenant, § 382; Taylor on Landlord & Tenant, § 161; 24 Cyc. 1061.

[7] It is to be further observed that the action of the parties is significant as showing their intention, and that the construction of the lease now contended for by the appellees is not warranted. It appears that a large part of the leased premises, known as the Carter tract, part of which is the land in controversy in this suit, is cleared and has no mining timber upon it and no coal underlying it, and yet it was regarded as so important to the leased premises that the appellant, before consummating the lease, re-

quired the appellees to purchase the tract and include the same in the lease. This was manifestly not done for the purpose of mining coal or cutting timber from such land, for it was known that neither was there, but only because it was regarded as necessary for the lessee to have control of the surface in connection with its contemplated coal and coke operations. Its purchase and inclusion in the lease would have been a vain and useless thing unless the lessee could use the surface thereof in such manner as seemed to it best for furthering the success of its enterprise.

It further appears that the lessors made no objection to the erection of the houses in controversy on the leased premises, nor have they ever made any expenditure either for building the houses in controversy or for keeping up repairs or paying the insurance and taxes thereon. The houses were built under an arrangement made by the lessee for the purpose of providing tenements for its employes when needed. If under these circumstances the lessors were entitled to the rents of the houses, they would be entitled to the possession, and, if so, they would seem to have an equal right to enter and take possession of any other house of the lessee which was not at the time being occupied by an employe connected with its mining operations. Such a right would be repugnant to the letter as well as the spirit of the lease, and such a narrow construction of the lease, if carried to its logical conclusion, would impede and disorganize, if not entirely stop, the operations of the lessee.

In conclusion we are of opinion that the appellant was plainly within its rights in having the houses in controversy erected under the arrangement pointed out and in renting them to the Currier Lumber Corporation until it became necessary for appellant to use them for its own employes; and, further, that appellant was under no obligation to account to the appellees for the rent of such houses arising from their occupancy by the Currier Lumber Corporation or any one else.

The decree appealed from must therefore be reversed, and this court will enter such decree as the circuit court should have entered, dissolving the injunction in favor of the appellees and dismissing their bill, with costs.

Reversed.

ROSS et al. v. ROSS et al.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. WILLS (§ 733*)—CONSTRUCTION—DESCRIPTION OF PROPERTY—PERSONAL PROPERTY.

A holographic will, by which the testator bequeathed to his wife \$3,000 in cash from any money that was to his credit at the time of his death and all of his personal property of

every description, when construed according to the expressed intent of the testator, using the words in their definite legal sense, gave to the wife immediately upon his death the cash on hand, which amounted to less than \$3,000, and she was, at the settlement of the estate, entitled to the balance of the personal property, consisting largely of bonds and notes secured by mortgages and deeds of trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.*]

2. WILLS (§ 565*)—CONSTRUCTION—DESCRIPTION OF PROPERTY—PERSONAL PROPERTY.

The separate bequest of the money will not be construed as indicating that the testator did not use the term "personal property" in its technical sense, but meant thereby his tangible personal effects, especially where it appeared that he had been supervisor and assessor and had had an opportunity to learn the legal distinction between real and personal property, and where the other clauses of the will spoke in detail of other property, but made no reference to the bonds and notes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1233-1238; Dec. Dig. § 565.*]

3. WILLS (§ 564*)—CONSTRUCTION—PROVISION FOR SUPPORT.

Where a testator provided by his will that his wife should manage the real property until the youngest child became 21, and then divide it equally among the children, and that out of the rents she should support herself and the unmarried daughters, she is not entitled to spend the entire amount of the rents for her support, but only such amount as is necessary to support herself and daughters in their station in life, and the balance is to be retained and divided when the property is divided.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1228-1232; Dec. Dig. § 564.*]

Appeal from Circuit Court of City of Lynchburg.

Suit by Ross and others against Ross and others. Decree for defendants, and plaintiffs appeal. Modified and affirmed.

S. V. Kemp, of Lynchburg, for appellants.
F. S. Kirkpatrick, of Lynchburg, for appellees.

HARRISON, J. The late Eugene E. Ross departed this life at his home in Campbell county in June, 1912, leaving surviving him his wife, Lizzie I. Ross, and nine children. The deceased was twice married, and seven of the children surviving him were the offspring of his first marriage; the remaining two being the children of his second and surviving wife, the youngest of these two being born after the father's death.

The bill in this case was filed by the six adult children of the first marriage for the purpose of having construed the holograph will left by Eugene E. Ross, dated August 10, 1905, and duly probated in June, 1912. The will mentioned is as follows:

"I give to my Wife Lizzie I ROSS one Double Tenemt House on the Corner of 8th and Wise Street in Lynchburg, Va., and three thousin Dollars in Cash from eny Muney that may bee to my Credet at the time of my Deth and All my pursnal Property of Every Discription I Give to Doherty Ross my youngest

Daughter two houses and Lots in Campbell County none as Lots 10 and 11 in Fair ground Addition Saima Lots as Come to me from John A. Faulkner.

"It is my Request that all other Property owned By me Shall bee kept to Gether Except thee Carpented Chops located in Park avenue Addition whitch I wood Advice the Salle as Soon as Poseble all other Property Except sushas I have Given a way in this will Shall bee Ceped to Gether, untell my youngest Child become of Age then Equly Devided beleen all of my Children including Doherty Ross and I apoint my wife Lizzie I. Ross my agent to take incharge of all of my Property and Corlect all Rents and make Improvements and give to hirsif and children and unmared Dauter a Support out of Eny Rents She may Corlec untell the youngest Child become of Age I further more Request that no Bond be Required of Hir in wilness of the Above," etc.

It is apparent from the testator's spelling and punctuation that he was a man of little learning. The record, however, shows that he was a man of fine sense, excellent judgment, and good business qualifications, who had acquired by his thrift and business sense an estate valued at more than \$50,000, which was nearly equally divided between real and personal property. While his spelling and punctuation are bad, the intention of the testator is expressed with reasonable clearness.

[1, 2] The present controversy concerns chiefly the first sentence of the will, which is as follows: "I give to my Wife Lizzie I ROSS one Duble Tenemt House on the Corner of 8th and Wise Street in Lynchburg, Va., and three thousin Dollars in Cash from eny Muney that may bee to my Credet at the time of my Deth and All my pursnal Property of Every Discription."

At the time of the testator's death he had securities, principally deeds of trust or mortgages, aggregating about \$23,000, and something over \$1,000 in cash to his credit in bank. The interpretation which the complainants, who are the appellants here, insist upon giving to the foregoing language employed by the testator is that the cash to his credit at the time of his death included the bonds and notes left by him, and that the whole, cash on hand and the securities left, must be treated as one fund, out of which the \$3,000 given his wife in cash from any money he might have to his credit must be paid; that the testator did not use the term "personal property" in its technical sense, but intended by the words "All my pursnal Property of Every Discription" to give his wife only the tangible household property; that, if he had intended to give her all his personal property of every description, there would have been no occasion for the provision of \$3,000 in cash from any money that might be to his credit at the time

of his death, as the term "personal property" technically used would cover the \$3,000 in cash, as well as the notes and bonds.

In *Allison v. Allison*, 101 Va. 543, 544, 44 S. E. 906, 63 L. R. A. 920, it is said:

"The object in construing wills is to arrive at the true intent of the testator, but that intent is to be gathered from the language used, for the object of construction is not to ascertain the presumed or supposed, but the expressed, intention of the testator; that is the meaning which the words of the will, correctly interpreted, convey. *Wooton v. Redd's Ex'r*, 12 Grat. [53 Va.] 206; *Hatcher v. Hatcher*, 80 Va. 171; *Waring v. Boshers' Adm'r*, 91 Va. 286, 21 S. E. 464.

"In construing wills, the words used should be given their ordinary and usual signification; but, where technical words are used, they are presumed to be used technically, and words of a definite legal signification are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument. *Waring v. Waring*, 96 Va. 641, 32 S. E. 150."

Guided by these well-settled principles, we are of opinion that the construction contended for by the appellants is strained, and not warranted by the language used, and would wholly fail to effectuate the manifest intention of the testator. In addition to the presumption that the testator understood the technical meaning of the term "personal property," and that he used the words "All my personal Property of Every Description" in their usual and ordinary sense, and not in the restricted sense suggested by the appellants, it is shown of record that he had enjoyed large and unusual opportunities for acquiring a thorough knowledge of the distinction which the law makes between personal and real estate. For six years he was an active and influential member of the board of supervisors of Campbell county. In this capacity he frequently examined with care the tax lists which are divided into two classes and listed in separate books, one for real estate, and the other for personal property. He was at one time the assessor for his district, lying adjacent to the city of Lynchburg, which paid at that time about one-half of the taxes gathered from the entire county. In this capacity he had to assess separately both real and personal property. His opportunities, therefore, for knowing what was meant by the term "personal property," and what was included therein, were exceptionally good. His practical knowledge of the subject is further shown by the fact that he listed with the commissioner of the revenue, under the head of personal property, to be taxed, \$8,500 of the bonds that are now the subject of dispute. It is not conceivable that a man of the testator's large business experience and fine sense would have given his wife all of his personal property of every description, when he had bonds and notes, intending by the use of such broad language to include only tangi-

ble property, such as household and kitchen furniture. Nor is it a reasonable supposition that he intended to include bonds and notes not due in the language "Cash from any Muneys that may be due to my Credit at the time of my Death."

There is no such conflict between the gift to his wife of \$3,000 in cash from any money to his credit and the gift of all his personal property of every description as to justify the interpretation contended for by appellants, which would defeat the manifest intention of the testator. The testator doubtless realized that his wife, who was to have the care and support of his younger children, would need at once ready cash, and his purpose was to supply that need by providing that, out of any money to his credit at the time of his death, she should have not exceeding \$3,000. It turned out that he had to his credit in bank at the time of his death little more than one-third the amount named, which is all that his wife can get under that provision. This result was probably intentional on the part of the testator; at any rate there is no occasion to speculate as to the proper disposition of the surplus cash, had he left more than \$3,000 of money to his credit.

The effort to include bonds and notes not due for several years after the testator's death in the language "Cash from any Muneys * * * to my Credit at the time of my Death" is not in accord with common experience. The testator's good sense, fine judgment, and long and prosperous business career forbid the conclusion that he intended by the use of the language "Cash from any Muneys * * * to my Credit at the time of my Death" to include as money to his credit bonds and notes not due.

When we look to the whole will, we find that the testator speaks somewhat in detail of his other property, which had not been devised by the clause under consideration. He authorizes his wife to collect the rents and use the same in making improvements, etc., and in supporting herself and children and unmarried daughter until the youngest child comes of age. He does not refer to the interest or income from his bonds and notes, because the personal property from which such income would be derived had already been given in absolute estate to his wife. In the latter part of his will he was dealing only with the estate left after the gift of his personal property to his wife.

It is very clear from the whole will that the testator's intention was to provide liberally for his wife, who was charged with the care and support of his dependent children, and yet, if the construction sought to be placed upon his will by the appellants were sound, his wife would have far less with which to carry her burden than she would have had if her husband had died intestate. Upon this branch of the case, the decree appealed from is without error.

[3] It is conceded that the support which the rents had to afford was for the widow, her two children, and unmarried daughter. The decree appealed from gives them this support, but goes further, and directs that the net proceeds of such rents shall be divided into four equal parts, one of which shall belong to Mrs. Ross, and one to each of her three daughters.

We are of opinion that this provision for support means a support according to their station in life, and while from the evidence it is not likely that the rents will exceed such support before the youngest child comes of age, still it is possible that it may do so, in which event the surplus over a support would have to be preserved for distribution among all the children when the youngest child reaches maturity. The language of the testator must be regarded, and the court was without power to determine now that until the youngest child comes of age—some 15 years hence—all the net rents should be applied to such support.

The decree under review inadvertently holds that the pretermitted child, Verna Ross, is entitled to one-eighth of the estate, whereas it should have held her entitled to one-ninth thereof; there being nine children.

The decree appealed from must, therefore, be so modified as to provide that the net revenue from rents shall be used by Lizzie I. Ross until her youngest child is of age, for the support of herself and three daughters, named in the decree, to the extent that such net rents may be necessary for their support according to their station in life, and further modified so as to provide that Verna Ross, the pretermitted child, shall be entitled to one-ninth of the estate. Subject to these two modifications, the decree complained of must be affirmed, with costs in favor of the appellees, as the parties substantially prevailing.

Modified and affirmed.

STEELE'S ADM'R v. COLONIAL COAL & COKE CO.

(Supreme Court of Appeals of Virginia.
Sept. 11, 1913.)

1. RAILROADS (§ 282*)—INJURIES TO LICENSEE—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action for the death of a coal miner who was killed by being knocked from the platform of an engine, where he was riding for his own convenience, by the impact of an engine of the defendant company with a car coupled to the engine on which he was riding, evidence held insufficient to show any actionable negligence on the part of the employees of the defendant company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

2. TRIAL (§ 156*)—DEMURRER TO EVIDENCE—DETERMINATION.

Where deceased was killed by being thrown from the platform of a dinky engine, on which he was riding, by the impact of another engine against a car, from which the dinky had

just been uncoupled, but the evidence failed to show whether it was before or after the dinky was put in motion, it will be assumed on demurrer to the evidence that it was afterwards.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.*]

3. NEGLIGENCE (§ 121*)—ACTIONS—PRESUMPTION AND BURDEN OF PROOF.

Negligence will not be presumed in an action to recover damages for personal injuries; but the burden is upon the plaintiff to prove it by a preponderance of the evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

4. NEGLIGENCE (§ 1*)—ACTIONS—ASSUMPTION OF RISK.

No cause of action arises from an injury caused by the doing of a dangerous but lawful act in a lawful manner; but in such cases the doctrine of assumption of risk applies.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. RAILROADS (§ 276*)—INJURIES TO LICENSEES—ASSUMPTION OF RISK.

The rule that one who takes passage on a freight train assumes the risk of such jerking and jarring as are incident to the operation of such trains applies more strongly to a licensee than to a passenger, for whose safety the carrier is held to the exercise of extraordinary care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 878-886; Dec. Dig. § 276.*]

6. RAILROADS (§ 260*)—INJURIES TO LICENSEES—DUTY TO MAKE RULES.

Where one coal company allows another to use its railroad yards, it owes no duty to a licensee on an engine of the other company to promulgate rules for the movement of engines in the yards.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 817-823; Dec. Dig. § 260.*]

7. RAILROADS (§ 282*)—INJURIES TO LICENSEES—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

In an action for the death of one who was killed while riding upon an engine of a coal company in the yards of the defendant company, evidence held insufficient to show any proximate causal connection between the failure of the defendant company to promulgate rules for the movement of engines in its yards and the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

Error to Circuit Court, Wise County.

Action by William Steele's administrator against the Colonial Coal & Coke Company. Judgment for the defendant upon a demurrer to the evidence, and plaintiff brings error. Affirmed.

E. M. Fulton, of Wise, and A. N. Kilgore, of Norton, for plaintiff in error. Bullitt & Chalkley, of Big Stone Gap, for defendant in error.

WHITTLE, J. The following is a summary of the salient facts concerning the killing of William Steele, to recover damages for whose death this action was brought:

The defendant, the Colonial Coal & Coke Company, prevailed in the circuit court upon a demurrer to the evidence, and that judgment is now before us for review.

[1] The defendant is a private corporation, and operates a railroad as an adjunct to its business, extending from its coal mines and coking plant at Dorchester to Dorchester Junction, three miles away, where a connection is formed with the Louisville & Nashville Railroad and the Interstate Railroad. The defendant is not a common carrier, but uses this branch line of railway under the statute which allows a coal company to operate a railroad from its mines to a junction point with a common carrier. The Sutherland Coal & Coke Company (which will hereinafter be called the Sutherland Company) is a private firm of coal operators, and owns a line of railroad from their plant on Powell's river, a distance of several miles, to a point of junction with the defendant's road at Dorchester, from which latter point to Dorchester Junction they run their cars over the defendant's road. Besides its main track from Dorchester to Dorchester Junction, the defendant has several switches or yard tracks, used in connection therewith, in the immediate vicinity of its coke ovens. The Sutherland Company owned a "dinkey" engine of about 18 tons weight, and the defendant's engine weighed 65 tons. There was also a traffic arrangement between the two coal companies, by which the Sutherland Company was permitted to operate its "dinkey" over the defendant's yard tracks.

[2] On the day of the accident the dinkey had pushed a car loaded with brattice lumber from the plant of the Sutherland Company to Dorchester to a point where a gondola car loaded with cinders was standing on the main track. Thereupon the dinkey pushed both cars down the main track and stopped near the commissary. The big engine was on the main track a short distance below the commissary, and the crew were under orders to shove the cinder car up the track, and switch it off on the cinder track to be emptied. The engineer in charge of the dinkey was advised of the proposed movement, and requested to remove his engine up the track beyond the cinder switch. He accordingly raised the lever on the brattice car and placed it in position to uncouple that car from the dinkey. Discovering two negroes and Steele in the cab of his engine, he ordered them to "unload," and the negroes stepped off. It does not appear whether Steele attempted to get off the dinkey or not; but at that juncture (whether immediately before or after the dinkey was put in motion was not clearly shown, but upon a de-nurrer to the evidence it must be assumed to have been afterward) the big engine backed up against the cinder car, and the force of the jar was imparted to the brattice car and jostled the lever back in position, automatically coupling the car to the dinkey, which moved it several feet up the track, leaving that space between it and the cinder car. At the time of the impact Steele fell from the platform of the dinkey, which was

unguarded, between it and the brattice car, and the wheels of the latter passed over his body and killed him. Steele was an employé of the Sutherland Company (but was not about its business when he was killed), and such employés were in the habit of getting on the dinkey anywhere it might be in the yard to ride back from Dorchester to Sutherland. This service was rendered free of charge, and Steele had boarded the dinkey for his own convenience, and at a time and under circumstances which must have made it known to him that the time had not arrived for the dinkey to set out on the return trip to Sutherland, nor was it satisfactorily shown why he remained on the engine after he was ordered to "unload" (to get off).

It is denied that the engineer in charge of the dinkey was apprised of the purpose of the crew of the big engine to couple it onto the cinder car and push it off on the cinder track, and that this was done in the usual way, and with ordinary care. The speed of the big engine did not exceed one mile an hour, and the force of the impact was not excessive, "the bump was very light," less, it was said, than is usually incident to coupling cars under like conditions. Nor does it appear that those in charge of the big engine knew of the presence of Steele on the dinkey.

[3] In these circumstances, without considering any other phase of the case, it is manifest that the evidence fails to fix actionable negligence upon the defendant. The general doctrine is fundamental, that, in an action to recover damages for personal injuries, negligence will not be presumed; but the burden rests upon the plaintiff to prove it affirmatively and by a preponderance of the evidence. This rule is nowhere more strongly stated, or more steadfastly adhered to, than in the decisions of this court. *N. & W. Ry. Co. v. Cromer*, 101 Va. 687, 44 S. E. 898; *Consumers' Brewing Co. v. Doyle*, 102 Va. 390, 46 S. E. 390; *Northington v. Norfolk R., etc., Co.*, 102 Va. 446, 46 S. E. 475; *N. & W. Ry. Co. v. McDonald*, 106 Va. 207, 55 S. E. 554; *Baughner v. Harman*, 110 Va. 316, 66 S. E. 86.

[4, 5] No cause of action can arise when an injury results from doing a dangerous but lawful act in a lawful manner. To hold otherwise would be to outlaw numerous occupations which are essential to the welfare of mankind. In all such cases the doctrine of "assumption of risk" applies. When, therefore, one takes passage on a freight train, he assumes the risk of such jerking and jarring as are incident to the operation of that class of trains as distinguished from passenger trains. 6 Cyc. 625, and cases cited. If this be the rule with respect to passengers, for whose safety the carrier is usually held to the exercise of extraordinary care, a fortiori must it apply to a mere licensee, to whom a lesser degree of care is due, who chooses to ride on a dinkey engine,

without compensation, and for his own convenience.

[8, 7] Complaint is made of the failure of the defendant to have promulgated rules for the movement of engines on its yard. No such duty was owing from the defendant to a mere licensee upon its premises; but if it were the evidence does not show any proximate causal connection between the alleged omission and the injury complained of, as was done in the case of an employé in *Va. Iron, Coal & Coke Co. v. Lore*, 104 Va. 217, 51 S. E. 371.

The judgment is plainly right, and must be affirmed.*

Affirmed.

KISER v. COLONIAL COAL & COKE CO.†
(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. ELECTRICITY (§ 15*)—LIABILITY FOR INJURIES TO LICENSEES AND TRESPASSERS.

Parallel with a wagon road was the track of a motor road, across which was a path used by those in the vicinity in crossing the track. An electric light wire was strung along the motor poles, and had broken at a point five feet from the path. In disobedience to the positive orders of her parents not to go on the track, a child three years old went on the track, took hold of the wire, and brought it in contact with the rail, causing a flash, which set fire to her clothes. *Held*, that the company owning the track and wire was not liable for her injuries and death, since she was a trespasser, or at most a bare licensee, to whom the company owed no duty of having the place of the accident in safe condition, and, moreover, the bringing of the wire in contact with the rail was a result which could hardly have been foreseen.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 8; Dec. Dig. § 15.*]

2. NEGLIGENCE (§ 33*)—CARE REQUIRED AS TO TRESPASSERS.

An owner of premises owes to a trespasser the duty only of doing him no intentional or willful injury, and before any duty of protection arises there must be such notice of his danger as would put a prudent man on the alert.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 45-47; Dec. Dig. § 33.*]

3. NEGLIGENCE (§ 32*)—CARE REQUIRED AS TO "LICENSEE."

A "licensee," or one who is permitted by the passive acquiescence of the owner to come on his premises for his own convenience, takes upon himself all the ordinary risks attached to the place and the business carried on there, and while the owner must not intentionally or willfully injure him, he owes him the active duty of protection only after he knows of his danger, or might have known it and avoided it by the use of ordinary care.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4143; vol. 8, p. 7706.]

Error to Circuit Court, Wise County.

Action by J. B. Kiser, administrator of May Lunsford, against the Colonial Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bond & Bruce, of Wise, for plaintiff in error. Bullitt & Chalkley, of Big Stone Gap, for defendant in error.

WHITTLE, J. This is a personal injury action to recover damages for the death of plaintiff's intestate, May Lunsford, ascribed to the wrongful act of the defendant in error, the Colonial Coal & Coke Company, hereinafter referred to as "the company." The plaintiff brings error to the judgment of the circuit court rendered for the company on a demurrer to the evidence.

[1] The material facts are these: May Lunsford, who at the time of her death was 3 years and four months old, was the daughter of James Lunsford, a coal miner in the employment of the company, and lived with her parents in a house leased from the company and located in the mining town of Dorchester. The house fronts on a wagon road, beyond which and practically parallel with it at that point is the track of the motor road, which is about 40 feet from the house. There was also a wire fence between the house and the motor track, which was in a dilapidated condition. There were three houses, including the house occupied by the Lunsfords, in a row on the same side of the motor track, and the families who lived in these houses were in the habit of using a path which crossed the track in front of them for the purpose of going to the commissary and post office and spring, and the miners to their work. These various places could also be reached by following the wagon road to the stable and thence across the track into the streets of Dorchester; but the path afforded a nearer route, and was habitually used for the purposes mentioned by the three families referred to. It moreover appeared that the children of these families were accustomed to use the space between the dwellings and the motor track for a playground; but the track was a recognized place of danger for children, and Lunsford had given his wife instructions to keep their children off the track and had whipped them for going upon it, fearing that they might be run over and killed by the motor, which ran along there frequently and at a rate of speed which rendered it extremely dangerous to young children who might be on the track. A small electric light wire was strung along the motor poles and used to supply light to the company's barn and one of its tenant houses. This wire from some cause was weak and had frequently broken, and from time to time been repaired in a crude way by any employé of the company who chanced to discover the break; and of its general condition the company had notice.

Shortly before the casualty, which caused the child's death two days later, the wire broke at a point 5 feet from the path. The details of the accident may best be told in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig., Key-No. Series & Rep'r Index

† Rehearing denied December 4, 1913.

the language of an eyewitness, Mrs. Farbush, who says: "I saw the little boy, the brother of May, take hold of the wire and put the end down against the track, and it made a flash. I supposed at the time they had powder there. The little girl then took hold of the wire and stuck it down, and there came a flash and set the little girl's clothes on fire. The boy was about 6 years old."

It thus appears that there was no danger in merely taking hold of the wire. No harm resulted to either child from that cause *per se*; but the injury came when the flash caused by bringing the end of the live wire in contact with the rail set fire to the child's clothes. That was the proximate cause of the accident, a result which could hardly have been foreseen. Moreover, it is not pretended that the children had any business at the point of the accident. They were there in disobedience to the positive orders from their parents, and without the knowledge or consent of the company. They were in no sense invitees, and were trespassers, or at most bare licensees, upon the track. In neither relation did the company owe to plaintiff's intestate the duty of having the place of accident in safe condition. The duty of prevision is not due by the proprietor of premises to either one of those classes.

[2] Speaking generally, the duty owing by the owner "to a trespasser on his premises is to do him no intentional or willful injury." There must be such notice of the trespasser's

danger as would put a prudent man on the alert before the duty of protection arises.

[3] So, also, with respect to a bare licensee (that is to say, one who is permitted by the passive acquiescence of the owner to come on his premises for his own convenience). He "takes upon himself all the ordinary risks attached to the place and the business carried on there." The owner must not intentionally or willfully injure him, but he owes him the active duty of protection only after he knows of his danger, or might have known of it and avoided it by the use of ordinary care. These principles have been repeatedly announced by this court and are conclusive of the case. *Nichol's Adm'r v. W. O., etc., R. Co.*, 83 Va. 102, 5 S. E. 171, 5 Am. St. Rep. 257; *N. & W. R. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *Walker v. Potomac, etc., R. Co.*, 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871, 8 Ann. Cas. 862; *Clark v. Fehlhaber*, 106 Va. 803, 56 S. E. 817, 13 L. R. A. (N. S.) 442; *Eaton v. Moore*, 111 Va. 400, 69 S. E. 326.

In *Walker v. Potomac, etc., R. Co.*, *supra* (a turntable case in which an infant was killed), the authorities are reviewed at length, and the court reaches the conclusion that the rule that a landowner does not owe to a trespasser the duty of keeping his land in a safe condition applies as well to infants as to adults.

Upon the whole case, we find no error in the judgment under review, and it must be affirmed.

Affirmed.

CHEESEBREW v. TOWN OF POINT PLEASANT et al.

(Supreme Court of Appeals of West Virginia.
Oct. 29, 1912.)

Dissenting opinion.

For majority opinion, see 71 W. Va. 199,
76 S. E. 424.

WILLIAMS, J. (dissenting). I agree that the charter of a municipality, which gives it the right to sue and be sued, to contract and be contracted with, by necessary implication also confers power to employ counsel and to provide for their compensation; but such implied power must be limited to the cases in which the town's rights are directly involved. It does not confer the right to employ counsel in suits wherein the town is not a party and its interests only collateral and incidental. *Butler v. Milwaukee*, 15 Wis. 493; *Hight v. Monroe County*, 68 Ind. 575. Such implied power can be no more than is necessary to make effective the powers expressly granted; it must be restricted to cases wherein the town sues, or is sued, or, wherein its contracts, involving liability, are at stake. It must either be a party to the suit, or it must have some present pecuniary interest directly affected by the litigation; it must involve more than a mere right to be exercised at some future time.

The town of Point Pleasant was not peculiarly interested in the result of Harden's trial. It had issued him a license to sell intoxicating liquors, and had received its license tax. It did not guarantee the right, and was not bound to return the tax in the event the court had held the license void. It was as much Harden's duty to interpret the town's charter as it was the duty of the town itself. He took whatever risk there was of a mistaken interpretation; and the courts never relieve against a mistake of law.

The courts are as much bound, being a co-ordinate branch of the government, to interpret correctly the charter privileges and powers of a municipality, when they are collaterally brought in question, as they are to interpret correctly the law relating to any other matter. Hence, viewing the municipality as a subdivision of the state government, its interest in securing a particular interpretation of its charter is not distinct from the interest which the court itself would have in giving that interpretation. They are both instruments of government. A municipal charter confers governmental, not private, rights; and the Legislature may grant to, or withhold from, municipalities privileges and powers, at its pleasure; and the courts must construe the law so as to carry out the legislative will. Therefore a municipality has no more implied power to employ counsel to engage in a suit, to which it is not a party for

the purpose of securing a particular construction of its charter, than it has to employ counsel to attend a session of the Legislature, for the purpose of securing the passage of an act amending its charter; and no one, I think, would contend that such power as that is given by implication.

McGUIRE v. OLD SWEET SPRINGS CO.

(Supreme Court of Appeals of West Virginia.
Dec. 2, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 651*)—RECORDS—DEPOSITION—WANT OF SERVICE.

Apparent want of service of a notice to take a deposition read on the trial in the court below over a general objection will not be regarded on writ of error here when it is made to appear from a corrected record certified from the lower court that notice thereof was in fact duly accepted by counsel.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2815; Dec. Dig. § 651.*]

2. MASTER AND SERVANT (§ 6*)—EMPLOYMENT—FABRICATED CONTRACT—SUFFICIENCY OF EVIDENCE.

The evidence in this case is not sufficient to overcome the verdict of the jury against defendant's theory that the contract sued on was a fabricated contract.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 6; Dec. Dig. § 6.*]

3. CORPORATIONS (§ 291*)—OFFICERS—TERM OF OFFICE—WORKMEN.

Section 53, chapter 53, Code 1906, relating to corporations providing that "the officers and agents so appointed shall hold their places during the pleasure of the board," does not apply to persons employed to perform work, such as carpenter work, and who are in no way to act in a representative capacity.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1250-1254; Dec. Dig. § 291.*]

4. CORPORATIONS (§ 407*)—GENERAL MANAGER—AUTHORITY—CONTRACT—VALIDITY.

There is no apparent authority in the general manager of a corporation operating a summer hotel, due to the nature of his office, to make unusual, extraordinary or unnecessary contracts for labor, such as carpenter work, extending beyond the term of his own employment, but when with specific direction of the president, or there is no abuse of such authority and no fraud or imposition practiced in making such contract, it is not necessarily void.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1615-1619; Dec. Dig. § 407.*]

5. CORPORATIONS (§ 407*)—GENERAL MANAGER—AUTHORITY—CONTRACT—VALIDITY.

A proposal in writing by such corporation operating such hotel through such general manager, to a mechanic, to furnish him carpenter work, at a definite price per day, and for a definite time, running for a short time into another season and beyond the term of such general manager, when duly accepted and the work entered upon, is not void for want of authority express or implied on the part of such general manager to make the contract, and as being an unusual, extraordinary or unnecessary contract.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1615-1617; Dec. Dig. § 407.*]

6. CONTRACTS (§ 10*)—MUTUALITY—WORK AND LABOR.

Nor is such a contract or proposal, when so accepted, void for want of mutuality of obligation on the part of the contracting parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

Error to Circuit Court, Monroe County.

Action by W. J. McGuire against the Old Sweet Springs Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Brown, Jackson & Knight and O. P. Fitzgerald, all of Charleston, for plaintiff in error. T. N. Read, of Hinton, and J. H. Crozier, of Ronceverte, for defendant in error.

MILLER, J. In assumpsit plaintiff recovered a verdict and judgment for \$387.00, on the following contract declared on: "September 15, 1908. Mr. Wm. McGuire contract with Old Sweet Springs Hotel Co. * * * Old Sweet Springs Hotel Co. agrees to furnish carpenter work for Wm. McGuire from above date to June 1—09 at Rate of 2.50 per day, McGuire to board himself, the Company to furnish 6 Rooms in Blery Cottage free of rent also to furnish all cord wood required between dates mentioned. Company also agrees to employ McGuire's Son (U. McG.) as Carpenter at least two (2) days a week at \$2.00 per Day between dates mentioned, he to board himself. [Signed] Old Sweet Springs Hotel Co. (R)."

It is substantially averred in the declaration, that in consideration of the agreement and promises contained in said contract, plaintiff with his said son, a minor, on September 15, 1908, did move upon the premises of defendant, and into said cottage, and then and there began the discharge of their duties under the contract, and that defendant, well knowing and understanding the terms and effect thereof, did then and there recognize, approve and ratify the same, and did then and there furnish plaintiff and his said son, the cottage, cord wood and carpenter work, pursuant thereto, and so continued until November 1, 1908, when without any fault on his part, and without cause or assigning any reason therefor, and without plaintiff's consent, it withdrew from plaintiff and his said son all carpenter work, and other work of any kind, and notified him, that it would not furnish him further work, in direct violation of the terms of said contract, and did, on November 1, 1908, withdraw all further work from him, and paid him for the time from September 15, 1908, to November 1, 1908, at the rate of \$2.50 per day for his services, and at the rate of \$2.00 per day for two days in each week for his said son, and did furnish the cottage and cord wood as aforesaid, and that he and his said son had always been ready, willing, able and desirous to continue the work, but were stopped and hindered therein by defendant,

wherefore, and for breach of the contract by defendant, plaintiff was entitled to recover from it, on the contract, for 182 working days from November 1, 1908, to June 1, 1909, on account of labor to have been performed by himself, and for 60 days, at the rate of \$2.00 per day within the same period, to have been performed by his said son. Laying his damages at \$500.00.

Defendant demurred to the declaration and to each count, which was overruled. Its pleas were non-assumpsit, and a special plea of non est factum, on which issues were joined, and the case was tried by a jury.

On the trial it was shown and admitted that the name, "Old Sweet Springs Hotel Co. (R)," was signed to the alleged contract, as the initial "R" implied, by W. D. Rockefeller, general manager, employed to operate the hotel for the season, and whose time, beginning in the spring, expired November 1, 1908; and it was proven that about September 1, 1908, Rockefeller had been notified, by the president of the defendant company, that he would not be continued in service after his term expired, and to at once close the house, discharge the labor, and prepare to settle up his accounts, and end his connection with the company.

The issues tendered on the trial were: (1) That the alleged contract was a fabrication conceived of after Rockefeller's employment ended. (2) That in any event, it was void and not binding on defendant, being without *express* authority; and, in so far as it purported to hire help for a period beyond Rockefeller's own employment, not within any "apparent authority" incident to his position. (3) That in any event, the alleged contract was nudum pactum, without consideration, and non-enforceable.

The following are relied on as errors calling for reversal: First, the admission of Rockefeller's deposition in evidence: Second, the refusal of the court to instruct a verdict for the defendant: Third, the giving of the only instruction asked for by plaintiff: Fourth, the refusal of the court to set aside the verdict and award defendant a new trial.

[1] The first point we think is not seriously relied on. There was objection on the trial to the reading of the deposition, which was overruled; but the objection was general, and not for want of notice suggested here. The notice as certified in the bill of exceptions does not show service of the notice on defendant, but a corrected copy from the record, since certified here on our request by the clerk of the circuit court, shows acceptance of service of the notice by local counsel for the defendant company. So this point of error will be overruled.

[2] If either of the three several issues tendered by defendant, were erroneously determined against it, it follows that the second, third and fourth errors assigned should

be sustained, and the judgment below reversed. On the first, that the contract was a fabrication, the evidence is conflicting. Actual knowledge of this fact was known only to Rockefeller and McGuire, both of whom swear that the contract was made on or about its date, September 15, 1908. Rockefeller swears, moreover, that it was made pursuant to express verbal authority, of C. C. Lewis, Jr., President of the Company, and upon a memorandum made on an envelope in the presence of Lewis, shortly before the paper was prepared, and that the contract was made on a duplicate copy book, which was left in the safe in the private office at the hotel when everything was turned over to the company. McGuire swears that he moved into the cottage, and that he and his son performed labor under the contract, and were paid according to its terms up to November 1, 1908, when he was discharged. Prior to the date of the paper, both McGuire and his son had been working under Rockefeller, at the same kind of work, for several months, by the day, and under no special contract in writing.

That any such special authority was given by Lewis, president, is flatly denied by him; he swears that while at the hotel about September 1, 1908, he notified Rockefeller to close the house, discharge the help and that his services would not be required after November 1, 1908; that he left Old Sweet Springs about September 1, 1908, it might have been a few days after the first, returning to his home in Charleston, and that the first he knew of the alleged contract, was through his father, some time during the following winter. Mr. C. C. Lewis, Sr., appointed general manager, September 30, 1908, notified Rockefeller about October 10 or 12, that he would be at the hotel on October 14; that he did go and then instructed him to close up everything. Later, on November 3, he returned, to settle up, and on inquiry of Rockefeller whether he had his accounts ready so he could settle and pay labor bills, Rockefeller replied that there was no one then employed, except Burns, the gardener, Griffith, employed regularly on the farm, and a girl he had brought with him as a family servant. He did say there was one man McGuire, whom he considered it a hardship to dismiss at that time, and on Rockefeller's suggestion, Lewis went to see McGuire, telling him that if he considered it a hardship, he could have the cottage and his fire wood free until May 1, 1909, which seemed satisfactory to McGuire, and that the existence of the alleged contract was not then hinted or suggested either by Rockefeller or McGuire, and that he never heard of such a contract until in April following, when at the Springs McGuire delivered him a letter telling him of the contract, and threatening suit. He further swears that he then inquired of McGuire whether the alleged contract had not been drawn by Rockefeller and

Marshall, his lawyer, a few days previous, when Marshall was there, and to which McGuire would make no answer.

There is considerable other evidence tending to throw suspicion on the contract. For example, McGuire wrote Lewis, Sr., February 16, 1909, making demand for a small bill for labor, which one of the workman had assigned him to pay a board bill, also requesting him to secure payment of a small bill for crating a cart for Mr. John Lewis, and saying he was badly in need, having been without anything to do all winter, with a family to support. Then on April 3, 1909, he delivered to Lewis, Sr., the letter already alluded to, evidently dictated by an attorney, notifying Lewis of his alleged contract.

A bit of evidence, which might have shed much light on the question of fabrication, in the possession of defendant, was not produced. That was the duplicate order book, containing the contract with McGuire, which Rockefeller swears he left in the defendant's safe, November 1, 1908. The fact of the existence of that book and its contents was not denied, and the book was not produced. If that book came to the possession of defendant November 1, 1908, and contained the contract with McGuire, as Rockefeller swears, and swears that Lewis, Jr., had knowledge of it, it would have been strong evidence against the defendant's theory of fabrication, at least after November 1. If, on the contrary, the contract was not in the book, it would have furnished almost convincing evidence of fabrication, besides would have convicted Rockefeller of swearing falsely, entitling his whole evidence to little, if any, credence.

The apparent silence of McGuire about the contract, for so long a time, is of course a very strong circumstance against him. But if he was resting in the belief that defendant knew of his contract, through Rockefeller, and had the evidence of it in the order book, his conduct afterwards and in writing the letters are not wholly inconsistent. He swears that when he was laid off in November he understood it was for only a short time, and, according to Griffith, he said he, Lewis, Sr., had promised him the refusal if improvements should be made. If he had a binding contract, he might have been willing to be laid off for a short time, without surrendering any rights under his contract. He swears that he applied to Putney, the bookkeeper, for work, and also to Mr. Lewis himself, pursuant to the contract. Putney is not called as a witness on the subject.

On this evidence, was the jury wholly unwarranted in finding the contract genuine and not a fabrication, according to the theory of defendant? Whatever our personal views of the evidence may be, we could not justify reversal of the judgment, on principles applicable to trials by jury, on this score.

[4] Now as to the second issue, namely,

want of *express* or *apparent* authority in Rockefeller to make the contract, voiding it. As noted, Rockefeller swore that he had the express direction of Lewis, Jr., president, to make the contract, denied by Lewis, but according to Rockefeller, fully known to him, and recorded in the duplicate order book left in the defendant's possession. There is one thing respecting Rockefeller's evidence of express authority from Lewis, which weakens it. He swears that his direction from Lewis to employ McGuire, was when the latter had another offer, and the proposal involved McGuire's moving his family from Pocahontas County to Old Sweet Springs, and in connection with proposed improvements of the property amounting to \$50,000, to be carried out under Rockefeller's direction, with McGuire as foreman, etc. These circumstances accord with the circumstances of McGuire's original employment, before his departure from Pocahontas County, and in the beginning of Rockefeller's own employment, rather than those surrounding the parties in September, after all work had been ordered stopped, and Rockefeller had been notified of his own discharge, to be effective November first. He was evidently mistaken in the circumstance of the contract. But there is the contract, made or purporting to have been made September 15, 1908, recorded in the duplicate order book of the defendant, and the participating witnesses swear that it is genuine and made at that time.

But it is said the case was not tried or rested on the theory of express authority, but, as evidenced by the only instruction to the jury asked and given on behalf of plaintiff, on the theory of apparent authority of a general manager. If there was express authority, as, upon the evidence, the jury might have found, defendant could not complain of an instruction on the theory of apparent authority, of the general manager.

Against the theory of apparent authority, it is contended, first, that section 53, chapter 53, Code 1906, constitutes a statute of limitation, not only upon the general manager, but upon the board of directors of a corporation also, employing officers and agents, except at the pleasure of the board of directors. Second, that there is no apparent or implied authority from the character of the office of general manager to employ labor or make contracts of any kind for a period beyond his own employment.

[3] The statute, section 53, chapter 53, Code 1906, provides: "The officers and agents so appointed shall hold their places during the pleasure of the board." Note the statute says "officers and agents." In *Darrah v. Ice & Storage Co.*, 50 W. Va. 419, 40 S. E. 373, the plaintiff suing was the Secretary-Treasurer, an officer of the company, and clearly within the statute. In *Munn v. Trust Co.*, 66 W. Va. 204, 66 S. E. 230, 135 Am. St. Rep. 1024, we held that a mere book-

keeper, employed to do such work as might be assigned by the officers of the bank was not *ex vi termini* an officer or agent within the meaning of this statute. If this be the law, certainly a common carpenter employed, as the contract sued on implies, to do such daily work as he might be directed, and with no authority express or implied to represent the corporation, or to come into contact with the public in its business, is not an officer or agent whom the board or its general manager might not employ for a definite period. True he might be discharged by the corporation, but not without incurrance of liability for damages sustained, as *Munn v. Trust Co.*, and cases cited, hold. If this were not law one board of directors, or its officers, could not contract for any kind of service beyond their own term of service, which would be greatly to the detriment of all kind of corporate business.

[5] But is there implied or apparent authority in a general manager to contract for such non-representative service, as carpenter work, beyond his own term of service? We think the authorities cited and relied on by counsel for defendant answer, No, if for anything unusual, extraordinary, or unnecessary, or if fraud or imposition upon the employer be shown. *Laird v. Michigan L. Co.*, 153 Mich. 52, 116 N. W. 534, 17 L. R. A. (N. S.) 177; *Camacho v. Hamilton Bank Note & Engraving Co.*, 2 App. Div. 369, 37 N. Y. Supp. 725; *Nephew v. Michigan C. R. Co.*, 128 Mich. 599-602, 87 N. W. 753; *Carney v. N. Y. Life Ins. Co.*, 162 N. Y. 453, 57 N. E. 78, 49 L. R. A. 471, 76 Am. St. Rep. 347; *Ceeder v. H. M. Loud & Sons L. Co.*, 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134; *Smith v. Co-operative Dress Ass'n*, 12 Daly (N. Y.) 304; *Boogher v. Maryland L. Ins. Co.*, 8 Mo. App. 533; *Vogel v. St. Louis Museum, etc.*, 8 Mo. App. 587; *Reupke v. Grain Co.*, 126 Iowa, 633, 102 N. W. 509. But is this rule applicable here? Here was a general agent, with admitted authority to employ and discharge all labor, make necessary improvements, and carry on generally the business of a corporation operating a hotel remotely situated from centers of population, where good mechanics are generally found. Was it any thing unusual, extraordinary, or unnecessary, that he should employ a carpenter to reside on the grounds, and work out of season in making necessary repairs, usually made at such time, and to have the property in readiness for the following season, particularly, if, as is claimed in this case, such employment was suggested or directed by the president, or other executive officer, authorized in the premises? We can not think so. The power of a general manager depends largely on the nature of the business of the corporation. 2 Thompson on Corp. section 1585. We do not think, in this case, it was anything out of the usual or ordinary that the general manager should contract for labor to make repairs for the

coming season, though extending slightly beyond the term of his own employment, even without the direction of an executive officer. With such direction there could be no doubt of it we think. 2 Thompson on Corporations, section 1581.

[6] But is the contract lacking in mutuality, and for this reason unenforceable? This point is strongly urged in a very elaborate and able brief of learned counsel. But we are of opinion, that it cannot be affirmed on authority. The contract amounted at least to a proposal by defendant to plaintiff to employ him. It was definite, certain and distinct both as to time, price and amount of service. According to the evidence plaintiff accepted this proposal, not by any formal writing, but by entering on the employment, and was paid according to the terms of the contract up to November 1, 1908. All this amounted to an acceptance of the proposal, binding him and the defendant to its entire performance, and though executory, constituted a valid contract, not void for want of the necessary element of mutuality. And if the defendant knew of the contract, and accepted service under it, and paid plaintiff pursuant thereto, as plaintiff's evidence tends to show, and as the jury may have concluded, that amounted to ratification, rendering the contract, if not in its inception, thereafter valid and binding. The acceptance by defendant could not be said to have been indefinite, conditional or uncertain. It is only when the acceptor himself has really promised nothing in return, has not made himself liable for any thing, or when the proposal is indefinite or uncertain so that acceptance results in nothing, that the rule of the authorities cited and relied on by defendant's counsel have complete application. 9 Cyc. 325; 1 Page on Contracts, sections 304, 306, and note 4; 2 Thompson on Corp. section 1585; Tucker v. Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Hoffman v. Maffoli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427. But when the proposal is certain, definite and unconditional, though the proposal be to one to perform labor, and there is like acceptance, there is no lack of mutuality, as the authorities cited and relied on we think fully show. Louisville & Nashville R. Co. v. Offutt, 99 Ky. 427, 36 S. W. 181, 59 Am. St. Rep. 467. If the conduct of plaintiff after the proposal in entering on the work amounted to acceptance, as we think it did, that proposal being certain, definite and unconditional, there was complete acceptance, and he thereby became bound to its fulfillment, and there was no lack of mutuality. We must, therefore overrule the point.

From all these considerations it follows, that the second, third and fourth points of error relied on must likewise be denied, and the judgment below affirmed.

GIBSON v. STATE. (No. 4,567.)

(Court of Appeals of Georgia. Aug. 25, 1913.
Rehearing Denied Sept. 23, 1913.)

(Syllabus by the Court.)

1. EMBEZZLEMENT (§ 11*)—PUBLIC FUNDS—EVIDENCE.

One cannot be convicted of embezzlement, when it appears that all moneys collected by him in his fiduciary capacity have been fully paid to the person, firm, corporation, or department of government to which the funds should have been paid. The case is not altered if the payments are made on the wrong account.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

2. EMBEZZLEMENT (§ 4*) — WHAT CONSTITUTES.

If A. is charged with the duty of collecting for B. accounts from C. and D., he cannot be convicted of embezzlement if he pays the entire amount collected from D. to B., even though he directs that the amount collected be applied to the credit of C.'s account, if in fact he has not collected anything from C., and the account due by C. to B. is still outstanding.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 1; Dec. Dig. § 4.*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

F. L. Gibson was convicted of embezzlement, and brings error. Reversed.

Branch & Snow, of Quitman, for plaintiff in error. Bennet, Long & Harrell, of Quitman, and Shipp & Kline, L. L. Moore, and J. A. Wilkes, Sol. Gen., all of Moultrie, for the State.

RUSSELL, J. The defendant was elected tax collector of Brooks county, to fill the unexpired term of his deceased father, who had held that office for about 14 years. At the time that he was inducted into office there was a shortage in the accounts of his deceased father of several thousand dollars, which had been collected as taxes of 1908. In 1909 the defendant collected the taxes for that year, and they were applied to settle the shortage of 1908. In the summer of 1910 the comptroller general called upon the tax collector for a settlement, but the defendant was unable to comply with this demand, because the funds had been applied as collections upon the accounts of his father for the year 1909. Various negotiations for settlement occurred between the defendant and the county officers of Brooks county and the comptroller general, and finally the grand jury of Brooks county indicted the defendant for embezzlement, and upon his trial he was convicted. There are various exceptions to rulings of the trial judge upon the admission of testimony, and complaints as to certain excerpts from his charge to the jury. We shall not consider any of these assignments of error, for the reason that we are of the opinion that the evidence fails to show the guilt of the accused, and that a new trial should have been granted upon the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

general ground that the verdict was contrary to law, because there was no evidence to support it.

[1] The single proposition upon which we base our ruling is that one cannot be shown to be guilty of embezzlement who has paid over all the money which he has collected to the person to whom it is due, even though he may have paid it upon the wrong account. The record shows that every dollar collected by this defendant was paid by him, either to the county of Brooks, if it was county tax, or to the comptroller general, if it was a state tax. It is true he directed that the money be applied to the shortage of his deceased father, in the effort to preserve the memory of that father from disgrace; but, after all, the county of Brooks and the state of Georgia received every dollar he collected, and it requires nothing more than the application of these payments to the proper account to correct the wrong, if any, done by the defendant. The Code section under which the accused was indicted declares that "any officer, servant, or other person employed in any public department, station, or office of the government of this state, or any county, town or city thereof, who shall embezzle, steal, secrete, or fraudulently take and carry away any money, paper, book, or other property or effects, shall be punished by imprisonment and labor in the penitentiary for not less than two years nor longer than seven years." Penal Code, § 184.

[2] It is somewhat strenuously insisted that, even if the conviction of the defendant was not authorized by proof of the embezzlement of \$6,395 as alleged, he is guilty because of the embezzlement of the taxes collected from Tillman and those whom he represented. We of course recognize the principle that the conviction of the defendant would have been authorized as much if there was proof that he converted a portion of the amount charged against him as if he had converted to his own use the entire amount alleged in the indictment. If the defendant had collected the taxes from Tillman and those whom he represented, and had appropriated this amount (which is less than \$200), or even \$1 of it, to his own use, he would be guilty. According to the evidence, however, Tillman did not pay any money to the defendant. It appears that the defendant was personally indebted to Tillman for an amount larger than the amount due by Tillman to the state and county for his taxes for the year 1909, and that he gave Tillman tax receipts, signed by himself as tax collector, for the amounts due for taxes by Tillman himself and by certain firms and individuals whom Tillman represented, with the understanding that he (the defendant) personally was to make good these receipts by paying the taxes of Tillman and those

whom he represented. Tillman did not pay to the defendant \$1 in money. The fact that the defendant gave Tillman receipts does not affect the right of the county or state to force Tillman to pay the taxes, for nothing is better settled than that a receipt is only prima facie evidence of payment. "Receipts for money are always only prima facie evidence of payment, and may be denied or explained by parol." Civil Code, § 5795. If the defendant had carried out his undertaking, and had furnished the money to pay Tillman's taxes, and had in fact paid them, Tillman would have been relieved from liability to the state and county. But, as the tax collector in fact received no money from Tillman, he did not appropriate any such money to his own use, and he simply failed to carry out his promise to Tillman to pay Tillman's taxes; and, since no money was paid, this is a matter between Tillman and the defendant, with which the state of Georgia and the county of Brooks are not concerned. In other words, if Tillman had paid his taxes in money, it would have been within the power of the defendant either to have forwarded this money, as was his duty, or to have appropriated it to his own use, in which latter case he would have been guilty of embezzlement. But, having received no money, the only obligation resting upon the defendant was to make good his promise to Tillman, by supplying the money with which Tillman's taxes could be paid. This he failed to do, but this does not make the offense of embezzlement.

It is very plain from the evidence that the court erred in refusing a new trial.

Judgment reversed.

GEARRELD et al. v. WOODRUFF.
(No. 4,843.)

(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

1. BAILMENT (§ 18*)—LIEN OF BAILEE—REPAIRS—RECORDING.

A failure to record a claim of lien for labor done or material furnished in repairing personal property within 10 days from the completion of the labor or the furnishing of the material is fatal to the maintenance of the lien, where possession of the property is surrendered to the bailor. *Mulkey v. Thompson*, 3 Ga. App. 522, 60 S. E. 223.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. § 18.*]

2. BAILMENT (§ 18*)—LIEN—REPAIRS—RECORDING—WAIVER.

The evidence demanded a finding that no claim of lien was recorded, and that possession of the property had been surrendered to the owner after the repairs for which the lien was claimed had been made. The evidence further demanded a finding that the defendants had waived their lien by an agreement to balance accounts from time to time with the person for whom the repairs had been made. This being so, and no claim of lien having been

recorded as required by law, the lien was lost. *Palin v. Cooke*, 125 Ga. 442, 54 S. E. 90.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. § 18.*]

3. TROVER AND CONVERSION (§ 17*)—RIGHT OF ACTION—TITLE OF PLAINTIFF.

One who holds personal property as security for a debt may maintain trover for its recovery from one who wrongfully withholds possession thereof.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 17.*]

4. PREJUDICIAL ERROR—SUFFICIENCY OF EVIDENCE.

There was no prejudicial error in the excerpts from the charge objected to, and the evidence authorized the verdict.

Error from City Court of Newnan; W. A. Post, Judge.

Action by Mrs. P. L. Woodruff against W. P. Gearreld and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Hall & Jones and T. G. Farmer, Jr., all of Newnan, for plaintiffs in error. W. G. Post, of Newnan, for defendant in error.

HILL, C. J. Judgment affirmed.

HOBBS v. TAYLOR et al. (No. 4,864.)
(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

PRINCIPAL AND SURETY (§ 156*)—ACTION—PLEA.

Suit was brought on a forthcoming bond alleged to have been executed by two named minors as principals and the defendants as sureties. The defendants pleaded that they did not sign the bond sued on as sureties for the minors, but that they did execute a forthcoming bond for one Warren as principal, and that since its execution it was altered, without their knowledge or consent, so as to make it appear that the two minors named in the petition had signed the bond by Warren as agent and next friend. The undisputed evidence established the truth of this plea. *Held*, the trial judge did not err in refusing to strike the plea over the objection that it was not alleged therein that the alteration referred to was fraudulently made, and it was not error to direct a verdict in favor of the defendants. The effect of the plea was to set up that the defendants had not executed the contract sued on, and that for this reason they were entitled to be discharged. The plea was not governed by the general rule in reference to fraudulent alteration of instruments.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 423-426; Dec. Dig. § 156.*]

Error from City Court of Dublin; J. B. Hicks, Judge.

Action by A. L. Hobbs, administrator, against W. B. Taylor and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jas. A. Thomas, of Dublin, for plaintiff in error. S. P. New, of Dublin, for defendants in error.

HILL, C. J. Judgment affirmed.

JOSEPH DRY GOODS CO. v. HOME PATTERN CO. (No. 4,752.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

SALES (§ 363*)—ACTION FOR PRICE—DIRECTION OF VERDICT—EVIDENCE.

The written contract sued on being unambiguous in its terms, and it being admitted that the defendant had not complied with the provision of the contract which authorized the defendant to return to the plaintiff and receive credit for certain patterns not sold by the defendant, and there being no facts in evidence which would excuse the noncompliance with the contract, the plaintiff was entitled to recover the full amount sued for, and there was no error in directing the jury so to find.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1064; Dec. Dig. § 363.*]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by the Home Pattern Company against the Joseph Dry Goods Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hines & Vinson, of Milledgeville, for plaintiff in error. D. S. Sanford, of Milledgeville, for defendant in error.

RUSSELL, J. Judgment affirmed.

NEWTON v. COOPER. (No. 5,024.)
(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

1. PARENT AND CHILD (§ 5*)—CONTROL OF CHILD—ABANDONMENT BY PARENT.

By abandonment of his family a father loses parental control over his minor children and the right to their services and the proceeds of their labor. Civil Code 1910, § 3021; *Southern Railway Co. v. Flemister*, 120 Ga. 524, 48 S. E. 160.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 70-73, 76, 76; Dec. Dig. § 5.*]

2. PARENT AND CHILD (§ 5*)—EARNINGS OF CHILD—RIGHTS OF MOTHER.

A mother, who has the care and custody of a minor child who has been abandoned by his father, is entitled to the services of the child and the proceeds of his labor. *Savannah Railway Co. v. Smith*, 93 Ga. 742, 21 S. E. 157; *Amos v. Atlanta Railway Co.*, 104 Ga. 809, 31 S. E. 42.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 70-73, 75, 76; Dec. Dig. § 5.*]

3. PARENT AND CHILD (§ 6*)—ACTION FOR CHILD'S EARNINGS—NECESSITIES.

Where a parent sues one who, without his consent, had employed his minor son, to recover the value of the son's services while employed by the defendant, the latter has the right to set off the value of necessities supplied by him to the minor during the employment. *Culbertson v. Alabama Construction Co.*, 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411, 9 Ann. Cas. 507.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 77-85; Dec. Dig. § 6.*]

4. PARENT AND CHILD (§ 6*) — ACTION FOR CHILD'S EARNINGS—NECESSITIES.

Applying the foregoing principles to the testimony of the plaintiff as set forth in the answer of the justice of the peace, the verdict in her favor was warranted. Under her testimony the sum recovered was less than the value of the minor's services, after deducting the amount expended by the defendant for necessities. There was no error in overruling the certiorari.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 77-85; Dec. Dig. § 6.*]

Error from Superior Court, Fayette County; Robt. T. Daniel, Judge.

Action by Mattie Cooper against Horace Newton. Judgment for plaintiff in justice's court, and from the refusal of certiorari by the superior court the defendant brings error. Affirmed.

Lester C. Dickson, of Fayetteville, for plaintiff in error. H. A. Allen, of Senoia, for defendant in error.

POTTLE, J. Judgment affirmed.

JONES v. BELLE ISLE. (No. 4,902.)
(Court of Appeals of Georgia. Sept. 16, 1913.)

(Syllabus by the Court.)

1. SUNDAY (§ 11*)—CONTRACTS—RIGHT TO ENFORCE.

A contract made on Sunday in furtherance of work of the ordinary calling of one of the contracting parties cannot be enforced by him.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 30-34; Dec. Dig. § 11.*]

2. SUNDAY (§ 15*)—CONTRACTS—RATIFICATION.

Where one, in pursuance of the work of his ordinary calling, lets to another on Sunday a conveyance which is used on that day, a subsequent promise by the user to pay for the conveyance, made on a secular day without any new consideration, will not support an action, either for the sum agreed to be paid or upon an account for the value of the hire of the conveyance.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 46; Dec. Dig. § 15.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by A. L. Belle Isle against H. T. Jones. Judgment for plaintiff, and defendant brings error. Reversed.

J. E. & L. F. McClelland and M. Herzberg, all of Atlanta, for plaintiff in error. Young H. Fraser, of Atlanta, for defendant in error.

POTTLE, J. Suit was brought to recover for the hire of automobiles. The defendant pleaded that the contract sued on was made and performed on Sunday. The evidence shows that on Saturday night, May 25, 1913, about 10 o'clock, the defendant rented an automobile from the plaintiff for the purpose of calling on some friends. The driver was told to wait, and some time after 12 o'clock the defendant ordered another machine, and

both of them were used by him for several hours on Sunday morning in riding for pleasure, or as one witness described it, in "joy riding," which seems to be a term peculiarly applicable to pleasure trips in automobiles. Several days after the ride the defendant promised to pay the plaintiff the account sued on. The plaintiff's ordinary and usual business was letting automobiles for hire. The plaintiff prevailed, and the defendant's petition for certiorari was overruled.

[1] 1. The pursuit of one's ordinary calling on Sunday, except from necessity or for charity, is a crime. Penal Code, § 416. The law will not enforce a contract, the performance of which is made penal. The crime is punished, and the criminal must likewise lose the fruits of the illegal act. *Ford v. Thomason*, 11 Ga. App. 359, 75 S. E. 269. Hence it is that the court will not enforce a contract made on Sunday in furtherance of one's ordinary business. *Calhoun v. Phillips*, 87 Ga. 482, 13 S. E. 593; *Smith v. Christian*, 6 Ga. App. 259, 64 S. E. 1002; *Dorough v. Equitable Mortgage Co.*, 118 Ga. 178, 45 S. E. 22. Generally if a contract founded upon an illegal consideration is executed, it will be left to stand. If it be executory, neither party can enforce it. *Watkins v. Nugen*, 118 Ga. 372, 45 S. E. 262. As letting automobiles for pleasure rides was a work neither of charity nor of necessity, the contract as to the automobile hired on Sunday was void ab initio.

[2] 2. If one's ordinary calling is lawful, a contract made in furtherance thereof is neither illegal nor immoral. If made on Sunday, it is unenforceable solely because the state, in the exercise of its police power, has prohibited the citizen from pursuing his usual business or calling on the Sabbath day. A contract founded upon a consideration which is neither illegal nor immoral may be subsequently ratified, even though it is unenforceable ab initio because made on a day on which the law prohibits it from being executed. Hence, if a contract of sale be made on Sunday and the property delivered to the purchaser, his retention of it after the expiration of Sunday would amount to a ratification and render him liable for the purchase price. And where a contract is made on Sunday, and the parties proceed to carry it out on a subsequent day, both will be bound. *McAuliffe v. Vaughan*, 135 Ga. 852, 70 S. E. 322, 33 L. R. A. (N. S.) 255, Ann. Cas. 1912A, 290; *Bryant v. Booze*, 55 Ga. 438. In *Meriwether v. Smith*, 44 Ga. 541, it was held that, where a contract for labor was made on Sunday and afterwards performed by the laborer on a secular day, the promisor could not set up the illegality of the contract. In that case the distinction is clearly drawn between a suit to enforce a promise or undertaking entered into on Sunday and a suit on a contract made on Sunday where the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thing to be done was afterwards performed. As was said by Judge McCay: "It would be a fraud, in one who has received the consideration of a contract on a week day, to set up the invalidity of the contract because made on Sunday. He reaffirms the contract by receiving the consideration." In *Bendross v. State*, 5 Ga. App. 175, 62 S. E. 728, this court held that a laborer could not be prosecuted for refusing to perform a contract of labor executed on Sunday; but it appeared that no affirmative action had been taken ratifying the contract on a secular day.

The consideration of the contract into which the defendant entered in the present case was neither illegal nor immoral. The services were rendered by the plaintiff. The defendant was not bound by his promise to pay made on Sunday, nor would he be held bound by the implied promise to pay arising from the acceptance of the services. It is an anomaly to speak of the ratification of an agreement which never had any legal existence as a contract. *Day v. McAllister*, 15 Gray (Mass.) 433; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230. Perhaps it is more accurate to say that, where a sale is made on Sunday, the retention of the property on a secular day will be treated as evidence of a new promise to pay, the continued use of the property being sufficient consideration for the promise, though upon principle it seems that the new promise ought to be confined to the value of the property and not to the amount contracted to be paid on Sunday. None of the cases, however, extend this rule, the soundness of which has been doubted (*Ladd v. Rogers*, 11 Allen [Mass.] 209; *Tillock v. Webb*, 56 Me. 100), to a case where the consideration has been consumed on Sunday and the status cannot be restored. The owner of the automobile knew it was illegal to let his machine on Sunday. With this knowledge he took the risk of voluntary payment by the defendant. The contract was wholly executed on Sunday; nothing remained to be done but to pay for the use of the machine. The new promise to pay was founded upon no new consideration, and there was no such obligation to pay as would support the new promise. The hirer of the automobile was engaged in an illegal act, one which is denounced by our law as a crime. The original promise to pay was made in furtherance of a crime. Therefore it could not furnish a consideration for a new promise made on a secular day. *Catlett v. M. E. Church*, 62 Ind. 365, 30 Am. Rep. 197. There is no reason why the courts should be solicitous to aid one who violates the Sunday law to reap the fruits of his illegal act. It is the declared policy of this state that no one shall pursue the work of his ordinary calling on Sunday. To allow the plaintiff to recover in this case would encourage the violation of the Sunday law. The purpose of the law

is to discourage and, as far as possible, prohibit work on the Sabbath day save that which is done of necessity or for charity.

The plaintiff had no right to let his automobile for hire, and the defendant's promise to pay amounted to nothing. Of course, as to the machine used on Saturday, he is liable to the extent of its use on that day, and to this extent the plaintiff is entitled to recover.

Judgment reversed.

IVEY v. LOUISVILLE & N. R. CO. et al. (No. 4901.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

PETITION—SUFFICIENCY—GENERAL DEMURRER.

As against a general demurrer, the petition set forth a cause of action for the recovery of the sum paid by plaintiff for transportation from Sparta to Atlanta over the defendant's railroad. As to other elements of damage, the petition set forth no cause of action. *Johnson v. Seaboard Air Line Railway*, 13 Ga. App. —, 79 S. E. 91.

Error from City Court of Sparta; R. W. Moore, Judge.

Action by Pelham Ivey against the Louisville & Nashville Railroad Company and others. Judgment for the defendants, and plaintiff brings error. Reversed.

R. H. Lewis, of Sparta, for plaintiff in error. Jos. B. & Bryan Cumming, of Augusta, and Burwell & Fleming, of Sparta, for defendants in error.

RUSSELL, J. Judgment reversed.

SALTER v. BETTISON. (No. 4930.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 197*)—REVIEW—CERTIORARI.

To entitle a plaintiff in certiorari to another trial, he must show error in the trial under review. The plaintiff in the lower court (the defendant in certiorari) foreclosed a mortgage, and the defendant interposed an affidavit of illegality, based solely upon the ground that the property upon which the levy was made was homestead property and exempt from the debt for which the mortgage was given. The mortgage contained a waiver of homestead, and the record does not disclose any evidence tending to show that the nature of the exemption conferred by the homestead was such as to defeat the lien of the mortgage. The property having been found subject in the justice's court, the burden was upon the plaintiff in certiorari to show some legal reason why this judgment was erroneous. Having failed to show error in the judgment, the certiorari should have been overruled.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 768-771; Dec. Dig. § 197.*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

Action by T. W. Salter against W. H. Betison. Judgment for plaintiff. From the sustaining of a certiorari in the superior court, plaintiff brings error. Reversed.

W. V. Custer, of Bainbridge, for plaintiff in error.

RUSSELL, J. Judgment reversed.

HERRING v. FIRST NAT. BANK OF VIENNA. (No. 4,925.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 330*)—ASSIGNMENTS (§ 34*)—BONA FIDE HOLDER OF NOTE—NECESSITY OF INDORSEMENT.

To enable the holder of a promissory note payable to another to assert successfully the rights of a bona fide purchaser for value, it must appear that the payee formally indorsed or assigned it in writing to the holder before its maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-804; Dec. Dig. § 330; *Assignments, Cent. Dig. §§ 67-71; Dec. Dig. § 34.*]

2. BILLS AND NOTES (§ 452*)—EVIDENCE (§ 432*)—PAROL DEFENSES—WANT OF CONSIDERATION.

The consideration of a promissory note is always a proper subject of inquiry, and the answer of the defendant in this case was not demurrable upon the ground that his counterclaim antedated the note which was the basis of the action. The case is clearly distinguishable from that of *Turner v. Pearson*, 93 Ga. 515, 21 S. E. 104, and similar cases.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1303, 1352-1364, 1367-1376; Dec. Dig. § 452; *Evidence, Cent. Dig. §§ 1981-1989; Dec. Dig. § 432.*]

Error from City Court of Vienna; W. H. Lasseter, Judge.

Action by the First National Bank of Vienna against T. L. Herring. Judgment for plaintiff, and defendant brings error. Reversed.

Jere M. Moore, of Montezuma, for plaintiff in error. Watts Powell, of Vienna, for defendant in error.

RUSSELL, J. The suit was upon two promissory notes signed by the plaintiff in error. The notes were payable to the Vienna Cotton Oil Company, and were not indorsed or assigned in writing. The petition was filed in the name of the Vienna Cotton Oil Company, for the use of the First National Bank of Vienna, and alleged an indebtedness on the part of the defendant of \$881.70, besides interest and attorney's fees. On motion of the plaintiff the petition was amended by striking the words "Vienna Cotton Oil Company for the use of," and thus the case

proceeded, with the First National Bank of Vienna as plaintiff, suing for its own use. The court struck the answer of the defendant, and, upon the petition as amended, rendered judgment against the defendant for the full amount set forth in the petition. The motion to amend the plaintiff's petition was made in response to a motion on the part of the defendant to strike the petition.

[1] We think the trial judge erred in rendering judgment against the defendant, for there was no evidence which authorized the plaintiff to recover. The statement in the petition that the plaintiff "was the owner in due course of business of said note before maturity" is a mere conclusion of the pleader, and is wholly unsupported by anything in the record. The notes themselves were not negotiable without indorsement, for payment was stipulated to be made to the Vienna Cotton Oil Company. "Unless a promissory note is made payable to bearer, it is not proprio vigore negotiable in the strict legal sense; it is wanting in the final requisite which imparts to it the quality of negotiability, viz., indorsement. By this act alone can it become negotiable, and therefore it follows that he who receives it before indorsement does not take it as negotiable paper; and not being thus negotiable, he takes subject to the equities between the parties." *Benson v. Abbott*, 95 Ga. 75, 76, 22 S. E. 129. Furthermore, the interest of the oil company in the note, and its title thereto, could not be passed except in writing. "Where a note, draft, or check is made payable to order, the indorsement of the payee is necessary to transfer the legal title to another. Without such indorsement, the transferee takes the paper as a mere chose in action, and to recover upon it must aver and prove the consideration." *Farris v. Wells*, 68 Ga. 604. There being no averment in the petition in the present case as to what was the consideration, and no proof that there was any consideration by reason of which the title of the oil company to the note passed to the bank, the bank was not entitled to recover against the defendant, even though the oil company might have been able to do so.

It is no defense to an action on a note brought by the holder of the legal title to the note, that he has no pecuniary interest in the suit; but the holder of a note payable to another, which has not been indorsed or assigned in writing, cannot bring an action thereon in his own name, but must necessarily use the name of the holder of the legal title, as suing for his use. See *Hartford Insurance Company v. Amos*, 98 Ga. 534, 25 S. E. 575, in which it was held that a demurrer to an action brought upon a policy of fire insurance by a person other than the one to whom the policy was issued should have been sustained, though the declaration alleged that the latter had "for a valuable consideration transferred and assigned and

delivered said policy of insurance to the petitioner." Under our Code (Civil Code, § 3653) all choses in action are assignable; but, as held by the Supreme Court in construing this section of the Code, the assignment must be in writing. *Hartford Insurance Company v. Amos*, supra; *Turk v. Cook*, 63 Ga. 681; *Daniel v. Tarver*, 70 Ga. 206; *Hatcher v. Bank*, 79 Ga. 547, 5 S. E. 111; *Riley v. Hicks*, 81 Ga. 272, 7 S. E. 173; *First National Bank v. Hartman Steel Co.*, 87 Ga. 438, 13 S. E. 586. Even after the court had erroneously overruled the defendant's motion to strike the petition as amended, the plaintiff in this case was certainly not entitled to recover, in the absence of proof that the transfer was upon consideration.

[2] 2. In view of the fact that it is only as to a bona fide purchaser before maturity that the maker of a note is precluded from setting up equities, the court erred in striking the defendant's answer. In the state of the pleadings there was nothing to show that the plaintiff bank was a bona fide purchaser before maturity of the notes in question; and for this reason the defendant was not precluded from showing (as he averred in his plea to be the case) that the consideration of the notes had partially failed.

Judgment reversed.

WATTERS v. SOUTHERN FIXTURE & CABINET CO. (No. 4,764.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 192*)—DISCHARGE BY SECURITY—EFFECT.

Where property which has been attached has been replevied, the attachment is dissolved, the bond is substituted for the property, "and the case stands as if it had been founded on ordinary principles." *Thompson v. Wright*, 22 Ga. 613; *Camp v. Cahn*, 53 Ga. 558; *Walter v. Kierstead*, 74 Ga. 18 (5a); *Woodbridge v. Drought*, 118 Ga. 871, 45 S. E. 268.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 637-639; Dec. Dig. § 192.*]

2. ATTACHMENT (§ 339*)—LIABILITIES ON BOND—BOND FOR RELEASE—JUDGMENT.

Where an attachment has been dissolved by the giving of a replevy bond, and on the trial a general verdict is returned in favor of the plaintiff for the amount of his claim, it is lawful for the plaintiff to take judgment against the defendant and his securities upon the replevy bond. Civ. Code 1910, § 5113.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1223-1232; Dec. Dig. § 339.*]

3. MOTION TO SET ASIDE JUDGMENT—DENIAL.

The court did not err in overruling the motion to set aside the judgment.

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by the Southern Fixture & Cabinet Company against A. W. Watters. Judgment for plaintiff, and defendant brings error. Affirmed.

Eubanks & Mebane, of Rome, for plaintiff in error. Sharp & Sharp, of Rome, for defendant in error.

RUSSELL, J. Judgment affirmed.

CARPENTER v. FIRST NAT. BANK OF SANDERSVILLE. (Nos. 4,946-4,950.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 267*)—EXCEPTIONS TO FINAL JUDGMENT—NECESSITY.

Suit was brought on a promissory note. The bill of exceptions recites that the court passed "an order refusing an amendment to an original plea filed by the defendant, and, on demurrer, struck the plea and amended plea and entered judgment for the plaintiff." The only assignment of error in the bill of exceptions is in the following language: "To the action of the court in refusing the amendment to the original answer the plaintiff in error excepted, and now excepts and assigns the same as error, on the ground that the same was contrary to law." *Held*, that the writ of error in each case must be dismissed. To confer jurisdiction upon this court, it was essential that error be assigned upon the final judgment. The judgment refusing to allow the amendment to the defendant's plea was not a final judgment; nor would a judgment allowing the amendment have effected a final disposition of the case. A mere specification of a final judgment is not sufficient. There must be at least a general assignment of error on the final judgment; else this court is without jurisdiction to determine any interlocutory ruling made during the progress of the trial. The question of practice is controlled by the decision of the Supreme Court in *Lyndon v. Georgia Ry. & Electric Co.*, 129 Ga. 353, 58 S. E. 1047. See, also, *McCrane v. Shipp*, 10 Ga. App. 544, 73 S. E. 701; *Simmons v. Peagler*, 7 Ga. App. 252, 66 S. E. 629; *Whidden v. Merry*, 8 Ga. App. 564, 69 S. E. 1085; *Neal-Blum Co. v. Zeigler*, 11 Ga. App. 273, 75 S. E. 142; *Mertins v. Pritchard*, 135 Ga. 643, 70 S. E. 328, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1447, 1460, 1572-1578, 1581; Dec. Dig. § 267.*]

Error from City Court of Louisville; W. L. Phillips, Judge.

Separate actions by the First National Bank of Sandersville against G. L. Carpenter, J. T. O'Neal, C. W. Churchill, J. O. Kelly, and J. W. Pilcher. Judgments for the plaintiff, and defendants bring error. Writs of error dismissed.

R. N. Hardeman, of Louisville, for plaintiffs in error. Gross & Swint and Evans & Evans, all of Sandersville, for defendant in error.

RUSSELL, J. Writs of error dismissed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

McCLENDON v. TEMPLE COTTON OIL CO. (No. 4,883.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 753*)—ASSIGNMENTS OF ERROR—NECESSITY.

There being no assignment of error in the bill of exceptions upon any ruling or judgment, no question is presented for the decision of this court, and the writ of error must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086-3089; Dec. Dig. § 753.*]

Error from City Court of Carrollton; James Beall, Judge.

Action between Green McCleendon and the Temple Cotton Oil Company. Judgment for the Temple Cotton Oil Company, and McCleendon brings error. Writ of error dismissed.

J. O. Newell, of Carrollton, for plaintiff in error. Griffith & Matthews, of Buchanan, and C. E. Roop, of Carrollton, for defendant in error.

RUSSELL, J. Writ of error dismissed.

SEABOARD AIR LINE RY. CO. v. LINDSEY. (No. 5,041.)

(Court of Appeals of Georgia. Sept. 17, 1913. On Motion for Rehearing, Sept. 23, 1913.)

(Syllabus by the Court.)

CARRIERS (§ 359*)—APPEAL AND ERROR (§ 1003*)—EJECTION OF PASSENGER—DISOBEDIENCE OF RULES—VERDICT OF JURY.

The plaintiff was a passenger on one of the defendant's trains. According to his testimony, he entered one of the coaches, where several persons were smoking, and lit a cigarette. There were one or two female passengers on the train, and the conductor requested the plaintiff to cease smoking. The plaintiff agreed to comply with the request, provided the conductor would compel others in the car to desist from smoking. The conductor failed to compel the others to desist, and used towards the plaintiff harsh and insulting language, and, upon the plaintiff's refusal to stop smoking, stopped the train and ejected him therefrom. The jury were authorized to accept the plaintiff's version of the transaction, and under it the verdict in his favor for \$100 was authorized. Under the plaintiff's testimony, the conductor was not in good faith endeavoring to enforce a reasonable regulation of the company; and if others were permitted to smoke on the car the plaintiff had a right to assume that the conductor was attempting to impose upon him an unwarranted restriction on account of personal grievance directed solely against him, which he had done nothing to provoke. The testimony in the company's behalf makes a different case; but the jury declined to accept its explanation of the occurrence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1439-1442; Dec. Dig. § 359.* Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by C. B. Lindsey against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed, and motion for rehearing denied.

W. G. Loving, of Atlanta, for plaintiff in error. Alonzo Field, of Atlanta, for defendant in error.

POTTLE, J. Judgment affirmed.

On Motion for Rehearing.

Counsel for the plaintiff in error insists that this court misapprehended the evidence, and that the jury were not warranted in finding that persons other than the plaintiff were permitted by the conductor to smoke in the car. Apparently the preponderance of the evidence is with the defendant; but, under the law, this court has no power to pass upon disputed questions of fact. From its organization until the present time it has consistently held that, if there is any evidence, no matter how slight, to authorize the verdict, this court cannot interfere, unless some material error of law has been committed. It is true that in the present case some of the witnesses introduced by the plaintiff himself did not corroborate his version of the transaction; but this was solely a question for the jury. The plaintiff testified that other persons were permitted by the conductor to smoke, and, under his testimony as a whole, the inference was warranted that the conductor was not attempting to enforce a regulation of the company impartially, but was imposing an unwarranted restriction upon the plaintiff alone. This may not be the truth; but the jury by their verdict say that it is; and this issue of fact is thus foreclosed so far as this court is concerned. This conflict in the testimony clearly distinguishes the case from that of *Central of Georgia Ry. Co. v. Motes*, 117 Ga. 923, 43 S. E. 990, 62 L. R. A. 507, 97 Am. St. Rep. 223, relied on by counsel for the plaintiff in error.

Rehearing denied.

DURHAM v. PAGE. (No. 4,868.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 534*)—WRIT OF ERROR—BILL OF EXCEPTIONS—RECORD—PETITION FOR CERTIORARI.

Where a bill of exceptions complains of the refusal of the judge of the superior court to sanction a petition for certiorari, and the petition is not set forth in the bill of exceptions, nor attached thereto as an exhibit, but is specified and sent up as a part of the record, no question is presented for decision by this court, and the writ of error must be dismissed. Where the judge of the superior court refuses to sanction the certiorari, the petition does not become a part of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the record, and cannot be brought to this court as such. A petition for certiorari if not sanctioned, is not a part of the record. *Taylor v. Town of Omega*, 12 Ga. App. 698, 78 S. E. 144, and citations.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2397, 2398; Dec. Dig. § 534.*]

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action between C. M. Durham and George J. Page. From a refusal to sanction a petition for certiorari, Durham brings error. Writ of error dismissed.

J. A. McDuff, of Lavonia, and Moore & Pomeroy, of Atlanta, for plaintiff in error. Skelton & Skelton, of Hartwell, for defendant in error.

RUSSELL, J. Writ of error dismissed.

BROOKE v. GEORGIA PERUVIAN OCHRE CO. (No. 4,739.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS—PARTY NOT ENTITLED TO RELIEF.

The permission granted by the defendant to the plaintiff to use a portion of the defendant's land for agricultural purposes was subsequent to the delivery of the unconditional warranty deed by the plaintiff conveying the same premises to the defendant; and, so far as appears from the record, this permission was given without consideration. A verdict in favor of the defendant was therefore demanded, and errors in the charge, if any, were immaterial. No material errors were committed upon the admission of testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068;* Trial, Cent. Dig. § 525.]

Error from City Court of Cartersville; A. M. Foute, Judge.

Action by George W. Brooke against the Georgia Peruvian Ochre Company. Judgment for the defendant, and plaintiff brings error. Affirmed.

Finley & Henson, of Cartersville, for plaintiff in error. Neel & Neel, of Cartersville, for defendant in error.

RUSSELL, J. Judgment affirmed.

RICHARDSON v. MALLORY. (No. 4,938.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(*Syllabus by the Court.*)

1. LOGS AND LOGGING (§ 28*)—LIEN OF SAWMILL PROPRIETOR—VALIDITY.

The lien of a sawmill man, provided for in section 3356 of the Civil Code of 1910, must be asserted in the manner prescribed in section 3354. It follows that, where possession of the property upon which the lien is claimed has been surrendered to the debtor, the lien is lost, unless the claim of lien is recorded in the of-

fice of the clerk of the superior court of the county where the owner of the property resides within 10 days after the work is done or the material is furnished.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 72-74; Dec. Dig. § 28.*]

2. NEW TRIAL (§ 81*)—GROUNDS—WAIVER.

Where, in the trial of the issue arising upon the foreclosure of such a lien and a counter affidavit filed thereto, it appears from the evidence that possession of the property upon which the lien is claimed was surrendered to the debtor before the lien was foreclosed, and the evidence fails to disclose that the claim of lien was recorded as required by law, a verdict in favor of the lien is without evidence to support it; and it is error to overrule a ground of the motion for a new trial specifically raising this point, although at the trial there was no motion raising the point that the failure of the plaintiff to record his claim of lien operated to defeat the lien.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 131; Dec. Dig. § 81.*]

Error from City Court of Madison; K. S. Anderson, Judge.

Action by T. A. Mallory against R. A. Richardson. Judgment for plaintiff, and defendant brings error. Reversed.

F. C. Foster, of Madison, for plaintiff in error. Williford & Lambert, of Madison, for defendant in error.

RUSSELL, J. Judgment reversed.

J. K. ORR SHOE CO. v. UPSHAW & POWLEDGE. (No. 4,964.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(*Syllabus by the Court.*)

1. BANKRUPTCY (§ 363*)—ALLOWANCE OF CLAIM—EFFECT AS BAR.

The fact that a claim for the unpaid price of goods sold on credit is proved and allowed in bankruptcy is no bar to a subsequent action by the creditor against the debtor to recover the balance due for the goods, where it is alleged they were obtained by false representations made by the debtor to induce the sale. *Friend v. Talcott* (U. S. Supreme Court, April, 1913) 30 Am. Bankr. Rep. 81, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 550-554; Dec. Dig. § 363.*]

2. BANKRUPTCY (§ 426*)—DISCHARGE—EFFECT—FRAUDULENT REPRESENTATIONS.

A discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or false representations. *Atlanta Skirt Mfg. Co. v. Jacobs*, 8 Ga. App. 299, 68 S. E. 1077.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 787, 791-807; Dec. Dig. § 426.*]

3. BANKRUPTCY (§ 363*)—ACCEPTANCE OF DIVIDEND—WAIVER OF FRAUD.

This was a suit upon an account, to which the defendants pleaded a discharge in bankruptcy. It was conceded that the plaintiff had proved its debt in a court of bankruptcy and received a dividend in the bankruptcy proceedings. The plaintiff offered evidence to prove that credit was extended to the defendants because of certain false representations made to it by the defendants at the time of the sale. *Held*, that the trial judge erred (1) in exclud-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing this testimony; (2) in holding that the plaintiff, "having chosen to enter the bankrupt court and take its place with other creditors, and having received a dividend, waived any fraud in the purchase of these goods, and stood on the contract, and thus made the debt one provable in the bankrupt court, against which the discharge in bankruptcy is a complete bar;" and in directing a verdict for the defendants accordingly.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. § 363.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the J. K. Orr Shoe Company against Upshaw & Powledge. Judgment for defendants on directed verdict, and plaintiff brings error. Reversed.

Hendrix & Silverman and Mayson & Johnson, all of Atlanta, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, for defendants in error.

HILL, C. J. Judgment reversed.

ALLISON v. MORGAN et al. (No. 5,017.)
(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 627*)—BILL OF EXCEPTIONS—FILING—DISMISSAL.

To give this court jurisdiction, the bill of exceptions must be filed in the clerk's office within 15 days from the date of the trial judge's certificate thereto. Here the certificate is dated May 22d, and the clerk's entry shows that the bill of exceptions was filed in his office June 7th. Civil Code 1910, § 6167; Foote & Davies Co. v. Evans, 10 Ga. App. 194, 72 S. E. 1098, and citations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.*]

Error from City Court of Jefferson; G. A. Johns, Judge.

Action between B. H. Allison and D. D. Morgan and others. From the judgment, Allison brings error. Writ of error dismissed.

P. Cooley and Ray & Ray, all of Jefferson, for plaintiff in error. J. A. B. Mahaffey, of Jefferson, for defendants in error.

HILL, C. J. Writ of error dismissed.

SOUTHERN RY. CO. v. JOHNSON.
(No. 4,852.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1001*)—JUDGMENT—EVIDENCE.

This being an action against a railway company for the killing of a cow, and the evidence not being such as to demand a finding that the presumption of negligence arising against the railway company had been rebutted, the judgment overruling the certiorari sued out by the defendant company will not be disturbed.

Western & Atlantic Railroad Co. v. Clark, 1 Ga. App. 235, 57 S. E. 916.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by J. E. Johnson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Battle & Hollis and W. G. Love, all of Columbus, for plaintiff in error. S. M. Davis and Ed Wohlwender, both of Columbus, for defendant in error.

RUSSELL, J. Judgment affirmed.

PINE BELT LUMBER CO. v. MORRISON & HARVEY. (No. 5,008.)

(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

1. PAYMENT (§ 85*)—MISTAKE—RIGHT TO RECOVER.

Under the evidence introduced in behalf of the defendants, they were entitled to set off against the plaintiff's demand money paid by mistake; it appearing that the mistake could be corrected without injustice to the plaintiff.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272-281; Dec. Dig. § 85.*]

2. PAYMENT (§ 89*)—MISTAKE—EVIDENCE.

The evidence authorized the verdict, and no error of law was committed.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 291-296; Dec. Dig. § 89.*]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by the Pine Belt Lumber Company against Morrison & Harvey. Judgment for the defendants, and plaintiff brings error. Affirmed.

W. D. Bule, of Nashville, for plaintiff in error. Whitaker & Dukes, of Valdosta, for defendants in error.

POTTLE, J. The Pine Belt Lumber Company sued Morrison & Harvey on an account for \$182.43. The defendants admitted the indebtedness, but pleaded that by mistake they had paid the plaintiff \$242.26, and prayed to recover the difference between the two amounts. The jury returned a verdict in favor of the defendants for \$59.83. The plaintiff's motion for a new trial was overruled.

[1] 1. From the evidence it appears that the plaintiff sold a car of lumber to the Pannabaker Lumber Company, and by agreement drew on that company for \$175, and the draft was paid. At this time the plaintiff was indebted to the Pannabaker Lumber Company, and this indebtedness and the draft made up the purchase price of the car of lumber. The Pannabaker Lumber Company credited the plaintiff with the amount of the indebtedness, paid the draft,

and directed that the lumber be shipped to certain persons. When the invoice for the lumber came in, the Pannabaker Lumber Company obtained bill of lading drawn in favor of the persons to whom it directed that the shipment be made, and attached the bill of lading to a note payable to a bank for \$242, and obtained from the bank the amount for which the lumber had been sold. After this transaction the Pannabaker Lumber Company, being in failing circumstances, desired to close out its business. It held out several orders for lumber, besides the one from plaintiff. Morrison & Harvey agreed to take over certain of these orders, pay the Pannabaker Lumber Company, and resell the lumber to the best advantage. They paid for the car sold by the plaintiff to the Pannabaker Lumber Company by assuming and paying after maturity the note which that company had executed to the bank. When the defendants took over the order on the plaintiff for the car of lumber, they credited the plaintiff on their books with the price of the car merely for convenience in keeping trace of the shipment, intending to charge it back when the bank was paid. During the absence of their bookkeeper, one of the defendants saw the account on the books and mailed the plaintiff a check for \$242.66 by mistake, overlooking the fact that they owed the bank, and not the plaintiff. A short time after the defendants bought the car of lumber from the Pannabaker Lumber Company the plaintiff wrote defendants, requesting a remittance for a balance due by the Pannabaker Lumber Company. Defendants replied that they had nothing to do with the Pannabaker Lumber Company, and were not responsible for their accounts.

Under this evidence it is clear that the verdict in favor of the defendants was authorized. Money paid under a mistake of fact, or in ignorance of facts, may be recovered back, if the circumstances are such that the party receiving ought not in equity and good conscience to retain it. *Camp v. Phillips*, 49 Ga. 456. Certainly there is nothing in the evidence which would render it inequitable for the defendants to recover this money. The plaintiff has lost nothing by the payment of the money, and will be in no worse position after the mistake is corrected than it was before. One of the witnesses testified that, if it had not been misled by the payment, the plaintiff might have collected its indebtedness from the Pannabaker Lumber Company. But, according to evidence which the jury had a right to believe, the Pannabaker Lumber Company did not owe the plaintiff any money at the time the defendants paid it the \$242.66 by mistake. Besides, shortly after the sale of the lumber, and before the mistake in payment was made, the defendants

distinctly notified the plaintiff that they were not responsible for the debts of the Pannabaker Lumber Company. From their making the payment, the plaintiff would have had a right to assume that the defendants had agreed to pay this particular debt, were it not for the fact that the plaintiff had already been paid for this car of lumber by the Pannabaker Lumber Company. At least the jury could so find. Under the evidence for the defendants, the plainest principles of justice would require the money to be paid back.

[2] 2. There was no error in admitting evidence tending to show that the Pannabaker Lumber Company was not indebted to the plaintiff, nor in the admission of testimony explanatory of the transactions between the defendants and the Pannabaker Lumber Company, for the purpose of showing just what connection they had with that company and how the mistake came to be made. The instructions of the court covered the principles of law applicable to the recovery of money paid by mistake, both those pertinent to the plaintiff's contentions and those applicable to the contentions of the defendants. No error of law was committed.

Judgment affirmed.

HELMLEY v. SAVANNAH OFFICE BLDG. CO. SAVANNAH OFFICE BLDG. CO. v. HELMLEY. (Nos. 4,956, 5,028.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 977*) — GRANT OF NEW TRIAL—SCOPE OF REVIEW.

This court will not disturb the first grant of a new trial, where the verdict was not demanded by the law and the evidence, though the motion was based upon a single ground; nor will it determine whether the trial court was right in granting the motion on this special ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

2. CARRIERS (§§ 280, 316*)—ELEVATOR PASSENGERS—CARE REQUIRED—PRESUMPTION OF NEGLIGENCE.

The relation between one owning and operating an elevator for passengers and those carried in it is similar to the relation between carrier and passenger which arises in the case of an ordinary common carrier of passengers. The exercise of extraordinary diligence is required in the transportation of passengers while in the elevator, and also in giving intended passengers reasonable opportunity to enter it, and if, in the operation of the elevator, an injury occurs to one who is a passenger therein, or who is entering it with the intention of becoming a passenger, on proof of the injury, a presumption of negligence arises against the owner.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117, 1261, 1262, 1283, 1285-1294; Dec. Dig. § 280, 316.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from City Court of Savannah; Davis Freeman, Judge.

Action by F. N. Helmly against the Savannah Office Building Company. Judgment for plaintiff. From the granting of a new trial, plaintiff brings error, and defendant files a cross-bill of exceptions. Affirmed.

Osborne & Lawrence, of Savannah, for plaintiff in error. Hitch & Denmark and Wm. L. Clay, all of Savannah, for defendant in error.

HILL, C. J. 1. The Savannah Office Building Company, the defendant, was the owner of a large office building, and operated an elevator in connection with the building for the benefit of its tenants and those having business in the building. The plaintiff was an employé of a tenant in this building, and while he was entering a passenger elevator, for the purpose of going to the office of his employers, he was injured by the sudden and unexpected starting of the elevator as he was in the act of entering. He sued the building company for damages for these injuries, and the jury gave him a verdict for \$7,500. The defendant made a motion for a new trial, and the trial court granted the motion on the ground that the verdict was "legally excessive," and the plaintiff assigns error on the order granting another trial. A cross-bill of exceptions filed by the defendant brings to this court for consideration the question made in the motion for a new trial as to the relation existing between the plaintiff and the defendant,—whether that relation was one of passenger and common carrier, or that of landlord and tenant; the defendant in the cross-bill insisting that the relation was that of landlord and tenant, and that the rule of ordinary diligence was applicable, and assigning error on an instruction to the jury that the relation of common carrier for hire and passenger existed between the plaintiff and the defendant, and that the defendant owed to the plaintiff the duty of extraordinary diligence, and that on proof of injury to him by the running of the elevator a presumption of negligence arose.

[1] As to the main bill of exceptions, which complains of the grant of a new trial, the case is fully controlled by the decision of the Supreme Court in *Smith v. Maddox-Rucker Co.*, 135 Ga. 151, 68 S. E. 1031, where it is held that, "where the verdict was not demanded by the law and evidence, the Supreme Court will not disturb the first grant of a new trial, though it was upon a single ground, nor will it determine whether the trial court was right in granting a motion on a special ground. This is a rule without an exception." Therefore, as to the main bill of exceptions, the judgment must be affirmed.

[2] 2. The question made in the cross-bill of exceptions, which it is necessary to decide, since there is to be another trial of the case, has never been passed upon by the Supreme

Court of this state, and there is conflict in the authorities on the subject. We have given the question a very careful consideration, and have concluded that the liability of the owner of a building who maintains in it an elevator for the use of its tenants and their customers and employes is that of a common carrier of passengers, and the rule of diligence which applies to common carriers of passengers, under the statute of this state, is applicable. The doctrine here announced is sustained by the great weight of authority, although there are some decisions of courts of last resort of the highest character which announce a contrary rule. The authorities on both sides of this question can be found in a note to the case of *Edwards v. Manufacturers' B. Co.* (Rhode Island Supreme Court) in 2 L. R. A. (N. S.) 744. It will be seen from an examination of these authorities that, except in Michigan, Rhode Island, and New York, it is held that the obligation of an owner of an elevator to passengers, or those attempting to become passengers, is the highest degree of care in protecting them, or, as required by the statute of this state as to common carriers, extraordinary care and diligence. It seems also to have been the rule announced by the United States Circuit Court of Appeals in *Mitchell v. Marker*, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33, decided by Judge Lurton, Circuit Judge (now a member of the Supreme Court of the United States). In that case it was held that passenger elevators are within the rule governing other carriers of passengers, which requires the highest degree of care, and that reasonable opportunity must be given to a passenger on entering an elevator to obtain his balance, before a rapid and sudden start of the elevator is made.

The Code of this state defines a common carrier as "one who pursues the business constantly or continuously for any period of time, or any distance of transportation," and it declares that such a carrier "is bound to use extraordinary diligence." Civil Code 1910, § 2712. In section 2714 it is declared that "a carrier of passengers is bound to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers." Unquestionably, under this definition, one who carries passengers on an elevator from floor to floor of a large office building, or of a hotel, constantly and continuously, is a carrier of passengers. No rational distinction in principle can be based on the fact that the passengers are carried vertically rather than horizontally; and it is not material as to the distance the passengers are carried. True, the passenger on an elevator pays to the owner of the elevator no fare or hire for his carriage; but payment for this service is made to the owner by his tenants, by reason of the fact that their rental is increased in proportion to the facility of the service

given to them by the owner. In other words, this increased rental is equivalent to the fare paid to railroad or street car companies. Certainly the danger to the passenger on an elevator is as great as the danger to a passenger on a railroad train or street car. Persons who are lifted by elevators are subject to great risks of life and limb. They are hoisted vertically; they have no power over the running of the elevator, and are unable, in case of the breaking of the machinery of the elevator, to help themselves. In their passage from floor to floor they are absolutely at the mercy of the owner's employé who runs the elevator. They must depend upon his skill and upon his attention to duty; and in our opinion there is no employment where the law should demand a higher degree of care and diligence than in the case of persons using and running elevators for lifting human beings from one level to another. The danger is great, and the utmost care and diligence should be required.

We conclude, therefore, that the learned trial judge correctly instructed the jury to the effect that the measure of diligence which the law required of the owner and operator of an elevator in an office building, or elsewhere, for the carrying of passengers, was that prescribed by the statute of this state for common carriers of passengers. We therefore affirm the judgment on the cross-bill of exceptions.

Judgment affirmed.

FRANKLIN v. FIELDS & CHANCE.
(No. 4,710.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 132*)—PROCEEDINGS—STATEMENT OF GROUNDS—ADMISSION OF EVIDENCE.

A ground of a motion for a new trial complaining of the admission of documentary evidence cannot be considered, when the evidence is not set forth in the ground, either literally or in substance, or attached thereto as an exhibit.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275; Dec. Dig. § 132.*]

2. EVIDENCE (§§ 157, 419*)—PAROL—CONSIDERATION—NOTE.

Where, in a suit upon a promissory note alleged to have been given in payment of commissions for the sale of real estate, the defendant contended that he had not employed the plaintiff to sell the property, it was not error to permit the plaintiff to testify that the defendant had listed with him the property to be sold upon commission, over the objection that it did not appear whether the contract was oral or written, and that the admission of the evidence permitted an inquiry into the consideration of the note sued on.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470, 1912-1928; Dec. Dig. §§ 157, 419.*]

3. APPEAL AND ERROR (§ 979*)—REVIEW—DISCRETION OF TRIAL COURT—MOTION FOR NEW TRIAL.

The evidence was directly conflicting upon the issues made by the pleadings, and a verdict for either party would have been authorized; consequently the discretion of the trial court in overruling the motion for a new trial will not be controlled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

Error from City Court of Statesboro; H. B. Strange, Judge.

Action by Fields & Chance against John Franklin. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. J. E. Anderson, of Statesboro, for plaintiff in error. Fred T. Lanier, of Statesboro, for defendants in error.

RUSSELL, J. Judgment affirmed.

GLASS v. LOWRY NAT. BANK.
(No. 4,793.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

BILLS AND NOTES (§ 537*)—EVIDENCE—DEFENSE.

There being no evidence offered in support of the defendant's plea that the note sued on was without consideration, it was immaterial whether the plaintiff's purchase of the note was before or after maturity, and for this reason the court did not err in directing a verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Lowry National Bank against S. C. Glass. Judgment for plaintiff, and defendant brings error. Affirmed.

T. C. Battle, of Atlanta, for plaintiff in error. Tindall & Silverman, of Atlanta, for defendant in error.

RUSSELL, J. Judgment affirmed.

FRANKLIN v. FORD. (No. 4,778.)
(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. CONTINUANCE (§ 46*)—GROUNDS—SUFFICIENCY OF SHOWING.

The trial judge did not abuse his discretion in overruling the motion for continuance based on the absence of the defendant and his alleged sickness. This ground of the motion was supported only by the unsworn statement of one who was alleged to be a physician. There was no evidence that the certificate was made by a physician. It also appeared from the record that, if the defendant had been present at the trial, the result would not have been different, as no meritorious defense was set up. *Handley v. Bank*, 10 Ga. App. 383, 73 S. E. 413.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 132-140; Dec. Dig. § 46.*]

2. BASTARDS (§ 17*)—CONTRACTS—VALIDITY.

An agreement made by the reputed father of a bastard child with the mother of the child that he will pay her \$5 a month, on the 20th day of each month, until the expiration of 10 years, for the support of the child, is founded on a good consideration, and is valid. *Hays v. McFarlan*, 32 Ga. 699, 703, 79 Am. Dec. 317.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 24-27; Dec. Dig. § 17.*]

3. ACTION (§ 53*)—SPLITTING CAUSE OF ACTION—CONTRACT TO SUPPORT BASTARD.

The mother with whom such a contract has been made has a legal right to sue monthly the putative father, or she can wait until the expiration of the 10 years, and sue him for the entire amount covered by the contract.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 549-551, 553-623; Dec. Dig. § 53.*]

4. BASTARDS (§ 17*)—CONTRACTS—RIGHT OF ACTION—PARTIES.

The contract being with the mother, and obligating the putative father to pay her so much a month for the support of the child, the mother, and not the child, has a right to sue on the contract.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 24-27; Dec. Dig. § 17.*]

5. ATTORNEY AND CLIENT (§ 190*)—SETTLEMENT OF SUIT—SUBSEQUENT PROCEEDINGS BY ATTORNEY FOR FEES.

Where the mother employs an attorney to bring suit on the contract at the expiration of the 10 years, and he files suit thereon, the mother, after the suit has been filed, cannot legally satisfy the suit, or judgment, or decree thereon, without full satisfaction of the fees due the attorney in accordance with her contract with him for such legal services; and where she does settle the suit after it has been filed, without payment of the fees due the attorney, the attorney has a right to control the suit, and to prosecute it to a termination, for the purpose of recovering the fees due him according to the contract. *Georgia Ry. & Elec. Co. v. Crosby*, 12 Ga. App. — 78 S. E. 612.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 412-417; Dec. Dig. § 190.*]

6. ATTORNEY AND CLIENT (§ 190*)—SETTLEMENT OF SUIT—SUBSEQUENT PROCEEDINGS BY ATTORNEY FOR FEES—PLEADINGS.

In a suit to recover fees as indicated above, no change or amendment of the pleadings is necessary to perfect the attorney's right to recover. The filing of the suit by him is sufficient to put the defendant on notice as to his rights as an attorney.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 412-417; Dec. Dig. § 190.*]

7. DIRECTION OF VERDICT.

The evidence demanded the verdict as directed.

Error from City Court of Floyd County; *J. H. Reece*, Judge.

Action by C. S. Ford against G. W. Franklin, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

Denny & Wright and Graham Wright, all of Rome, for plaintiff in error. M. B. Eubanks and E. P. Treadaway, both of Rome, for defendant in error.

HILL, C. J. Judgment affirmed.

HUDGINS v. STATE (No. 4,918.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 665, 918*)—SEQUESTRATION OF WITNESSES—DISCRETION.

The enforcement of the rule requiring the sequestration of witnesses is an administrative function of the trial court, and the manner of its exercise rests largely within the discretion of the court. Failure of the court to require strict or absolute sequestration of witnesses is not ground for a new trial, unless it is manifest that there was an abuse of the discretion of the trial judge, due to the manner of its exercise.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1549-1566½, 2163-2192, 2195, 2196, 2219-2224; Dec. Dig. §§ 665, 918.*]

2. CRIMINAL LAW (§ 665*)—WITNESSES (§ 311*)—SEQUESTRATION OF WITNESSES—PROSECUTING WITNESS—CREDIBILITY.

In exercising his discretion in administering the rule which requires a trial judge to accord to either party the right of having the witnesses of the opposite party examined out of the hearing of each other, it is not error for the judge in a criminal case to permit the prosecutor to remain in the courtroom throughout the trial. If the prosecutor is called as a witness, the fact that he has heard the testimony, as well as his relation to the case and his interest therein, may be considered by the jury in passing upon the credibility of his testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1549-1566½; Dec. Dig. § 665.* *Witnesses*, Cent. Dig. §§ 1072-1075; Dec. Dig. § 311.*]

3. CRIMINAL LAW (§ 1178*)—APPEAL—ASSIGNMENT OF ERROR—ABANDONMENT—BRIEF.

Assignments of error not even referred to in the brief and argument of counsel for the plaintiff in error must be treated as having been abandoned.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

4. CRIMINAL LAW (§ 935*)—NEW TRIAL—EVIDENCE.

The evidence, though conflicting, authorized the verdict finding the accused guilty, and it was not error to refuse a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2193, 2194, 2297, 2298, 3068; Dec. Dig. § 935.*]

Error from City Court of Dublin; *J. B. Hicks*, Judge.

Will Hudgins was convicted of carrying a pistol concealed, and brings error. Affirmed.

H. P. Howard and T. E. Hightower, both of Dublin, for plaintiff in error. Geo. B. Davis, Sol., of Dublin, for the state.

RUSSELL, J. 1, 2. The defendant was convicted of carrying a pistol concealed. The complexion of the case is such that the jury would have been authorized to acquit the accused. However, inasmuch as there is evidence which authorized the conviction of the defendant, it cannot be held that the trial judge erred in overruling the motion for new trial, so far as the motion is predicated upon the ground that the verdict is contrary to the evidence and without evidence to support it.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] In reference to the special grounds: The court did not err in permitting the recall of the witness Joe Beard, to testify for the state, over the objection of the defendant's counsel, although at the beginning of the trial the defendant had asked for a strict sequestration of the witnesses, and later, after this witness had testified in chief, again requested the court to send this witness from the room during the examination of the other witnesses, if the state intended to use him again. It appears from the indictment that Joe Beard was the prosecutor. In enforcing the right accorded by section 1043 of the Penal Code to either party in a case to have the witnesses of the opposite party examined out of the hearing of each other, the judge discharges an administrative function of the court, but the manner of its exercise is necessarily addressed largely to his sound discretion. *Shaw v. State*, 102 Ga. 666, 667, 29 S. E. 477; *Keller v. State*, 102 Ga. 506 (1), 31 S. E. 92.

[2] So far as we know, the practice is almost universal for the court to permit the prosecutor, whose name appears upon the indictment, to remain in the courtroom throughout the trial, to aid the solicitor general in the conduct of the case. Of course, in passing upon the credibility of a prosecutor's testimony, if he should be a witness, the jury would take into consideration the fact that he had heard the testimony, just as they would view his testimony in the light of his interest as a prosecutor. While, as suggested by counsel for the plaintiff in error, it appears from the record that the testimony of the prosecutor, upon his second examination, referred to the testimony of the witnesses for the defendant who had testified in the interval between his first and second examinations, and sought to specifically deny what they had sworn, still this does not demonstrate that the judge had abused his discretion in permitting the prosecutor to remain in the courtroom. The jury heard his reference to the testimony of the witnesses, they knew he had heard them testify, and it was for them to say whether or not his statement to the contrary of what they had sworn, in specific denial of the previous testimony, was true or false. It is true that, even under strict enforcement of the provision of the Code as to sequestration, it

is not feasible to exclude the parties to a cause in a civil case, or, generally, the officers of the court, if they should be witnesses.

The ruling of this court in *Collins v. State*, 10 Ga. App. 34, 72 S. E. 526, cited by counsel for plaintiff in error, is in accord with what is now held. The only difference in the two cases is that in the *Collins Case* the facts implied a waiver of the right to a strict sequestration and in the present case the defendant did not waive any right and insisted upon a strict sequestration. The degree of strictness with which the rule requiring the sequestration of the witnesses should be enforced must necessarily depend largely upon the facts in each case, and it cannot be said that a judge abused his discretion in administering the rule in reference to the sequestration of witnesses, unless it is manifest that the right given by the Code was arbitrarily denied. Without regard to this, the precise matter urged by the plaintiff in error is not a proper matter for an assignment of error, for it is well settled that a violation of the orders of a trial judge to sequester the witnesses affords no reason for excluding the testimony of a witness who remained in the hearing of the court, although the jury may consider his presence within the hearing of the other witnesses in passing upon the credibility of his testimony.

[3] 3. The defendant objected to the introduction of the minutes of the September term, 1910, of the court, showing that he was at that term of the court tried and convicted of the offense of pointing a pistol, upon the ground that this evidence was irrelevant, and it would seem that this testimony was clearly objectionable, and probably was prejudicial; but for some reason the plaintiff in error abandoned this assignment of error in this court. The argument in the brief is restricted to a consideration of alleged errors of the court in the matter of the sequestration of the witnesses, and there is no reference whatever to other grounds of the motion for new trial. Consequently, under the well-settled rule, these grounds of the motion will not be considered.

[4] 4. The evidence, though conflicting, authorized the verdict finding the accused guilty, and it was not error to refuse a new trial.

Judgment affirmed.

CENTRAL OF GEORGIA RY. CO. v.
FLEMING.

FLEMING v. CENTRAL OF
GEORGIA RY. CO.
(Nos. 4,750, 4,751.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 281*)—CARRIAGE OF SICK PAS-
SENGER—LIABILITIES.

While it is the duty of a carrier of passengers, who accepts a sick passenger, to exercise due diligence in taking care of him, and to furnish all practical facilities for his safe and comfortable passage, consistent with the conduct of the carrier's business and the comfort and safety of other passengers, this measure of diligence does not require the carrier to place a sick passenger in its baggage car. It applies only to the transportation of passengers in passenger cars provided for that purpose; and refusal by a conductor of a passenger car to transport a sick passenger in a baggage car raises no liability on the part of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1093-1097, 1241; Dec. Dig. § 281.*]

2. CARRIERS (§ 281*)—CARRIAGE OF SICK PAS-
SENGER—LIABILITIES.

The fact that conductors of passenger cars had previously permitted sick passengers to be placed in the baggage car would not vary the rule as announced in the foregoing headnote, and would not give a passenger the right to be transported in the baggage car. A baggage car is a place of danger, and, either sick or well, a passenger has no right to demand that the company shall transport him as a passenger in the baggage car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1093-1097, 1241; Dec. Dig. § 281.*]

Russell, J., dissenting.

Error from City Court of Greenville; H. H. Revill, Judge.

Action by E. M. Fleming against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error, and plaintiff files cross-bill of exceptions. Reversed on main bill, and cross-bill dismissed.

Ella May Fleming, as the widow of Henry A. Fleming, sued the Central of Georgia Railway Company to recover damages for the alleged negligent homicide of her husband. The petition in substance alleges that he was suffering from appendicitis, and that it was necessary to bring him to Atlanta for an operation; that for this purpose he was taken to a station of the defendant's railway, where a ticket was purchased for him, and a demand was made upon the conductor in charge of the train that, on account of his sickness and inability to sit up, he be taken in the baggage car as a passenger to Atlanta, the baggage car being a place where he could recline upon his cot and could be more safely transported than in a passenger car. The conductor declined to receive him as a passenger in the baggage car, and directed that he be taken upon his cot into a compart-

ment of a passenger coach, called a "smoking car." In the smoking car two seats were thrown in such a way that the cot on which the sick man was being carried could be laid between the two. It is alleged that there was no place or room for his cot in the smoking car, that it was necessary to place his cot between two seats thrown together, and that this caused his body to be placed in a bowl-like position, which was uncomfortable and dangerous, and which caused the appendix to burst, and that the bursting of the appendix caused his death. There is also an allegation that, in taking the cot into the smoking compartment, one of the employees who was aiding in this service negligently dropped his end of the cot; but there is no allegation that any injury was caused by this act of negligence. On the contrary, it is distinctly affirmed in the petition that those in charge of Fleming managed the best way they could to place him in the smoking car according to the instructions of the conductor. It is also alleged that the railway company had been in the habit of transporting sick persons as passengers in the baggage car, and that this habit was so frequent as to become a custom binding upon the company. The negligence alleged against the defendant, in substance, is the refusal of the conductor to allow Fleming to be taken on the baggage car as a passenger; also that the defendant well knew his condition, and that "the failure of the defendant company to provide a safe, convenient, and comfortable place for the carrying of said Fleming caused his appendix to burst, and this caused his death."

The defendant demurred to the petition generally and specially. The court sustained some of the special grounds, overruled others, and overruled the general demurrer. To this judgment the defendant excepted. The plaintiff excepted by cross-bill of exceptions to the judgment so far as it sustained the special demurrer. The view that we take of the question raised by the main bill of exceptions will render unnecessary any discussion of the cross-bill.

Battle & Hollis, of Columbus, and McLaughlin & Jones, of Greenville, for plaintiff in error. N. F. Culpepper, of Greenville, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] The trial judge erred in not sustaining the general demurrer. The allegations of the petition were not sufficient to show a cause of action. While railroad companies are required to exercise extraordinary diligence in taking care of their passengers, and, where a passenger is manifestly sick, to furnish him all practical facilities for his safe and comfortable passage, consistent with the conduct of the carrier's business and the comfort and safety of its

*For other cases see same topic and section-NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
79 S.E.—24

other passengers, yet we do not think this rule of diligence requires a railroad company to take any person as a passenger, either sick or well, in its baggage car. Civil Code 1910, § 2718, provides that all conductors, or other employes in charge of such cars shall be required to assign all passengers to their respective cars, or compartments of cars, provided for passengers. Section 2717 provides that all railroads doing business in this state shall furnish equal accommodations, in separate cars or compartments of cars, for white and colored passengers; the section not applying to sleeping cars. Section 2719 makes any passenger guilty of a misdemeanor when he refuses to remain in the seat, car, or compartment to which he has been assigned, and clothes the conductor and any and all employes on such cars with power to eject from the train or car any passenger who refuses to remain in the car or compartment assigned to him. Penal Code 1910, § 539, provides that companies operating and using compartment cars, or separate cars, shall furnish to the passengers comfortable seats and have such cars well and sufficiently lighted and ventilated, and that a failure to do so shall be a misdemeanor. These sections of the Code impose upon the carrier of passengers specific duties. It is required that equal accommodation be furnished to all passengers, that seats shall be furnished for passengers, and that passenger cars shall be furnished for passengers. The law requires also that baggage of passengers shall be transported in a baggage car furnished for that purpose.

Now, the gravamen of the complaint in the present case is that Fleming, the passenger, was not carried in the baggage car, a car designed, not for passengers, but solely for baggage. It is well known that baggage cars are not fitted up for the reception of passengers. It has also been frequently held that passengers who ride in baggage cars assume the risk of that place. A baggage car is a known place of danger. It is placed ahead of the passenger cars, and next to or near the locomotive. Railroad companies generally, if not universally, provide in their rules and regulations that passengers shall not ride in the baggage car; and such a rule is not only reasonable, but is also one, we think, which a conductor or other employe has no authority to waive, so as to bind the company under ordinary circumstances. 4 Elliott on Railroads, § 1631. But, even in the absence of any such rule or regulation, it is manifest from the sections of the Code above cited, as well as from common knowledge, that the proper place for a passenger is in a car fitted up for that purpose, and that a baggage car is a more or less dangerous place. Mr. Beach in his work on Contributory Negligence, §§ 150, 152, goes so far as to lay down the principle that one

who rides in a baggage car is a quasi trespasser, and cannot recover as a passenger, no matter whether the injury would have been sustained or not if he had remained in his proper place. We think, therefore, that it is clear that a carrier has the right to refuse to enter into a contract which would increase the hazard of a passenger, and a passenger cannot complain of such refusal.

[2] Even if there had been a practice of conductors to take sick passengers in the baggage car, there is no evidence that it was authorized by the company. Such a practice would certainly be against the spirit of the law set out in the Code sections above quoted. A railroad company is not required by law to carry hospital cars, or cars especially for sick people to ride in. It is not required to convert a baggage car into a car especially for sick people. If it accepts a sick passenger, its duty is to place him in a passenger car in such a position as will insure, so far as possible, his safety and his comfort. Where the carrier does this, the measure of its duty has been fulfilled. We think, therefore, that the trial judge should have sustained the general demurrer and dismissed the petition. We reverse the judgment on the main bill of exceptions, and dismiss the cross-bill of exceptions.

Judgment on main bill of exceptions reversed. Cross-bill dismissed.

RUSSELL, J., dissenting.

WESTERN UNION TELEGRAPH CO. v.
CALHOUN. (No. 4,857.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. PETITION NOT DEMURRABLE.

The petition set forth a cause of action, and was not subject to the demurrers filed thereto.

2. TELEGRAPHS AND TELEPHONES (§ 78*) —
ANSWER—ADMISSIONS.

Where, in a suit against a telegraph company to recover the statutory penalty for the failure to deliver a message as provided in section 2812 of the Civil Code of 1910, the petition alleges that the message was received by the defendant company on a given date at its office in a named city and the telegraph tolls were paid to the company as required by its regulations and the laws of this state, an answer by the defendant, that for want of sufficient information these allegations can neither be admitted nor denied, must be treated as an admission of those allegations. The facts thus averred in the petition are matters as to which the company must have had knowledge, and it will not be heard to say that it did not. Nor will it be excused for its failure to ascertain the truth in reference to these matters by a statement in the answer that it has not had sufficient time since filing the petition to make the necessary investigation to ascertain the truth. The time prescribed by law within which the defendant must file its answer must be held as a matter of law to be a reasonable time within which to make the necessary in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vestigation. *Southern Bell Telephone & Telegraph Co. v. Shamos*, 12 Ga. App. 463, 77 S. E. 312.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 79-81; Dec. Dig. § 78.*]

3. TELEGRAPHS AND TELEPHONES (§ 78*)—DECISION OF VERDICT.

The defendant's acceptance of the message for delivery to the plaintiff and the failure to deliver having been shown by undisputed evidence, and all other material averments in the petition having been proved, either by evidence or by admissions in the defendant's answer, it was not erroneous to direct a verdict in the plaintiff's favor.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 79-81; Dec. Dig. § 78.*]

4. APPEAL AND ERROR (§ 1078*)—EXCEPTION—ABANDONMENT.

The exception in the motion for a new trial in reference to the admission of certain documentary evidence, not being referred to in the brief of counsel for the plaintiff in error, must be treated as having been abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from City Court of Miller County; W. I. Geer, Judge.

Action by L. E. Calhoun against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bush & Stapleton, of Colquitt, and Dorsey, Brewster, Howell & Heyman and John K. MacDonald, all of Atlanta, for plaintiff in error.

RUSSELL, J. Judgment affirmed.

WESTERN UNION TELEGRAPH CO. v. CALHOUN. (No. 4,856.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 248*)—AMENDMENT—EFFECT—TELEGRAPHS AND TELEPHONES.

Where, in a suit against a telegraph company for the recovery of the statutory penalty for the failure to deliver a message, it is alleged in the petition that the defendant maintained an office at Macon, Ga., and that the telegram referred to was delivered to the defendant company at Macon, an amendment to the petition, striking the words "City of Macon" and substituting in lieu thereof "Town of Arlington," does not set forth a new cause of action; it appearing that the allegation of both the original petition and the amendment referred to the same message, and the purpose of the amendment being merely to correct the mistake made in the original petition in reference to the office at which the message was received.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.*]

2. DECISION FOLLOWED.

All of the other questions raised in the record are controlled by the decision this day rendered in *Western Union Tel. Co. v. Calhoun* (No. 4,857) 79 S. E. 370.

Error from City Court of Miller County; W. I. Geer, Judge.

Action by L. E. Calhoun against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bush & Stapleton, of Colquitt, and Dorsey, Brewster, Howell & Heyman and John K. MacDonald, all of Atlanta, for plaintiff in error.

RUSSELL, J. Judgment affirmed.

BOWEN v. DE LOACH. (No. 5,030.)

(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

1. SALES (§ 202*)—TRANSFER OF TITLE—CASH SALE.

Where personalty is sold on cash sale, title does not pass till the purchase money is paid.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

2. SALES (§ 202*)—TRANSFER OF TITLE—PART PAYMENT.

The evidence authorized a finding that title to the personalty sued for was not to pass to the person under whom the defendant claimed until the amount of the purchase money had been paid, and that the plaintiff had received only a small part of the purchase money. The fact that the sum so received had not been returned did not operate to pass title into the purchaser, but merely gave him the right to complete the sale and obtain title by payment of the balance due. Not having done this, he acquired no title which he could transmit to a third person. The evidence did not show a conditional sale to the person under whom the defendant claimed, but showed an absolute sale for cash.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action by C. C. De Loach against L. S. Bowen. Judgment for plaintiff, and defendant brings error. Affirmed.

J. P. Dukes, of Pembroke, for plaintiff in error.

POTTLE, J. Judgment affirmed.

HATTON v. W. D. MORTON & CO.

W. D. MORTON & CO. v. HATTON.

(Nos. 4,767, 4,780.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 20*)—CONTRACT—CONSTRUCTION—WHAT LAW GOVERNS.

The contract to pay commissions for the sale of real estate, upon which the suit was brought, was made and was to be performed within the state of Georgia; and hence its validity, form, and effect is to be controlled by the law of this state.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 20.*]

2. BROKERS (§ 42*)—RIGHT TO COMMISSION—FAILURE TO REGISTER.

Under the ruling of this court in *Ford v. Thomason*, 11 Ga. App. 359, 75 S. E. 269, which was followed in *Horsley v. Woodley*, 12 Ga. App. 456, 78 S. E. 260, the plaintiff was not entitled to recover, because he had not registered as a real estate dealer, as required by law. The court did not err in directing a verdict in favor of the defendant, and in view of the affirmation of that judgment, the assignments of error in the cross-bill of exceptions will not be considered.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 43; Dec. Dig. § 42.*]

Error from City Court of Waycross; Jno. C. McDonald, Judge.

Action by R. C. Hatton against W. D. Morton & Co. Judgment for defendants on directed verdict, and plaintiff brings error, and defendants file cross-bill of exceptions. Judgment on main bill affirmed, and cross-bill dismissed.

Herbert W. Wilson and Jno. S. Walker, both of Waycross, for plaintiff in error. Wilson, Bennett & Lambdin, of Waycross, for defendants in error.

RUSSELL, J. Judgment upon the main bill of exceptions affirmed. Cross-bill of exceptions dismissed.

WYATT v. WYATT et al. (No. 4,756.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 327*)—PARTIES—SURETY ON BAIL BOND.

An action of trover was brought, and bail process issued. The defendant gave bail bond, with surety. On the trial, upon motion of the defendant, the bail process was dismissed, and the surety on the bond discharged. Thereafter the case proceeded to verdict and judgment against the defendant in trover only. The plaintiff sued out a writ of error, assigning error upon the judgment discharging the surety; but the surety was not served with the bill of exceptions. *Held*, that the writ of error must be dismissed. The surety was not a party in the court below, but he has a property right in the judgment in his favor. He is a party to the writ of error, and, as his rights are to be affected by the judgment in the Court of Appeals, he is entitled to notice and an opportunity to be heard in this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1795, 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Error from City Court of Madison; K. S. Anderson, Judge.

Action by Frances Wyatt against Martin Wyatt and others. From the judgment, plaintiff brings error. Writ of error dismissed.

Williford & Lambert, of Madison, for plaintiff in error. E. H. George and F. C. Foster, Sr., both of Madison, for defendants in error.

RUSSELL, J. Writ of error dismissed.

MOBLEY v. HARRELL (No. 4,859.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 334*)—EXCESSIVE PAYMENT BY MISTAKE—RIGHT TO RECOVER.

The allegations of the petition set forth a cause of action.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

Error from Superior Court, Grady County; Frank Park, Judge.

Action by Sam Harrell against O. L. Mobley. A judgment dismissing the petition was reversed on certiorari to the superior court, and defendant brings error. Affirmed.

R. C. Bell and J. S. Weathers, both of Cairo, for plaintiff in error. R. R. Terrell, of Whigham, for defendant in error.

HILL, C. J. Harrell sued Mobley in the city court of Whigham. Mobley demurred generally and specially, and the court sustained the demurrer and dismissed the petition, and Harrell by certiorari carried the case to the superior court, where the judgment of the city court was reversed, and the case remanded for trial. Mobley excepted to this judgment of the superior court.

The suit in the city court was for money had and received, and the allegations of the petition made the following case: On October 30, 1911, Harrell bought from Mobley a certain tract of land containing 150 acres, more or less, in the southwestern portion of lot No. 185 in the nineteenth district of Decatur county, Ga., at the fixed price of \$11 per acre of whatever the tract would measure, to be paid on or before November 1st thereafter. Harrell and Mobley acting together secured the county surveyor to survey and measure this tract for the purpose of ascertaining the exact number of acres therein. The surveyor made this survey and measurement, and reported to them that the tract contained 133.66 acres, including a 7-acre tract that there was some dispute about. Assuming that this survey and measurement was correct, Harrell paid to Mobley the sum of \$1,470.25, which was at the rate of \$11 per acre, according to the survey and measurement, and Mobley executed his deed to Harrell accordingly. Very soon thereafter Harrell received a letter from the surveyor, notifying him that, after carefully looking over his figures relating to the survey and measurement, he found that he had made a mistake of fact, that the tract of land which Harrell had bought contained only 108.19 acres, that this mistake came about by reason of his being interrupted both by Harrell and by Mobley while he was trying to figure the number of acres contained in the tract. The disputed strip of 7 acres was not surveyed, and the addition of this to the tract

which Mobley had sold to Harrell made the entire tract contain 115.19 acres, and this, at \$11 per acre, amounted to \$1,266.09. It was alleged that by reason of this mistake of the surveyor the petitioner paid to Mobley \$204.16 more than he should have paid him, and more than Mobley should have received for the land, and the suit was brought to recover this excess, with interest on the same from the time of its payment. Mobley demurred to this petition, on the general ground that it set forth no cause of action, and on the special grounds that no copy of the contract of sale or of the deed referred to was attached to the petition, and that the relief that the plaintiff sought was on account of an alleged mistake, for which the city court was without jurisdiction to give relief, the same being equitable relief, which could only be granted by the superior court. The demurrer was sustained by the trial judge, and on certiorari this judgment was reversed.

We think the judgment of the superior court, sustaining the certiorari and remanding the case for trial, was right. If the plaintiff establishes on the trial the allegations of the petition, he will be entitled to recover the money paid the defendant in excess of the agreed price for the land. The land was not sold by the tract, according to the allegations of the petition, but expressly sold by the acre at a stipulated price of \$11 per acre. The case, under the allegations, is not one where the vendor is charged with having made a fraudulent statement about the number of acres to induce the vendee to buy the land. There is no allegation that the vendee was deceived by any statement of the vendor; nor is it a case in which the vendee himself was guilty of negligence in ascertaining the facts, and, because of his own laches, would not be allowed any relief. In other words, it was not a case in which the purchaser relied upon the guaranty of the vendor as to the number of acres and was deceived, and there was no allegation of actual fraud upon the part of the vendor. If these were the facts, there could be no recovery. *King Lbr. Co. v. Cowart*, 136 Ga. 739, 72 S. E. 37. Nor is it a case where the vendee had sufficient opportunity to inspect the property and was prevented by the seller's fraud from so doing; but he voluntarily chose to rely upon the vendor's statement, without making any investigation to ascertain the truth. If this was the case, the plaintiff could not recover. *Martin v. Harwell*, 115 Ga. 156, 41 S. E. 686.

But the allegations of the petition, which are admitted to be true by the demurrer, clearly show that the excess over the stipulated price of the land was paid, not because of any fraud of the defendant or any negligence of the plaintiff, but simply through a mistake of fact, which mistake was made, not by the plaintiff or the defendant, but by the surveyor whom both had selected to

ascertain the exact number of acres, in order that the correct amount as stipulated could be arrived at. Certainly, if the plaintiff established the allegations of his petition, the money should be refunded to him by the defendant, for the money had been paid through a mistake made by the surveyor. An action for money had and received lies in all cases where money is in the hands of another which ex sequo et bono the plaintiff is entitled to recover, and which the defendant is not entitled in conscience to retain. *Bates-Farley Bank v. Dismukes*, 107 Ga. 212, 217, 33 S. E. 175, and citations. We therefore conclude that the judge of the superior court did right in sustaining the certiorari and remanding the case for a trial.

Judgment affirmed.

JARRARD v. HAWES. (No. 4781.)
(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 126*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS—STATUTORY PROVISIONS.

The evidence act of 1889 (Acts 1889, p. 85) superseded the decisions of the Supreme Court rendered prior to its passage, in which the evidence acts of 1866 (Acts 1866, p. 138) were construed. The provisions of section 5858 of the Code exclude the plaintiff, in a case in which the defendant has died, from testifying with relation to any conversation or transaction with the deceased; and there is no exception to the rule. For this reason the trial judge did not err in withdrawing, in his charge to the jury, that portion of the testimony of the plaintiff which purported to relate statements of the deceased defendant.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 551; Dec. Dig. § 126;* *Statutes*, Cent. Dig. §§ 359, 362.]

2. CONTRACTS (§ 353*)—ACTIONS FOR BREACH—INSTRUCTIONS—AMOUNT OF RECOVERY.

The plaintiff's action was based upon an entire contract, and for this reason the trial judge did not err in confining the consideration of the jury to a recovery for the plaintiff of the full amount of the contract price, in case the jury found in his favor.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 93, 1829-1844; Dec. Dig. § 353.*]

3. NEW TRIAL (§ 71*)—CONFLICTING EVIDENCE.

The evidence, though conflicting, warranted the finding in favor of the defendant, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by M. A. Jarrard against T. S. Hawes, administrator. Judgment for the defendant, and plaintiff brings error. Affirmed.

M. E. O'Neal, Albert H. Russell, and W. V. Custer, all of Bainbridge, for plaintiff in error. B. B. Bower, Jr., and T. S. Hawes, both of Bainbridge, for defendant in error.

RUSSELL, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BLALOCK v. EMPIRE LIFE INS. CO.
(No. 4,877.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 179½*)—EVIDENCE (§ 450*)—PAROL EVIDENCE—POLICY—CONSTRUCTION.

This was an action on a life insurance policy dated August 6, 1910, providing for the payment of an annual premium of \$47.73. The first annual premium was paid. On August 6, 1911, the premiums were made payable quarterly, and the insured paid a quarterly premium of \$12.65, less a dividend of 74 cents. The second quarterly premium became due on December 6, 1911 (allowing the 30 days' grace provided for in the policy). On December 22, 1911, the insured died, having failed to pay the second quarterly premium. The policy provides: "If any premiums shall not be paid when due, the company shall first apply any withdrawable surplus to pay the same, and the remainder of the premium due, if any, shall be charged against this policy as a loan, if the prospective loan value specified herein be sufficient to cover such advance, in addition to any existing liens and accrued interest; provided that, if the credits be not sufficient to cover the entire premium then due, the company shall apply the same, if sufficient, to pay the premium for a shorter period, but not less than a full quarterly premium." It is further provided in the policy that the insured may borrow the amount specified in column 2 of a table accompanying the policy, for the year in which the loan is to be taken, the contract to be assigned to the company as security, "and the premiums on the contract shall be paid in full to the end of the next policy year succeeding the day when the loan is made." In the loan table accompanying the policy and in column 2 thereof, opposite the words "2nd policy year," appear the figures \$78. The plaintiff contends that when the second quarterly premium for the second year became due, to wit, on December 6, 1911, the policy had a loan value of \$19.50, which, under the "automatically nonforfeitable" clause of the policy, should have been automatically applied by the company to the payment of the second quarterly premium, which would have carried the insurance beyond the date upon which the insured died. Held: (1) The policy is not ambiguous, and parol evidence was not admissible to explain its terms. (2) Construing the provisions in the policy relating to loans, in connection with the "automatically nonforfeitable" clause, the meaning of the policy is that at the time of the default as to the payment of the second quarterly premium by the insured the policy had no loan value which could be automatically applied to the payment of the premium due, and, under the policy, no amount was available to the insured as a loan until the end of the second year and the payment by him of a full annual premium for the third policy year.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 179½*; Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by A. L. Blalock, administrator, against the Empire Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Miller & Jones and Wallace Miller, all of Macon, for plaintiff in error. Hatcher & Smith, of Macon, for defendant in error.

RUSSELL, J. Judgment affirmed.

McARTHUR v. WILSON. (No. 4,972.)
(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. SET-OFF AND COUNTERCLAIM (§ 33*)—RIGHT TO INTERPOSE.

In this state the statutory right of set-off is restricted to demands or claims of a similar nature, and a claim arising ex contractu cannot be set off against a claim arising ex delicto. Civil Code 1910, § 5521; Geer v. Cowart, 5 Ga. App. 251, 62 S. E. 1054.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 1, 32, 54, 55; Dec. Dig. § 33.*]

2. COURTS (§ 188*)—CITY COURTS—JURISDICTION—EQUITABLE SET-OFFS.

Except as above limited, the right of set-off is a purely equitable right, cognizable only in a court of equity. Hecht v. Snook, 114 Ga. 923, 41 S. E. 74. The city courts of this state have no jurisdiction to allow equitable set-off.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 439, 440, 442, 447, 448, 451, 452, 454, 458, 464, 465, 467, 468; Dec. Dig. § 188.*]

3. SET-OFF AND COUNTERCLAIM (§ 33*)—CONTRACT AND TORT.

In a trover suit to recover possession of personal property, a plea setting up a debt claimed by the defendant against the plaintiff should not have been allowed.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 1, 32, 54, 55; Dec. Dig. § 33.*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Action by W. B. McArthur against W. C. Wilson. Judgment for defendant, and plaintiff brings error. Reversed.

Way & Burkhalter, of Reidsville, for plaintiff in error.

HILL, C. J. Judgment reversed.

ROGERS-McRORIE CO. v. ROBESON CUTLERY CO. (No. 4,935.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. SALES (§ 347*)—ACTION FOR PRICE—EVIDENCE.

This was a suit upon an account for goods sold and delivered. The defendant pleaded that the goods were never received, and that, if they were delivered to the carrier as the agent of the consignee, the plaintiff agreed to release the defendant from payment, and to look alone to the carrier for the value of the goods. The case was submitted to the judge without the intervention of a jury, and he rendered a judgment in favor of the plaintiff; the judgment being put upon the ground "that the alleged rescission is not effective to defeat the plaintiff's recovery." There was evidence from which the judge could have found that the goods sued for had been actually delivered to the defendant by the carrier at destination. It follows that a judgment in favor of the plaintiff was authorized, without reference to whether the alleged agreement of release or rescission was based upon a sufficient consideration and therefore binding upon the plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. § 347.*]

2. EVIDENCE (§ 179*)—WITNESSES (§ 255*)—BEST AND SECONDARY EVIDENCE—DUPLICATE BILL OF LADING—MEMORANDUM.

The admission in evidence of the alleged duplicate bill of lading issued by the initial carrier affords no ground for a new trial, both because it appeared that the original bill of lading was beyond the jurisdiction of the court and not accessible to the plaintiff, and because the duplicate was the highest and best evidence that could be produced. Furthermore, there was evidence of an actual delivery of the goods to the initial carrier. While the witness who testified as to the delivery of the goods to the carrier stated that his testimony was based upon a certain memorandum with which he had refreshed his recollection, it appeared, from his testimony, that he knew the memorandum was correct at the time it was made, and that it was made either by himself or under his supervision. The testimony was therefore admissible. *Lenney v. Finley*, 118 Ga. 427, 45 S. E. 317. There was no material error in any of the rulings complained of.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 595-599; Dec. Dig. § 179; *Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

Error from City Court of Baxley; D. W. Krauss, Judge.

Action by the Robeson Cutlery Company against the Rogers-McRorie Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Parker & Highsmith, of Baxley, for plaintiff in error. R. L. J. & S. J. Smith, Jr., of Commerce, and Little, Powell, Hooper & Goldstein, of Atlanta, for defendant in error.

RUSSELL, J. Judgment affirmed.

ELROD v. M. C. KISER & CO. (No. 4,799.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. ACCORD AND SATISFACTION (§ 11*)—FORM OF AGREEMENT—CHECK—CONDITION OF ACCEPTANCE.

Where a debtor sends to his creditor a check which contains a statement to the effect that it is to be applied in full settlement of all accounts and notes due by the debtor (and as to the amount of which indebtedness the parties were in dispute), the creditor's acceptance and collection of the check will operate as a full settlement and satisfaction of all accounts and notes owing the creditor by the debtor previous to that date. *Bass Dry Goods Co. v. Roberts Coal Co.*, 4 Ga. App. 520, 61 S. E. 1134; *Wilcox v. Rogers*, 13 Ga. App. —, 79 S. E. 219.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75-82; Dec. Dig. § 11.*]

2. TRIAL (§ 203*)—INSTRUCTIONS—ISSUES.

This being a suit upon a promissory note, and the only defense filed by the defendant being that of accord and satisfaction, by reason of the fact that the plaintiff had accepted and collected a check containing a condition such as that above mentioned, and there being evidence offered in support of that defense, it was error to charge the jury in substance that the defendant could not prevail unless he showed that the note sued on had been paid, and to omit to

give in charge the principle announced in the preceding headnote.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by M. C. Kiser & Co. against D. N. Elrod. Judgment for the plaintiffs, and defendant brings error. Reversed.

Skelton & Skelton, of Hartwell, for plaintiff in error. Jas. H. Skelton, of Hartwell, for defendants in error.

RUSSELL, J. Judgment reversed.

LITTLE ROCK FURNITURE CO. v.

JONES & CO. et al. (No. 5,009.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. NOVATION (§ 1*)—PRINCIPAL AND SURETY (§ 97)—DISCHARGE OF SURETY.

A change in the nature or terms of a contract is called novation. Such novation without the consent of the surety discharges him. Civil Code 1910, § 3543; *Bethune v. Dozier*, 10 Ga. 235.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 1; Dec. Dig. § 1; *Principal and Surety, Cent. Dig. §§ 146-168; Dec. Dig. § 97.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4848-4851; vol. 8, p. 7733.]

2. PRINCIPAL AND SURETY (§ 97*)—DISCHARGE OF SURETY—ALTERATION OF CONTRACT.

This rule will not be altered by the fact that the change in the contract, which was made without the knowledge or consent of the surety, nevertheless inured to the benefit of the principal and the surety. If the change is made without the knowledge or consent of the surety, the surety's complete reply is "Non hæc in fœdera veni." *Hill v. O'Neill*, 101 Ga. 832, 28 S. E. 996.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146-168; Dec. Dig. § 97.*]

3. GUARANTY (§ 53*)—DISCHARGE—CHANGE IN CONTRACT.

The above-stated rule applies to guarantors as well as to sureties; and any material alteration in the original contract, without the knowledge or consent of the guarantor thereof, would relieve him from the guaranty. *Johnson v. Brown*, 51 Ga. 498.

[Ed. Note.—For other case, see Guaranty, Cent. Dig. §§ 64, 66; Dec. Dig. § 53.*]

4. GUARANTY (§ 53*)—DISCHARGE—CHANGE IN CONTRACT.

The Little Rock Furniture Company entered into a contract with Jones & Co. to furnish to them a certain number of cots and equipment to be used at the Confederate reunion in Macon, at stipulated terms. The Georgia Life Insurance Company went on the bond of Jones & Co. to guarantee the performance of their part of the contract. Subsequently the original contract was changed in material parts, without the knowledge or consent of the guarantor. These facts appeared from the allegations of the petition. *Held*, that the judgment sustaining a demurrer filed by the insur-

ance company, setting up the novation and its consequent release, was properly sustained.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 64, 66; Dec. Dig. § 53.*]

5. APPEAL AND ERROR (§§ 205, 260*)—OBJECTION TO EXCLUSION OF PLAINTIFF'S EVIDENCE—SUFFICIENCY—NONSUIT.

The trial judge having, on objection, excluded from the evidence all the testimony introduced by the plaintiff to sustain the allegations of the petition as laid, and this judgment not having been excepted to, the award of a nonsuit was proper. The correctness of the judgment excluding the evidence, where no objection or exception was filed to that judgment, could not be brought in question by an exception to the judgment awarding a nonsuit. This being the situation, this court must assume that the exclusion of the testimony was proper; and the exclusion of the testimony left the plaintiff where it could not legally recover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282, 1503-1515; Dec. Dig. §§ 205, 260.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Little Rock Furniture Company against Jones & Co. and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jno. R. L. Smith and W. D. McNeil, both of Macon, for plaintiff in error. Miller & Jones and Robt. W. Barnes, all of Macon, for defendants in error.

HILL, C. J. Judgment affirmed.

CITY DRUG CO. v. AMERICAN SODA FOUNTAIN CO. (No. 4,861.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 95*)—PRINCIPAL AND AGENT (§ 103*)—SALE BY AGENT—APPROVAL OF PRINCIPAL.

Where an agent for the sale of personal property receives an order for its purchase, in which is a recital that the order is taken subject to the approval of his principal, no sale is completed until the principal approves the order; and where the purchase price exceeds \$50, such approval must be in writing, in order to comply with the statute of frauds. Civ. Code 1910, § 3222, par. 7. Prior to its acceptance by the principal the order is merely an offer to buy, and it does not become a complete contract of sale until it has been accepted by the principal in writing. The fact that the proposed purchaser pays to the agent to whom the order is delivered the sum of \$1 as a part of the purchase price does not dispense with the necessity for a written acceptance by the principal, in the absence of proof that the money was paid to and accepted by the principal with knowledge of the terms of the order.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 183-185; Dec. Dig. § 95.* Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.*]

2. DIRECTED VERDICT APPROVED.

The foregoing propositions control the case. The evidence demanded the verdict in favor of the plaintiff, and the court did not err in directing the jury so to find.

Error from City Court of La Grange; Frank Harwell, Judge.

Action by the American Soda Fountain Company against the City Drug Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. A. Jones, of La Grange, for plaintiff in error. Hatton Lovejoy, of La Grange, for defendant in error.

RUSSELL, J. Judgment affirmed.

BALLARD v. DANIEL et al. (No. 4,819.)
(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. CERTIORARI (§ 70*)—APPEAL—ASSIGNMENTS OF ERROR—CERTAINTY AND CLEARNESS.

There is no merit in the motion to dismiss the bill of exceptions because the assignments of error are insufficient.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 195-208; Dec. Dig. § 70.*]

2. JUSTICES OF THE PEACE (§ 202*)—REVIEW BY CERTIORARI—ASSIGNMENTS OF ERROR.

Though the allegations and assignments of error in the petition for certiorari were not very clearly or intelligibly set forth, they were not so indefinite or unintelligible as to require a dismissal of the certiorari on that ground by the judge of the superior court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 778-789; Dec. Dig. § 202.*]

Error from Superior Court, Morgan County; Jas. B. Park, Judge.

Certiorari by R. L. Ballard against C. E. Daniel and others to review a judgment of a justice of the peace. To the order of the superior court dismissing the certiorari, the petitioner brings error. Reversed.

M. C. Few, of Madison, for plaintiff in error. E. H. George, of Madison, for defendants in error.

HILL, C. J. [1] 1. This was a foreclosure of a laborer's lien. The fl. fa. issued thereon was levied upon certain property to which a claim was interposed. On the trial of the claim case in the justice's court, the justice found in favor of the claimant. The plaintiff sued out a writ of certiorari, and in the superior court the judge dismissed it, on the ground that the assignments of error complained of were insufficient and defective. When the case was called for argument in this court, a motion was made to dismiss the bill of exceptions because it failed to specify plainly the decision complained of; that "the assignments of error were insufficient in law; that the assignments of error were confused, incoherent, and unintelligible, and failed to present clearly any statement of the rulings of which it seeks to complain and the matters which transpired in the court below."

The assignments of error are as follows:

(1) That the court erred in not disposing of the traverse filed to the truth of the answer of the magistrate whose judgment was the subject-matter of the complaint; (2) that the court erred in dismissing said certiorari upon the ground that the errors complained of were insufficiently assigned, said assignment being as follows: "That the court erred in passing the order dismissing said levy and said laborer's lien upon all the grounds as therein stated, which said order is as follows: 'After argument had, after all of the evidence of the plaintiff was introduced, on motion of the claimant's attorney, it is ordered that said levy be dismissed on the grounds that the evidence fails to show that the contract of labor was completed, or that the plaintiff was forced to abandon her contract of labor, or that she had fully settled with her employer, the defendant in *fi. fa.*, with the cotton picked to the date of said levy. In open court this the 12th day of Dec., 1910. E. H. Prince, J. P.' To which errors of the court in passing said order as aforesaid on the 8th day of March, 1913, dismissing said petition for certiorari and disallowing the same, plaintiff says was error, and to said error of the court she then excepted, and now excepts and assigns the same as error upon all of the grounds as stated in the original petition for certiorari and as hereinbefore in this bill of exceptions stated fully." While the assignments of error are not very aptly or clearly stated in the bill of exceptions, we think they are sufficient to furnish all the necessary information for this court; and the motion to dismiss is therefore overruled.

[2] 2. We think that the judge of the superior court erred in dismissing the certiorari on the ground that the petition failed to set out any sufficient assignments of error, or to inform the court as to what transpired in the magistrate's court on the trial of the case. The assignments of error contained in the petition for certiorari may be briefly stated as follows: After stating the character of the case, it is alleged that the judgment was adverse to the petitioner, and being dissatisfied therewith, she (petitioner) brings her petition for certiorari within 30 days after the final determination of said case, and then proceeds plainly and distinctly to set forth what occurred on the trial of the case and the errors complained of. First, Petitioner, being plaintiff in laborer's lien, tendered issue, and issue was joined, whereupon the claimant moved the court to dismiss said lien foreclosure, upon the ground that it did not distinctly set forth that the contract had been fully performed. Whereupon petitioner offered the following amendment: "And now comes the affiant, in case of Rosa Lee Ballard v. C. F. McDonald and amends her affidavit in said matter, and for cause of amendment says: The nonperformance of

the contract to a finish was caused by breach of the contract on the part of C. F. McDonald refusing to deliver to her her part of the crops as marketing said crop, and Charlie Daniel, the claimant in said matter, to do the same"—which amendment was allowed. Evidence was then introduced by the plaintiff in support of her lien. After the conclusion of the evidence, the following order was passed by the magistrate: "After all the evidence for the plaintiff was introduced, on motion of the claimant's attorney it is ordered that said levy be dismissed, on the ground that the evidence fails to show that the contract for labor was completed, or that the plaintiff was forced to abandon her said contract of labor, or that she had fully settled with her employer, the defendant in *fi. fa.*, with the cotton picked to the date of said levy." Petitioner assigned the following errors: "That the court erred in passing the order dismissing said levy and said laborer's lien upon all of the grounds as therein stated."

The assignments of error are somewhat confused, but we think that they are sufficiently specific, and that the judge of the superior court erred in dismissing the certiorari on the ground that the assignments were not sufficiently definite and specific. We think, further, that the judge should have submitted to the jury the traverse to the answer of the magistrate, and should also have passed upon the assignments of error upon their merit. Judgment reversed.

JACKSON v. STATE. (No. 5,012.)

(Court of Appeals of Georgia. Sept. 17, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—SERVICE—CERTIFICATE OF ATTORNEY.

There is no provision of law for serving a bill of exceptions upon the opposite party by mail. The mere certificate of counsel is not proper evidence of service of a bill of exceptions. In the present case, the only evidence of service of the bill of exceptions being a statement indorsed thereon and signed by counsel for the plaintiff in error, to the effect that he had served the solicitor general "with the within bill of exceptions by mailing to him through the U. S. mail a copy of the within," the motion of the solicitor general to dismiss the writ of error must be sustained. Civ. Code 1910, § 6160; *Clark v. Lyon*, 48 Ga. 126.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834–2861, 2919; Dec. Dig. § 1092.*]

Error from Superior Court, Laurens County; K. J. Hawkin, Judge.

Lelia Jackson was convicted of selling liquor, and brings error. Dismissed.

Howard & Kea, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

RUSSELL, J. Writ of error dismissed.

CENTRAL OF GEORGIA RY. CO. v. McKEY.
(No. 4,851.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 369*)—INJURIES TO PERSONS ON TRACK—STATUTORY SIGNALS.

A railroad company, relatively to a person not upon or approaching a public crossing, is under no duty to comply with the statutory requirements as to giving signals and checking the speed of its train; and the failure to comply with such requirements is not, as to such a person, negligence for which damages may be recovered. *Atlanta & Charlotte Air Line Railway Co. v. Gravitt*, 93 Ga. 369 (4), 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1259-1262; Dec. Dig. § 369.*]

2. RAILROADS (§ 359*)—INJURIES TO PERSONS ON TRACK—DUTY OF COMPANY.

A driver of an automobile, who undertakes to cross a railroad elsewhere than at a public crossing, cannot recover for injuries to the automobile, received in consequence of a collision with a passing train, solely upon the ground that the railroad company's servants failed to comply with the statutory requirements in reference to ringing the bell or blowing the whistle and checking the speed of the train. The only duty which the railroad company owes to a person in such a situation is not to injure him or his property wantonly or willfully, and to use ordinary care to prevent such injury after the person or his property is discovered.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.*]

3. RAILROADS (§ 389*)—INJURIES TO PERSONS ON TRACK—PROXIMATE CAUSE—FAILURE TO GIVE SIGNALS.

The failure of the engineer to give the signals required by the statute when approaching a public crossing will not impose liability upon a railroad company to a person upon or near the railroad track who is fully aware of the approach of the train. In such a case failure to give the statutory warning of the approach of the train cannot be regarded as the proximate cause of an injury sustained by a person having knowledge of the approach of the train. *Central Railroad v. Brinson*, 70 Ga. 209.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1319-1323; Dec. Dig. § 389.*]

4. NEGLIGENCE (§§ 136, 141*)—COMPARATIVE NEGLIGENCE—QUESTION FOR JURY—INSTRUCTIONS.

There being evidence of mutual negligence on the part of the driver of the automobile, as well as on the part of the defendant, and the comparison of such negligence being a question for the jury, it was error to refuse a written request to charge as follows: "If you believe that the plaintiff and the defendant were both negligent, but the negligence of the plaintiff exceeded that of the defendant, or equaled it, then the plaintiff could not recover, and you should find for the defendant." *Macon Railway & Light Co. v. Carger*, 4 Ga. App. 477, 61 S. E. 882; *Brunswick & Western R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353, 382-399; Dec. Dig. §§ 136, 141.*]

5. RAILROADS (§ 400*)—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS—PROXIMATE CAUSE.

It being undisputed in the evidence that the driver of the automobile saw the ap-

proaching train at a distance of about a mile from where the collision occurred, the trial judge should have instructed the jury that the failure of the engineer to ring the bell and blow the whistle would not be such negligence as would afford the plaintiff ground for complaint.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1385-1381; Dec. Dig. § 400.*]

6. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

The charge to which exception is taken in the third ground of the amendment to the motion for a new trial was not erroneous, in view of the fact that the trial judge, in another part of the charge, instructed the jury in reference to the law of contributory negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

7. NEGLIGENCE (§ 101*)—RAILROADS (§§ 387, 389, 395, 396*)—INJURIES TO PERSONS ON TRACK—ACTIONS—BURDEN OF PROOF—COMPARATIVE NEGLIGENCE.

Where, in a suit against a railroad company for damages, it appears that injury has been sustained by the running of the defendant's trains, a presumption of negligence arises against the railroad company, and it carries the burden of proving that it exercised all ordinary and reasonable care and diligence. This may be done either by showing that the plaintiff was at fault equally with or more than the defendant, or that the injured party could by the exercise of ordinary care have avoided the consequences of the defendant's negligence, or that the injury was due to an unavoidable accident for which neither party was to blame. The railroad company may defend by proving one or more of the foregoing theories of defense. It is not bound, at all events, to prove any particular one or more than one of them; and therefore the court erred in placing the burden upon the defendant in this case of showing that the plaintiff was guilty of negligence or that the occurrence was an accident.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.* *Railroads*, Cent. Dig. §§ 1296, 1314-1316, 1319-1323, 1339, 1340, 1341-1343, 1357; Dec. Dig. §§ 387, 389, 395, 396.*]

8. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES.

The question of the width of the public highway was, under the pleadings, pertinent only for the purpose of illustrating the question whether the plaintiff's automobile stopped within the public highway or beyond the highway. The only allegation of negligence in reference to the character of the crossing maintained was that it was not so filled or elevated as to afford a safe, easy, and convenient passage for automobiles and other vehicles; hence the question of negligence of the defendant in the maintenance of the crossing should be confined to the specific act of negligence charged in the petition.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

9. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—IGNORING ISSUES.

There was evidence from which the jury could find that at the time of the collision the automobile was on the railroad at a public crossing, and that the defendant was negligent in failing to check the speed of its train before reaching the crossing. In view of the fact, however, that there was a conflict in the evidence as to the location of the automobile, the errors indicated above required the grant of a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from City Court of Forsyth; T. B. Cabaniss, Judge.

Action by T. S. McKey against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lloyd Cleveland, of Griffin, J. E. Hall, of Macon, and Willingham & Willingham, of Forsyth, for plaintiff in error. Whitaker & Dukes, of Valdosta, for defendant in error.

RUSSELL, J. Judgment reversed.

HALL v. C. J. ROEHR & CO. (No. 4,806.)
(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 93*)—DECISIONS REVIEWABLE.

"Where the only questions presented for review by this court arise upon rulings by the court below on the trial of the issue raised by special plea to the jurisdiction, which was not sustained by the verdict thereon returned, and it appears that neither a reversal of any one or more of such rulings nor a setting aside of such verdict would operate to terminate the main case, but would leave the same still pending, the writ of error is premature, and must be dismissed." *Ross v. Mercer*, 115 Ga. 353, 41 S. E. 594. See, also, *State Mutual Ass'n v. Kemp*, 115 Ga. 355, 41 S. E. 652; *Warren v. Blevins*, 94 Ga. 215, 21 S. E. 459.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 643-647; Dec. Dig. § 93.*]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by C. J. Roehr & Co. against C. O. Hall. The court made certain rulings on the trial of a special plea, which was not sustained by the verdict returned, and defendant brings error. Writ of error dismissed.

R. G. Hartsfield, of Bainbridge, for plaintiff in error. J. C. Hale, of Bainbridge, for defendant in error.

RUSSELL, J. Writ of error dismissed.

LOUISIANA RED CYPRESS CO. v.
GEORGE GILMORE & CO.
(No. 4,813.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

1. CUSTOMS AND USAGES (§ 10*)—APPLICATION—SCOPE.

Where one goes into the open market of a particular trade or business and makes a contract to purchase, he is bound by a custom universal in its character, which is applicable to that particular trade or business (the custom becoming by implication a part of the contract), unless the contract stipulates to the contrary, or, in making the purchase, the purchaser notifies the seller that the contract is made without regard to the particular custom.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 11-21, 35-39; Dec. Dig. § 10.*]

2. CUSTOMS AND USAGES (§ 21*)—SUFFICIENCY OF EVIDENCE.

The evidence in the present case was issuable as to the character and universality of the custom claimed by the plaintiff to exist in the market where the purchase was made, and as to the knowledge of the defendant of the existence of such custom, and also as to whether the contract was made irrespective of the custom.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 47; Dec. Dig. § 21.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by the Louisiana Red Cypress Company against George Gilmore & Co. Judgment for defendants, and plaintiff brings error. Reversed.

Goodwin & Wood, of Sandersville, for plaintiff in error. Evans & Evans, of Sandersville, for defendants in error.

HILL, C. J. *Gilmore & Co.*, of Warthen, Ga., inquired by letter of the Louisiana Red Cypress Company, of New Orleans, La., for prices on best cypress shingles in car load lots. In reply the Louisiana Red Cypress Company wrote, making the following quotations of prices:

"4"	Best Cypress Shingles.....	\$4 30
5"	" " " ".....	4 30
6"	" " " ".....	4 30"

On receipt of these quotations of prices *Gilmore & Co.* ordered a car load of five-inch shingles, specifying that 10,000 six-inch shingles be included in the shipment. The car of shingles was shipped to *Gilmore & Co.* and was received by them. They received from the Louisiana Red Cypress Company a bill for 168,000 shingles, covering the shipment, and they replied that they had counted the shingles, and that there were only 131,500 shingles. The Louisiana Red Cypress Company admitted that this was the correct number of pieces, and took the position that the shingles were sold on the basis of the standard shingle of four inches in width; that when shingles four inches in width are bought, the purchaser receives 1,000 pieces, which are counted as 1,000 shingles; that when he orders five-inch shingles he receives 800 pieces counted as 1,000 shingles (on the basis of four-inch shingles this being the unit and standard of counting); and that when six-inch shingles are ordered the purchaser receives 667 pieces, counted as 1,000 shingles (on the basis of four-inch shingles, as the unit of counting). *Gilmore & Co.* refused to make payment on this basis, but did pay what they understood to be due under their contract, to wit, \$374.74, the price of 131,500 shingles.

The Louisiana Red Cypress Company brought suit against them for the balance which it claimed to be due according to the custom governing the designation of shingles which prevailed in the Louisiana market (the shingles having been shipped from Louisiana), and also sued for the freight.

On the trial the evidence showed that the freight had been paid by Gilmore & Co., and the trial judge directed a verdict for them on the ground that, although there was a custom among lumbermen to count shingles on the basis of four-inch shingles this custom was not communicated or known to the defendants, and therefore that they were not bound by it. The plaintiff excepts, taking the position that knowledge of this custom had been communicated to the defendants; that, according to the evidence, the defendants were dealers in shingles, and had been for years, and knew, or should have known, the custom of counting shingles; and that by implication the custom of the trade became a part of the contract and binding on the defendants.

It will be seen from the foregoing statement of facts that the controlling question raised by the record was the interpretation which should be placed upon the order for shingles which Gilmore & Co. gave to the Louisiana Red Cypress Company. There was no dispute that in the market where these shingles were bought there was a custom of counting cypress shingles as claimed by the plaintiff. The question in dispute was whether the defendants had knowledge of the custom. If the custom prevailed in the market where the shingles were bought, and was universally understood as applicable to a particular trade or business, by implication of law this custom became a part of the contract and was binding upon both parties. 12 Cyc. 1085 (b); Kirby Planing Mill Co. v. Hughes, 11 Ga. App. 645 (4), 75 S. E. 1059. In other words, where a custom is universal or general, and applies to the subject-matter of the contract, every person who makes the contract is presumed to know the custom, and it enters into the contract. Kirby Planing Mill Co. v. Hughes, *supra*; Horan v. Strachan & Co., 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471. As above stated, the evidence in behalf of the plaintiff was that in Louisiana, where these shingles were bought, it was universally understood by the trade that, when one ordered 1,000 five-inch shingles and 1,000 six-inch shingles, the purchaser would receive only 800 five-inch shingles, and only 667 six-inch shingles, and in each instance the shingles would be counted as 1,000. Besides this evidence of the prevailing custom, knowledge of which the defendants were presumed to have had, there was evidence that they had been dealers in shingles for many years, and, from this fact, must have known of this custom. We conclude, without further discussing the question, that the issue was one for the jury, and could not have been determined as a matter of law by the court. It was for the jury to say, as a matter of fact, under the evidence, whether this was a custom where these shingles were bought, and, whether the defendants bought with knowledge, actual or constructive, of

such a custom, and, if so, whether they put the plaintiff on notice, at the time of the purchase, that they were not buying in accordance with this custom, but that when they ordered 1,000 shingles, whether five-inch or six-inch shingles, they expected to get 1,000 shingles by actual count.

[2] It is further contended by the defendants that, while there may have been such a custom as claimed by plaintiff, it was a mere local custom or business usage, and was not general or universal in its scope, and was not binding upon the defendants, unless they gave their assent thereto, and that the plaintiff was put on notice that in buying these shingles the defendants were relying upon the custom governing the sale of pine shingles, and that this custom was that they should receive 1,000 five-inch shingles and 1,000 six-inch shingles for every 1,000 ordered, regardless of the width of the shingles; in other words, that it took 1,000 five-inch shingles to make 1,000 shingles, and 1,000 six-inch shingles to make 1,000 shingles. This we think was a question for solution by the jury.

Judgment reversed.

W. H. COOPER & SONS v. BELL.

BELL v. W. H. COOPER & SONS.

(Nos. 4,922, 4,997.)

(Court of Appeals of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

NEW TRIAL (§ 117*)—MOTION—DISMISSAL—
DELAY IN FILING.

The motion for a new trial, not having been filed during the term at which the rule nisi was granted, should have been dismissed on motion made at the hearing thereof.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-241; Dec. Dig. § 117.*]

Error from City Court of Madison; K. S. Anderson, Judge.

Action by E. J. Bell against W. H. Cooper & Sons. Judgment for plaintiff, and defendants bring error, and plaintiff filed a cross-bill of exceptions. Judgment upon cross-bill of exceptions reversed, and main bill of exceptions dismissed.

E. H. George, of Madison, for plaintiffs in error. F. C. Foster, Sr., of Madison, for defendant in error.

RUSSELL, J. This case is controlled by the ruling of the Supreme Court in the case of Hilt v. Young, 116 Ga. 708, 43 S. E. 76. The plaintiff in the lower court has filed a cross-bill, the ruling upon which will be controlling in the decision of both writs of error. From the cross-bill it appears that the motion for a new trial was not filed at the term at which the rule nisi was granted, and indeed was not filed until the day the judgment was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rendered overruling the defendant's motion for a new trial. Upon the hearing of the motion for a new trial, the plaintiff's counsel made a motion to dismiss it, which was overruled. As decided in *Hilt v. Young*, supra, the judge erred in refusing to dismiss the motion for a new trial.

Our attention is called by counsel for the plaintiff in error in the main bill of exceptions to the case of *Cook v. Cook*, 67 Ga. 381. Counsel for the plaintiff in the lower court pursued the practice suggested in that case. Nothing more is held in that case than that a writ of error will not be dismissed where the motion to dismiss the motion for a new trial is not made in the lower court. And this ruling is in accord with the subsequent practice act of 1911 (*Laws* 1911, p. 149). The ruling in *Southern Ry. Co. v. Flemister*, 120 Ga. 524, 48 S. E. 160, is not in point, because in the present case the record discloses without dispute the date upon which the motion for a new trial was actually tried.

Judgment upon cross-bill of exceptions reversed; main bill of exceptions dismissed.

KERR GLASS MFG. CO. v. AMERICUS GROCERY CO. (No. 5,033.)

(Court of Appeals of Georgia. Sept. 16, 1913.
Rehearing Denied Oct. 3, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1005*)—VERDICT—CONFLICTING EVIDENCE.

The evidence was conflicting, but authorized the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

2. PLEADING (§ 93*)—ANSWER—INCONSISTENT PLEAS.

A defendant may in different paragraphs of his answer file contradictory or inconsistent pleas.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. § 93.*]

3. TRIAL (§ 295*)—ACTION FOR PRICE—INSTRUCTIONS—FRAUD.

The instructions of the trial judge were not subject to the criticism that they permitted the jury to base a verdict upon fraud not pleaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

4. SALES (§ 364*)—ACTION FOR PRICE—INSTRUCTIONS—FRAUD.

It was not error to charge that rescission is allowed if the party defrauded moves with "reasonable promptness" after discovering the fraud, nor that restitution of the goods bought need not have been made if they were worthless.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

5. APPEAL AND ERROR (§ 302*)—PRESENTATION BELOW—MOTION FOR NEW TRIAL.

Some of the grounds of the motion for a new trial, complaining of rulings on evidence,

are incomplete and cannot be considered. The others are without merit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

6. SALES (§ 273*)—LIABILITY FOR PRICE—MISREPRESENTATION OF QUALITY.

Where one orders an article described only by a name importing no particular quality, and the article proves to be unsuited to the use intended, and for which it was represented by the seller to be suitable, the purchaser is not bound for the purchase price, unless at the time of the purchase he had knowledge of the real quality of the article.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.*]

7. TRIAL (§ 350*)—INSTRUCTIONS—VERDICT.

Looking to the substance and not the form of the defendant's answer, the only defense relied on was that the goods sold were worthless. Its right to rescission depended upon the establishment of this defense. Proof of fraud was not an essential part of the defense, because, in the present case, if the goods were in fact worthless, it was immaterial whether or not the purchase was made because of fraudulent misrepresentations. It was not error to refuse to instruct the jury that, if they found for the defendant, they should specify in the verdict whether the finding was based upon the plea of rescission, or upon that of failure of consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

Error from City Court of Americus; W. M. Harper, Judge.

Action by the Kerr Glass Manufacturing Company against the Americus Grocery Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. L. Maynard, of Americus, for plaintiff in error. Shipp & Sheppard, of Americus, for defendant in error.

POTTLE, J. The plaintiff sued the defendant upon an open account for the purchase price of a lot of fruit jars. The account arose under a written contract for the purchase of a large lot of fruit jars described as "economy jars." A portion of the goods was delivered and accepted by the defendant, and the remainder rejected. The suit was for the balance claimed to be due under the contract. The defendant pleaded that it was induced to enter into the contract by the false and fraudulent representations of the plaintiff's agent in reference to the quality of the jars made to defendant and to retail merchants from whom the agent secured orders, which were turned over to defendant to be filled. It was further pleaded that the jars were worthless and wholly unsuited for the use for which they were intended, to wit, preserving fruit and vegetables, that the defendant had on hand a large quantity of the jars which it tendered to the plaintiff, and it prayed to recover back the amount it had paid for the purchase price. There was no demurrer to the answer, and the trial resulted in a general verdict for the defendant,

but in effect finding against its plea of recoupment. The plaintiff's motion for a new trial was overruled.

[1] 1. The evidence was conflicting upon the issue raised by the answer; but there was evidence which authorized a finding that the fruit jars were totally worthless and wholly unsuited for preserving fruits and vegetables, that repeated tests of the jars had been made by persons skilled in the business of canning fruits and vegetables, and in some cases all of the products placed in the jars spoiled. On the other hand, witnesses who had used the jars testified that they were suitable for preserving fruit and vegetables, and were of the quality which the seller's agent represented them to be. This conflict in the evidence was settled by the jury adversely to the plaintiff's contention, and the approval of the verdict by the trial judge forecloses the question of the sufficiency of the evidence.

[2] 2. Complaint is made that the court refused to require the defendant to elect whether it would stand on its plea of failure of consideration, resulting from a breach of the implied warranty of the law, or upon its plea of rescission. It is contended that the plea of failure of consideration is a recognition of the contract, a plea of rescission, a repudiation of the contract, and that a defendant cannot file these inconsistent defenses. A plaintiff is not permitted in the same action to treat a contract as subsisting and also repudiate it. *Harden v. Lang*, 110 Ga. 392, 395, 36 S. E. 100; *Timmerman v. Stanley*, 123 Ga. 850, 853, 51 S. E. 760, 1 L. R. A. (N. S.) 379. The defendant is, however, permitted to assume inconsistent positions and file inconsistent pleas. If suit is brought on a contract, the defendant may plead that no contract was ever entered into, that if entered into it was procured by fraud and was therefore void, or that it was valid when made, and the consideration has partially or totally failed. If such inconsistent pleas are filed, the defendant is entitled to prevail if he sustains any one or more of them. Civil Code 1910, § 5649; *Mendel v. Miller*, 134 Ga. 610, 68 S. E. 430. The rule just stated is applicable whether the inconsistent pleas be filed in the first instance or be introduced by way of amendment to the original answer.

[3] 3. Complaint is also made that the court charged generally upon the subject of fraud, and did not limit the instructions to the fraud pleaded. Upon examining the charge as a whole, we do not think it subject to this criticism. The jury must have understood from the language used by the trial judge that they must determine from the evidence whether the defendant had been defrauded as alleged in its answer.

[4] 4. Complaint is made of several parts of the charge of the court upon the subject of rescission for fraud, to the effect that restitution must be made with reasonable

promptness after the discovery of the fraud, unless the thing received is wholly worthless, in which event no offer to return it need be made. The Code provides that the defendant "must promptly, upon discovery of the fraud, restore or offer to restore" whatever he has received, "if it be of any value." Civil Code, § 4305. The instructions of the judge were in substantial accord with this section of the Code, and there was evidence to authorize the charge.

[5] 5. Several grounds of the motion complain of the admission of evidence. Some of these are not complete and cannot be considered, and the others present no meritorious exception.

[6] 6. The court charged the jury as follows: "I charge you that when a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser that it is required for a particular purpose, yet if the known, described and definite thing that is of the kind and quality called for or ordered be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. In other words, if it should appear that the defendant knew the economy jar, and knew its purposes and offices, and gave an order for it, although he may have stated that he wanted to use it for some foreign use, why, if the plaintiff shipped to him the jar that he ordered, with that knowledge on his part, he would not get the benefit of any warranty that it would do anything else beyond what it was ordinarily intended for." It is conceded that this instruction is in the main correct; but it is contended that the court erroneously limited the rule to a "known, described, and definite thing." There was no error in this instruction when applied to the facts of this case. The defendant ordered "economy jars." This was but the name of a jar which the manufacturer claimed to be superior in quality to other jars. If the defendant had, before the purchase, known of the defects which it now claims to exist, it would not be heard to complain. But the mere fact that a purchaser gets the brand of goods he orders does not necessarily preclude him from pleading total failure of consideration, if the goods prove to be worthless, and he is in ignorance of this fact at the time of the purchase. If the contract had described the jars and set forth their qualities, and the jars delivered were of the quality and kind thus described, the principle of the decisions relied on by the defendant would be applicable. *City of Moultrie v. Schofields Sons Co.*, 6 Ga. App. 464, 469, 65 S. E. 315; *Fay v. Dudley*, 129 Ga. 314, 58 S. E. 826. The defendant knew nothing of the quality of "economy jars." The name imported no particular article of a definite kind and quality. The jar exhibited by the agent appeared to be of the quality represented by

him when the test which he used was applied; but, according to some of the evidence, they were wholly worthless as fruit jars when put to practical use.

[7] 7. The defendant contends that, when requested to do so, the court ought to have instructed the jury to specify the plea upon which the verdict was based. This is the rule where more than one separate and distinct defense is filed. Civil Code § 5925; *Livingston v. Taylor*, 132 Ga. 1, 8, 63 S. E. 694. In determining whether there is really more than one defense, regard must be had more to substance than to form. A defendant may file a special defense in many different paragraphs and in varying language; but, if all the paragraphs contain substantially the same defense, the statutory rule does not apply. *Crockett v. Garrard*, 4 Ga. App. 360, 61 S. E. 552. In the present case the defendant had but one defense, viz., that the goods purchased were worthless. Its right to rescission depended on the establishment of this defense. Fraud also was pleaded; but, unless the goods were not reasonably suited for the purpose for which they were sold, there was no fraud. The jury did not allow any recovery for the jars which had been accepted and paid for, and the verdict merely relieved the defendant from taking and paying for goods not delivered. Only partial rescission was allowed, and the only theory upon which the verdict could have been founded was that the jars were not suited to the uses intended. If this was true, it is immaterial whether there were fraudulent misrepresentations or whether the seller honestly believed the goods were as represented. No material error is disclosed in any of the grounds of the motion for a new trial.

Judgment affirmed.

DAVIS v. COX. (No. 4,838.)

(Court of Appeals of Georgia. Sept. 9, 1913.
Rehearing Denied Oct. 3, 1913.)

(Syllabus by the Court.)

1. LOGS AND LOGGING (§ 25*) — VENDOR'S LIEN.

The lien provided for by section 3358 of the Civil Code of 1910 applies to timber or logs that have been severed from the soil, and does not apply to standing trees, although sold to the purchaser to be severed from the soil and converted into lumber for his sawmill.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 58; Dec. Dig. § 25.*]

2. LOGS AND LOGGING (§ 33*)—LIENS—THIRD PERSON CLAIMANT—RIGHT TO ATTACK LIEN.

A claimant has the right to show that an execution levied on the property claimed by him is void or inoperative, and, where an execution has been issued under foreclosure of a lien, under Civ. Code 1910, § 3358, and a counter affidavit has been filed and a claim interposed to the levy, the claimant has a right to at-

tack the validity of the lien claimed, although the defendant may have withdrawn his counter affidavit before the trial of the claim case.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 89-103; Dec. Dig. § 33.*]

(Additional Syllabus by Editorial Staff.)

3. LOGS AND LOGGING (§ 3*)—SALES—TRANSFER OF TITLE.

Where a written contract of sale of standing timber was entered into and one-half the purchase money paid, the title to the timber passed immediately to the purchaser, in so far as it affected the rights of innocent persons who subsequently bought from the purchaser lumber cut from the timber, though there was a verbal agreement, of which such innocent persons had no knowledge, between the seller and the purchaser that the title to the timber should not pass until it was cut.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Claim case in Justice Court by W. H. Davis against W. T. Cox. From a judgment finding the property subject, plaintiff appealed to the Superior Court, wherein judgment was again rendered finding the property subject, and claimant brings error. Reversed.

Cox foreclosed in a justice's court a lien for timber furnished to one Hughey for his sawmill, under the provisions of the Civil Code 1910, § 3358. Davis filed a claim, and from a judgment finding the property subject the claimant appealed to the superior court, where the case was submitted to the presiding judge, without the intervention of a jury, and the judge rendered a judgment finding the property subject. Error is assigned on this judgment.

A statement of the evidence on the trial is as follows: Cox, the plaintiff, testified that he sold to Hughey, the defendant, the timber from which the lumber levied on was sawed. It was standing timber when he sold it to him, and the purchaser was to cut and saw the timber into lumber. The timber was sold standing for \$200, and \$100 was paid in cash; the foreclosure being for the other \$100. "It was agreed between myself and Hughey that the title to the timber should not pass until it was cut." Davis, the claimant, testified that he had no notice as to the trade between the plaintiff and Hughey; that he bought the lumber from Hughey and paid him for it before Cox had filed or foreclosed his claim; that he bought it in good faith; that he knew that Cox had sold Hughey the timber from which this lumber was sawed, for he gave Hughey the money to pay Cox; that he advanced the money while Hughey was sawing the lumber; that when he advanced the money the lumber was sawed and stacked on Cox's land.

W. E. Mann, of Dalton, for plaintiff in error. M. C. Tarver, of Dalton, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] It has been repeatedly held by this court and the Supreme Court that the lien given under section 3358 of the Civil Code 1910 applies to logs and lumber which has been severed from the soil; that it is not intended to give a lien to a vendor of standing trees, though sold to be severed from the realty by the purchaser and converted into timber for his sawmill. *Ray v. Schmidt*, 7 Ga. App. 380, 66 S. E. 1035; *Giles v. Gano*, 102 Ga. 593, 27 S. E. 730; *Loud v. Pritchett*, 104 Ga. 652, 30 S. E. 870; *Balkcom v. Empire L. Co.*, 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58.

[2] In the *Ray Case*, supra, it was held by this court that, where the vendor of standing trees has foreclosed a lien for the purchase price and has had execution levied upon timber and logs made from the trees by the vendee, and the timber and logs are claimed by a third person, who bought them from the vendee before the date of the lien foreclosure, and, without notice of the claim of lien, on the trial of the claim case the possession of a lien by the plaintiff is open to attack by the claimant. *Wright v. Brown*, 7 Ga. App. 389, 66 S. E. 1034; *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54. In the present case it is insisted that, since the defendant had withdrawn his counter affidavit made to the foreclosure of Cox's lien, the claimant could not attack the validity of the lien. Under the authority of these decisions we think that this contention is not sound, and that the claimant can show that the lien claimed by the plaintiff is for any reason invalid.

[3] It is insisted, however, that these decisions are not applicable in this case, because the title to the timber did not pass until after it had been severed from the soil by the purchaser. This contention is based upon the testimony of Cox that "it was agreed between myself and Hughey that the title to the timber should not pass until it was cut." This contention seems to be answered by the decision of the Supreme Court in *Loud v. Pritchett*, 104 Ga. 652, 30 S. E. 870. The sale of the timber was complete, because, under the facts, the title to the timber passed into the purchaser immediately upon the conclusion of the contract, since there was nothing else for the vendor to do, and the sale was made of standing timber. A mere verbal agreement made between the seller and the purchaser that the title to the timber should not pass until it was cut would not change the rule of law in this respect, and such a reservation of title could not affect the rights of subsequent parties who bought the lumber which had been cut from the timber while in the possession of the purchaser, without any notice of the seller's lien or of this verbal condition attached to the sale.

Judgment reversed.

LEFTWICH et al. v. EARLY.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. EVIDENCE (§ 431*)—DELIVERY OF DEED—PAROL EVIDENCE.

While parol evidence is inadmissible to prove that a deed perfect on its face was delivered to the grantee on condition, this rule does not control where the question is whether there was such a complete and perfect delivery as to vest in the grantee a perfect and indefeasible title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1975-1980; Dec. Dig. § 431.*]

2. DEEDS (§ 66*)—DELIVERY—QUESTIONS FOR JURY.

Whether there has been such a complete and perfect delivery of a deed to the grantee as to vest in him a perfect and indefeasible title to land, or an interest therein, is a question of fact to be determined by the circumstances of the case, and cannot in the majority of instances be declared as a matter of law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.*]

3. DEEDS (§ 54*)—DELIVERY—NECESSITY.

Delivery of a deed is essential to its validity.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 116; Dec. Dig. § 54.*]

4. DEEDS (§ 56*)—"DELIVERY"—ACTS CONSTITUTING.

The fact of delivery of a deed depends on the intention which must be manifested by some express act of the grantor, or by acts, words, or conduct, and the grantor must lose control or dominion over the deed, and it must be his intention to pass title at the time and lose control over it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1958-1970; vol. 8, p. 7632.]

5. LOST INSTRUMENTS (§ 23*)—EVIDENCE OF EXECUTION, LOSS, AND CONTENTS—SUFFICIENCY.

In a suit by the heirs of a deceased husband against the wife to partition land originally owned by the wife, an interest in which it was claimed she conveyed to the husband by a deed which had been lost, equity would require strong and convincing proof of the former existence of such title, its loss, and its contents.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 51-57; Dec. Dig. § 23.*]

6. DEEDS (§ 208*)—DELIVERY—SUFFICIENCY OF EVIDENCE.

In a suit by the heirs of a deceased husband against the wife to partition land originally owned by her, evidence held insufficient to show that a deed executed by her for the purpose, as claimed by her, of giving the husband a life estate in case he survived her, had ever been delivered.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. § 208.*]

7. DEEDS (§ 58*)—DELIVERY—DELIVERY TO THIRD PERSON.

Where a deed from a wife to a husband which had not been delivered was intrusted by the wife to a third person upon his explanation that he thought he could use it to advantage in a railroad election in counting the vote, this did not constitute a delivery passing title to the husband; since while the deed may be delivered not only to the grantee himself but to a stranger for his use, or declared to be delivered al-

though the grantee be absent, yet, if delivered to a stranger without any declaration or other matter to show that it is for the use of the grantee, it is not a sufficient delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

Appeal from Circuit Court, Grayson County.
Suit for partition by Celia Leftwich and others against Josephine Early. From a decree dismissing the bill, complainants appeal. **Affirmed.**

J. S. Bourne and H. A. Cox, both of Independence, for appellants. R. L. Kirby, of Independence, for appellee.

CARDWELL, J. Josephine Willets was seised and possessed of a certain tract or parcel of land lying in Grayson county, Va., containing 80 acres, more or less, which she acquired by conveyance of date August 25, 1881, and, being so seised of said tract of land, the said Josephine Willets, in the year 1893, intermarried with N. C. Leftwich. N. C. Leftwich departed this life some time in the year 1905 intestate, leaving the said Josephine, his widow, and the following heirs at law, surviving him: Celia Leftwich, his mother, Joseph Leftwich, and C. E. Leftwich, brothers of the whole blood, and Charlotte Evans, a sister of the half blood. The said Josephine Leftwich afterwards intermarried with one Don Early, and at the first rules held in the clerk's office of Grayson county circuit court, February, 1907, Celia Leftwich, mother, and Joseph Leftwich and Charlotte Evans, brother and sister, of the said N. C. Leftwich, deceased, filed their bill in this cause against the said Josephine Early, the purpose of the bill being to have partition of the said tract of 80 acres of land between the plaintiffs and the defendant, the bill alleging that some time in the year 1895 the defendant, while the wife of the said N. C. Leftwich conveyed to him a one-half undivided interest in said tract of land in fee simple with general warranty of title; that said N. C. Leftwich died intestate seised and possessed of said one-half undivided interest in said tract of land; and that complainants were unable to file the deed or copy thereof conveying to him this undivided interest in the land, as an exhibit with their bill, because the deed was never admitted to record and has, since the death of the said N. C. Leftwich, been destroyed by his widow, the defendant, without the consent of his heirs at law, or either of them. The bill also sought partition of one-half an acre of land, alleged to have been owned by the said N. C. Leftwich at his death; but this parcel of land is not involved in this controversy.

The said Josephine Early filed her answer to said bill in which she admitted the ownership of said tract of 80 acres of land as alleged in the bill, and also her marriage to the said N. C. Leftwich, and that after his death she intermarried with said Don Early,

but denied emphatically that she ever at any time conveyed to her said husband, the said N. C. Leftwich, a one-half undivided interest in said tract of land or any interest therein, except as in her answer stated. Her answer then avers: "That at the time of her marriage to the said N. C. Leftwich he did not own any land; that they commenced and continued to live and keep house on the said 80 acres of land until his death; that this land was her sole and separate property; that there were no living children born to her of her marriage with the said N. C. Leftwich; that she was devoted to him and felt that in case of her death during his life that he might be turned out of a home; that he had become attached to her, and after frequent conversations with him on the subject she decided to give him some showing on the land during his lifetime, and from the date of her death to the date of his death." Her answer further avers: That after having reached this conclusion, she advised her said husband of her said decision and intention, and he caused a writing to be prepared, which was afterwards signed by her, and by the terms of which he took a life estate in one-half of said land in the event of his outliving her; that it was understood and agreed between them that this paper would never be worth anything to him unless he outlived her, and for this reason it was also agreed that it should not take effect, or be delivered to him, except at her death and in the event she died before he died." She further avers: "That from the day the said paper was signed and acknowledged by her until her said husband's death, and long after, it remained in her possession; that it being the understanding between them that it was to be of no effect unless he outlived her, and that in case of his death before her it would be destroyed, and feeling that the paper had served its purpose and that henceforth it was worthless, she paid no attention to it, and for aught she now remembers she may have destroyed it along with other of her said husband's papers; but, be this as it may, she is unable to find the same." Said defendant further says: "That this was the only interest or claim her said husband ever had to the said tract of land, in any way, and that this was not considered by her or her said husband as giving him any interest in the said land until her death, leaving him living, and that it was their intention in the execution of the said paper simply to protect him against the contingency of her dying first." The answer further states that she (the defendant) paid out a large sum of money for her said husband during his last illness, and that the claims asserted by complainants are neither legal nor equitable, etc.

Upon the hearing of the cause, on the pleadings and depositions of witnesses examined for both complainants and defendant, the cir-

cuit court being of opinion "that there has not been shown such delivery of the deed in controversy alleged to have been made by defendant, Josephine Leftwich, now Josie Early, to N. C. Leftwich, for a one-half undivided interest in and to the 80-acre tract of land mentioned and described in the bill as the law requires, and without such delivery said deed, even if made, is invalid, and that it did not pass title to N. C. Leftwich," adjudged and decreed that the complainants, have no interest in the said 80 acres of land, and that as to this tract of land the bill be dismissed with costs to the defendant. From said decree Celia Leftwich and her co-complainants obtained this appeal.

A decision of the case turns upon whether there was such delivery of the deed in question as was necessary to vest in the grantee, N. C. Leftwich, a perfect and indefeasible title to a one-half undivided interest in and to the said tract of land.

The contention of appellee throughout, and which was sustained by the circuit court, is, not that the deed in question was delivered on condition, but that it was never delivered at all, and that it was never to be delivered or taken possession of by the grantee therein until after the death of the grantor, leaving the grantee surviving her, and that even then it only conveyed to him a one-half undivided interest in the 80-acre tract of land for and during his life.

[1, 2] The authorities are uniform in holding that parol evidence is inadmissible to prove that a deed, perfect on its face, was delivered to the grantee on condition; but this rule does not control in a case where the question is whether there was such complete and perfect delivery of the deed from the grantor to the grantee as to vest in the latter a perfect and indefeasible title to land or an interest therein, which is a question of fact to be determined by the circumstances of the case, and cannot, in the majority of instances, be declared as a matter of law.

"Formal delivery is not essential if there be acts evidencing an intention to deliver, but an essential requisite to a good deed is that it be delivered by the grantor himself, or his attorney, and the deed takes effect only from such a delivery." 2 Min. Inst. (4th Ed.) p. 731, and authorities there cited.

"The date of a deed is *prima facie* the date of delivery, but only *prima facie*." *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591; *Harman v. Oberdorfer*, 33 Grat. (74 Va.) 497; *Raines v. Walker*, 77 Va. 92; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404.

"The question of delivery" of a deed "is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." *Martin v. Flaherty*, 13 Mont. 96, 32 Pac. 287, 19 L. R. A. 242, 40 Am. St. Rep. 415.

In the case just cited, the opinion quotes

from 1 Dev. on Deeds, § 262, as follows: "As no particular form of delivery is required, the question whether there was a delivery of the deed or not, so as to pass title, must in a great measure, where it is not clear that an actual delivery has been effected, depend upon the peculiar circumstances of each particular case. The question of delivery is one of intention and the rule is that a delivery is complete when there is an intention on the part of the grantor to make the instrument his deed. The main thing which the law looks at is whether the grantor indicates his will that the instrument should pass into the possession of the grantee; and, if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee. A deed does not become operative until it is delivered with the intent that it shall become effectual as a conveyance. Whether such intent actually existed is a question of fact to be determined by the circumstances of the particular case." 2 Min. Inst. supra; *Tyler v. Hall*, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 837.

In the last-named case it was held that "a deed left by the grantor in a place where it is accessible to the grantee does not constitute a delivery in the absence of an intention on the part of the grantor to deliver and of the grantee to accept. * * * So long as the delivery of a deed remains incomplete, a grantor can change his intent, and destroy the deed if he so desires."

In *Schuffert v. Grote*, 88 Mich. 650, 50 N. W. 657, 26 Am. St. Rep. 316, the opinion of the court says: "Evidence showing that a conveyance of land was signed, acknowledged, witnessed, and handed to grantee, who was a son of the grantor, to whom the deed was immediately returned; that the father said that he calculated to deed the property to his son, so that there would be no trouble after his death, but that he would not like to see it go on record in his lifetime; and the son replied he need not be afraid of its going on record, and that he (the father) could keep it himself—does not show a delivery of the deed; and if the grantor subsequently destroyed it, and conveyed the same property to another person in consideration of services performed and to be performed, the latter acquired the title."

In *Parrott v. Avery*, 159 Mass. 594, 35 N. E. 94, 22 L. R. A. 153, 38 Am. St. Rep. 465, the Supreme Court of Massachusetts held that "a deed is not delivered though it is executed in the presence of a witness, if there is no declaration on the part of the grantor that he intends it to take effect at once, and he retains it in his possession during his lifetime, putting it in a chest and bequeathed the chest to the grantee." *Stone v. French*, 37 Kan. 145, 14 Pac. 530, 1 Am. St. Rep. 237.

[3, 4] The authorities cited, to which many more might be added if deemed necessary.

hold that the delivery of a deed is essential to its validity; that the fact of delivery is one of intention, which intention must be manifested by some express act of the grantor, or by acts, words, or conduct manifesting an intention to deliver, and that by such act of delivery the grantor must lose control or dominion over the deed in question; and that it is his intention that it should pass title at the time and that he (grantor) should lose control over it.

The deed in question in *Tyler v. Hall*, supra, under which the defendant claimed title from his father, the original source of title, was found by the administrator of the father in a desk kept by him prior to his death and under his control, among other papers belonging to him at his death, and was afterwards given into the defendant's (grantee) possession by the administrator of the grantor. Held, that the burden of proving that the deed was delivered before the father's death was on the defendant.

[8] The suit out of which this appeal arises is in effect a suit to set up by parol evidence a muniment of title to land, and in such cases courts of equity require strong and convincing proof of the former existence of such title, its loss, and its contents.

This court held, in *Barley v. Bird*, 95 Va. 317, 28 S. E. 329, that "courts of equity, in exercising their jurisdiction to set up a lost instrument which is to constitute a muniment of title, require strong and conclusive proof of its former existence, its loss, and its contents."

[9] It appears from the record that appellee and her husband N. C. Leftwich were unlettered, ignorant negroes; the husband being impecunious, while the wife owned the land conveyed to her as above stated, and was economical and thereby enabled to do much more for the comfort of her husband in health, as well as in sickness, than he was ever able to provide for himself. They were married in 1893, and the deed here in question was signed and acknowledged by her in 1895, as she frankly admits, but was never delivered, nor was it to be delivered unless her husband survived her, in which event it was then and only then to be recorded, whereby he would own and control a one-half undivided interest in her land during his life, so that he might not be dispossessed of a home during his life. There is no proof that the husband, N. C. Leftwich, ever in his lifetime asserted title to any part of this land, or denied the ownership or control thereof in his wife. The wife (appellee) states fully in her answer in this cause the nature of the transaction under review, and in her deposition, taken in her own behalf, the statements she makes are not only entirely consistent with those made in her answer, but are consistent with the circumstances surrounding her and her said husband during their married life.

The only disinterested witness introduced by appellants whose evidence at all tends to prove a delivery of said deed within the meaning of the law is one M. L. Vaughan, who is a man of some prominence in the county in which appellee and her husband N. C. Leftwich resided during the period from the date of their marriage till the death of the husband; but Vaughan was not positive as to the material facts with respect to which he undertook to testify, and, in fact, not only are the statements made by him contradicted by proof of other facts and circumstances, testified to by others, but when the testimony given by him is read as a whole he appears to have but a slippery memory, and has to admit that he was mistaken as to the material facts with respect to which he had undertaken to testify.

Not only did N. C. Leftwich in his lifetime never assert a legal claim to an interest in the land of his wife, but no one has testified in this case that he ever was financially able to pay \$600, the amount that Vaughan states was the consideration named in the deed in question, "as well as he could remember," and there is no other evidence than that of Vaughan contradictory of the statement of appellee to the effect that the deed only stated a nominal consideration.

Every witness called on behalf of appellants, except said M. L. Vaughan, was a close relative of N. C. Leftwich, deceased, and directly interested in the result of this litigation. Much of the evidence given by these witnesses is wholly irrelevant to the issue, consisting largely of loose conversations with N. C. Leftwich not in the presence of appellee, or with the latter after the former's death, which in no way committed her to any concession helpful to the appellants in this cause, while the statements of other of these witnesses are either discredited or flatly contradicted by facts proven.

P. A. Reavis, a witness 52 years of age, a farmer, and who had known N. C. Leftwich from the time he was a small boy; T. E. Brannock, deputy clerk of the circuit court of Grayson county, a deputy treasurer and tax collector of the county in 1904; and Wilson Blair, also a prominent farmer—all totally disinterested witnesses, say in substance that not only did N. C. Leftwich never assert title to an interest in the land in controversy, but disclaimed any interest in his wife's land, and all along and within a short time of his death denied that he owned any land.

Appellee testified that in the year 1894 or 1895 she executed and acknowledged "what they called a deed, and that their agreement at the time was that if I would make him these papers in case I died first, that he was to hold an interest in the place his lifetime, and in case he died first the papers were to be destroyed and to be no more account. I to hold the paper in my possession

until the death of one or the other of us. He was to have what remained at my death his lifetime. It was agreed for me to hold it (the deed) in my possession, and if I died first it was to be delivered to him and it was to go on record, and if he died first it was to be destroyed. After his death I destroyed all the Leftwich's papers, and I suppose it was destroyed with them. It was in my possession from the time it was acknowledged until the time it was destroyed, except one time when I handed it to J. M. Parsons. He came to my house and sent Norvell (her husband) in after the paper, and I would not send it. He (Parsons) came in and explained to me why he wanted it. He said that he thought he could use it to advantage in railroad election in counting the vote. He wanted to see if he could. He receipted me for the paper and promised to return it when he was through and did so. He sent it to me by mail. I do not know M. L. Vaughan. He never received the paper from me and never passed my house and returned this deed." Appellee denies positively the statements made by the witnesses for appellants as to conversations with her husband with reference to said deed or her land, alleged to have taken place in her presence; in fact, she denies practically every statement made by appellants' witnesses except the fact that she made the deed to her husband in pursuance of the agreement and understanding stated by her in her answer and in her examination as a witness, and that she destroyed it in pursuance of this understanding, and denies that she ever delivered the deed to her husband for any purpose. She asserts positively that it was never out of her possession or control except on the occasion when at the request of J. M. Parsons she let him take it away with the understanding that he would return it to her which he did. It is not pretended that appellee understood the purpose for which Parsons wanted the deed or intended by the loan of it to him to confer any benefit upon the grantee, N. C. Leftwich.

[7] The weight of the evidence is decided by the effect that appellants' leading witness, Vaughan, never saw the deed by reason of its having been delivered to him by appellee or N. C. Leftwich for any purpose, and the contention, were it made, that appellee, an ignorant negro woman, by complying with the request of Parsons in the manner she did, intended that the deed should pass title, at the time, and that she should lose control over it, could not be maintained. Whilst a deed may be delivered, not only to the grantee himself, but to a stranger for his use, or declared to be delivered although the grantee be absent, yet if delivered to a stranger, without any declaration or other matter to show that it is for the use of the grantee,

it is not a sufficient delivery. 2 Min. Inst. p. 732.

It also appears from the proof in this case that when N. C. Leftwich incurred any debt it was paid by his wife (appellee), and therefore there was no conceivable reason why he should not have had this deed recorded and the land it purported to convey transferred to himself and claimed it, or some interest in it, as his own, except for the fact that, as appellee claims, the deed was never delivered to him, and was to be of no force or effect unless she died before he did, in which event he was to have only an undivided one-half interest in the land for his life.

This is not a controversy between creditors of N. C. Leftwich, deceased, and appellee touching the right of the former to subject the land in question to the payment of debts asserted against Leftwich but a case in which a court of equity is asked by the next of kin and heirs at law of the decedent to take the title of appellee's land from her and give it to them, and that too upon proof that is of itself not only unsatisfactory and therefore not conclusive, but is contradicted or discredited throughout by positive evidence, borne out by the circumstances clearly shown to have surrounded the parties to the transaction in question.

The decree appealed from is, in our opinion, not only in accordance with the right and justice of the cause, but is fully justified by the evidence in the record, and therefore it is affirmed.

Affirmed.

KEITH, P., and WHITTLE, J., absent.

MORGAN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

CRIMINAL LAW (§ 1014*)—APPEAL AND ERROR —SUCCESSIVE PETITIONS FOR WRIT OF ERROR.

Under Code 1904, § 3466, providing that when the Court of Appeals shall deem the judgment complained of clearly right, and shall reject a petition for a writ of error on that ground, and the order of rejection so states, no other petition shall thereafter be entertained, the court is without jurisdiction to entertain an amended petition for a writ of error to a judgment of conviction for crime, after the original petition had been denied in an order expressly stating that the court was of the opinion that the judgment was clearly right.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2571; Dec. Dig. § 1014.*]

Error to Circuit Court, Wise County.

One Morgan was convicted of malicious shooting, and files an amended petition for a writ of error. Petition denied.

Bond & Bruce, of Wise, for petitioner. The Attorney General, for the Commonwealth.

PER CURIAM. Morgan was indicted before the circuit court of Wise county for

malicious shooting, and was sentenced to four years' confinement in the penitentiary. He filed his petition, asking for a writ of error from this court, and praying that a new trial be awarded him. This petition was considered by this court at its session in Wytheville on the 16th day of June, 1913, and the court, being of opinion that the said judgment was plainly right, rejected the said petition and affirmed the judgment. See abstract of judgment of this court filed with the record.

By section 3466 of the Code it is provided, among other things, that when the Court of Appeals "shall deem the judgment, decree, or order complained of plainly right, and reject the petition on that ground, and the order of rejection so states, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court at its next term."

The case before us comes clearly within the operation of the statute. The court, as appears from its order, deemed the judgment complained of plainly right, and rejected the petition on that ground, and the order of rejection so states; therefore this court has no jurisdiction to entertain any other petition with respect to it, and the amended petition presented at this term of court is, for these reasons, rejected.

LYNCH v. O'BRIEN et al†

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. BILLS AND NOTES (§ 301*)—LIABILITY OF INDORSER—RELEASE.

Where, after the holder of a note, without the consent of an indorser, surrendered certain collateral security, the note was subsequently renewed from time to time, the indorser, who repeatedly renewed his indorsement with knowledge of the facts, waived his defense to the note based on such surrender, and estopped himself to assert such a defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 706-721; Dec. Dig. § 301.*]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE TO VARY WRITING.

An indorsement of a renewal note could not be varied or contradicted by proof of a contemporaneous parol agreement that the indorser should not be liable thereon, because of the holder's surrender of collateral security pledged for the payment of the original note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

Appeal from Law and Chancery Court of City of Roanoke.

Suit by J. W. Lynch against E. F. O'Brien and others. Decree for defendants, and plaintiff appeals. Affirmed.

Thos. W. Miller and Jackson & Henson, all of Roanoke, for appellant. A. E. King, of Roanoke, for appellees.

HARRISON, J. The bill in this suit was filed by the appellant for the purpose of obtaining release from his liability as indorser upon a certain negotiable note. The ground upon which the release was asked is that 32 shares of certain stock had been deposited with the original note, when executed, as collateral, and that subsequently 7 shares of this stock was surrendered without appellant's consent.

[1] It appears that in March, 1907, E. F. O'Brien executed a note for \$3,200, payable to the appellant, J. W. Lynch, and E. W. Tinsley 60 days after date. This note was indorsed by the payees and discounted for O'Brien by the First National Bank of Roanoke. In the body of the note it appeared that 32 shares of Roanoke Knitting Mills stock was deposited therewith as collateral. The note was curtailed by O'Brien, and renewed from time to time in the same shape, and with the same indorsement, until it was reduced to \$2,100. The renewal for \$2,100 was in the shape of a plain negotiable note, without mention of collateral. At the time of this last-mentioned renewal O'Brien withdrew 7 shares of the stock, leaving with the bank the remaining 25 shares. O'Brien made no further payment. The note was, however, subsequently renewed from time to time, with same indorsers, until it was reduced to \$1,800 by payments made by the indorsers.

The evidence is beyond dispute that, when appellant indorsed the several renewals of the \$1,800 note now held by the appellee bank and from which he seeks to be released, he had full knowledge of the fact that the 7 shares of stock had been withdrawn by O'Brien. Having repeatedly renewed his indorsement of the note after full knowledge of the defense available in respect to the original note, appellant must be held to have waived such defense and to be estopped from availing himself of it as to the renewal. This principle is elementary. Joyce on Defenses to Com. Paper, § 649; Building Ass'n v. Blair, 98 Va. 490, 495, 36 S. E. 513; University of Va. v. Snyder, 100 Va. 567, 579, 42 S. E. 337.

[2] Appellant relies upon an alleged parol agreement that he was not to be liable upon his indorsement of the renewals because of the previous withdrawal of the 7 shares of stock held as collateral. This parol contract is not satisfactorily shown. This, however, is immaterial; it being settled by numerous decisions of this court that a contemporaneous parol agreement cannot be shown to alter or vary the terms of a valid written instrument. Towner v. Lucas, 13 Grat. (54 Va.) 705; Slaughter v. Smither, 97 Va. 202, 33 S. E. 544; Percy v. Bank, 110 Va. 132, 65 S. E. 475. The absolute indorsement of the note in question cannot, therefore, be affected by a contemporaneous

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

agreement that, notwithstanding such indorsement, appellant was not to be bound by it.

The decree denying the relief asked in this case is plainly right, and it must be affirmed.

Affirmed.

KEITH, P., absent.

BRANHAM v. ARTRIP.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. SPECIFIC PERFORMANCE (§ 128*)—JURISDICTION—UNCERTAIN CONTRACT—DAMAGES.

Where equity could not grant specific performance of an alleged parol contract for the sale of land because of uncertainty of its terms, and complainant could not obtain complete relief at law, the suit would not be retained for the purpose of awarding complainant damages for the value of improvements, less the rental value of the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. § 128.*]

2. SPECIFIC PERFORMANCE (§ 128*)—RELIEF—VALUE OF IMPROVEMENTS—STATUTES—APPLICATION.

Code 1904, § 2760, provides that any defendant against whom a decree or judgment shall be rendered for land, when no assessment of damages has been made, at any time before the execution of the decree or judgment, may present a petition to the court for the allowance of the value of permanent improvements, less the rental value of the occupation of the land, and the court may suspend the judgment and assess the damages of the plaintiff and the allowances to the defendant for such improvements. *Held*, that such section applies only to actions of ejectment, or to cases in which a decree or judgment is rendered against a defendant for land, and cannot be invoked in a suit by an unsuccessful complainant for specific performance of an alleged contract to convey land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. § 128.*]

Appeal from Circuit Court, Dickenson County.

Bill by W. J. Artrip against W. J. Branham to restrain the prosecution of an action of ejectment and to enforce specific performance of an alleged contract for the sale of real property. From a decree in favor of complainant for the value of his improvements, less the rental value of the land, respondent appeals. Reversed.

Sutherland & Sutherland, of Clintwood, for appellant. Skeen & Skeen, of Clintwood, and Vicars & Peery, of Wise, for appellee.

HARRISON, J. The appellant instituted an action of ejectment to recover of the appellee the possession of a certain lot of land in Dickenson County. Appellee thereupon filed the bill in this case, praying that appellant be enjoined from prosecuting his action at law, and praying for the specific performance

of an oral contract alleged in the bill. The circuit court refused to specifically enforce the contract alleged, because it was too indefinite and uncertain, but entered a decree directing that possession be delivered to the appellant upon the terms that he should pay appellee the value of the improvements he had put upon the land less the rental value of the same. From that decree this appeal was taken.

[1] We are of opinion that the grounds necessary to justify the specific performance of the alleged contract were wholly wanting in the case, and that the circuit court properly refused to enforce it. We are, however, further of opinion that when the court reached that conclusion it should have dismissed the bill, leaving the parties to their remedies, if any, at law.

It is not every case in which a court of equity acquires jurisdiction of a cause for a specific purpose that it may, notwithstanding that purpose has failed in whole or in part, go on to decree against any party before it. So far from it, when the remedy at law is more appropriate than in equity, or where the verdict of a jury is proper, the jurisdiction will be declined. *Walters v. Farmers' Bank*, 76 Va. 12.

The case of *Robertson v. Hogshead*, 3 Leigh (30 Va.) 687, was one where the bill filed was for the rescission of a contract. The court, having held that the plaintiff was not entitled to a rescission of the contract, was asked to go on and ascertain the damages he had sustained by reason of the alleged fraud in the procurement of the contract. This the court declined to do, and on appeal Judge Tucker, speaking for this court, said: "A bill for damages only will not lie in equity. The court could only ascertain those damages by sending the case to a court of law. To that court, therefore, the party should apply, instead of clogging the litigation by a suit in equity, which could only end where he ought to have begun."

In the case before us the appellant denies that he ever entered into any parol agreement for the sale of the land in question. The appellee, having no title, is asking for the ascertainment of unliquidated damages for improvements claimed to have been put upon the land by him. The alleged parol contract is uncertain and indefinite, and the whole evidence adduced on the subject utterly conflicting and unsatisfactory. It is therefore a case, as was said in *Walters v. Farmers' Bank*, supra, where the remedy at law is more appropriate than in equity, and the verdict of a jury necessary for its proper determination.

[2] The appellee, to sustain the jurisdiction of a court of equity to go on and ascertain the damages to which he is entitled in this case for improvements alleged to have been put upon the land, relies upon section

2760 of the Code of 1904, which is as follows:

"Any defendant against whom a decree or judgment shall be rendered for land, where no assessment of damages has been made under the preceding chapter, may, at any time before the execution of the decree or judgment, present a petition to the court rendering such decree or judgment, stating that he, or those under whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment or decree, and impanel a jury to assess the damages of the plaintiff, and the allowances to the defendant for such improvements."

It has been repeatedly held that the statute relied on applies only to actions of ejectment, or to cases in which a decree or judgment is rendered against a defendant for land. *Graeme v. Cullen*, 23 Grat. (64 Va.) 266; *Woods v. Krebbs*, 33 Grat. (74 Va.) 685; *Effinger v. Hall*, 81 Va. 94; *Flanary v. Kane*, 102 Va. 547, 558, 46 S. E. 312, 681. The case at bar is not an ejectment suit, but a chancery suit for the specific enforcement of an alleged parol contract, and no decree has been rendered therein against the *defendant* for land.

For the foregoing reasons, this court will reverse the decree appealed from, and will enter such decree as the lower court should have entered, dismissing appellee's bill, with costs, without prejudice, however, to his right to proceed in a court of law to enforce such rights as he may have.

Reversed.

KEITH, P., absent.

HONAKER v. SHRADER.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

In ejectment involving the location of a disputed boundary, the jury's finding on conflicting evidence as to its correct location was conclusive, unless some other valid objection could be shown thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. BOUNDARIES (§ 36*)—EVIDENCE—ADMISSIBILITY.

In ejectment involving the location of plaintiff's eastern line, evidence as to the execution and contents of a lost title bond for land adjoining such line was properly admitted, where it was received only as tending to throw light on the location of the line and not for the

purpose of establishing defendant's title to the land in controversy.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.*]

3. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In ejectment involving a disputed boundary, the admission of an old survey, if error, was not prejudicial to plaintiff, where the land described therein was clearly identified and located by other evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

4. NEW TRIAL (§ 161*) — CONDITIONAL REFUSAL.

Where, in ejectment involving a disputed boundary, the declaration in one count sought the recovery of plaintiff's whole tract of land, containing 1,000 acres, and in another count the recovery of the 79-acre tract actually in controversy, and the real issue was understood by the court, the jury, and the parties, but the jury returned a general verdict for defendant, the court properly required defendant to enter a release of that portion of the land outside the tract which was the subject of dispute instead of granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 321-323; Dec. Dig. § 161.*]

Error to Circuit Court, Bland County.

Ejectment by one Honaker against one Shrader. Judgment for defendant, and plaintiff brings error. Affirmed.

Williams & Williams and A. R. Porterfield, all of Bland, for plaintiff in error. Jackson & Henson, of Roanoke, and Williams & Farrier, of Pearisburg, for defendant in error.

HARRISON, J. [1] The plaintiff's declaration in this action of ejectment contains two counts. The first describes the land alleged to be withheld as his entire tract containing 1,000 acres. The second count describes the land in controversy as 79 acres more or less, lying on the south side of Buckhorn Mountain, on Wolf creek, in Bland county. The real question involved in the controversy, as shown by the record, was the correct location, on the ground, of the eastern line of the plaintiff's land; plaintiff contending that its correct location was at one place, while the defendant insisted that it was at another. Upon this question the evidence was conflicting. The jury have established the true line to be as contended for by the defendant, and upon well-settled principles the verdict must stand, unless some other valid objection can be shown thereto. *Pilkerton v. Roberson*, 110 Va. 136, 65 S. E. 835.

[2] The objection made by the plaintiff to the evidence offered by the defendant as to the execution and contents of a lost title bond executed by Chapman & French to Hiram D. Lambert, about the year 1853, for land adjoining the plaintiff's eastern line, was properly overruled. Evidence of this title bond and its contents was not introduced, as contended by the plaintiff, for the purpose of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

establishing the defendant's title to the land in controversy, but merely as evidence tending to throw light upon the true location of the eastern boundary line, and that its true location was where the defendant claimed it to be. The court in admitting this evidence, both at the time of its admission, and subsequently by instructions, limited the same to the light, if any, it threw on the question of boundary involved. Oral evidence is always admissible as to location and boundary, and it would seem to be clear that evidence of the contents of a lost title bond was admissible for the same purpose. *Austin v. Minor*, 107 Va. 101, 57 S. E. 609; *Schaubach v. Dilleuth*, 108 Va. 86, 60 S. E. 745, 15 Ann. Cas. 825; *Edmunds v. Barrow*, 112 Va. 330, 71 S. E. 544.

[3] The plaintiff also complains of the ruling of the court in permitting an old survey, bearing on the question involved, to be introduced by the defendant. No sufficient reason for rejecting this evidence is suggested, but, even if it had been error to admit the survey mentioned, it was plainly without prejudice to the plaintiff, as the land described therein was clearly identified and located by other evidence in the case.

Several other objections to the ruling of the court upon the admission of evidence are raised, but upon examination they are found to be wholly without merit and, therefore, need not be adverted to in detail.

In the petition for a writ of error no complaint is made of the action of the court in refusing certain instructions asked for by the plaintiff, but it is contended that the verdict of the jury was not in accord with the instructions given, and the assertion is made that in the instructions given for the plaintiff the jury are told that the title deeds under which the plaintiff claimed covered the land in controversy and that he was entitled to recover the same. The instructions do not bear this interpretation. Whether the plaintiff's title papers covered the land in controversy depended upon the true location of his eastern line. This was a question of fact for the jury, and no instruction given by the court trenching upon the province of the jury to settle that question.

As to the instructions given by the court for the defendant, no error is pointed out; the plaintiff contenting himself with the general observation that they are erroneous and misleading. An inspection of these instructions shows them to be free from reasonable objection. They embody views of the law applicable to the case which have been long settled by the decisions of this court, and are expressed in language which could not be misunderstood.

[4] As already seen, the plaintiff's declara-

tion was in two counts, one for the recovery of his whole tract of land containing 1,000 acres, and the other for the recovery of the small tract actually in controversy. When the case was given to the jury they returned a general verdict for the defendant on the issue joined. After the jury was discharged the plaintiff moved the court to set aside the verdict upon the ground, among others, that the effect of the general verdict was to give the defendant the whole tract of 1,000 acres. Thereupon the court of its own motion required the defendant to enter of record a release of that portion of the land outside of the small tract which was the subject of dispute, and overruled the motion for a new trial. This action of the court is assigned as error; it being contended that the court had no power to put the defendant upon terms in a case like this.

The whole controversy in this case was as to the small tract of land described in the second count of the declaration. The ownership of this land depended upon the correct location on the ground of the plaintiff's eastern line; the defendant claiming no part of the land except the small tract to which the true location of the eastern line entitled him. The real issue in the case was understood from the beginning to the end of the trial by the court, the jury, and all parties concerned, and no reason is perceived why the court, to avoid the possibility of future controversy, should not have required the defendant to release of record all claim to the land outside of the small tract that the verdict of the jury had decided he was entitled to. *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482; *Tolley v. Pease* (W. Va.) 78 S. E. 111.

In the ejectment case of *Fry v. Stowers*, supra, this court said: "We do not approve the rule announced in *Shiflet v. Dowell*, 90 Va. 745 [19 S. E. 848], that the principle stated does not apply in the case of an action of ejectment, because of the statute which requires that the verdict shall 'specify the land, particularly as the same is proved, and with the same certainty of description as is required in the declaration.' The practice of putting a party upon terms where the verdict is plainly erroneous in part is a wise and salutary one, saving delay, costs, and above all, ending strife, and we perceive no good reason why the ends of justice are not as much subserved by the application of the principle in an action of ejectment as in any other case."

Upon the whole case, we find no error prejudicial to the plaintiff, and the judgment complained of must be affirmed.

Affirmed.

KEITH, P., and WHITTLE, J., absent.

LUCK CONST. CO. v. RUSSELL COUNTY.

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. COUNTIES (§ 205*)—DISALLOWANCE OF CLAIMS—APPEAL—FILING PLEA OF OFFSET.

While under Code 1904, §§ 833, 843, and 844, the manner of suing a county is by "appeal" from the action of the board of supervisors upon presentation of the claim, the determination of the board is not an adjudication of the case, and the court to which the "appeal" is taken is not an appellate court in the sense that a plea of offset cannot be filed therein.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 328-334; Dec. Dig. § 205.*]

2. COUNTIES (§ 206*)—CLAIMS AGAINST COUNTY—EFFECT OF ALLOWANCE.

The allowance of a claim against a county by the board of supervisors is not an adjudication of the claim, and does not estop the county from setting up a defense to the claim when subsequently sued upon it.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322, 323, 325-330; Dec. Dig. § 206.*]

3. HIGHWAYS (§ 113*)—ACTIONS AGAINST COUNTIES—PLEADING—SUFFICIENCY OF PLEA OF OFFSET.

In an action against a county for the balance of the contract price for constructing a road, a plea of offset, alleging that plaintiff failed to perform its agreement and that the county was damaged thereby in excess of the amount claimed, is sufficient to entitle the county to recover from the plaintiff.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. § 113; *Contracts, Cent. Dig. § 1335.]

4. HIGHWAYS (§ 113*)—CONTRACTS—CONSTRUCTION—ROAD CONSTRUCTION CONTRACT.

A contract with a county for the construction of a road provided that payments should be made on the engineer's estimates, that in case any work or material should be unsatisfactory to the engineer they should be removed, that the engineer should settle all disputes, and that no work should be regarded as accepted until final acceptance of the whole work. Held that, in view of the last provision, the engineer's estimates were not conclusive or a final acceptance and did not prevent inquiry as to whether the work embraced therein had been done according to contract.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. § 113; *Contracts, Cent. Dig. § 1335.]

5. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

An instruction, in an action against a county for the balance due on a road construction contract, that if the facts therein stated are true the county is estopped from denying that certain work was not according to contract, which disregards evidence that the plaintiff induced the action claimed to constitute an estoppel by fraud, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

6. ESTOPPEL (§§ 54, 59*)—EQUITABLE ESTOPPEL—PERSONS TO WHOM AVAILABLE.

The doctrine of estoppel in pais is an equitable one, and it cannot be taken advantage of by one claiming to have been influenced by the conduct of another to his injury, who acted with knowledge of the facts relied on as constituting an estoppel, much less by one whose

own acts or fraud induced conduct on the part of another alleged to constitute an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135, 146, 147; Dec. Dig. §§ 54, 59.*]

7. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO ISSUE.

A requested instruction, in an action against a county on a contract, that plaintiff is entitled to recover if the work was performed according to the specifications, "as directed by the engineer," was properly modified by striking out the words quoted, where the contract provided that the work should be done in accordance with the specifications and to the satisfaction of the county and engineer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

8. HIGHWAYS (§ 113*)—CONTRACTS—CONSTRUCTION OF ROADS—RESPONSIBILITY FOR ACTS OF ENGINEER—FRAUD OF OTHER PARTY—MISTAKE.

The estimates or other acts of the engineers under a contract with a county for the construction of a road are not binding upon either party, where induced by fraud of the other party or the result of fraud or mistake so great as to amount to fraud on the part of the engineers.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. § 113; *Contracts, Cent. Dig. § 1335.]

9. TRIAL (§ 260*)—INSTRUCTIONS—OTHER INSTRUCTIONS COVERING SAME POINT.

Instructions that the persons who were required to perform certain duties under a contract were the engineers within its meaning were unnecessary, and the court did not err in refusing them, where the jury were instructed that if they believed that certain persons, whom the evidence showed were the ones who performed such duties, were appointed to perform them, that they were the engineers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Error to Circuit Court, Tazewell County.

Action by the Luck Construction Company against the County of Russell. Judgment in favor of the defendant, and the plaintiff brings error. Affirmed.

Hart & Hart, of Roanoke, Chapman & Gillespie, of Tazewell, and Finney & Wilson, of Lebanon, for plaintiff in error. H. A. Routh, of Lebanon, and Henson & Bowen and A. S. Higginbotham, all of Tazewell, for defendant in error.

BUCHANAN, J. The plaintiff in error, who was the plaintiff in the trial court, entered into a written agreement with the county of Russell for the construction of some six miles of macadam road. When the plaintiff had performed its undertaking, as it claimed, it presented to the board of supervisors of that county for allowance and payment a claim for \$9,914.38, the balance due under the contract as it claimed. The board of supervisors refused to allow the claim, and from its action the plaintiff appealed to the circuit court for Russell county. It being agreed that there was good cause for removing the cause to another circuit, it was re-

moved to the circuit court for Tazewell county.

There was a verdict and judgment in that court for the defendant and a recovery in its favor for the sum of \$1,060.68. To that judgment this writ of error was awarded.

The first error assigned is to the action of the court permitting the defendant to file a special plea of set-off under section 3299 of the Code.

The first ground of objection is that no such plea could be filed in an appellate court.

By section 844 of the Code it is provided that "no action shall be maintained by any person against a county upon any claim or demand until such person shall have first presented his claim to the board of supervisors of such county." By section 838 it is provided, that, when any such claim is presented to and disallowed by the board of supervisors, the claimant may appeal within a named time; and by section 843 it is declared that such determination by the board of supervisors shall be final and conclusive and a perpetual bar to any action in any court, unless an appeal be taken from such action, or unless the board shall consent and agree to the institution of an action by such claimant. This is the manner prescribed by law by which claims against the county may be collected, and the county cannot be sued in any other mode than that prescribed by law. *Botetourt v. Burger*, 86 Va. 530, 533, 10 S. E. 264.

[1, 2] While the method prescribed by the statute for litigating the rights of the parties as to the claim so disallowed is called an appeal, the action of the board of supervisors is in no proper sense of the term an adjudication of the claim on its merits, and even where the claim has been allowed by the board such action will not estop the county from setting up a defense to the claim when subsequently sued upon it. *Board of Supervisors v. Catlett's Ex'rs*, 86 Va. 158, 162, 163, 9 S. E. 999, and authorities cited.

In that case it was held that the powers and duties of the board of supervisors are executive and not judicial, and that its allowance of a claim is not an adjudication and does not bar its contesting the claim's validity and pleading the statute of limitations when a mandamus is applied for to compel payment. And a fortiori this would be true where the claim has been disallowed.

The county had the same right to file a plea of set-off under section 3299 of the Code as it had to make any other defense which the facts justified it in making.

[3] A further objection to the action of the court in permitting the special plea of set-off to be filed is that it does not aver fraud or any other matter which would entitle the defendant to recover over against the plaintiff, and amounts to no more than the general issue. This latter objection does not seem to be much relied on, and if it were is plainly without merit. The allegations of the plea,

if true, show that the plaintiff not only failed to keep and perform its agreement in various particulars, but that by reason of such failure the defendant was injured and damaged in excess of the amount claimed and sued for by the plaintiff.

[4] Errors are assigned to the action of the court in giving and refusing instructions, in admitting evidence, and afterwards in refusing to exclude the same and in overruling the motion of the plaintiff to set aside the verdict of the jury because contrary to the law and the evidence. The propriety of the action of the court in respect to all these assignments of error depends for the most part upon what is the true meaning of the contract sued on.

The contention of the plaintiff is, and its assignments of error are based chiefly upon the view, that the monthly estimates of the engineer in charge of the work were conclusive upon the parties. On the other hand, the county claims that these monthly estimates are not conclusive of the statements contained in them.

By the terms of the agreement between the parties and the specifications which are expressly made a part of it, it is provided, among other things, that "payments shall be made monthly upon approximate estimates of the engineer, reserving ten per cent. (10 per cent.) of amounts due until a final settlement. * * * In case any of the said work done or materials provided by the party of the first part shall be unsatisfactory to the said engineer, then the party of the first part shall, on being notified thereof by the engineer, immediately remove such unsatisfactory work or materials and replace the same with good work or materials satisfactory to said engineer," and in the event the plaintiff did not do so the engineer was given the right to remove such rejected work or materials at the expense of the plaintiff. It was then provided, in the same clause, that "no work shall be regarded as accepted until the final acceptance of the whole work herein contracted for." It was further provided that "to prevent all disputes and litigation it is further agreed by the parties hereto that the said engineer shall decide all questions, difficulties and disputes of whatever nature which may arise relative to the construction, prosecution and fulfillment of this contract, and as to the character, quality, amount and value of any work done, material furnished under or by reason of this contract, and his estimates and decisions upon all claims, questions and disputes shall be final and conclusive upon the parties thereto."

It further provides that the plaintiff should not be "entitled to demand or receive payment for any portion of the work to be done under or by reason of the contract until all disputes, disagreements and questions between the parties hereto affecting the right to any portion of the amount claimed shall have been settled as above provided for."

There are other provisions of the contract which throw some light upon its meaning as to the question under consideration, but the provisions quoted are those chiefly relied on by the parties to sustain their respective contentions.

The agreement does not, as do many if not most contracts for the construction of rail-ways, macadam roads, and the like, expressly provide that when the work is completed there shall be a final estimate, or declare in express terms what shall be the effect of the monthly estimates of the engineer; but when all the provisions of the agreement are read and considered together it seems to us it is clear that it was not intended that the monthly estimates should be final and conclusive of the facts recited in them, or regarded as a final acceptance of the work mentioned in them. To so hold would be to give no effect to that provision of the contract which expressly declares that "no work shall be regarded as accepted until the final acceptance of the whole work herein contracted for." What would have been the meaning and effect of the contract if that provision had not been inserted, it is unnecessary to consider. It is in the contract; its meaning is plain and unambiguous. It shows that the parties did not intend that the making of monthly estimates during the progress of the work and payments thereon should be regarded as a full or final acceptance of the work embraced in such monthly estimates, but that the work was to be accepted as a whole when completed. This being so, the court did not err in giving instructions numbered 1 and 5, offered by the defendant, which told the jury that such monthly estimates were not conclusive of the statements made therein, and did not constitute final acceptance of the work covered by such monthly estimates. Neither did the court err in refusing to give instructions numbered 3, 5, and 7, offered by the plaintiff, by which the court was asked to tell the jury, in effect, that such monthly estimates and payments thereon as provided by the contract without objection were conclusive upon the parties and could not be controverted.

It will be convenient here to consider the assignment of error as to the action of the court in the admission of evidence.

The object of the evidence admitted over the plaintiff's objections, and which the court refused to exclude, was to show that part of the work embraced in the monthly estimates was not done according to the provisions of the contract. Under the construction placed upon the contract as to the effect of the monthly estimates, such evidence was clearly admissible.

[5] By instruction No. 10 offered by the plaintiff, the court was asked to tell the jury that if they believed the facts hypothetically stated therein the defendant was estopped from denying that such portions of the work done as were embraced in the monthly esti-

mates had not been properly constructed. Several objections are made to this instruction.

The instruction fails to take into consideration the fact that there was evidence tending to show not only that the plaintiff knew that the work embraced in the said monthly estimates was not done in accordance with the provisions of the contract, but that the plaintiff had by fraudulent practices deceived the engineer who made some of the monthly statements in the belief that such work had been properly done.

[6] The doctrine of estoppel in pais is purely an equitable one, and it is essential to the application of that principle that a party claiming to have been influenced by the conduct of another to his injury was ignorant of the state of facts relied on to constitute such estoppel. *C. & O. Ry. Co. v. Walker*, 100 Va. 69, 70, 92, 93, 40 S. E. 633, 914, and authorities cited. And still less can he base a claim for an estoppel upon acts or conduct which were induced by his own acts, and a fortiori on those induced by his own fraud or false representations. See *Jones v. Bond*, 86 Va. 81, 9 S. E. 503; note to *Williamson v. Jones*, 4 Am. & Eng. Dec. in Eq. pp. 285, 286, and cases cited; 16 Cyc. 747, and cases cited.

It is unnecessary to consider the other objections urged to instruction No. 10 since the objection already considered shows that the court did not err in refusing to give it.

[7] Instruction No. 6, offered by the plaintiff, was as follows: "The court instructs the jury that if you believe from the evidence that the plaintiff performed the work mentioned in the contract and specifications in evidence before you, according to the said contract and specifications, *as directed by the engineer*, and offered same to the defendant, through its agents and engineers, for acceptance, then you should find for the plaintiff, notwithstanding that the contract provides that 'no work shall be regarded as accepted until the final acceptance of the whole work herein contracted for.'"

The court modified this instruction by striking out the words italicized. The provision in the contract was that the work was to be done in accordance with the specifications and conditions of the agreement between the parties and to the satisfaction of the county of Russell and the engineer. The modification was clearly proper, and the instruction as given was as favorable to the plaintiff as it was entitled to have it.

The refusal of the court to give the plaintiff's instructions numbered 1, 2, and 4 is assigned as error.

The object of these instructions, as stated by the plaintiff in his petition for a writ of error, was to tell the jury who was "the engineer" provided for in the contract between the parties. The instructions were as follows:

"(1) The court instructs the jury that it

was the duty of the defendant under the contract to appoint an engineer to set the stakes, establish the grades, and do and perform the other duties designated by the contract to be done and performed by the engineer; and if you believe from the evidence that in the course of the construction the said defendant did appoint Messrs. Dorden, Mullen, Cocke, and Lancaster for the performance of these duties, then said Dorden, Mullen, Cocke, and Lancaster became and were the agents and officers of the defendant in the construction of said work, and all their acts as such engineers under the contract are valid and binding upon the defendant.

"(2) The court instructs the jury that the engineer named and provided for in the contract in evidence in this case is and was the person who performed and discharged the duties and did the things mentioned in said contract to be done and performed by the engineer, and that regardless of what he may have termed himself or may have been termed by others, and also regardless of his competency or incompetency in the science of engineering."

"(4) The court instructs the jury that it was the duty of the engineer mentioned in the contract to establish lines and grades to superintend and direct the work, and to make and furnish to the board of supervisors of Russell county estimates of the work done, and the party who performed and upon whom devolved these duties is the engineer under the terms of this contract, regardless of what name he may be called by."

The court modified instruction No. 1 by adding to it, "except in case of fraud on the part of the plaintiff or gross mistake made by the said engineers," and gave it as instruction "A."

[8] The effect of instruction No. 1, as offered by the plaintiff, was to tell the jury that the persons named therein, by whatever name called, were "engineers" within the meaning of the contract, and that all their acts under the contracts were valid and binding upon the defendant. The modification made in it by the court did not, in the slightest degree, change it as to the character of the persons named, nor the valid and binding effect of their acts under the contract, "except in case of fraud on the part of the plaintiff or gross mistake made by the engineers." The modification or rather addendum made by the court was clearly proper, for the acts of engineers under such contracts are not binding upon either party when such acts have been induced by the fraud of the other party or are the result of fraud or mistake on the part of the engineers so gross as to amount to fraud on the rights of the other party. *N. & W. Ry. Co. v. Mills*, 91 Va. 613, 22 S. E. 556.

[9] By instructions 2 and 4 the court was asked to tell the jury that the persons who were required to do certain acts and perform

certain duties under the contract were the engineers within its meaning. Having told the jury by instruction "A" that the persons named in that instruction (who the evidence showed did the work and performed the duties described in instructions 2 and 4) were to be considered the engineers within the meaning of the contract, there was no necessity for giving the last-named instructions and the court did not err in rejecting them.

Without discussing further the assignments of error based upon the giving and refusing of instructions, it is sufficient to say that this court is of opinion that the instructions given fully submitted the questions involved in the case to the jury, and submitted them as favorably as the defendant was entitled to have them submitted.

The remaining assignment of error is to the refusal of the court to set aside the verdict because it was contrary to the law and the evidence.

There was no error, as we have seen, to the prejudice of the plaintiff in giving and refusing instructions, nor in the admission of evidence. The case having been properly submitted to the jury, the only remaining question is as to the sufficiency of the evidence to support the verdict of the jury. While the evidence is conflicting, there is ample evidence, to say the least, to justify the jury in believing that the road was not constructed in accordance with the contract, and that the damage resulting to the county from the plaintiff's failure to keep and perform its contract was as much as the sum found by the jury in its favor.

The judgment complained of must be affirmed.

Affirmed.

KEITH, P., and WHITTLE, J., absent.

VIRGINIAN RY. CO. v. BELL

(Supreme Court of Appeals of Virginia. Sept. 11, 1913.)

1. CARRIERS (§ 348*) — INJURIES TO MAIL CLERK—CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.

In an action for injuries to a railway mail clerk, where there was evidence that he knew of the defective condition of the car, and that the door would shut upon a sudden checking of the speed of the train, and that he failed to take such precautions for his safety as he could have done, the defendant was entitled to have the question of contributory negligence submitted to the jury clearly and fully.

[Ed. Note.—For other cases, see *Carriers* Cent. Dig. §§ 1403-1405; Dec. Dig. § 348.*]

2. CARRIERS (§ 348*) — INJURIES TO MAIL CLERK—CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.

In such an action, instructions given for the plaintiff, which only impliedly require the jury to find freedom from contributory negligence by stating that they must find that the negligence of the defendant was the sole proximate cause of the injury, and by placing the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

burden of proving contributory negligence upon the defendant, do not submit fully and clearly the question of contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1405; Dec. Dig. § 348.*]

3. TRIAL (§ 267*)—INSTRUCTIONS — APPLICABILITY TO EVIDENCE—INJURIES TO PASSENGERS.

In an action for personal injuries to a railway mail clerk, where there is evidence tending to show contributory negligence, and the carrier submits an instruction which is erroneous as making the issue a question of law upon certain facts instead of a question of fact, the court should modify the instruction, or should give another instruction, which submits the issue of contributory negligence as fully as the instructions for the plaintiff submitted the issue of the defendant's negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

4. TRIAL (§ 296*)—INSTRUCTIONS — MISLEADING INSTRUCTION.

Where a declaration for injuries to a railway mail clerk alleged in two counts that the carrier was negligent in running its train at a rapid rate of speed and suddenly checking it, and in two other counts alleged negligence in other respects, but under such circumstances that the injury would not have happened unless the train had been suddenly checked while running at a rapid rate of speed, instructions as to the negligence in the last two counts, which did not require a finding that the train was suddenly checked while running at a rapid speed, did not mislead the jury to believe that the plaintiff could recover without showing the sudden checking, where an instruction, given at the defendant's request, expressly told them that there could be no recovery unless such fact was proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

5. CARRIERS (§ 347*)—INSTRUCTIONS — INJURIES TO PASSENGERS.

In an action by a railway mail clerk for injuries caused by the door sliding shut upon him, where he testified that he was looking out to see where they were, when the engineer checked the speed of the train, and caused the door to shut, and another mail clerk testified that under such circumstances he would not have used a hook to fasten the door open, if there had been one, the question of whether he would have used a hook should have been submitted to the jury in the instruction submitting negligence in failing to supply it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.*]

6. TRIAL (§ 252*)—INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

A requested instruction which is not supported by the evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

7. TRIAL (§ 251*)—INSTRUCTIONS — APPLICABILITY TO ISSUES—INJURIES TO PASSENGERS.

Where two counts of a declaration for injuries to a railway mail clerk charged the carrier with negligence in furnishing a defective car and improperly placing it in the train, so that the door slid shut upon the clerk, when the speed of the train was suddenly checked, but did not allege negligence in the checking of the train, instructions requested by the defendant, which based the plaintiff's right of recovery upon the defendant's negligence in the running of its train, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

8. CARRIERS (§§ 280, 325*)—CARRIAGE OF PASSENGERS—RAILWAY MAIL CLERKS—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

A railway mail clerk in the discharge of his duties, while he is required to exercise ordinary care in using a defective door of the mail car, and cannot recover if he fails to do so, is, nevertheless, entitled to the same degree of care as a passenger, and does not assume the risk of the defect, even though he knew of it and did not report it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117, 1348; Dec. Dig. §§ 280, 325.*]

Error to Circuit Court, Montgomery County.

Action by O. C. Bell against the Virginian Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Hall & Woods, of Roanoke, H. J. Phlegar, of Christiansburg, and G. A. Wingfield, of Norfolk, for plaintiff in error. Hunt & Staples, of Roanoke, for defendant in error.

BUCHANAN, J. This action was brought by the defendant in error, O. C. Bell, to recover damages for personal injuries caused, as alleged, by the negligence of the plaintiff in error, the Virginian Railway Company. Upon the trial of the cause there was a verdict and judgment against the railway company, and to that judgment this writ of error was awarded.

The first error assigned is to the action of the court in giving the following instructions asked for by the plaintiff:

"I. The court instructs the jury that, if they believe from the evidence that the plaintiff on October 26, 1911, was U. S. railway mail clerk, and in the discharge of his duties as railway mail clerk on combination mail and baggage car No. 23 of train No. 14 of the defendant railway company was injured by being struck on the neck by the sliding door of said car, and that his said injury was caused by the absence of a fastener or hook on the sliding door of said car, that a reasonably safe hook or other fastener could have been provided for and attached to said door by the exercise of the utmost care on the part of the defendant company, and that the exercise of the utmost care for the protection of the said plaintiff on the part of the defendant company required that said company should provide a reasonably safe hook or other fastener for said door, and that the said plaintiff's injuries resulted solely and proximately from such negligence of said defendant in not exercising the utmost care to provide said hook, then the jury shall find for the plaintiff, and assess his damages at such sum as they may believe he has sustained, not exceeding the amount alleged in the declaration.

"II. The court instructs the jury that, if

they believe from the evidence that the plaintiff on October 26, 1911, was a U. S. railway mail clerk, and in the discharge of his duties as railway mail clerk on combination mail and baggage car No. 23 of train No. 14 of the defendant railway company was injured by being struck on the neck by the sliding door of said car and that his injury was caused by the fact that said combination mail and baggage car No. 23 was being run with the mail end of said car to the rear instead of with the mail end of said car forward, and that said car could have been run with its mail end forward by the said defendant company by the exercise of the utmost care on its part, and the exercise of the utmost care on the part of the defendant for the protection of the said plaintiff required that said defendant should run the said combination car with its mail end forward, and that said plaintiff's injuries resulted solely and proximately from said defendant's negligence in not exercising the utmost care to run said car with its mail end forward then the jury shall find for the plaintiff, and assess his damages at such sum as they may believe he has sustained, not exceeding the amount alleged in the declaration, to wit, the sum of \$15,000.

"III. The court instructs the jury that if they believe from the evidence that the plaintiff on October 26, 1911, was a U. S. railway mail clerk, and while in the discharge of his duties as railway mail clerk on combination mail and baggage car No. 23 of train No. 14 of the defendant railway company was injured by being struck on the neck by the sliding door of said car, that said train No. 14, on which plaintiff was being carried, was being negligently run at an excessive rate of speed and was suddenly and negligently checked, and that as a result of said excessive rate of speed and said sudden checking that said sliding door of said car struck the said plaintiff on his neck and injured him, and that said excessive speed and sudden checking of said car could have been avoided by the exercise of the utmost care on the part of the defendant railway company, and that said plaintiff's injuries resulted solely and proximately from the negligence of said defendant in failing to use the utmost care to avoid running its train at an excessive rate of speed and to avoid a sudden checking of the speed of said train, then they shall find for the plaintiff, and assess his damages at such sum as they may believe he has sustained, not exceeding the sum of \$15,000, the amount sued for.

"IV. The court instructs the jury that, if they believe from the evidence that the plaintiff on October 26, 1911, was a U. S. railway mail clerk, and in the discharge of his duties as railway mail clerk on combination mail and baggage car No. 23 of train No. 14 of the defendant railway company was injured by being struck on the neck by the sliding door

of said car, and that his said injury was caused by the fact that said car was being run with mail end to the rear, and by the fact that said car was equipped with a sliding door instead of a hinge door, and, further, by the fact that there was no hook or other reasonably safe fastener provided for said sliding door, and, further, by the fact that said train No. 14 was being negligently run at an excessive rate of speed, and that the speed of said train was suddenly and negligently checked, and that said defendant company, by the exercise of the utmost care, could have run said car with mail end forward, and could have provided a hinge door in lieu of a sliding door for said car, and, further, could have provided a reasonably safe hook or other fastener for said sliding door, and that the exercise of the utmost care for the protection of the said plaintiff on the part of said defendant company required that said company should run said car with the mail end forward, and should provide said car with a hinge door instead of a sliding door, and should provide a reasonably safe hook or other fastener for said sliding door, and that such utmost care on the part of the defendant for the protection of the plaintiff required that it, the defendant, avoid such running at such excessive speed and sudden stopping, and that said plaintiff's injuries resulted solely and proximately from any one of the above-mentioned acts of negligence of said defendant, or from the concurrence of two or more of said acts of negligence, then the jury shall find for the plaintiff, and assess his damages at such sum as they may believe he has sustained, not exceeding the sum of \$15,000."

Each of these instructions is objected to upon the ground that they leave out of view the defendant company's theory of the case—that the plaintiff was guilty of contributory negligence. This objection may be considered in connection with the refusal of the court to give the defendant's instruction No. 6, which is also assigned as error.

[1] There was evidence tending to show that the plaintiff knew of the alleged defective condition of the car; that it was not being run with its mail end next to the engine, as he claims it should have been; that the door of the car would shut upon the sudden application of the brakes, when the train was running rapidly; that such application of the brakes might occur at any time; and that he could have taken but did not take any precautions for his protection at the time he was injured. The defendant was therefore entitled to have the question of contributory negligence clearly and fully submitted to the jury. The plaintiff's instructions 1, 2, 3, and 4 distinctly and fully submitted the plaintiff's theory of the case to the jury. While in each of those instructions the jury are told that, if they believe the facts hypothetically stated in them, they

must find for the plaintiff, yet in neither of them is there the usual qualification (where there is evidence tending to show that the plaintiff was not in the exercise of due care), "unless they believe that he was guilty of contributory negligence." See *A. C. L. Ry. Co. v. Caples*, 110 Va. 514, 519, 66 S. E. 855.

[2] The plaintiff insists that the qualification as to contributory negligence is contained in the requirement in his instructions 1, 2, 3, and 4, that the jury should believe that the alleged acts of negligence on the part of the defendant was the sole and proximate cause of the accident, before they could find for him, and in his seventh instruction.

That instruction is as follows: "The court instructs the jury that, if the defendant company relies upon contributory negligence of the plaintiff, as a defense to this action, then, unless the same appears from the testimony introduced by the plaintiff, the burden of proving such contributory negligence on the part of the plaintiff is upon the defendant, and it must appear by a preponderance of the evidence that said plaintiff failed to exercise, for his own safety, that degree of care, under all the circumstances of this case, which a reasonably prudent person, using ordinary care, would have exercised."

[3] The plaintiff's instructions Nos. 1, 2, 3, and 4 only submit the question of contributory negligence to the jury by implication, and his instruction No. 7 is directed chiefly to telling the jury upon whom was the burden of proof on that issue, and only in the most general way refers to what would constitute due care on the part of the plaintiff. These instructions not only did not submit fully and clearly the question of contributory negligence to the jury, but the court refused to give the defendant's instruction No. 6, which was in these words:

"The court instructs the jury that, although they may believe from the evidence that at the time the plaintiff claims he was injured the defendant was negligent in using a mail car with a sliding door and without a hook to hold the door open, or in so placing the mail car in the train that the door would slide shut in the direction the train was moving, or in running the train at an excessive rate of speed and stopping it suddenly, yet, if they further believe from the evidence that the plaintiff knew of the condition of said door and the position the mail car was placed in the train, that the train was running at a rapid rate of speed, and might possibly be suddenly stopped at any time, and with knowledge of these facts the plaintiff thrust his head out of the door, without using the means or precautions which he could have used to prop or hold the door open, then the plaintiff was guilty of contributory negligence, and they must find for the defendant."

That instruction sets out the facts relied upon by the defendant to show want of due

care on the part of the plaintiff at the time of the accident, and while it declares that these facts, as a matter of law, would make out a case of contributory negligence, instead of leaving that question to the jury, still, as the instructions given for the plaintiff did not distinctly and fully submit that question to the jury, the court, under the circumstances, ought to have corrected instruction No. 6, or given an instruction in lieu of it, which as fully and as distinctly submitted to the jury the theory of the defendant as to contributory negligence on the part of the plaintiff as the instructions given submitted the theory of the plaintiff as to the negligence of the defendant.

[4] Instructions Nos. 1 and 2 are also objected to upon the ground that they are in conflict with the defendant's instruction No. 8. That instruction told the jury that there could be no recovery under either count in the declaration, "unless the train approached the station at Ironto at a rapid rate of speed, and that the speed of said train was so suddenly checked as to cause the mail car to lurch forward with greater violence than ordinarily attends the stopping of trains, and that as a result thereof the door of the mail car slid shut with such force" that it caused the injury complained of.

The evidence tended to show that the use of the mail car with a hanging door without hooks, or the running of the car with the wrong end foremost, could not have caused the sliding door to shut suddenly and violently, unless the train was running rapidly and was suddenly checked. That this was the case was recognized by the pleader in framing his declaration, for in the first and fourth counts the rapid running and sudden checking of the train are charged to have been negligent, and in the second and third counts, while these acts are not alleged to have been done negligently, yet the allegations show that the accident could not have happened but for such rapid running and sudden checking.

But it is insisted by the plaintiff that his instructions (Nos. 1 and 2) require the jury to so believe before they could find for him, since his right to recover under either of said instructions is made to depend upon the fact that the sole and proximate cause of his injuries was the act or acts of negligence hypothetically stated in each.

While instructions Nos. 1 and 2 are not as clear upon that point as they might be, yet, when read in connection with instruction No. 8, we do not think that the jury could have believed that the plaintiff was entitled to recover, unless they had further believed that the train was running rapidly and was stopped suddenly when he was injured. But, as the judgment will have to be reversed upon other grounds, it would be better to make the instructions given upon the next trial clear upon this question.

[5] Another objection made to instruction No. 1 is that there was evidence tending to show that under the circumstances disclosed by the plaintiff's own evidence he would not have used the hook if it had been in place. He stated that, when the engineer blew the signal for the station: "I was changing my clothes; I pulled on my breeches. I didn't have no undershirt on, and when I ran to the door and looked out to see where I was, and just as I looked out he put his air on." One of the plaintiff's witnesses, also a mail clerk, testified that a mail clerk, who was only looking out to see if the mail was up, would not think of the hook, but would hold the door open with his hand. It is true that the plaintiff himself testified that he had no way of holding the door open while he was preparing to catch the mail; but he does not deny that, in looking out to see where he was or whether or not the mail was up, he could have held the door open with his hand. Opening the door to see where the train was or whether or not the mail was up required but a moment of time, and it is highly probable that under the circumstances disclosed by his own evidence the plaintiff would not have used or thought of the hook, as his own witness testified.

There being evidence tending to show that, if the hook had been in place, a mail clerk under like circumstances would not have used it, the question of whether or not the plaintiff would have used it to fasten the door before looking out ought to have been left to the jury, for the absence of the hook could not have been the proximate cause of the plaintiff's injury, if he would not have used it if in place.

The next assignment of error is to the action of the court in refusing to give instructions numbered 4, 5, 6, 10, and 11 offered by the defendant.

[6] Instruction No. 4 was properly rejected. While there is evidence tending to show that a mail clerk, in looking out of the door to see where his train was or whether the mail was up, would not have used the hook if it had been in place, under the circumstances testified to by the plaintiff (and hereinbefore discussed in considering the last objection to the plaintiff's instruction No. 1) there is no sufficient evidence to show that in handling the mails at the stations he would not have used the hook, or that it was not commonly used while actually handling the mail at stations, to justify the giving of the instruction as offered.

[7] Instructions Nos. 5 and 10 were also properly refused. Each of these instructions made the plaintiff's right to recover depend upon the fact that the defendant was guilty of negligence in the running of its train. Under the second and third counts in the declaration the right of the plaintiff

to recover does not depend upon the negligent running of the train but upon the character and condition of the mail car and the manner in which it was placed in the train. While under the allegations of these counts the accident would not have resulted but for the rapid running and sudden stopping of the train, there is no allegation that the defendant by such rapid running and sudden stopping was guilty of negligence.

The objection to instruction No. 6 was discussed in considering the assignment of error as to the giving of the plaintiff's instructions, and need not be referred to further.

[8] Neither did the court err in rejecting the defendant's instructions Nos. 11 and 12. By instruction No. 11 the court was asked to tell the jury that, if the plaintiff knew for several months before the accident that there was no hook to hold the mail car door open, and that it was dangerous to operate it without a hook, and the plaintiff continued to perform his duties as mail clerk, without reporting the absence of a hook, and without a promise from the defendant to replace it, the plaintiff assumed the risk, and could not recover. By instruction 12 the jury were to be told that, if the plaintiff knew of the absence of the hook, and that it was dangerous to operate the car without it, and continued to perform his duties as mail clerk, without reporting the absence of the hook to the chief clerk of the railway mail service, or to the defendant, then he was guilty of contributory negligence, and they must find for the defendant. The effect of both of those instructions was to hold that the plaintiff had assumed the risk resulting from the absence of hooks on the car door. If the failure to place and keep hooks on the car door was negligence on the part of the defendant, and the plaintiff knew of their absence, it was his duty to exercise reasonable or ordinary care in using the door in his work, and, if he failed to do so, he was guilty of contributory negligence, and could not recover. But in discharging his duties as mail clerk in the car in its alleged defective condition, without informing the railway mail service or the defendant of the defective condition of the car, he did not assume the risk of damage resulting from the absence of hooks, nor did his failure to so notify either deprive him of the right of recovery. The relation which the plaintiff bore to the defendant as a common carrier imposed upon it the same degree of care for him that it was bound to exercise toward its other passengers. *N. & W. Ry. Co. v. Shott*, 92 Va. 34, 44, 22 S. E. 811. See *Lindsey v. Pa. R. Co.*, 26 App. Cas. (D. C.) 503, 6 Ann. Cas. 862, and notes 863-865, and authorities cited. It was incumbent, therefore, upon the defendant to see that its mail car was such as it was its duty to furnish and maintain, and, if it failed to do so, the plaintiff was entitled to

recover, unless he was guilty of contributory negligence. It would scarcely be contended that, if an ordinary passenger on a passenger train had known for weeks or months that the car upon which he was accustomed to travel was in a defective condition, by reason of which defect he was injured while in the exercise of reasonable care on his part, he could not recover because he had failed to inform the carrier of such defect, a defect which, under the high degree of care imposed upon it, it was bound to have knowledge of and remedy.

Another error assigned is to the refusal of the court to permit a map or drawing which purported to be a standard plan of the United States railway postal compartment cars. The objection made to the paper offered was that it was offered as a copy, and that it was not authenticated, as provided by section 3343 of the Code, nor was there evidence that it had been compared with the original and found to be a correct copy.

The ruling of the court seems to have been proper from what appears in the record; but, as the objection made to the paper can be cured before or at the next trial, it will be unnecessary to pass upon the question.

The remaining assignment of error is to the refusal of the court to set aside the verdict. As the judgment complained of must be reversed, this assignment of error will not be considered, as the evidence may and the instructions will be different on the next trial.

The judgment will be reversed, the verdict set aside, and a new trial awarded, to be had not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

SOUTH ATLANTIC LIFE INS. CO. v. HURT'S ADM'X.

(Supreme Court of Appeals of Virginia. Sept. 11, 1918.)

1. INSURANCE (§ 646*) — LIFE POLICY—DEFENSES—SUICIDE—BURDEN OF PROOF.

In an action on a life policy, the burden is on the defendant to prove a defense of suicide by clear and satisfactory evidence that the insured did actually commit suicide; a mere preponderance of the evidence being insufficient.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

2. INSURANCE (§ 646*)—LIFE POLICY—ACCIDENTAL DEATH—SUICIDE—PRESUMPTIONS.

Where the evidence in an action on a life policy as to whether insured's death was accidental or suicidal leaves the question in doubt, it will be presumed that it was accidental.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

3. INSURANCE (§ 665*)—LIFE POLICY—SUICIDE.

Where, in an action on a life policy, the evidence that insured committed suicide is circumstantial, the defense of suicide will fail unless the circumstances exclude, with reasonable certainty any hypothesis of death by accident.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

4. EVIDENCE (§ 63*)—PRESUMPTION AGAINST INSANITY.

All men are presumed to be sane until the contrary is shown, and the burden is on the party alleging insanity to prove it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 83; Dec. Dig. § 63.*]

5. INSURANCE (§ 665*)—PROOF OF INSANITY—INSANITY OF RELATIVES.

In the absence of evidence of any demeanor, act, or word of insured at any time indicating that he was insane, the fact that he was shown to have had insane relatives did not prove that he was insane at the time of his death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

6. INSURANCE (§ 668*)—LIFE INSURANCE — SUICIDE—QUESTION FOR JURY.

In an action on a life policy, evidence held to require submission to the jury of the question whether insured died as a result of accident or committed suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

7. APPEAL AND ERROR (§ 1058*)—REVIEW—RULINGS ON EVIDENCE—PREJUDICE.

Where a physician was introduced as a witness by insurer and interrogated fully concerning what he knew of insured and what he meant by the language used in an affidavit in which he stated that he knew nothing of the special cause of insured's death "unless it be hereditary insanity," defendant was not prejudiced by the exclusion of the affidavit containing such answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

8. INSURANCE (§ 293*)—LIFE POLICY—FRAUD — ANSWERS WILLFULLY FALSE.

Where a life policy provided for two defenses only, to wit, suicide within 12 months from the date of the policy and fraud, fraud was not made out by untrue answers in the application failing to disclose that insured's uncle had been afflicted with hereditary insanity, where it was not shown that insured had knowledge that such insanity was hereditary and that the answers were willfully false.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 693; Dec. Dig. § 293.*]

9. INSURANCE (§ 293*)—LIFE POLICY—APPLICATION—FAMILY HISTORY—QUESTIONS—INSTRUCTION—"HEREDITARY DISEASE."

An application for life insurance, after containing numerous questions as to the applicant's physical and mental condition, inquired whether any intimate associate or any person in the applicant's immediate household was then ill with consumption, whether any one of them had recently been ill or died of that disease, and then asked whether any of the applicant's uncles or aunts had consumption or any "hereditary" disease. Held, that the last question should be construed as inquiring concerning physical ail-

ments and condition and not to refer to hereditary insanity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 693; Dec. Dig. § 293.*]

For other definitions, see Words and Phrases, vol. 4, p. 3281.]

10. INSURANCE (§ 378*)—LIFE POLICY—APPLICATION—MEDICAL EXAMINER—KNOWLEDGE—IMPUTATION TO INSURER.

Where insurer's medical examiner, who took insured's application for the policy sued on, was well acquainted with the mental condition of insured's family, his uncles and aunts, and had been so from early boyhood, the insurer was bound by the physician's knowledge concerning such condition, under the rule that the examining physician for an insurance company is the agent of the insurer notwithstanding a provision of the contract to the contrary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 878.*]

Error to Circuit Court, Tazewell County.

Action by Ollie L. Hurt, as Administratrix of John B. Hurt, deceased, against the South Atlantic Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry & Graham, of Tazewell, and Thos. B. Gay, of Richmond, for plaintiff in error. Greever & Gillespie and Chapman & Gillespie, all of Tazewell, for defendant in error.

HARRISON, J. Ollie L. Hurt, administratrix of John B. Hurt, deceased, recovered a judgment against the South Atlantic Life Insurance Company, in the circuit court of Tazewell county, for \$5,000, the amount of a policy of insurance issued by the defendant company upon the life of the plaintiff's intestate; and upon the petition of the company this judgment is now before us for review.

Upon the trial of the case the defendant company interposed the plea of non assumption and a special plea tendering the plaintiff \$27.30, being the amount of reserve fund held on account of the contract sued on, which it claimed was all that was due under the policy. Being required to file a statement of its grounds of defense, the company made two contentions: First, that the insured, during the first 12 months from the date of the policy, committed suicide; and, second, that the insured made in his application for insurance untrue answers to certain questions, which were material to the risk contracted for in the policy, thereby voiding the same.

From the evidence adduced it can be stated with confidence that at the time the policy in question was issued the insured was in good health, and that the application was made and the policy accepted by him in good faith. The evidence as a whole reveals the insured as a man of the highest integrity, of unusual business ability, possessed of large real and personal property, actively engaged in the successful prosecution of extensive business interests, with a large and happy

family consisting of his wife and eight children, to which he was attached and in which he took great pride. Up to the time of his death he was full of plans for the future, with every confidence in his ability to carry them through successfully, with nothing to trouble him in any of his affairs, either in business or in his personal relations.

These were the conditions of the insured and the circumstances surrounding him up to the morning of January 26, 1911, when he left his home with two of his work hands to feed his cattle. After the cattle were fed he directed his men to return to the house, saying that he would remain "to watch the hogs away from the cattle." Failing to return to his home that day, search was instituted, and his dead body was found on the following morning in a pasture some distance from his home; death having been caused by a gunshot wound in his right temple. The body was found in an adjoining field to that in which the cattle had been fed, at the foot of a stump, lying on the left side with his feet partly drawn up. The left arm and hand was under him, and the right arm thrown across his body with the right hand resting upon the butt of a 38 calibre pistol, which showed that one chamber was empty. The deceased was shown to have owned a pistol which was not found after his death.

[1] While two grounds of defense were set out by the defendant company, the record discloses that the real contest was that the insured committed suicide within 12 months after the date of the policy. The great weight of authority, both text-writers and decisions, agrees that in a case of this kind the burden is upon the defendant to show by clear and satisfactory evidence that the insured did actually commit suicide; that a mere preponderance of evidence will not suffice.

In the case of *Cosmopolitan Life Ins. Co. v. Koegel*, 104 Va. 619, 52 S. E. 166, it is held that: "The defense of suicide, to avail, must exclude every hypothesis of accidental death. The party making the defense has the burden of proof. It will not be presumed. The mere fact that the body of an insured is found with a pistol in his hand and a bullet wound in his head is not sufficient to prove suicide."

[2] In that case, quoting with approval from high authority, it is further said: "Accidental death will be presumed, and this presumption must be overcome by the proof of facts which exclude every hypothesis of death except by suicide." And further that: "Where the evidence as to whether the death was accidental or suicidal leaves the question in doubt, the presumption is in favor of accident."

The doctrine laid down in the *Koegel Case*, supra, is adhered to and emphasized

*For other cases see same topic and section-NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

by this court in the subsequent cases of Life Insurance Co. of Va. v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989, and Metropolitan Life Insurance Co. v. De Vault, 109 Va. 392, 63 S. E. 982, 17 Ann. Cas. 27.

[3] In the last-named case it is said: "Where the evidence of self-destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident."

The principles announced in the Virginia cases prevail with unanimity in numerous cases in point from other jurisdictions where the defense of suicide is sought to be established by circumstantial evidence. Of these we shall refer to but one.

In the case of Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1192, 15 South. 389 (24 L. R. A. 589, 49 Am. St. Rep. 349), the suit was brought by a widow on a policy issued on the life of her husband. The jury found for the defendant on the defense of suicide, and on appeal the judgment upholding that verdict was reversed and a judgment entered in favor of the plaintiff for the amount of the policy. The facts were not unlike those in the case at bar, so far as the circumstances tending to support the theory of suicide were concerned. Briefly stated, the body was found with a wound from a gunshot causing death; the discharged pistol was wedged as if it had been forced on the right hand; the body was reclining on a sofa, as of one sleeping; the left arm rested on the breast; the right leg crossed on the left; the head in the usual position of one in repose; there being no evidence of any convulsive movement. The court said: "The question is whether these appearances point to suicide, to the exclusion of any other cause. Why not, with equal potency, to accidental death or death by the hand of another? * * * When, as in this case, circumstantial evidence alone is relied on to establish suicide, it is at least within bounds to say the evidence must be of a character to exclude, with reasonable certainty, any other cause of death. If the evidence falls short of this exaction, the suicide is not proved. The fact of death remains, and that casts the liability on the company insuring against death, with the excepted case of self-destruction, which the company fails to establish. This appreciation of the evidence and of the burden of proof constrains us to set aside the verdict and judgment of the lower court in favor of the defendant."

[4] In the case at bar the defendant company seeks to avoid the burden of proving that the insured committed suicide by attempting to show that he was insane at the time of his death, and that therefore the presumption against suicide never existed. Here, again, the defendant is confronted with another presumption, namely, that all men are presumed to be sane until the contrary

is shown, and the burden is upon the party alleging insanity to prove it. Howard v. Howard, 112 Va. 566, 72 S. E. 133.

[5] The record fails to show one word or act of the insured up to the moment he was last seen to remotely suggest that he was insane. When last seen on the day of his death he was in his usual health and engaged, as usual, in the performance of his daily duties. It is true that the mother and certain relations of the insured are shown to have been insane, but it does not follow from this that the insured was insane. The result of the testimony of the experts in this case is that, when the acts and demeanor of a person indicate insanity, the fact that he has had insane relatives strengthens the view that he is insane, but, where no word or act on the part of the person whose sanity is questioned is shown, the fact that such person has had insane relatives, standing alone, raises no presumption of insanity. A critical reading of the record fails to disclose any demeanor, act, or word on the part of the insured, at any time indicating that he was insane, and therefore the fact that he was shown to have had insane relatives, standing alone, does not prove that he was insane at the time of his death. Apart from the insanity of relatives, the only other circumstance relied on by the defendant as tending to show that the insured was insane is that recently before his death he had lost flesh and was less talkative and jovial than usual. The experts agree that, while these circumstances may be present in cases of insanity, they do not, standing alone, indicate that a person is insane. They may and often do arise from many physical causes having no relation whatever to the disease of insanity.

[6] In concluding this branch of the case it is sufficient to say that, even if it be conceded that there is greater probability that the death of the insured resulted from a suicidal act than from an accident, still we cannot say that death by suicide is the only reasonable conclusion to be drawn from the evidence. The proof does not exclude, with reasonable certainty, death from accidental shooting, and, the burden being upon the defendant to establish its defense by proof, it was properly left to the jury to say whether or not it was a case of suicide.

[7] In the first assignment of error petitioner complains of the exclusion of the affidavit made by Dr. Baylor when the proof of death was made out; the point relied on being that petitioner was entitled to the benefit of his answer as to the special cause of the insured's death, the answer being: "Know of nothing unless it be hereditary insanity."

The statement of the attending physician in a proof of death would seem to be only necessary or valuable when the deceased has died from natural causes and has actually been attended by a physician. In such a case

the insurance company has a right to know what the physician knows as to the cause of death. But in this case there was no attending physician, and the answer of Dr. Baylor, which is mere conjecture, shows that he knew no more about what caused the death than any one else who saw the dead body. But, be that as it may, Dr. Baylor was subsequently introduced as a witness by the defendant and interrogated fully on this point as to what he knew of the deceased in every way and what he meant by the language of the answer he gave in the affidavit mentioned. All that he knew was thus put completely and effectually before the jury, and the defendant suffered no prejudice whatever from the action complained of.

[8] The second assignment of error is to the action of the circuit court in refusing to give certain instructions asked for by the defendant company and in giving certain other instructions. The court's refusal to give instructions A and C, asked for by the defendant and refused, may be dealt with together.

In his application for the policy sued on the insured was asked the following question: "Have any of your uncles or aunts had consumption or any hereditary disease? If so, on paternal or maternal side?" To which the insured replied, "No." Instruction A told the jury that this answer was false and that it was material to the risk and directed the jury to find for the defendant. Instruction C told the jury that, if the insured, in answering the question mentioned, failed to disclose that his uncle, A. J. McGuire, had been afflicted with hereditary insanity, they must find for the defendant company.

[9] These instructions were properly refused. The policy provides for two defenses only, namely, suicide within 12 months from the date of the policy and fraud. Untrue answers, in order to be fraudulent, must be willfully false. *Mason v. Chappell*, 15 Grat. (56 Va.) 572, settles the law in Virginia that the scienter must be shown. There is no evidence that the applicant for this insurance knew that he had "uncles or aunts" who had been the victims of hereditary insanity. He doubtless knew that he had relatives who had been insane, but that this layman knew the character of their insanity is not to be presumed when learned experts who have testified in this case differ as to the hereditary nature of insanity, all agreeing that certain kinds of insanity are not hereditary. When the doctors differ as to the hereditary nature of insanity, it is hardly to be expected that a layman, unlearned in the technical meaning of medical terms, would know whether or not a particular case of insanity was hereditary. Further, the form of the question was well calculated to mislead the applicant. He was asked a number of questions as to his physical and

mental condition, and immediately preceding the question and answer under consideration he was asked: (16) "Is any intimate associate, or any person in your immediate family or household, now ill with consumption?" (17) "Has any one of them recently been ill, or died of that disease?" (18) "Have any of your uncles or aunts had consumption, or any hereditary disease?" This last question, certainly in view of those immediately preceding, would naturally have been regarded by the applicant as referring wholly to physical diseases, and it would be most natural for a layman to understand from the question that hereditary diseases of a like nature were referred to. Dr. Williams, the medical examiner for this company, who wrote out the answers of the applicant to these questions, when asked the meaning of the term "good health," said: "In the usual acceptance of the term, you would have reference to the physical condition." This witness is shown to have been, at the time, fully informed as to the family history of the applicant, and particularly as to the mental condition of his mother, uncles, and aunts, and in answer to the question, "Were those answers as you wrote them, and made by Mr. Hurt, true at the time they were made?" he says: "So far as I know they were." It does not seem reasonable to suppose that the defendant intended, by the question under consideration, to include mental trouble in the language "consumption or any hereditary disease." If it did, it has only succeeded in making an erroneous impression upon the applicant and misleading him into ignorantly making the answer now complained of.

[10] Apart, however, from these considerations, it appears that Dr. Williams, the medical examiner for the defendant company, who wrote out the answers of the deceased in his application for this policy, was well acquainted with his mother, uncles, and aunts from his early boyhood and was thoroughly familiar with their mental condition. It is a well settled principle that any knowledge which the agent of an insurance company may have is imputed to the company, and that medical examiners for insurance companies are considered as agents for the company, and the company is bound by any information its medical examiner may have at the time he fills out the application for the insured. *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92.

There is a very lengthy and luminous note to this case in which it is said, citing numerous authorities in support of the proposition, that: "The principle stated applies equally to medical examiners appointed by life insurance companies, though the application or policy may declare that such is not the case, for examiners are in law agents of the corporations selecting them and requiring the performance of their duties, including the asking of questions and the writing in the

application of the responses thereto. Hence, though a medical examiner omits an answer made by the applicant, or writes it out substantially different from the response actually given by him, and the insurer acts only on the answers so written, still, as in law the medical examiner is the agent of the insurer and not of the insured, the former cannot escape liability on account of the failure of its medical examiner to perform his duty, nor even on account of his intentional misperformance of it. He is the agent of the insurer, and to it his knowledge is imputed, and, if it issues its policy, it must be deemed to have done so after its agent had communicated to it all the facts made known to him, and it is estopped from contending to the contrary."

The defendant company, therefore, knew or could have had through its medical examiner all the information that it now claims to have desired to elicit by the question under consideration, and it is estopped from contending to the contrary.

Instruction B asked for by the defendant tells the jury that the plaintiff's intestate committed suicide and peremptorily directs them to find for the defendant. Enough has been already said to show the fallacy of this instruction and that it was properly refused.

The petition points out no error in the instructions given by the court, and an examination of them shows that they are free from objection.

The case having been fairly submitted to the jury, their verdict must, under the law, stand and the judgment upholding the same be affirmed.

Affirmed.

KEITH, P., absent.

STATE ex rel. SIMS v. McMASTER, Insurance Com'r et al.

(Supreme Court of South Carolina. Sept. 30, 1913.)

INSURANCE (§ 20*)—FOREIGN INSURANCE COMPANY—LICENSE TO DO BUSINESS—REVOCA-TION—INSURANCE COMMISSIONER—DISCRE-TION—MANDAMUS.

Civ. Code 1912, §§ 2669, 2670, 2671, provide that it shall be a condition precedent to the right of a foreign insurance company to do business in the state that all actions arising out of such business with citizens of the state shall be tried in the state courts, and section 2700 declares that, if the Insurance Commissioner shall find that any such company has violated the law of the state, he shall revoke or suspend its license. *Held* that, where relator sued a foreign insurance company, which removed the cause to the federal court, and on complaint by relator to the Insurance Commissioner an order to show cause why the company's license should not be revoked was issued, and on return of such order the company showed that the removal was a mistake and without any intention on its part to violate the law, and offered to consent that the case be remanded, whereupon the Commissioner refused

to revoke the license, his right so to act was discretionary, and relator had no such interest in the matter as entitled him to maintain mandamus against the Insurance Commissioner to compel him to revoke the license.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 16, 18-22; Dec. Dig. § 20.*]

Mandamus on relation of T. P. Sims against F. H. McMaster, Insurance Commissioner, and others. Writ denied.

Gwynn & Hannon, of Spartanburg, for appellant. T. M. Mordecai and W. A. Holman, both of Charleston, for respondent McMaster.

PER CURIAM. Sections 2669, 2670, and 2671 of the Civil Code of 1912 provide that it shall be a condition precedent to the right of any foreign corporation to do business in this state that all actions arising out of the business of such corporations with the citizens of this state shall be tried in the state courts; and that it shall be deemed an essential part of all contracts between such corporations and the citizens of the state that actions arising thereout or pertaining thereto shall be tried in the state courts, which shall have exclusive jurisdiction of all such actions brought therein, saving the right of appeal to the Supreme Court of the United States. Other sections of the Civil Code prohibit foreign insurance companies from doing business in the state without a license from the Insurance Commissioner; and section 2700 provides that, besides other contingencies therein mentioned, if the Commissioner shall find that any such company has violated the law of the state, "he shall revoke or suspend" its license, and prohibits the doing of business thereafter by such company, until its authority to do business is restored by the Commissioner.

In June, 1912, the relator, T. P. Sims, commenced an action in the court of common pleas for Spartanburg county against the respondent the Mutual Life Insurance Company of New York on a cause of action arising out of a transaction with said company. On petition and motion of the company, the cause was duly and regularly removed to the federal court. Thereafter, at the instance of the relator, the respondent F. H. McMaster, the Insurance Commissioner of the state, cited the company to show cause before him why its license to do business in the state should not be revoked, because of its violation of the provisions of the statutes above mentioned in removing said cause to the federal court. For cause, the company showed that the case had been removed in consequence of its general policy and custom in such cases, and without any intention to violate the law of the state, and offered to do all that it could to have it restored to the dockets of the state court for trial, agreeing that, if the plaintiff would move to dismiss the action in the federal court, it would consent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereto, and it would have its attorneys accept service of the same summons and complaint upon which the action had been originally brought and pay all costs and expenses to which the plaintiff therein (the relator herein) had been put by reason of the removal, except the fees of his attorneys. Upon this showing, the Commissioner refused to revoke the company's license.

Thereupon the relator instituted this proceeding to obtain a writ of mandamus to compel the Commissioner to revoke the license. Upon the petition, a rule to show cause was issued, and the matter was heard by the Chief Justice, at chambers. Upon hearing the returns, he held that the revocation of the license was in the discretion of the Commissioner, and that he had not abused his discretion or exercised it capriciously or arbitrarily, and further that the relator had shown no interest which had been prejudiced by the action of the Commissioner. He therefore dismissed the petition. The relator appealed.

The respondent the Mutual Life Insurance Company of New York moved, on due notice, to dismiss the appeal on the ground, among others, that the relator had no right to prosecute it, since no right of his was prejudiced by the action of the Commissioner. Upon the day set for the hearing of the motion, no one appeared to resist it, and, on motion of respondents' attorneys, the court passed an order dismissing the appeal on the ground that the said T. P. Sims had not offered to show that he had any right to prosecute it.

Thereafter, on notice and affidavits, excusing their default, the attorneys for T. P. Sims moved the court to reinstate the appeal. At the hearing of this motion, it was agreed by counsel that the court should consider, along with the motion to reinstate the appeal, the original motion to dismiss it, the practical effect of which is that, if the court shall conclude that the appeal was properly dismissed, the motion to reinstate must be refused.

After careful consideration of the matter, we are of the opinion that no right of the relator, T. P. Sims, was prejudiced by the action of the Commissioner; and therefore he has no right to prosecute this appeal. We fail to see how he would be benefited by the revocation of the company's license. The Commissioner properly took into consideration, in exercising his discretion, not only that the revocation of the license, under the circumstances, would not benefit the relator, but that it would do positive injury to the company, to the state, in the loss of revenue, and to many citizens of the state who are agents of the company, and to many others who are policy holders therein.

The citation of the company to appear before the Commissioner to show cause why its license should not be revoked had the effect of bringing the company to a realization of

its duty, under the law, to submit to the jurisdiction of the state court, and it offered and agreed to do all that was in its power which the relator could have reasonably asked or required it to do to restore the case to the jurisdiction of the state court. We are unable to see wherein the relator has any further interest in the matter, except, perhaps, to indulge a desire to punish the company; but the Legislature has not seen fit to confer upon private individuals the power to punish in such cases.

The motion to reinstate the appeal is therefore refused.

The CHIEF JUSTICE disqualified.

HUGGINS v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. June 10, 1913. On Rehearing, Sept. 29, 1913.)

1. DAMAGES (§ 208*)—PUNITIVE DAMAGES—EVIDENCE.

Where, in an action for injuries to a railroad engineer, plaintiff claimed that the injury was caused by the incompetency of his fireman and testified that he had previously complained to defendant's foreman that the fireman was incompetent and had been promised a new fireman on his next trip, while the foreman denied notice of his incompetency and testified that if any such report of incompetency had been made to him he would not have kept the fireman two minutes, there was evidence justifying the submission of plaintiff's right to recover punitive damages on the theory that the foreman had recklessly and consciously disregarded plaintiff's right to the assistance of a competent fireman.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

A verdict, on conflicting evidence, that plaintiff was injured as a result of the application of emergency brakes by plaintiff's fireman in response to a signal from plaintiff and not from a brakeman, was conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

3. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—INCOMPETENT SERVANT—ISSUES AND PROOF.

Where, in an action for injuries to a railroad engineer by the alleged incompetency of his fireman, the complaint alleged that defendant's foreman knew of the fireman's unfitness, that the same had been repeatedly reported to defendant's officers, and that the fireman had a habit of tampering with the engine and of moving the train without authority, long prior to the date of the accident, such allegation authorized the admission of evidence of specific instances other than that alleged in the complaint of the fireman's meddling with the engine, and that other employes had complained to the foreman of the fireman's incompetency.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

4. TRIAL (§ 242*)—MISLEADING INSTRUCTIONS.

Where the court charged that plaintiff could not recover if he was guilty of negligence in any one or more of the nine particulars specified in the answer, the jury were not misled by an instruction that the burden was on defendants to establish every material allegation of the defense of contributory negligence, in that it required proof of every one of the specifications of contributory negligence, whereas proof of one was sufficient to defeat a recovery; the same burden having been placed on plaintiff by an instruction requiring him to prove every material allegation of the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.*]

5. APPEAL AND ERROR (§ 1062*)—INSTRUCTIONS—PREJUDICE—CLAIM FOR PUNITIVE DAMAGES—WITHDRAWAL.

Where, in an action for injuries to a servant, there was evidence sufficient to support a verdict for punitive damages, defendants were not prejudiced by plaintiff's withdrawal of his claim for punitive damages at the conclusion of the arguments to the jury, using the evidence merely to bar the defense of contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

6. NEW TRIAL (§ 153*)—GROUNDS—MISCONDUCT OF JURY—AFFIDAVIT—SERVICE.

Affidavits showing misconduct of jurors as a ground for new trial need not be served on opposing counsel four days before hearing.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 283, 288; Dec. Dig. § 153.*]

7. NEW TRIAL (§ 55*)—GROUNDS—MISCONDUCT OF JURORS.

Where defendants' counsel acquired knowledge of misconduct of certain jurors during the trial, but did not call the same to the attention of the trial judge until after verdict, such misconduct, not having been such as to be clearly prejudicial, did not require the granting of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 106-111; Dec. Dig. § 55.*]

8. APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVE VERDICT.

The Supreme Court has no power to set aside a verdict as excessive unless it is so excessive as to warrant a conclusion that the trial judge abused his discretion in refusing to grant relief against it, since if it is only moderately excessive the trial judge alone is vested with discretion to set it aside, either absolutely or conditionally.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

9. DAMAGES (§ 132*)—PERSONAL INJURIES—VERDICT—EXCESSIVENESS.

Plaintiff, a railroad engineer 35 years old, in previous good health, was totally and permanently disabled as the result of the alleged negligence of his fireman in stopping the train suddenly in response to plaintiff's signal. At the time of his injury plaintiff had a wife and children dependent on him for support and was earning from \$150 to \$200 a month. As a result of his injury he was so totally and permanently disabled as to be unable to turn himself in bed without assistance, and was doomed for the rest of his life to suffer pain, both of body and mind. *Held*, that a verdict awarding him \$40,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

On Rehearing.**10. APPEAL AND ERROR (§ 833*)—PETITION FOR REHEARING—SERVICE.**

A petition for rehearing is *ex parte*, designed to give counsel an opportunity to bring the alleged grounds to the attention of the court; it not being necessary to serve notice of the petition or of the grounds on opposing counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3214, 3229-3240, 3244-3246; Dec. Dig. § 833.*]

11. APPEAL AND ERROR (§ 670*)—RECORD—CASE—SUPPLYING FACTS.

Where the "case" on appeal did not show whether defendants during the trial had called attention of the trial judge to alleged misconduct of the jury, on which ground defendants based a motion for a new trial, such fact could not be proved by affidavit, but could only be shown by remanding the "case" to the trial court for amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2865, 2866; Dec. Dig. § 670.*]

Appeal from Common Pleas Circuit Court of Barnwell County; R. E. Copes, Judge.

"To be officially reported."

Action by H. C. Huggins against Atlantic Coast Line Railroad Company and another. Judgment for plaintiff, and defendant railroad company appeals. Affirmed.

P. A. Willcox, of Florence, Harley & Best, of Barnwell, and L. W. McLemore, of Sumter, for appellant. R. C. Holman and Bates & Simms, all of Barnwell, L. K. Sturkie, of Orangeburg, W. A. Holman, of Charleston, and Best & Cunningham, of Columbia, for respondent.

HYDRICK, J. This is an action for damages for personal injuries sustained by plaintiff, on October 21, 1909, while in the service of the defendant company as a locomotive engineer. He alleges that his injuries were caused by the negligent, willful, and wanton conduct of defendant in furnishing him an incompetent fireman, Peter Wilson by name, to assist him in the discharge of his duties as engineer; that said Wilson had the habit of tampering with the engine and moving the train without his authority and against his objection and protest, a fact which he had reported to the company several times, but, notwithstanding said reports and the company's knowledge that Wilson constantly and persistently interfered with the engine, contrary to his orders and the rules of the company, he was compelled to accept the assistance of said Wilson; that on the day he was injured, while he was in the caboose attached to his train, where he had the right to be, Wilson took charge of the engine and began to move the train; that, for the purpose of stopping him, as was his duty, he left the caboose, while the train was moving slowly, and got upon a flat car loaded with clinkers to signal him to stop, there being a number of cars between him and the engine; that when he gave him the signal to stop, instead

of applying the service brakes, as he should have done, he applied the emergency brakes, and stopped the train so suddenly and violently that he was thrown to the ground under the car and injured.

The answer was a general denial and the plea of contributory negligence on the part of plaintiff in allowing Wilson to operate the engine, instead of doing so himself, and in unnecessarily exposing himself to danger by going upon the flat car to give the signal, when he could have done so with safety from the ground. There were nine specifications of contributory negligence, but the foregoing general statement substantially covers them all, in so far as they were sustained by evidence and relied upon in argument.

Plaintiff's testimony and that of his witness Miller tended to prove his allegations as to Wilson's persistence in disobeying the orders of the engineer and the rules of the company in moving the engine, and that it had been frequently reported to Charles Sykes, defendant's foreman, who had charge of that department of labor. They testified that, before going out on his last trip, plaintiff objected to taking Wilson as his fireman, saying to the foreman, "If you don't remove this man, he is either going to cause me to hurt somebody, or he will tear me up"; that the foreman told him to take Wilson on and that he would give him another fireman on the next trip.

Upon the issues as to Wilson's unfitness for the reason alleged, and as to the fact thereof having been reported to Sykes, the foreman, there was sharp conflict in the testimony. Only the plaintiff and his witness Miller testified to the affirmative of these issues, while some five or six engineers, the conductor of plaintiff's train, and others testified that Wilson was a good and obedient fireman; and the foreman denied that any report of the alleged objection to Wilson as a fireman had ever been made to him, saying that, if such report had been made, he would not have kept him in the service two minutes. He admitted, however, that plaintiff had complained of Wilson's inability to keep the engine hot.

Plaintiff testified that he got upon the flat car to signal Wilson to stop, and that he sat down on the corner of the car to make himself safe, and gave the signal; that his position was a safe one, if the train had not been stopped so suddenly and violently. On the other hand, defendant's testimony tended to show that Wilson was not running the train in disobedience of plaintiff's orders, but at his special request, and that the signal which caused him to put on the emergency brakes was given by Robert White, a brakeman.

Upon the close of all the testimony, the company moved for a directed verdict on the following grounds: "First. There is no proof of negligence upon which the plaintiff can re-

cover. Second. There is no proof of willfulness upon which the plaintiff can recover. Third. The entire testimony shows that the accident and resulting injury to plaintiff was caused or contributed to by plaintiff's own negligence. Fourth. The entire proof shows that the accident and resulting injury to plaintiff were due to acts of omission of a fellow servant or fellow servants." The motion was refused, and, after hearing the arguments and the judge's charge, the jury rendered a verdict for plaintiff for \$40,000. From judgment thereon, the company appealed.

[1] The foregoing statement of the issues and evidence shows that there was no error in refusing the motion to direct the verdict. It would be a useless consumption of time to enter upon any lengthy consideration of the law and the evidence to show the correctness of our conclusion that, under the decisions of this court, there was testimony which compelled the submission to the jury of all the issues raised by the pleadings. In deference, however, to the very earnest argument of the learned counsel for appellant, we notice the points which they have specially pressed upon the attention of the court. The first of these is that, upon consideration of all the testimony in the case, the issue of punitive damages should not have been sent to the jury. The specific point urged in this connection is that, assuming the truth of plaintiff's testimony as to Wilson's unfitness and his report thereof to Sykes, the latter's conduct in retaining Wilson in the service must be judged in the light of the testimony of the five or six engineers and others who testified as to Wilson's fitness and efficiency. That argument would be of great force, if we had jurisdiction to decide questions of fact; but we are only permitted to say whether there was *any* evidence from which a reasonable juror could have inferred a reckless or conscious disregard of plaintiff's right to a competent fireman to assist him and of defendant's duty to furnish him such an one. It must not be forgotten, however, that Sykes does not attempt to excuse his keeping Wilson in the service on the ground suggested, to wit, that he had investigated the charge and found it untrue. On the contrary, he testified that no such report had been made to him; but that, if it had been, it would have been his duty to investigate it, and, if found to be true, to take Wilson out of the service. He also testified that, if such report had been made, Wilson would not have been left in the service two minutes. Assuming, then, as we must, that the report was made and that it was true, and that, against plaintiff's objection and protest, he was ordered to take Wilson out with him as fireman, and that he did so, under promise of being given another on his next trip, it certainly cannot be said that this testimony would not support a reasonable inference of

a reckless or conscious neglect of the duty to furnish plaintiff with a reasonably suitable and competent fireman.

[2] The next contention which we notice is that the only rational conclusion which can be drawn from all the evidence is that the signal which caused the emergency brakes to be put on was given by Robert White, a brakeman, for whose negligence, being a fellow servant of plaintiff, defendant is not liable. Here, again, counsel have overlooked a conflict in the evidence. While defendant's testimony does tend strongly to support that conclusion, the plaintiff and his witness Miller both testified that the plaintiff himself gave the signal to stop, and, in response to that signal, the emergency brakes were applied. Therefore it was a disputed question of fact whether the emergency brakes were applied on the signal from the plaintiff or on that given by the brakeman.

What has just been said disposes of the following assignment of error: That having charged the jury that plaintiff could not recover, if his injury was caused by the negligence of any other member of the crew than the fireman, and plaintiff having testified and all the evidence having shown that the injury was caused by the application of the emergency brakes on the signal from the brakeman, the court erred in refusing the motion for a new trial.

[3] Appellant complains because the court admitted testimony of specific instances, other than that alleged in the complaint, of Wilson's meddling with the engine. The ground of objection to this evidence was: "There is no allegation like that in the complaint." Turning to the complaint, we find the following general allegation: "Wilson had a habit of tampering with the engine * * * and of moving the train without authority * * * and had been doing such unauthorized acts long prior to the date above mentioned." The testimony was admissible under this general allegation. The ground now taken that evidence of specific instances of meddling with the engine was inadmissible, because notice thereof was not brought home to the company, cannot be considered, because that ground of objection was not made on circuit.

Upon the same principle, the exception which assigns error in allowing plaintiff to testify that other employes had complained to foreman Sykes of Wilson's incompetency must be overruled. The ground of objection was that there was no allegation like that in the complaint. But the testimony was admissible under the general allegation that defendant knew of Wilson's unfitness, and that the same had been repeatedly reported to its officers.

[4] Appellant's next complaint is that the judges charged the jury that the burden was upon the defendants to establish every material allegation of the defense of contributory negligence; the contention being that, as

there were nine specifications of contributory negligence, the charge required the proof of each and every one of them, whereas the proof of one was enough to defeat a recovery. Examination of the charge shows that the same burden was placed upon the plaintiff—that he must prove every material allegation of his complaint, which, as a general statement of the law, is not incorrect. But it also appears from the charge that the jury were specially instructed, three or four times, that plaintiff could not recover, if he was guilty of negligence "in any one or more of the particulars" specified in the answer. From this, we are satisfied that the jury were not misled by the general statement complained of.

[5] At the conclusion of the arguments to the jury, plaintiff's attorneys announced that they would not ask a verdict for punitive damages. In response to this announcement, the judge charged that the jury must exclude punitive damages from their consideration. Appellant contends that it was error to allow plaintiff's attorneys to withdraw his claim for punitive damages after he had had the benefit of it throughout the trial and in the argument to the jury. The record fails to show that appellant interposed any objection in the court below, or that the court made any ruling, upon which this exception can be based. So far as the record shows, it may be inferred that the course adopted by plaintiff's attorneys was acquiesced in by defendant's attorneys. But passing by this defect in the record, we fail to see wherein appellant was prejudiced. If there had been no testimony upon which punitive damages could have been recovered, appellant's contention would be sound, because the jury were instructed that contributory negligence is no defense to a reckless or willful tort. Therefore, in the absence of any such testimony, respondent could not have sustained the verdict on the ground that, under the instructions of the court, no punitive damages had been awarded, because, although the court might assume that the jury had obeyed the instruction and had not awarded any punitive damages, still the question would be left open, with no way of finding out whether the jury had denied to the defendant the benefit of the plea of contributory negligence on the ground that the injury was inflicted recklessly, willfully, or wantonly. But as there was testimony to support such a finding, the withdrawal of the claim was favorable rather than prejudicial to defendant. We see no reason why a plaintiff should not be allowed to prove that a tort was recklessly, willfully, wantonly, or maliciously inflicted merely for the purpose of defeating the defense of contributory negligence.

[6] When the jury were impaneled, the court ordered the sheriff to take charge of them and keep them together. On the first day of the trial, when the court had adjourned for dinner, and after the judge and most of those in attendance had retired from the

courtroom, and while the plaintiff, his wife, and a few others remained, the sheriff also being present, several of the jurors went to where the plaintiff was sitting and shook hands with him and talked with him. One of them either picked up a cigar from the floor and handed it to him or gave him a cigar and struck a match and assisted him to light it. This was observed by two of defendants' attorneys from the opposite side of the room. They called the sheriff's attention to what was going on and admonished him that it was in violation of the court's order. Whereupon the sheriff sent the jury to their rooms until plaintiff was removed from the courtroom. During the dinner hour of the next day, being the day on which the verdict was rendered and prior to the rendition thereof, one of the jurors was seen by one of defendants' attorneys on the public square, near the courthouse, talking to another person, who was not a member of the panel. He had been allowed to separate from the panel and speak to this person without being accompanied by a bailiff. Neither incident was brought to the attention of the court until after the verdict was rendered, when defendant's attorneys presented affidavits, setting forth the fact above stated as a basis of one of their grounds for a new trial. Plaintiff's attorneys objected to the consideration of the affidavits, because they had not been served upon them four days before the hearing of the motion. They have given the proper notice that they would ask this court to sustain the judgment, if necessary, upon the ground that the circuit court should not have heard the affidavits for the reason stated. There is no statute or rule of court which requires the service upon opposing counsel of the affidavits touching such matters four days before the hearing. The circumstances might require a much shorter time. Suppose, for instance, that such an irregularity should occur in the trial of a case only a few hours before the court has to adjourn for the term by operation of law; in that event, it must be brought to the attention of the court on short notice or not at all. There was no error in hearing the affidavits.

[7] Nor was there error in overruling the motion. While the conduct of the jurors was in violation of the court's order, and they and the sheriff, or his bailiffs, who had charge of them, were reprehensible for doing and permitting it, and while they should have been reprimanded or dealt with more severely, if their conduct was willful, still the appellant waived its right to take advantage of it by failing to bring it to the attention of the court more promptly after it was observed. Parties will not be allowed to speculate on chances by withholding information of such irregularities until after verdict found, and then bring them forward or not as they may make for or against them. If either incident had been brought to the attention of the court at the first opportunity, to

wit, upon the reassembling of the court in the afternoon, it might have been investigated, and, according to the result of the investigation, in the exercise of its discretion, the court might have ordered the trial to proceed, after proper caution and instruction to the jury; or it might have withdrawn the case from that jury and impaneled another; or it might have withdrawn it, and continued it to the next term as the circumstances would have permitted or required. The disposition of complaints of such irregularities must necessarily be left to the judgment and discretion of the presiding judge, who, being in the atmosphere of the trial, is in much better position than this court to determine whether, all things considered, they have resulted in injury or prejudice to the party complaining. Therefore this court will not interfere with the decision in such matters, unless it is made to appear clearly that it was erroneous and prejudicial.

[8] Much has been said by counsel for appellant about the size of the verdict in this case. Unquestionably, it is a very large verdict. But if a verdict which is only moderately excessive is allowed to stand, the trial judge is alone responsible; for he alone is vested with power and discretion to set it aside, absolutely or conditionally. This court has no power to do so, unless, as was said in *Bing v. Railroad Co.*, 86 S. C. 530, 68 S. E. 645, it is so excessive as to warrant the conclusion that the circuit judge abused his discretion in refusing to grant relief against it. In that event, this court would have the power to set it aside, because a verdict which is so excessive as to warrant the inference that it is the result of caprice, passion, prejudice, or other considerations not found in the evidence, is without authority of law, and it would be manifest error of law to refuse to vacate it. To allow such a verdict to stand would be a just reproach upon the administration of justice.

[9] But in considering the size of the verdict, we must not overlook the fact that plaintiff's injury was severe and his consequent damages were great. At the date of his injury, he was a young man in good health, 35 years old, with a wife and children dependent upon him for their support, and he was earning from \$150 to \$200 a month. Now he is totally and permanently disabled, not even able to turn himself in bed without assistance, and, according to the evidence, he is doomed for the balance of his life to suffer pain of body and necessarily, also, that anguish of mind which is consequent upon his physical suffering and the contemplation of his helpless and hopeless condition.

Affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

On Rehearing.

HYDRICK, J. Upon the filing of the petition for rehearing, in deference to the earn-

est request of counsel for appellant, we carefully re-examined the record and the arguments of counsel in the light of the allegations of the petition and the argument in support thereof. But we have not discovered that any material fact or principle of law was overlooked or disregarded in the original consideration of the case.

The third paragraph of the petition is as follows: "With reference to exceptions 13 and 14, petitioner desires to present to the attention of the court one fact which the decision in the case has brought forward, and which possibly has not heretofore been noticed in the important bearing which it now occupies. In passing upon the question of the improper conduct of the jurors, the court says: 'Neither incident was brought to the attention of the court until after the verdict was rendered, when defendant's attorneys presented affidavits setting forth the facts above stated, as the basis of one of their grounds for a new trial.' The fact is that immediately following the incident observed in the courtroom, as soon as counsel for your petitioner could gain access to his honor, the circuit judge, the facts were laid before him; no time was lost, but he was fully apprised of the situation before the reassembling of the court in the afternoon, and we wish to impress upon this court, the fact that there was no attempt on the part of counsel for your petitioner to speculate by withholding information which it was believed the circuit judge should be supplied with. It seems now unfortunate that the record does not show this fact. So far as counsel for your petitioner can recall, no contention has been made in the case by opposing counsel that this was not done, and certainly could not have been made before the circuit judge, or, if made, have affected his mind, because he was well aware of the fact that the matter had been brought to his attention. This case is not of ordinary concern; it is of the most vital moment, and in the judgment of petitioner's counsel one in which the verdict was clearly the result of undue sympathy on the part of the jury. The verdict does not represent a dispassionate assessment of damages. Therefore, in considering the present question, it is vital for this court to take into consideration every incident that might have bearing on the verdict. As we have already stressed in the argument before this court and in our printed brief, it was obviously impossible for your petitioner's counsel to produce evidence of the nature of the communication with the jurors. And more important still, notice should be taken of the fact that plaintiff could have explained the transaction, or the court could have inquired into it. Nothing was done, and the fact stands of improper conduct and the violation of an order of the court. We therefore earnestly beg that the court will, if necessary, give to your petitioner the benefit of a further report from

his honor, the circuit judge, so that the record in the cause may show the fact which this court now regards as vital—that the improper conduct on the part of the jury complained of was brought to the attention of the court. Under the circumstances appearing in this case, we feel impelled to urge upon the court petitioner's principal contention, which embodies every specific contention relied upon by the argument of the appeal; that is, that upon the whole case, where it appears that in the light most favorable to the plaintiff upon the issues involved there is barely a scintilla of evidence, this court should apply the most rigid test in measuring plaintiff's right to recover such a verdict as that rendered here, and should not hesitate to afford some relief from what must be apparent as a recovery palpably against the law applicable and the evidence adduced on the trial."

A short time after filing the petition, Mr. E. J. Best, one of plaintiff's attorneys, wrote each member of the court as follows: "Sirs: I am at a loss to know how to proceed in the case of H. C. Huggins, Plaintiff-Respondent, v. Atlantic Coast Line Railroad Company, Defendant-Appellant, now pending before your honorable court on a petition for a rehearing. The affidavit of Hon. R. E. Copes, presiding judge, shows the facts stated in paragraph 3 of the petition, to the effect that counsel for the defendant railroad company called to the attention of the trial judge the so-called or alleged misconduct of jurors, are absolutely false and untrue. Judge Copes states, in the form of affidavit, herewith inclosed, that he had no knowledge whatever, of any kind, that any alleged misconduct on the part of jurors had taken place, until his attention was called to the fact about a week after the trial had ended. If this be true then it is a matter, which I respectfully submit this honorable court should investigate upon its own motion and responsibility; such statements by practitioners of this honorable court should not go unnoticed. A palpable wrong and injustice can be done a successful litigant by petition for rehearing if all kind of ex parte statements are permitted to be made, which are calculated to influence the court. I am writing, as I stated, asking for suggestion as to the mode of procedure to be adopted under these extraordinary circumstances, and I will thank the court to confer in regard to what is the proper course for me to pursue under the circumstances. I am desirous of protecting the rights of my client to the fullest but do not desire to violate any rules of procedure or the practice which does and ought to obtain before your honorable court. Paragraph 3 of the petition for a rehearing is equivalent to presenting absolutely new evidence on the part of the railroad company by ex parte affidavits without the right of plaintiff-respondent or his attorneys to refute the

same absolutely which can be done in the case under consideration."

In his affidavit, which accompanied Mr. Best's letter, Judge Copes said that the alleged misconduct of the jurors was not brought to his attention, privately or officially, until the hearing of the motion for a new trial, which was about a week after the rendition of the verdict. In reply to Mr. Best's letter, the court, through a letter of the Chief Justice, advised him that he should send a copy of the letter which he had addressed to the members of the court and a copy of the affidavit of Judge Copes to the attorneys for the appellant. Upon receipt of copies of this letter and affidavit, the attorneys for the appellant submitted affidavits of Mr. C. A. Best and Mr. Lucian W. McLemore to the effect that, as soon as they could get the opportunity to do so, after they had observed the conduct of the jurors in question, and before any other step was taken in the trial, at the suggestion of Mr. P. A. Wilcox, their senior associate, to whom they had reported the incident, they went to Judge Copes, in his private office, and told him what they had seen, as afterwards set out in their affidavits on the motion for a new trial; that the judge stated that he was glad they had done so, and that he would bear it in mind; that he did not suggest or require that it should be brought to his attention in open court. Mr. Wilcox, in his affidavit, affirms that they mentioned the incident to him, and that he advised them to inform the presiding judge of it privately, and suggest to him that, if he thought best, it would be brought to his attention in open court; that they went to the judge's private office, and, on returning, reported to him that they had carried out his instructions. Thereafter, in consequence of the letter of Mr. E. J. Best, Mr. Wilcox and his associates demanded an investigation of their conduct by this court.

These incidents have suggested the advisability of our calling attention to the practice and procedure in such matters, which has long prevailed and received the sanction of the bench and bar, and the importance of adhering to it, in order that ill-advised action on the part of members of the bar may be avoided in future.

[10] A petition for rehearing is *ex parte*. It has never been the practice to serve notice or the grounds thereof on opposing counsel. It is designed to give counsel the opportunity to bring to the attention of the court matters of law or of fact which counsel who file it think that the court has overlooked or disregarded in its consideration of the case. It is not intended that it shall be taken advantage of to reargue questions which were fully argued at the hearing and were considered and decided by the court.

[11] The grounds of the petition should therefore state, as concisely as possible, the

matter of fact or principle of law which the court is supposed to have overlooked or disregarded. If counsel desire, they may submit argument in support of the grounds, but it should be separate and apart from the grounds themselves, and not incorporated in or commingled with them. The two should be kept as separate and distinct as the exceptions, or grounds of appeal, and the argument on appeal.

We have declared in numerous cases that we are bound by the "case," as prepared for the hearing of the appeal in this court, and that we will not consider, or allow to influence our decision, anything that counsel may say in argument, or otherwise, which is not based upon the "case." We do not consider statements found in the exceptions, unless they are supported by the facts stated in the "case." Of course, either side may rely upon anything which is fairly inferable from what is in the "case." In view of this frequently repeated declaration of the court, it was entirely useless, and not in accord with the proper practice, for counsel for appellant to assert in their petition that the alleged misconduct of the jurors had been brought to the attention of the circuit court, and the statement should not have been made, because it was admittedly not so stated in the "case," nor reasonably inferable from what was there stated.

The statutes and rules of court provide the manner in which the "case" shall be agreed upon or settled by the trial judge and prepared for the hearing of appeals in this court, and, when it has been so agreed upon or settled, all parties, including this court, are bound by it. Therefore it behooves counsel to exercise due care to see that it contains all that it should and nothing that it should not to sustain their various contentions. If, however, by accident, mistake, inadvertence, surprise, or excusable neglect, anything should be omitted which should have been inserted, or vice versa, the proper course is to move this court, upon due notice and affidavits served upon opposing counsel, to recommit the "case" to the circuit court, for the purpose of having it corrected—a motion which this court has the discretion, in furtherance of justice, to grant, upon such terms as may seem just and proper. It follows that the affidavit of Judge Copes should not have been asked for or given, because it foreclosed his judicial attitude in relation to the matter, when circumstances might have required that the "case" be recommitted to him to settle the dispute between the parties upon the very point upon which he had given one of them an affidavit, without the attorneys on the other side having had an opportunity to refresh his recollection about the matter in dispute.

On the other hand, counsel for respondent should have known that, under the rule

above stated, this court would pay no attention to the statement referred to, and therefore he violated correct practice in two respects: First, in addressing any communication to the members of the court upon the subject at all. Second, having done, so, in not sending a copy thereof to opposing counsel. As a rule, subject to but few exceptions, no communication should be had by counsel engaged in causes with judges touching matters pending before them, unless it be an *ex parte* proceeding, without the knowledge of opposing counsel. The incidents above narrated emphasize the importance of a strict adherence to this rule. If it had been observed, and counsel for the respondent had been invited to be present, when the alleged misconduct of the jurors was reported to the presiding judge, there would probably have been no dispute about it. We are not to be understood as holding that everything should be brought to the attention of the presiding judge in open court, because that course might result in prejudice to one side or the other. There was, therefore, no impropriety in reporting the incident in question to the judge in private, but opposing counsel should have been notified, and asked to be present, when it was done. But as respondent's counsel was not advised of what was done, and as it is not alleged in the petition that it was done in private and without his knowledge, he probably and naturally interpreted the allegation to mean that it was done in open court. This may explain, even if it does not fully excuse, his characterization of the allegation as "absolutely false and untrue." Possibly, if he had communicated with appellant's counsel and sought an explanation of the allegation, that which has been given would have appeared to be satisfactory. This leads us to remark that counsel should not be too quick to impugn the motives or the conduct of each other. Things are not always what they seem—especially when viewed in the fierce light of conflict and through glasses colored, perhaps, by personal and professional zeal and interest.

Being fully satisfied of the integrity of the counsel who have demanded an investigation of their conduct at the hands of this court, and being satisfied, also, that the unfortunate circumstance which gave rise to the demand grew out of a misunderstanding between counsel for appellant and respondent, no investigation is deemed necessary. We take pleasure in saying that we are quite sure that the departures from the strictly correct practice which we have pointed out on the part of counsel for both parties were due entirely to inadvertence, without any thought of impropriety, or intention to gain any unfair advantage.

The petition is dismissed, and the stay of remittitur heretofore granted revoked.

GARY, C. J., and WATTS and FRASER, JJ., concur.

HOLMES et ux. v. CARR et al.

(Supreme Court of North Carolina. Sept. 26, 1913.)

1. ACKNOWLEDGMENT (§ 20*)—AUTHORITY TO TAKE—DISQUALIFICATION OF OFFICER.

The probate of a deed was not invalid, because the justice of the peace before whom it was taken was the son of the grantee, and subsequently acquired an interest in the land by inheritance; he having no interest, vested or contingent, at the time of the conveyance.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 104-111; Dec. Dig. § 20.*]

2. ESTOPPEL (§ 35*)—BY DEED—AFTER-ACQUIRED TITLE.

Where the widow and only daughter of a decedent partitioned his lands between them, the daughter and her husband conveyed the part allotted to her, and the widow subsequently died intestate without having disposed of her interest, the daughter's grantee had title, whether the partition was valid or invalid, since the daughter, although married, was estopped by her deed, and the devolution of her mother's title on her by descent "fed the estoppel."

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 84; Dec. Dig. § 35.*]

Appeal from Superior Court, Greene County; Allen, Judge.

Ejectment by Henry Holmes and wife against W. G. Carr and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

George M. Lindsay, of Snow Hill, for appellants. J. Paul Frizzelle, of Snow Hill, for appellees.

CLARK, C. J. [1] The plaintiffs except to the admission of a deed from them to T. W. Carr, the father of defendants, on the ground that the probate was improperly taken by W. G. Carr, the son of the said T. W. Carr, as justice of the peace. Said probate was taken by him in 1894, and at that time he had no interest in the property to which he succeeded, together with the other defendants, as heirs at law of their father, T. W. Carr, who died in 1903.

We have numerous decisions that an acknowledgment of a deed by the husband and wife, and privy examination of wife, taken before a justice of the peace, commissioner, or a notary, is a judicial, or at least a quasi judicial, act, and that a probate is void, if taken before one who has an interest in the conveyance. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177; *Long v. Crews*, 113 N. C. 256, 18 S. E. 499; *Land Co. v. Jennett*, 128 N. C. 4, 37 S. E. 954. But this must be a pecuniary interest in the property conveyed. In *Gregory v. Ellis*, 82 N. C. 227, Dillard, J., says: "No judge, whether probate or other,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

could take jurisdiction of any cause wherein he was a party or otherwise had a *pecuniary interest*."

But in this case W. G. Carr, the justice of the peace, though he has since acquired an interest in the property by inheritance, at the time of the conveyance had no interest, either vested or contingent, in the property conveyed. His father might have sold it, or have devised it. The mere fact of his relationship to one of the parties to the conveyance does not affect the validity of the probate of the deed by him. In *McAllister v. Purcell*, 124 N. C. 262, 32 S. E. 715, this question was directly presented, and the court said: "There is no principle of law, nor precedent, which invalidates the acknowledgment and privy examination taken before an officer who has neither any interest in the instrument nor is a party thereto, simply because he is related to the parties."

[2] The land belonged to Richard Jones, who died in 1873, leaving Mahala Jones, his widow, and Sarah Holmes, the plaintiff, his daughter, who partitioned the land between them, and they went into possession of their respective shares. In 1894, while Mahala Jones was still living, Sarah Holmes and husband conveyed to T. W. Carr the part of which she was in possession—the land in controversy. Subsequently Mahala Jones died intestate, without having disposed of her land, leaving Sarah Holmes her sole heir. The question whether the partition was valid or not is immaterial. Sarah Holmes had no title to the interest, whether a divided or undivided interest, which Mahala Jones owned in the land at the time of the deed; yet Sarah Holmes, though a married woman, is estopped by her deed, and the subsequent devolution of her mother's title on her by descent "feeds the estoppel." *Mordecai's Lectures*, 785; *Zimmerman v. Robinson*, 114 N. C. 39, 19 S. E. 109.

The other exceptions require no discussion. No error.

BURNETT v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Sept. 24, 1913.)

1. MASTER AND SERVANT (§ 100*)—EMPLOYER'S LIABILITY ACT.

The acceptance of benefits from a relief department does not prevent a recovery of damages for negligence under the federal Employer's Liability Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166-170; Dec. Dig. § 100.*]

2. MASTER AND SERVANT (§ 87*)—EMPLOYER'S LIABILITY ACT.

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), creates no right that did not exist at

common law, since the change of the law as to contributory negligence, assumption of risk, and negligence of a fellow servant only withdraws a defense, and does not create a new right.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.*]

3. LIMITATION OF ACTIONS (§ 182*)—PLEADING—EMPLOYER'S LIABILITY ACT.

Employer's Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66 (U. S. Comp. St. Supp. 1911, p. 1324), providing that no action shall be maintained under the act unless commenced within two years, is a statute of limitation, and not a condition inherent in, or annexed to, the right of action declared by the act, and hence must be pleaded by defendant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-680, 682, 695, 705; Dec. Dig. § 182.*]

Appeal from Superior Court, Edgecombe County; Cline, Judge.

Action by General Burnett against the Atlantic Coast Line Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This is an action to recover damages for personal injury caused by the negligence of the defendant, and the only defense relied on is that the plaintiff has since his injury accepted benefits from the relief department. No statute of limitations has been pleaded; but it is admitted that this action was commenced more than two years after the injury. It was further admitted that the complaint alleges a cause of action under the federal Employer's Liability Act, and that that act is applicable to this case; the point in controversy being whether section 6 of the act is a condition imposed upon the right of action or a statute of limitation.

The facts are set out in the judgment appealed from, except it is inadvertently stated therein that an issue of negligence was submitted to the jury, when the pleadings show that negligence was not denied, and the only controverted fact was the amount of damages.

The judgment is as follows:

"This cause came on originally to be heard before his honor, Geo. W. Ward, judge, and a jury, at the ——— term, 1911, of Edgecombe Superior Court. At that time the question of whether or not the plaintiff was injured by the negligence of the defendant, and, if so, the amount of damage sustained by him was submitted to the jury, and the jury found the issue of negligence in favor of the plaintiff, and fixed his damages at \$1,000. No judgment was rendered upon the verdict; but by agreement the matter was left open to be further heard, and judgment signed at some subsequent term of court nunc pro tunc. The reason for deferring judgment (as stated to the judge rendering this judgment) was that at said former term one or more cases were pending in the Supreme Court of North Carolina, the decision of which would aid the lower court in a determination of the case at bar.

"The plaintiff Burnett insisted that, admitting the facts set out in the defendant's further answer, he was nevertheless entitled to judgment; the defendant insisting that, taking the facts stated therein to be true, it was entitled to judgment that it go hence without day, etc. Thereupon it was agreed that the facts set forth in the further answer by the defendant were true; but the conclusions of law therein were not admitted by the plaintiff. The plaintiff further contended that the contract called the relief department was invalid as matter of law, and Judge Ward made an entry on his notes of this admission and contention. It was further understood and agreed between the parties that the expression in paragraph 3 of the further answer, 'that the plaintiff did solemnly make and execute his said election, and did receive and accept under said regulations an aggregate sum of \$97,' should only be taken as a statement of fact to mean that he did receive checks or drafts aggregating \$97 from the relief fund, under the terms of his membership in said relief department, and cashed and used them.

"The cause was placed upon the motion docket at the March term, 1913, and came on to be heard before his honor, E. B. Cline, judge presiding, upon motion of both plaintiff and defendant for judgment in favor of each, respectively. It was agreed that, if the facts stated in the further answer in regard to the relief department, *and the things done in connection therewith, or not done, by both parties were not a bar to recovery by plaintiff in this case*, then the court was to render judgment in his favor for \$1,000 and costs; but if they constituted a bar to a recovery by him, then the judgment was to be rendered in favor of the defendant.

"The court did not understand that the verdict of the jury was to determine the matter other than to find the negligent act and the amount of damages, if any were recoverable. Upon the argument before the undersigned, the plaintiff insisted upon the rendition of a judgment in his favor both under the acts of Congress as well as under the state law. The defendant insisted that the federal statutes were not applicable, and that it was entitled to judgment under the decision of *King v. Railroad*, 157 N. C. 44, 72 S. E. 801, and other decided cases.

"Treating the facts set forth in the further answer as true, except as qualified above, and which are made a part of this judgment as fully as though they were set forth herein, the court, upon consideration of federal statutes, the decision of the Supreme Court of the United States in the case of *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911, and other cases, is of the opinion that they cannot aid the plaintiff to a recovery.

"As the court understands the application

of the decision in *King v. Railroad*, supra, to this case, the plaintiff, under the facts appearing in the further answer, is estopped and precluded from a recovery against the defendant in this action.

"It is therefore considered and adjudged that the plaintiff is not entitled to recover, that he take nothing by his writ, and that the defendant go hence without day.

"E. B. Cline, Judge Presiding."

The plaintiff excepted and appealed.

G. M. T. Fountain & Son, of Tarboro, for appellant. F. S. Sprull, of Rocky Mount, for appellee.

ALLEN, J. [1] It is settled beyond controversy by the decisions of the Supreme Court of the United States that the acceptance of benefits from a relief department does not prevent a recovery of damages for negligence under the Employer's Liability Act of 1908 (*Chicago R. R. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; *Railroad v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911), and, as it is admitted that the act is applicable to this case, the only question presented by the appeal is the construction of section 6 thereof, which reads as follows: "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

If this is a statute of limitation, the defendant cannot avail itself of its protection, because of its failure to plead the statute, which is required both under our Revisal, § 360, and under the general law (1 Wood on Limitations, § 7), and, on the other hand, if it is a condition inherent in and annexed to the right of action, the defendant was not required to plead it, and it would operate to defeat the plaintiff's action, which was commenced more than two years after the cause of action accrued.

The last principle is illustrated by the decisions in this state and elsewhere, under Lord Campbell's Act creating a right of action for wrongful death, and is the one invoked by the defendant.

It is true it has been generally held by the courts that, where a statute creates a right not known to the common law, and provides a remedy for its enforcement, and limits the time within which the remedy must be pursued, the remedy in such cases forms a part of the right, and, if not invoked within the time, both the remedy and the right are lost (*Bear Lake Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327; *Negaubauer v. Railroad*, 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150; *Rodman v. Railroad*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 706); but this view is not universally entertained, as it was held otherwise in *Kaiser v. Kaiser*, 16 Hun (N. Y.) 602, and the rule is at most a rule of construction adopted by the courts to aid

in ascertaining the intent of the legislative body.

We must then examine the act of Congress, and, after considering its purpose, the subject with which it deals, the language used, and its effect, determine the legal operation of section 6. Again, we turn to the decisions of the Supreme Court of the United States, and find that one purpose of Congress was to adopt a uniform rule operating alike on all employes of railroad companies engaged in interstate commerce, and that one of the effects of the statute is to supersede the laws of the states in so far as they cover the same field. *Mondou v. Railroad*, 223 U. S. 51, 53, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

[2] The act includes within its terms all employes of railroad companies injured by negligence while employed in interstate commerce, and these may be divided into three or four classes for the purposes of this discussion.

In the first are those employes injured by the negligence of the company, when there is no assumption of risk, no contributory negligence, and no negligence of a fellow servant, and that there are such employes is exemplified by this record, from which it appears that the only *fact* in issue, or debated in this case, is the amount of damages.

The act of Congress creates no right in this class of employes that did not exist at common law, as they had the right before the act of Congress to maintain an action in the state courts, to recover damages for injuries caused by negligence, and the usual limitation upon the exercise of this right was three years.

In the next class are those employes, injured by the negligence of the company, who are guilty of contributory negligence. These are permitted to recover damages, which they could not do at common law; the act introducing the doctrine of comparative negligence, instead of that of contributory negligence.

The change in the law as to contributory negligence confers no right, and is operative only to withdraw from the company a defense theretofore existing, and the same may be said as to changes in the doctrine as to the negligence of a fellow servant, and of assumption of risk.

This seems to be the construction of the act adopted by the Circuit Court of Appeals in *Garrett v. Railroad*, 197 Fed. 715, 117 C. C. A. 109, in which the court says: "The damages allowed to the injured employes are but declaratory of rights existing at common law," and, if correct, it may well be questioned whether the rule of construction relied on by the defendant has any application; but, however this may be, the considerations suggested furnish reasons bearing upon the legal effect of section 6.

[3] The act supersedes the state law, and

thereby deprives employes of a right of action existing at common law. It is entitled "The Employer's Liability Act," and was enacted for the benefit and protection of employes. It was designed to make it easier for employes to recover damages for injuries caused by negligence, and not to impose conditions destructive, not of the remedy, but of the right. If so, it seems to us more reasonable to conclude that in an act of this character, having in view the establishment and maintenance of the rights of the employe, under just restrictions, and considering the different classes of employes affected, it was the intent of Congress to limit the time within which an action could be commenced, and not to destroy the right.

The physical separation of the provision as to time from the section defining the right of action is also significant, and when considered in connection with the verbiage of section 6, which is peculiarly adapted to a statute of limitation, becomes, without other considerations, almost controlling.

The language of the section is strictly within the definition of a statute of limitation. Mr. Wood says in his work on Limitations (volume 1, § 1): "Statutes of limitations are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced. Statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are statutes of limitation." And in *Upton v. McLaughlin*, 105 U. S. 640, 28 L. Ed. 1197, a statute in the following words was held to be a statute of limitation: "No suit, either at law or in equity, shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee unless brought within two years from the time when the cause of action accrued for or against such assignee."

The decisions of our court upon the provision as to time in the act conferring a right of action for wrongful death (Rev. § 59) in no wise conflicts with the position that section 6 of the Employer's Liability Act is a statute of limitation, because the act first referred to clearly confers a new right of action not existing at common law, the language used is not that ordinarily found in statutes of limitation, and the limitation as to time is a part of the section defining the right of action, and is made a part of it. The statute reads: "Whenever the death of a person is caused by a wrongful act, * * * the person or corporation * * * shall be liable to an action for damages to be brought within one year after such death."

The case of *Dockery v. Hamlet*, 162 N. C. —, 78 S. E. 13, is also called to our at-

tention, in which it was held that the limitation of the time within which a claim against a county, city, or town could be presented was not a statute of limitation. The decision in that case was made upon the authority of *Wharton v. Com'r's*, 82 N. C. 14, and the court was not advertent to the fact that, when the *Wharton* Case was decided, the statute in question was a part of the chapter regulating county revenue, and that since then it has been made a part of the statute of limitation by express legislative act, and is now section 390, subsec. 1, of the Revisal.

The case of *King v. Railroad*, 157 N. C. 44, 72 S. E. 801, has no application, because it was decided under the principles of the common law, and this case is governed by the federal statute.

After full consideration, we are of opinion that the sixth section of the Employer's Liability Act is a statute of limitations, and that there is error.

The plaintiff is entitled to judgment upon the verdict for the amount of damages awarded, less \$97 received by him from the relief department, which the statute says must be deducted.

Error.

BROWN, J., was not present and took no part in the decision of this case.

STATE v. RUFFIN.

(Supreme Court of North Carolina. Sept. 24, 1913.)

LARCENY (§ 15*)—PROPERTY SUBJECT OF LARCENY.

Where defendant broke open a letter intrusted to him to mail and abstracted money therefrom, he was guilty of "larceny."

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 39-42; Dec. Dig. § 15.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 3991-4003.]

Appeal from Superior Court, Vance County; Cline, Judge.

James Ruffin was convicted of larceny, and he appeals. Affirmed.

The facts in evidence tended to show that on a certain Sunday night, 1913, Robert Royster had several letters written, and same were put in envelopes sealed and addressed to the respective parties; that one of these letters so inclosed and sealed was addressed to his father, Spot Royster, Vergilina, Va., and in that one said Robert had put \$10 in bills. Next morning Robert gave these letters to Eugene Sandiford to mail, and Sandiford handed them to defendant for like purpose. There was further evidence tending to show that defendant, having opened the envelope and taken the money, resealed and mailed the letter at the post office in Henderson. The court charged the jury that if they

should find beyond a reasonable doubt that defendant secured the letter from Sandiford for mailing and undertook to mail same at his request, that the money was then in it, and he broke open the letter and took it out and appropriated it to his own use, they would render a verdict of guilty; that the breaking of the letter was a sufficient taking within the proper definition of the crime. There was verdict of guilty, and from sentence to jail for eight months defendant excepted, assigning for error that on the facts in evidence defendant could not be convicted of larceny, having acquired possession by consent of owner or his bailee.

Thomas M. Pittman, of Henderson, for appellant. The Attorney General and T. H. Calvert, of Raleigh, for the State.

HOKE, J. (after stating the facts as above). At common law it was regarded as an essential feature of the crime of larceny that the party charged should have acquired possession of the property against the will of the owner and ordinarily with intent to steal at the time. The taking considered necessary to make out the offense involved the idea of a trespass on the possession of the owner either actual or constructive. The principle was held to include cases where possession was acquired from the owner *animo furandi*, by trick or fraudulent contrivance. *State v. McRae*, 111 N. C. 665, 16 S. E. 173; *People v. Miller*, 169 N. Y. 339, 62 N. E. 418, reported with instructive editorial note 88 Am. St. Rep. 546. And convictions were upheld when the party charged had only the custody of the property; the constructive possession remaining with the owner. Instances of this occurring when a servant or employé intrusted by the master with goods or money for a specific purpose, in breach of this purpose, appropriates same to his own use with felonious intent. *State v. Jarvis*, 63 N. C. 556.

There is high authority for the position that the conviction in the present case could very well be sustained on the ground that defendant had only the care or custody of the property and not the possession. *Murphy v. People*, 104 Ill. 528; *Walker v. State*, 9 Ga. App. 863, 72 S. E. 446. We are not called on to determine whether this view is in accord with our decisions more directly relevant to the question presented; the defendant not being the servant or employé of the prosecutor (*State v. Copeland*, 86 N. C. 692-695; *State v. England*, 53 N. C. 399, 80 Am. Dec. 334; *State v. Martin*, 34 N. C. 157), being of opinion that on the record the defendant has been properly convicted whether considered originally as bailee or only as custodian. It is the well-established principle that "a bailee who breaks bulk and appropriates the goods or a part of them to his own use with felonious intent is guilty of larceny." 18 A.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 79 S.E.—27

& E. p. 479; Robinson v. State, 1 Cold. (Tenn.) 122, 78 Am. Dec. 487; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Rex v. Jones, 32 Amer. Com. Law, p. 474; Reg. v. Jenkins, 38 Eng. Com. Law, p. 38. In Fairclough's Case, supra, citation is made from my Lord Coke as follows: "If a bale or pack of merchandise be delivered to carry to one at a certain place and he goeth away with the whole pack this is no felony, but if he open the pack and take anything out 'animo furandi,' this is larceny." 3 Coke's Ins. p. 417. In the Robinson Case, supra, the principle was applied where the prosecutor left his room and trunk unlocked in charge of defendant, who in prosecutor's absence opened the trunk and took money out of it with felonious intent. And again in Rex v. Jones, supra, to a case where defendant broke open a letter intrusted to him to mail and abstracted money from same, the very case we have here, and is recognized as the correct position in State v. England, supra, an authority to which we were referred by counsel. There is no error, and the judgment is affirmed.

No error.

COOPER et al. v. SEABOARD AIR LINE R. CO.

(Supreme Court of North Carolina. Sept. 24, 1913.)

1. TRIAL (§ 58*)—CONDUCT OF TRIAL—WITHDRAWAL OF EVIDENCE.

Where improper evidence is admitted, it is the duty of the trial court to withdraw it from the consideration of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 137; Dec. Dig. § 58.*]

2. APPEAL AND ERROR (§ 1053*) — REVIEW — HARMLESS ERROR.

Where evidence improperly admitted was withdrawn from the jury, it must be assumed that they heeded the admonitions of the court, and, in the absence of a showing that the admission was prejudicial, the error will be considered cured by the withdrawal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

3. EVIDENCE (§ 548*)—COMPETENCY.

In a personal injury action, evidence by a medical expert that the muscles in the region of the stomach were rigid is competent as substantive evidence, being the result of a physical examination and the statement of a fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2346, 2365; Dec. Dig. § 548.*]

4. EVIDENCE (§ 548*)—OPINION EVIDENCE—EXPERT TESTIMONY.

The opinion of a medical expert based upon an examination and statements of the party injured was competent, when the examination was made solely to become a witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2346, 2365; Dec. Dig. § 548.*]

5. APPEAL AND ERROR (§ 206*)—RECEPTION OF EVIDENCE—RESTRICTION OF SCOPE.

Under rule 27 (140 N. C. 662, 66 S. E. viii), providing that it will not be ground of exception that evidence competent for some

purpose but not for all is admitted unless the appellant asks that its purpose be restricted, an appellant cannot complain of the absence of such request that evidence competent in corroboration only was not so restricted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1273, 1283-1289; Dec. Dig. § 206.*]

Appeal from Superior Court, Currituck County; Adams, Judge.

Action by Bessie Cooper and others against the Seaboard Air Line Railroad Company. From a judgment for plaintiff defendant appeals. Affirmed.

Murray Allen, of Raleigh, for appellant; Hayes & Bynum, of Pittsboro, for appellee.

ALLEN, J. [1] The principal evidence relied on is to the admission of certain evidence of Dr. Farthing, an expert in medicine, which was important to the plaintiff, which was withdrawn by the court from the consideration of the jury; the defendant contending that, although withdrawn from the jury, its impression upon the minds of the jurors remained and affected their verdict.

The authorities are all to the effect that it was not only within the power, but was the duty, of the judge to withdraw evidence, which he concluded had been improperly admitted (Gilbert v. Jones, 86 N. C. 225, 1 S. E. 629; Bridgers v. Dill, 97 N. C. 225, 1 S. E. 629; and the rule is fully recognized in Parrott v. Railroad, 140 N. C. 547, 1 S. E. 432, relied on by the defendant, in Justice Brown, while discussing the withdrawal of evidence, says: "His honor withdrew the consideration of all of it from the jury in a very clear and distinct manner. In doing so, we do not think his honor exceeded his authority. When we say that the appellant has been really misled by such action, we will always order a new trial."

[2] We cannot see from the record that the defendant has been injured, and were to base a reversal upon the testimony of the defendant, we would be acting upon mere conjecture, unsupported by any evidence.

The qualifications of jurors prescribed by the statute are that they shall be of good moral character and of sufficient intelligence, "good and lawful men," and, as the presumption is that the public officers entrusted with the duty to make up the jury lists have performed their duty, we must assume the contrary appears, that there is no man on the jury in this action who does not understand the direction of the court, and not to consider certain evidence, which would not honestly obey the instructions of the court.

The present Chief Justice said, in Wilson v. Manf. Co., 120 N. C. 95, 26 S. E. 629: "If the jury are to be deemed in-

enough to obey his instructions in the charge, they must also be able to comprehend his instruction that certain evidence had been improperly admitted and is not to be considered by them."

The comments of Mr. Creasy on the jury system, in his work on the English Constitution, may be appropriately applied to our own juries. He says: "Juries are, of course, liable to error; and when they err, their blunders are made in public, and draw at least a full share of notice; but, on the other hand, we should remember the inviolable honesty and the almost invariable patience with which juries address themselves to their duty. No spectacle is more mark-worthy than that which our common-law courts continually offer of the unflagging attention and resolute determination to act fairly and do their best, which is shown by jurors, though wearied by the length of trials, which are frequently rendered more and more wearisome by needless cross-examinations and unduly prolix oratory. * * * Nor are the errors of judgment which juries fall into by any means so numerous as the impugnors of the system assert. The jury generally know what they are about much better than their critics do. 'Twelve men conversant with life, and practiced in those feelings which mark the common and necessary intercourse between man and man' are far more likely to discriminate correctly between lying and truth-telling tongues, between bad and good memories, and to come to a sound, common sense conclusion about disputed facts, than any single intellect is, especially if that single intellect has been 'narrowed though sharpened' by the practice of the profession of the law. * * * Each juror knows that it is not by him alone, but by him and his eleven fellow jurors conjointly, that the verdict is to be given. Each juror, therefore, knows that if any of the eleven differ from him in opinion at the end of the case, they must argue the matter out among them. Each juror, therefore, watches the entire progress of the trial with his reasoning faculties intent on every part of each litigant's case, and thus prepares himself for a full and fair discussion of the whole," and he quotes from the French philosopher, De Tocqueville, that: "The jury, and especially the civil jury, serves to imbue the minds of the citizens of a country with a part of the qualities and character of a judge; and this is the best mode of preparing them for freedom. It spreads amongst all classes a respect for the decisions of the law; it teaches them the practice of equitable dealing. Each man in judging his neighbor thinks that he may be also judged in his turn. This is in an especial manner true of the civil jury, for, although hardly any one fears lest he may become the object of a criminal prosecution, everybody may be engaged in a lawsuit. It teaches every man

not to shrink from the responsibility attaching to his own acts; and this gives a manly character, without which there is no political virtue. It clothes every citizen with a kind of magisterial office; it makes all feel that they have duties to fulfill towards society, and that they take a part in its government; it forces men to occupy themselves with something else than their own affairs, and thus combats that individual selfishness, which is, as it were, the rust of the community."

[3] The evidence of Dr. Farthing, which was admitted and not withdrawn, that the muscles in the region of the stomach were rigid, was competent as substantive evidence, and in corroboration of the plaintiff, as the evidence was the result of a physical examination of the plaintiff and was the statement of a fact.

[4] There is authority for the position taken by the defendant that the opinion of a medical expert, based upon an examination and *statements* of the party injured, are incompetent, when the examination is made for the purpose of becoming a witness for such party (*Railroad v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Railroad v. Wiley*, 134 Ky. 461, 121 S. W. 402); but these decisions have no application to the facts presented here, as it appears that all statements made to the doctor by the plaintiff, and his opinion thereon, were withdrawn from the jury.

[5] The defendant admits that the evidence of the father of the plaintiff was competent in corroboration of the plaintiff, but insists that it was not substantive evidence, and complains that his honor did not restrict the purpose for which it was introduced. There was no request to restrict the evidence, and the objection is met by rule 27 (140 N. C. 662, 66 S. E. viii): "Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted."

Upon the whole record, we find no error.
No error.

STATE v. COBB.

(Supreme Court of North Carolina. Sept. 18, 1913.)

1. HOMICIDE (§ 282*)—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for murder held to warrant the submission to the jury of the question of defendant's guilt.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 574; Dec. Dig. § 282.*]

2. CRIMINAL LAW (§ 422*)—DECLARATIONS OF CODEFENDANT.

One of two defendants jointly on trial for murder cannot object that declarations of his codefendant admissible only against his code-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fendant, were made while in custody and under duress.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.*]

3. CRIMINAL LAW (§ 673*)—EVIDENCE—DECLARATIONS OF CODEFENDANT.

While the declarations of one of two defendants jointly on trial for murder were admissible only as against the party making them, it was not error to admit them, when the jury were instructed that they were incompetent as to the other defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.*]

4. CRIMINAL LAW (§ 1153*)—WITNESSES (§ 226*)—EXAMINATION—DISCRETION OF COURT—REVIEW.

The mode of the examination of witnesses is within the sound discretion of the trial court and is not reviewable on appeal except in cases of very gross abuse of such discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.* Witnesses, Cent. Dig. §§ 792-797; Dec. Dig. § 226.*]

5. CRIMINAL LAW (§§ 633, 1152*)—TRIAL—CONDUCT OF TRIAL—DISCRETION OF COURT.

The mode of conducting the trial is in the discretion of the trial judge, and the exercise of discretion is not reviewable unless in case of abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1450, 1451, 1453, 1454, 1459, 3053-3057; Dec. Dig. §§ 633, 1152.*]

Appeal from Superior Court, Halifax County; Lane, Judge.

R. W. Cobb was convicted of murder in the first degree, and he appeals. Affirmed.

R. C. Dunn, of Enfield, and Jos. P. Pippen, of Littleton, for appellant. T. W. Bickett, Atty. Gen., T. H. Calvert, Asst. Atty. Gen., and E. L. Travis, of Halifax, for the State.

BROWN, J. There are 60 exceptions in the case on appeal. We have examined each one of them and the entire record with that care which the importance of the case demands, but will not undertake to comment on them seriatim, as it would unduly lengthen this opinion, and would be threshing over again much "old straw."

The most important contention of defendant is that the court should have allowed his motion to nonsuit or direct a verdict of not guilty at conclusion of the evidence upon the ground that the evidence is insufficient to convict.

[1] The state's evidence tends to prove that the deceased was a merchant, living about 2 or 3 miles from Rosemary, and his store was situated about 100 yards from his dwelling. He was in the habit of closing the store about 10 o'clock at night on Saturdays, and carried the money with him from the store to the house. On the night of the homicide he left the store about 10 o'clock with his son, Shelton Shaw. It was a dark night, and they had just come out of the light of the store. When they reached the corner of the house porch, a man, who was sitting on the ground,

stood up and said, "Hands up!" The deceased ordered him to get away, and the man then shot. The son of the deceased testified that he could not recognize the man, or tell whether it was a white or a black man, on account of the darkness of the night, but that he was wearing a cap and that he was of the height and size of the defendant. There was other testimony that the defendant usually wore a cap. There is testimony tending directly to prove the conversation of Cobb and Gurkins that they were planning to rob the deceased, and if necessary kill him; that they were to borrow bicycles so as to escape being tralled by hounds; that the agreement was made; and that Cobb said: "I will put a gun in his face, and we will get that kit. We will get on the bicycles and ride back to town. Damn sure thing; bloodhounds can't track a bicycle." The deceased was shot and killed after this on Saturday night, May 3d.

C. O. Byrd testified that on May 2d he saw Cobb sitting on the steps of the church, and that he engaged the witness in conversation. This witness testified: "He told me 'I saw a thing that looked good to me out in the country yesterday, and all it takes is nerve, and what it takes to get it, I got it.' I said, 'Yes, and you will get got, too.' He said, 'Why, can't you get a job?' I said, 'Yes, I have several jobs here to finish and cannot save any money in Norfolk.' He said, 'I am going Sunday morning, if things have come out as I have planned.'" There is evidence that defendant borrowed two bicycles on the evening of the homicide, and that the bicycle track leading from scene of homicide had eight ridges in the tires, corresponding exactly with the wheel defendant borrowed the same evening from Clyde Taylor. There was evidence of successful trailing with hounds and evidence that the shoe tracks leading from the scene of the homicide were carefully measured and corresponded exactly with those of defendant. Then there is the evidence of Gurkins, and much circumstantial evidence tending strongly to establish defendant's guilt, which it is unnecessary to set out. The whole evidence taken together well warranted his honor in denying defendant's motion, and in submitting the question of his guilt to the jury.

[2] A dozen exceptions were taken to the admission of the declarations of Gurkins. It is first contended that these were made while Gurkins was in custody, and under circumstances tending to show that Gurkins made them under duress. This objection is open to Gurkins only, and cannot be made by this defendant. As Gurkins was acquitted, they are now irrelevant.

[3] It is contended that these declarations were incompetent as against Cobb, and should have been excluded. They were admitted while Gurkins was on trial, and were compe-

tent as against him. His honor very explicitly and repeatedly told the jury that Gurkins' declarations were competent against him only, and cautioned them not to let them weigh against Cobb. We think his honor's directions fully complied with the rulings of this court. *State v. Collins*, 121 N. C. 667, 28 S. E. 520; *State v. Brite*, 73 N. C. 26.

[4] Eight exceptions also complain to the mode of examination of witnesses, leading questions, etc. This is a matter within the sound discretion of the trial court, and this court will not review it except in cases of a very gross abuse of such discretion. *Bank v. Carr*, 130 N. C. 481, 41 S. E. 876; *Crenshaw v. Johnson*, 120 N. C. 271, 26 S. E. 810.

[5] The defendant also complains that when the state rested its case, the solicitor, in the presence of the jury, requested the court to hold Henry Gurkins until the solicitor could send a bill charging him as accessory before and after the fact of the murder of Shaw. This was asked after the state had entered a verdict of "not guilty" as to the defendant Gurkins and had used him as a witness for the state. The request was granted, and the court ordered the sheriff to take Gurkins into custody. This exception is taken to the action of the court in allowing this to be done, and in ordering Gurkins into custody in the presence of the jury. The mode of conducting the trial is in the discretion of the trial judge, and the exercise of discretion is not reviewable unless it appears that there has been an abuse of the discretion. There is nothing in this record to show that there was an abuse of discretion or that the action of the court was prejudicial to the defendant. *State v. Moore*, 104 N. C. 743, 10 S. E. 183.

It appears to us from an examination of the voluminous record in this case that the defendant has had a fair trial, and that he has no just reason to complain of the rulings, or charge of the court.

No error.

BELL v. NORFOLK SOUTHERN R. CO. et al.

(Supreme Court of North Carolina. Sept. 24, 1913.)

1. CARRIERS (§ 45*)—FAILURE TO FURNISH SHIPPING FACILITIES.

Revised 1908, § 2631a, making a railroad company liable to a penalty for its failure to furnish cars upon written demand of shipper, does not affect the common-law duty of the railroad to receive and transport freight tendered it within a reasonable time.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 120, 123-128; Dec. Dig. § 45.*]

2. CARRIERS (§ 44*)—CARRIAGE OF GOODS—REFUSAL TO FURNISH MEANS OF TRANSPORTATION.

Where piling had been delivered and placed by a shipper in the yards of a railroad company and two cars loaded, and the railroad com-

pany refused to transport the cars thus loaded or furnish cars for that in the yard which filled it, the shipper was not required to deliver other piling and place it on the highway in order to recover damages for the railroad's refusal to transport same.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 120-122, 230; Dec. Dig. § 44.*]

Appeal from Superior Court, Currituck County; Long, Judge.

Action by C. B. Bell against the Norfolk Southern Railroad Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

This action was brought originally against the receivers of the Norfolk & Southern Railway, and when the receivership was terminated the Norfolk Southern Railroad Company was made a party defendant. The properties of the Norfolk & Southern Railway were sold by the receivers, under an order of the Circuit Court of the United States, and the Norfolk Southern Railroad Company became the purchaser. The decree confirming the sale contains, among others, the following provisions:

"The purchaser or purchasers shall, as a part of the consideration of such sale, and in addition to the purchase price bid, take the property purchased (1) upon the express condition that the purchaser or purchasers, his or their successors or assigns, will pay for and classify all claims and demands heretofore filed under the order of reference heretofore entered herein on the 23d day of October, 1908, etc.; (2) subject to all pending contracts in respect to the property herein described, lawfully made by the receivers, which said contracts shall be assumed and performed by the purchaser or purchasers, his or their heirs and assigns; (3) and upon the express condition that such purchaser or purchasers, his or their successors and assigns, shall pay, satisfy, and discharge any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers in respect thereto before the delivery of possession of the property sold."

"It is further ordered, adjudged, and decreed that this court reserve the exclusive jurisdiction of this cause for the purpose of enforcing and executing the provisions of said decree of foreclosure and sale entered October 14, 1909, and for the purpose at all times of protecting said grantee, or grantees, their successors or assigns, in the enjoyment of the property, assets, and franchises purchased under the aforesaid decree of foreclosure and sale and to determine any and all controversies as to the character, extent, and validity of the possession of said grantee, or grantees, their successors or assigns, acquired through the execution of said decree and hereunder, and for the purpose of enforcing all the obligations and liabilities assumed by said grantee or grantees, their successors or assigns, under and by virtue of the afore-

said decree of foreclosure and sale or any subsequent decree, including this decree."

The evidence on behalf of the plaintiff tends to show that plaintiff was the owner of a lot of piling, and about August 1, 1909, placed a portion of same upon the right of way of defendant at its regular station, at Shawboro, N. C., and applied to the agent of the defendant company for two cars on which to ship the piling; that the cars were put on the siding the next day, and plaintiff commenced on the 5th day of August to load the cars; that defendant's agent objected to the manner in which plaintiff's servants were loading the cars and proceeded to instruct them how to load, and that thereafter the plaintiff's servants followed strictly the instructions of the defendant's agent; that the defendant carried the two flat cars out on the switch, but never moved them from the depot, and refused to issue a bill of lading for the cars; that after this refusal plaintiff verbally applied for cars on which to load other piling which he had placed on the right of way and on the depot grounds and in the lane leading to the depot; that some of the piling was not moved out of the woods, some distance away, because plaintiff had placed on the station grounds and in the station lane as much of the piling as he could; that plaintiff notified the defendant's agent that he had contracted to deliver all this piling, that on the cars, that on and near the right of way, and that in the woods, to a party in Portsmouth, Va., in ten days, and that plaintiff would lose his sale and suffer great loss if cars were not furnished; that defendant refused to furnish any more cars; and that all the piling was damaged or destroyed and the plaintiff lost the sale of the same.

The evidence on the part of the defendant tends to show that the cars were loaded by the plaintiff in an improper manner and could not be moved without great danger to life and property; that plaintiff's attention was called to the fact that the cars were not loaded in the manner required by the rules of the company; and that plaintiff made no demand in writing for cars but his demands were all verbal.

The plaintiff asked for actual damages and for penalties to the amount of several hundred dollars for failure to furnish the cars, but the claim for penalties was abandoned by the plaintiff and only the action for damages was tried.

W. M. Bond, of Edenton, for appellants.
Ward & Grimes, of Washington, N. C., for appellee.

BROWN, J. (after stating the facts as above). The defendants assign 13 errors but these present only three questions: (1) Is the defendant the Norfolk Southern Railroad Company liable for the tort of the receivers? (2) Was it the duty of the defendants to furnish the cars on a verbal demand? (3)

Are the defendants liable for not furnishing cars for the shipment of the piling not actually placed on defendants' right of way? We are of opinion that each of these questions must be answered in the affirmative.

The first question is disposed of by our decision in *Lassiter v. Norfolk Southern R. R. Co.*, 79 S. E. 264, at this term. In addition to what is so well said by the Chief Justice in the *Lassiter Case*, we think a fair interpretation of the decree of the Circuit Court of the United States is that the court did not intend to in any way interfere with the rights of parties guaranteed to them by the act of Congress. We deduce from the pleadings, the course of the trial, and the brief of the defendant that it does not contend that it is not liable if the receivers are liable, but that the said court is without jurisdiction to determine the liability of the receivers. We cannot for a moment assume that the Circuit Court of the United States intended to enter a decree so plainly violative of a federal statute.

[1] Second. The defendants invoked section 2634a of the Revision of 1908 to sustain their contention that plaintiff cannot recover damages for failure to receive and ship the piling unless there was a written demand for the cars. But this section applies only to actions to recover penalties and was not intended to in any way relieve the railroad of its common-law duty to transport freight tendered it within a reasonable time. In speaking to this question in *Meredith v. Railroad Co.*, 137 N. C. 480, 50 S. E. 2, Mr. Justice Conner says: "It is to be noted that the basis of this action is the alleged breach of the duty imposed by the common law upon carriers to safely carry and, within a reasonable time, deliver goods tendered them for that purpose. For failure to perform this duty the person injured has a cause of action in which he may recover such damages as he sustained within the reasonable contemplation of the parties to the contract. To this common-law duty the Legislature added a statutory duty, fixing, for that purpose, a definite time within which such duty should be performed, giving to the person injured an action for a fixed penalty." The act does not supersede or alter the duty of the company at common law. The penalty in the case provided for is superadded. The act merely enforces an admitted duty. *Branch v. Railroad*, 77 N. C. 347.

[2] Third. It is elementary that the law does not require a man to do a vain thing. The plaintiff loaded two cars which the defendants refused to move. He filled the depot yard and the station lane with piling and demanded cars upon which to load it, and the defendants refused to furnish them. He notified the defendants that he had more piling in the woods nearby ready to place for loading, and the defendants still refused to move that which had been loaded or to furnish cars for that which had been placed. Under these circumstances it would have

been the acme of folly for plaintiff to have hauled the other piling and scattered it along the highway.

A case directly in point is *Houston, E. & W. T. R. R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225. In that case the court says: "And it is insisted that the plaintiff did not even have the wood prepared for shipment in this case, and that therefore he cannot recover. There was but a small part of the wood ready for shipment at the time the cars were demanded which the defendant failed to furnish. But was the plaintiff bound to provide the wood with which to fulfill his contract with Keller, and to offer it at the depot for transportation, after the agents of defendant had refused to furnish cars for that purpose? We think not. A similar question arose in the case of *Texas P. R. Co. v. Nicholson*, 61 Tex. 491, and it was there held that a tender of the property was unnecessary where the proposed shipper had been informed in advance that it was not required and would not be accepted. That was a case of a breach of contract to ship at a certain time; but the principle is the same. The rule announced is a general one and applies to all offers and tenders. When the defendant knew that the transportation would not be furnished, he was not bound, in order to recover for the wrong done him, to prepare and offer the wood. As argued by his counsel, it was his duty to pursue that course best calculated to lessen the damage resulting from the wrong."

In *Waugh v. Gulf, C. & S. F. Railway Co.* (Tex. Civ. App.) 131 S. W. 843, the plaintiff demanded cars for the shipment of logs. The railroad failed to furnish the cars and was held liable for special damages incurred by plaintiff in keeping team ready to haul and load the logs, and also for damages to logs that were worm-eaten. It appears from the facts in the above case that a part of the logs had not been hauled at all, but plaintiff had demanded cars and the company had promised to furnish them.

In *Ethridge v. Central of Georgia R. R.*, 136 Ga. 677, 71 S. E. 1063, 38 L. R. A. (N. S.) 932, Ann. Cas. 1912D, 128, the court says: "It was not necessary that the plaintiff should haul and deposit on the right of way the wood he had cut in order for him to have a right of action because of the company's refusal to receive it. * * * The plaintiff alleged that he had hauled and deposited on the right of way of the defendant company a part of the wood he had cut and corded for the purpose of having it shipped by the defendant company. It would have been a useless expense to have deposited the rest of the wood on the right of way if the company would not receive it there." This case is on all fours with the facts in the case at bar and is a convincing authority.

Upon consideration of the whole case we

are of opinion that the judgment of the superior court should be affirmed, and it is so ordered.

DAVENPORT et al. v. COMMISSIONERS OF PITT COUNTY.

(Supreme Court of North Carolina. Oct. 1, 1913.)

1. APPEAL AND ERROR (§ 1009*)—FINDINGS OF FACT IN EQUITY.

While findings of fact by the trial judge in injunction orders are not binding upon the appellate court, they are entitled to due weight and consideration.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. BRIDGES (§ 7*)—ESTABLISHMENT OF BRIDGES—DISCRETION OF COUNTY COURT.

The establishment of a county bridge rests in the discretion of the county commissioners, and, in the absence of fraud or oppression, their discretion cannot be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 9-13, 15, 16; Dec. Dig. § 7.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Suit by J. R. Davenport and others against the Commissioners of Pitt County. From an order dissolving an injunction, plaintiffs appeal. Affirmed.

The trial court made the following findings of fact:

"(1) That the resolution in controversy was passed by the board of commissioners on November 14, 1912; it being an adjourned meeting from the regular meeting which was held on Monday, November 4, 1912.

"(2) That on the first Monday in December, 1912, there was a motion by plaintiffs to rescind the action of the commissioners in passing the resolution in controversy, and on said motion being made all action on said resolution was deferred.

"(3) That said commissioners in passing said resolution on November 14th acted in good faith and within the discretion vested in them by law.

"(4) That the defendants, the present board of commissioners of Pitt county, have acted in good faith and within the discretion vested in them by law in regard to the resolution in controversy.

"(5) That Boyd's Ferry is a public ferry, and the roads leading up to said ferry on the north and south side of said ferry are public roads.

"(6) That a bridge at Boyd's Ferry is a public necessity."

Albion Dunn and Harry Skinner, both of Greenville, for appellants. Julius Brown, F. G. James & Son, and Jarvis & Wooten, all of Greenville, for appellee.

BROWN, J. The object of this action is to enjoin the defendant from constructing a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

public bridge in lieu of a public ferry which has been operated for many years across Tar river at Boyd's Ferry, wholly within the county of Pitt.

We have examined the affidavits printed in the record, and can find no evidence of fraud or corruption, or of a gross abuse of discretion, and we fully concur in the finding of his honor that the defendants have acted in good faith and within the discretion vested in them by law in regard to the wisdom and feasibility of erecting the bridge.

[1] While the findings of fact of the Judge of the superior court are not binding on us in injunction orders, we give them due weight and consideration, and we fully concur in those made in this case.

[2] In adopting the resolution to build the bridge, the defendants acted well within their legal powers. In the absence of fraud, or oppression, it is a matter within their sound discretion, and will not be reviewed by us. *Glenn v. Commissioners*, 139 N. C. 412, 52 S. E. 58; *Brodnax v. Groom*, 64 N. C. 245; 7 Am. & Eng. Ency. of Law, 1009; 16 Am. & Eng. Ency. of Law, 423.

In discussing the discretion of county commissioners in building bridges, in *Brodnax v. Groom*, 64 N. C. 250, Judge Pearson says: "In short, this court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly, as to the county authorities, and erecting a despotism of five men, which is opposed to the fundamental principles of our government, and the usage of all times past."

The principle laid down in this often cited case has been consistently adhered to, and never departed from by this court where the act is clearly within the power of the county authorities and no fraud, corruption, or oppression is shown.

Affirmed, and action dismissed.

BARKER v. MASSACHUSETTS MUT. LIFE INS. CO. et al.

(Supreme Court of North Carolina. Oct. 1, 1913.)

1. EVIDENCE (§ 317*)—HEARSAY—STATEMENT OF PERSON SINCE DECEASED.

In an action upon policies of insurance, where the only defense was suicide, testimony of the insured's wife and beneficiary that some 8 or 10 months before his death he stated to her that he needed a pistol as deputy sheriff and was thinking of getting one, and a later conversation as to the need of a pistol to protect her in his absence, offered to rebut the theory of suicide, based on his purchase of a pistol on the day he was killed, were incompetent as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

2. EVIDENCE (§ 122*)—RELEVANCY—RES GESTÆ—STATEMENTS BEFORE EVENT.

Such statements could throw no possible light upon the question whether insured had an intention of killing himself at the time he bought a pistol and were no part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 339-350; Dec. Dig. § 122.*]

3. EVIDENCE (§ 272*)—DECLARATIONS—DECLARATIONS AGAINST INTEREST.

Declarations against a party's interest are competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1105-1107; Dec. Dig. § 272.*]

4. EVIDENCE (§ 271*)—DECLARATIONS—SELF-SERVING DECLARATIONS.

In an action on life policies, where the only defense was suicide, his statement to his wife 8 or 10 months before his death that he needed a pistol as deputy sheriff was incompetent as self-serving declarations, where they were not in corroboration of competent statements.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on life policies, where the only defense was suicide, held, that the erroneous admission of irrelevant evidence, hearsay evidence, and self-serving declarations as to why deceased bought the pistol by which he was killed was injurious and prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

Appeal from Superior Court, Carteret County; Allen, Judge.

Action by Mamie W. Barker against the Massachusetts Mutual Life Insurance Company and another. Judgment for plaintiff, and defendants appeal. New trial.

Gulon & Gulon, of New Bern, for appellants. A. D. Ward and T. D. Warren, both of New Bern, for appellee.

CLARK, C. J. This is an action by the widow of Joseph C. Barker on two policies issued by the defendants separately upon the life of her husband, in which she was named as beneficiary. The actions were brought separately, but by consent they were consolidated and tried as one; the same questions being presented. Indeed, the only matter at issue is the defense that the insured committed suicide.

[1] The plaintiff was allowed to testify that some 8 or 10 months before her husband's death he stated to her that he needed a pistol as deputy sheriff and was thinking of getting one, and she also gave a conversation on another occasion, later, between herself and husband, as to the need of a pistol to protect herself in his absence. The object of this testimony was of course to rebut the theory of suicide based upon the purchase of the pistol by him on the evening or afternoon of March 7, 1911; the evidence being uncontradicted that the insured was killed by that pistol, in his own hands, 6:30 the next morning. The controversy is as to

*For other cases see same topic and action NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

whether such killing was intentional or accidental.

[2-4] The conversations testified to by the wife as having occurred "8 to 10 months previously" and at the other time were incompetent as hearsay. They could not possibly be a part of the *res gestæ*. The times were too remote for that purpose. Such conversations were not merely irrelevant but were calculated to prejudice the defense. That the assured had, or had not, an intention to buy a pistol for a legitimate purpose 8 or 10 months previously and on the other occasion referred to, two weeks before the death, could throw no possible light upon the question whether he had an intention to kill himself at the time he bought this pistol. Nor could hearsay evidence of his declarations to his wife in his own favor on those occasions be admissible. Declarations against the party's interests are competent but not self-serving statements, except in corroboration of competent statements.

Suppose the assured had not succeeded in the act and had been indicted therefor, could these declarations have been admitted in his favor? On the other hand, suppose he had been indicted for murder committed with that pistol (the killing of some one else than himself), could these declarations made to his wife weeks and months previously of his disposition to buy a pistol for a legitimate purpose, which purpose was not then executed, be admitted to rebut the presumption arising from the killing with a deadly weapon? Suppose, indeed, on such indictment for homicide the same question had arisen as here whether the shooting was intentional or accidental, would such previous statement by him of an unexecuted intention be competent in his defense? We think not. It follows, therefore, that they were incompetent when the question is whether the killing of himself was accidental or intentional.

[5] We are not disposed to grant a new trial for error in the admission or rejection of testimony unless we can see that it was prejudicial, but we think that the admission of this testimony must have been injurious to the defendants. It was introduced for that purpose.

There must be a new trial.

DANIEL v. DIXON et ux.

(Supreme Court of North Carolina. Oct. 1, 1913.)

1. CANCELLATION OF INSTRUMENTS (§ 59*)—RELIEF TO DEFENDANT—COMPENSATION FOR IMPROVEMENTS—AMOUNT.

Under Revisal 1906, § 652, providing that any defendant against whom a judgment shall be rendered for land may present a petition stating that he or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed therefor "over and above the value of the use and occupation of such land," and

that thereupon the court may impanel a jury to assess plaintiff's damages and the allowance to defendant for such improvements, where, in an action to set aside deeds, it was adjudged that plaintiff was entitled to recover rents and profits, it was error to render judgment against him for the value of the betterments as found by the jury without deducting the rents and profits.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119-125; Dec. Dig. § 59.*]

2. CANCELLATION OF INSTRUMENTS (§ 59*)—COMPENSATION FOR IMPROVEMENTS—AMOUNT.

Under such section, in an action against a husband and wife to set aside deeds, where the wife was still a tenant in common with plaintiff after the setting aside of the deeds, it was error to render judgment against plaintiff for the full value of the betterments as found by the jury, as he should have been charged with only one-half thereof.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119-125; Dec. Dig. § 59.*]

3. PARTITION (§ 78*)—INCIDENTAL RELIEF—IMPROVEMENTS.

On a partition of land, the party making betterments is entitled to have the part improved by him allotted in his share, in which case he recovers nothing for the betterments.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211-223; Dec. Dig. § 78.*]

4. IMPROVEMENTS (§ 4*)—COMPENSATION—STATUTORY PROVISIONS.

Under Revisal 1906, § 652, providing that any defendant against whom a judgment shall be rendered for land may present a petition stating that he or those under whom he claims have made permanent improvements thereon, and praying that he may be allowed for the same, and that thereupon the court may impanel a jury to assess plaintiff's damages and the allowance to defendant for the improvements, the right to an allowance for betterments is not restricted to actions of ejectment.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. §§ 4, 7-26; Dec. Dig. § 4.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Action by Sidney Daniel against E. S. Dixon and wife to set aside certain deeds. From a judgment against plaintiff for betterments, he appeals. Reversed.

Julius Brown, of Greenville, and H. S. Ward, of Washington, N. C., for appellant. T. J. Jarvis and Harry Skinner, both of Greenville, for appellees.

CLARK, C. J. [1, 2] This was an action to set aside and annul certain deeds. There was verdict and judgment in favor of the plaintiff, and the judgment was affirmed in this case, 161 N. C. 377, 77 S. E. 305. The defendants then filed their petition, under Revisal, § 652, for betterments. The jury found that the defendants "had good reason to believe, and did believe, that at the time they were making improvements on the land that they had a good title thereto," and that "the premises had been enhanced in value at this time by reason of said improvements \$700."

The only point presented is as to the cor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rectness of the judgment. The court signed judgment against the plaintiff for \$700 betterments without any deductions for rents and profits adjudged to the plaintiff in a former trial, which the law provides shall be deducted, and without regard to the fact that the plaintiff and the feme defendant are still tenants in common and that the feme defendant will get the benefit of the improvements equally with the plaintiff. To charge the plaintiff with the whole of the added value would be contrary to law and natural justice as well.

[3] Where there is a partition of property, the party making betterments is entitled to have the part improved by him allotted in his share, in which case he recovers nothing for the betterment which he has placed upon the property which has thus become his own. *Pope v. Whitehead*, 68 N. C. 191; *Collett v. Henderson*, 80 N. C. 337; *Holt v. Couch*, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648. But in the present case there is no partition, and one-half of the added value of \$700 placed upon the whole property by reason of the betterments inures to the benefit of the defendants whose half interest in the property is increased \$350, and they are entitled to recover from the plaintiff only the added value of \$350 which by reason of the improvements will enhance the plaintiff's interest in the property. In putting \$700 in added value on the property they have spent \$350 for their own benefit and \$350 for the benefit of the plaintiff.

There was a former judgment in this case at November term, 1912, which was affirmed (161 N. C. 377, 77 S. E. 305), which adjudged that the plaintiff was entitled to one-half interest in the land described in the pleadings charged, however, with the payment of one-half of \$771.88, which the defendants had disbursed in paying off a mortgage on the property less one-half the rental value of the property while in the hands of the defendant; the jury having found the average rental value to be \$150 per year.

The plaintiff tendered a judgment charging himself with one-half of said \$771.88 with interest and for \$350, one-half of said betterments, and charging the defendants with one-half of the rents and profits with interest. By this calculation the defendants would recover of the plaintiff \$184.39. This calculation and adjustment is correct, and the court should have signed the judgment tendered by the plaintiff. The latest case on the subject of betterments is *Whitfield v. Boyd*, 158 N. C. 451, 74 S. E. 452, which was like this, a recovery of an undivided interest in land, and the court held that it was in effect a proceeding in ejectment and that betterments could be assessed.

[4] We cannot, however, agree with the contention of the plaintiff that betterments are only allowed, under the statute, in eject-

ment. There is no such restriction therein. Indeed, if no petition for betterments had been filed, it is generally recognized that when tenants in common have partition they are entitled to lands on which they have made improvements assigned to them without credit for the improvements placed thereon. *Pope v. Whitehead*, 68 N. C. 191. This can be done when there is an actual partition; but when there is no partition, or there is a sale for partition, the added improvement goes to swell the value of the whole tract, and the defendants here can only recover, as above stated, their one-half of the betterment which was for the benefit of the plaintiff, deducting therefrom the balance due by them to the plaintiff in accordance with the judgment of November term, 1912.

The amount of rents set off against the claim for betterments does not exceed those accruing within three years before the beginning of this action. The other rents and profits were set off against the lien paid off by the defendants, and an adjustment decreed by the judgment of November term, 1912.

The judgment should be set aside, and a new judgment entered in the court below in accordance with this opinion.

Reversed.

ANDERSON v. HARRINGTON et al.

(Supreme Court of North Carolina. Oct. 1, 1913.)

1. TRUSTS (§§ 17, 18*)—DECLARATION OF TRUST—ORAL AGREEMENT—STATUTE OF FRAUDS.

The statute of frauds requiring that a sale of land must be evidenced by a memorandum signed by the party to be charged has no application to a declaration of trust as to land.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.*]

2. TRUSTS (§ 35*)—CREATION—ORAL AGREEMENT.

It is not necessary that a trust be declared in any particular mode, and where money was loaned a purchaser of land to pay the price, and a deed taken in the lender's name under an oral agreement that when the loan should be repaid each would have a half interest in the land, a trust was thereby created in favor of the purchaser.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 45-50; Dec. Dig. § 35.*]

Appeal from Superior Court, Craven County; Allen, Judge.

Action by George F. Anderson against W. H. Harrington and another. From a judgment for plaintiff, the defendant named appeals. Affirmed.

This issue was submitted to the jury by the court: "Did the plaintiff and defendant contract and agree as alleged in section 1 of the complaint, and was the deed made to Harrington in accordance with said agreement? Answer: Yes."

Section 1 of the complaint is as follows: That prior to April 11, 1911, the plaintiff had bargained for the purchase of the tract of land herein referred to at the price of \$450, and applied to the defendant W. H. Harrington for the money, whereupon it was agreed between the plaintiff and W. H. Harrington that plaintiff should buy the property and draw on the defendant W. H. Harrington for the purchase money, and then the plaintiff was to proceed with the cutting of the standing timber on the tract and sell the same and turn over the net proceeds to the defendant W. H. Harrington, until such payments had amounted to the purchase price, and that they would then sell the land and divide the proceeds then between them, share and share alike, or otherwise they would be equal owners in the land after the said W. H. Harrington had been paid the purchase money.

It is admitted in the answer that the deed to the land and timber was executed to defendant by A. J. Waters and wife on April 11, 1911. It is further admitted "that plaintiff made a draft on defendant W. H. Harrington for the said \$450 with which to pay the grantor in the said deed, which draft was paid and honored by the said W. H. Harrington."

Upon these admissions and the finding of the jury, his honor adjudged "that W. H. Harrington be first paid the balance of the \$450 purchase money, and the balance be equally divided between the plaintiff and defendant, that costs including this term be taxed against the defendant W. H. Harrington, that for purpose of division D. L. Ward and W. D. McIver be appointed commissioners to make sale of the land and timber according to law." The defendant excepted and appealed.

D. L. Ward, of New Bern, for appellant. W. D. McIver, of New Bern, for appellee.

BROWN, J. In the view we take of this case, it is unnecessary to consider each of the numerous assignments of error. In the briefs the action appears to be treated as one to settle a copartnership, whereas it is in reality an action to set up and establish a parcel trust in land. The defendant requested his honor to charge the jury: "There is no evidence in this case to sustain a recovery of an interest in land. In order to recover land, there must be some memorandum in writing signed by the party to be bound thereby." This is not an action for specific performance of a contract in the sale of land, but one to establish a trust. One of the four methods of creating a trust is by contract, based upon valuable consideration, to stand seised to the use of, or in trust for, another. *Wood v. Cherry*, 73 N. C. 115.

[1] It is so well settled in this state that the statute of frauds, requiring a memoran-

dum in writing in respect to the sale of land to be signed by the party charged, does not apply to the declaration of trusts that it is a waste of time to discuss the question at this late day. *Riggs v. Swann*, 59 N. C. 118.

[2] At common law it was not necessary that a trust be declared in any particular mode. In England the statute requires that declarations of trust be evidenced and proved by some writing, but in this state there is no such requirement, and therefore the matter stands as at common law. *Riggs v. Swann*, 59 N. C. 118; *Shelton v. Shelton*, 58 N. C. 292. In view of this well-settled principle, it has been held that, where one person buys land under an agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchases the land. *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241; *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684; *Owens v. Williams*, 130 N. C. 165, 41 S. E. 93.

The jury have found the facts set out in section 1 of the complaint to be true. Those facts are sufficient to create a trust in the defendant for plaintiff's benefit, and it necessarily follows that the judgment pronounced by his honor is correct.

The motion to nonsuit was properly denied, as there is abundant evidence introduced by the plaintiff tending to establish the trust alleged in the complaint.

No error.

SHELTON et al. v. WHITE et al.
(Supreme Court of North Carolina. Sept. 24, 1913.)

1. DRAINS (§ 13*) — DRAINAGE DISTRICTS — RIGHT TO ESTABLISH.

The establishment of levee and drainage districts is a valid exercise of legislative power, based upon the police power, the right of eminent domain, and the taxing power.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 4; Dec. Dig. § 13.*]

2. DRAINS (§ 14*) — DRAINAGE DISTRICTS — PROCEEDINGS FOR ESTABLISHMENT—APPEAL.

Under Laws 1909, c. 442, §§ 16, 17, providing for the hearing by the clerk of objections by landowners within a proposed drainage district, any landowner may appeal from his decision to the superior court upon the issue as to whether his land will be benefited, and have such issue passed upon by a jury.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

3. EMINENT DOMAIN (§ 31*)—DRAINAGE DISTRICTS—ESTABLISHMENT—APPEAL.

Under Laws 1909, c. 442, §§ 16, 17, relating to the formation of drainage districts, if, on appeal to the superior court by a landowner upon the issue as to whether his land will be benefited, the jury finds that his land will not be benefited, the land can, nevertheless, be so included, when necessary for construction purposes, under the right of eminent domain upon an allowance for damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 77; Dec. Dig. § 31.*]

4. DRAINS (§ 14*)—DRAINAGE DISTRICTS—PROCEDURE FOR ESTABLISHMENT—OBJECTIONS TO REPORT OF VIEWERS.

Where, upon the hearing of the final report of viewers, under Act 1909, § 9, relating to the formation of drainage districts, a majority of landowners and owners of three-fifths of the lands within the proposed district objected, the proceeding should have been dismissed, notwithstanding some of the objectors signed the original petition for the formation of the district, since the final report may have shown the facts as to cost and benefit of the district to be different from what they appeared to be when they signed the original petition.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

Appeal from Superior Court, Edgecombe County; Cline, Judge.

Proceedings by B. F. Shelton and others against J. A. White and others to establish a drainage district. Exceptions to the report of viewers were overruled, and, on appeal to the Superior Court, the judgment below was affirmed, and defendants' appeal Remanded.

E. Paul Kitchin, of Scotland Neck, and Manning & Kitchin, of Raleigh, for appellants. H. A. Gilliam and W. O. Howard, both of Tarboro, for appellees.

CLARK, C. J. This is a proceeding under General Drainage Law 1909, c. 442, as amended by Laws 1911, c. 67, to establish the "Deep Creek drainage district" in Edgecombe and Halifax. The original petition asked for the creation of a district, 19 miles long and 3 or 4 miles wide, on both sides of Deep Creek. The board of viewers, appointed by the preliminary decree, recommended a district about 10 miles long, cutting off both ends of the original proposition. The clerk ordered this modification and the establishment of the district as recommended. All the owners of the land in the district who had not signed the petition were notified, as required by the statute. Section 2. The clerk directed the engineer and viewers to make their survey and report with a map the plans, specifications, classification, and cost.

The board of viewers filed their report in accordance with this decree; the total estimated cost of the improvement being about \$40,000, and the acreage 6,135 acres. On May 11, 1912, when the final report came on for hearing (section 16, c. 442, Laws 1909) before the clerk, 36 owners of land within the district filed exceptions, and asked that the district be not established, and that the proceedings be dismissed. Some of the objectors were signers of the original petition, alleging that the report showed that the cost would be practically double the original estimate and would exceed the benefit, and that the district was impracticable. They averred that the objectors owned three-fifths of the land in the proposed district. The clerk overruled all

exceptions, and confirmed the final report. Exceptions were duly noted, and an appeal was taken to the superior court in term, as provided by the statute.

In the superior court his honor declined to submit any phase of the controversy to the jury. He heard the evidence, and confirmed the judgment of the clerk. It is provided by Laws 1911, c. 67, § 3, amending section 17, c. 442: "Such appeal shall be based and heard only upon the exceptions theretofore filed by the complaining party, either as to issues of law or fact, and no additional exception shall be considered by the court upon the hearing of the appeal."

[1] The authority of the Legislature to provide for the creation of "levees and drainage districts" is based upon the police power, the right of eminent domain, and the taxing power, and has been repeatedly sustained in this court. The act of 1909 was fully considered, and its constitutionality sustained by Hoke, J., in *Sanderlin v. Luken*, 162 N. C. 738, 68 S. E. 225, and has been followed in *White v. Lane*, 153 N. C. 14, 68 S. E. 895, *Forehand v. Taylor*, 155 N. C. 355, 71 S. E. 433, *Mann v. Gibbs*, 156 N. C. 44, 72 S. E. 82, *Carter v. Com'rs* (the "Mattamuskeet Lake" Case) 156 N. C. 183, 72 S. E. 380, *Forest v. Railroad*, 159 N. C. 547, 75 S. E. 796, *Com'rs v. Webb*, 160 N. C. 595, 76 S. E. 552, *Caravan v. Com'rs*, 161 N. C. 100, 76 S. E. 681, and *In re Drainage District*, 162 N. C. 127, 78 S. E. 14. Similar legislation thereto had been affirmed by this court on a former statute in many cases, among them *Norfleet v. Cromwell*, 70 N. C. 639, 16 Am. Rep. 787; *Porter v. Armstrong*, 154 N. C. 449, 46 S. E. 997; s. c., 139 N. C. 179, 51 S. E. 926; *Adams v. Joyner*, 147 N. C. 77, 60 S. E. 725; *Staton v. Staton*, 148 N. C. 490, 62 S. E. 596. Such legislation has been repeatedly held valid in the U. S. Supreme Court, as in *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229, *Irrigation District v. Bradley*, 164 U. S. 163, 17 Sup. Ct. 56, 41 L. Ed. 369, and in many other cases, as well as by numerous decisions in other states, many of which have been collected. 10 A. & E. (2d Ed.) 223; 14 Cyc. 1024, 1025.

The procedure in the formation of these districts, under Laws 1909, c. 442, may be thus summarized, leaving out details: A petition must be presented to the clerk, signed by a "majority of the resident landowners of the proposed drainage or levee district, or by the owners of three-fifths of all the land which shall be affected by or assessed for the expense of the proposed improvement." Thereupon notice is issued to all the other landowners in said district, and the clerk appoints a surveyor and two freeholders of the county, who shall make a survey, and report whether the proposed improvement is practicable and conducive to the

general welfare of the district, whether it will be of benefit to the lands sought to be benefited, and whether all the lands benefited are included in the proposed district. They are required to file with this report a map of the proposed district, showing the location of the ditches, canals, or levees proposed, together with any other information bearing on their conclusion.

On the coming in of this report, if it is adverse to the formation of the district, and the clerk shall approve such finding, the petition is dismissed. If, however, they file a favorable report, and the clerk shall approve the same, he shall give notice of a further date to hear objections. If on such hearing he approves the report, he orders the formation of the district. It is then open to any one, whose land is included in the district, who shall object that he will not be benefited, and who asks that his land shall be excluded, to appeal, under section 8, upon the issue of fact whether his lands will be benefited or not. This issue can be tried by jury on appeal. It is not open to him to contest the practicability of the formation of the district, which is based upon the petition of the majority of the landowners, and approved by the report of the viewers and surveyor, and affirmed by the clerk. As a minority landowner, he cannot contest such action. His rights extend no further than to raise the issue of fact whether his own lands will be benefited. If, on appeal, the jury find against the appellant, the judgment of the clerk is, of course, affirmed. But should the jury find in his favor he is not entitled as of course to have his land excluded, because in some cases this may destroy the formation of the district, which has been ordered on the petition of the majority, and sustained by the report of the board of viewers and surveyor, and approved by the clerk. The judge, upon the finding of the issue of fact by the jury in favor of the appellant, can either order his land excluded from the proposed district, if that can be done without injuring the district, or he can order that such land be retained within the district for the purpose of giving a right of way for the proposed improvements over his lands, upon the payment of damages awarded by the verdict under the right of eminent domain. Laws 1911, c. 67, § 2.

[2, 3] Upon the preliminary order establishing the district, the court, under section 9 of the act of 1909, refers the report of the surveyor and viewers back to them "to make a complete survey, plans, and specifications for the drains, levees, or other improvements," and fixes a date for their report. This report shall contain detailed information, and be accompanied by a map, profile and estimate of cost, the assessment of damages, and the classification of lands according to benefits. When this final report is filed, notice shall be given by publi-

cation of a final hearing, at which date objections may be heard. The clerk may then approve or modify the report, or, if the costs of construction and damages prove to be greater than the resulting benefit that will accrue to the lands affected, he may dismiss the proceeding. If the clerk approve the proceeding, any objector, who contends that the benefit to him will be less than the cost and damages, may appeal, under sections 16 and 17, upon that issue, and have it passed upon by a jury in the superior court. It is not open to him to contest the formation of the district which is backed by the majority of the landowners. As a minority landowner, he can only raise the issue of fact whether he will be benefited or not. As in case of an appeal from the preliminary order, under section 8, if the jury find against the objector, the judgment is approved; but if the jury find in his favor, then the court will adjudge whether the lands of the objector can be excluded from the district without injury thereto. If this cannot be done, then the objector's lands will be retained in the district for the purpose of a right of way for the proposed improvements, and he will be allowed damages under the right of eminent domain, to be assessed by the jury at the same time that they pass upon the issue of fact.

On the appeal from the preliminary order, under section 8, it would not seem that any landowner who has signed the petition should be allowed, contrary to his averments in the petition, to object and appeal. But on the report at the final hearing it may well be that from the information afforded by such final report any one who signed the petition may find that, contrary to his previous opinion, the cost of the improvements and damages will amount to more than the benefits accruing, and he should then be entitled to ask that his land be omitted from the district, and for an issue of fact as to whether he will be benefited.

If the finding of the jury is that the lands of any objector will not be benefited by the proceeding, they can, nevertheless, be so included, under the right of eminent domain, upon an allowance for the damages, if the clerk or judge shall so order, or, as provided by Laws 1911, c. 67, § 2, the judge can permit the names of the owners of such lands to be withdrawn from the proceeding; but, if such lands are "so situated as necessarily to be located within the outer boundaries of such district, such fact will not prevent the establishment of the district, and said lands shall not be assessed for any drainage tax, but this shall not prevent the district from acquiring a right of way across such lands for constructing a canal or ditches or for any other necessary purpose authorized by law."

As to all other matters involved in the reports, such as classification of the lands, the assessments, the valuation of the benefit to

the respective owners, the location of the ditches and levees, and other incidental matters, these are questions of fact to be determined by the report of the surveyor and board of viewers, and later on by the drainage commissioners, when appointed, subject to approval by the clerk, whose action in these respects can be reviewed on exceptions by appeal to the judge. These are questions of fact, and do not require the intervention of a jury. If they did, the delay and expense would render the system impossible.

After the final report and judgment thereon, the work of construction and administration, including the issuance of bonds, is committed to a board of drainage commissioners, who are appointed by the clerk upon election by the landowners, who in this manner control the execution and maintenance of the work. The drainage commissioners appoint a superintendent of construction.

While the finding of the jury in favor of the objectors as above stated will not entitle them to be excluded from the district, unless the judge is of opinion that they are not necessary to the formation of a district, on the other hand, the fact that a majority of the resident landowners or the owners of three-fifths of the land petition for the district is not sufficient to require its formation, unless the viewers shall make the findings required by section 3, and such findings are approved by the clerk, and on appeal by the judge, also.

[4] In the present case it is alleged that on the appeal, under sections 16 and 17, from the final order a majority of the resident landowners in the proposed district and the owners of three-fifths of the acreage therein objected. This fact is not found by the judge. The case must therefore be remanded to him. If the fact is as alleged, the proceeding should be dismissed, notwithstanding that some of the objectors signed the original petition, for upon the coming in of the final report they may ascertain that the facts are different both as to cost and benefit from what was understood when they signed the petition. But, if the fact is not so found, then the issue of fact raised by the exceptions of the objectors, under section 16, will be submitted to the jury. If that fact is found against the objectors, the judgment should be affirmed. If the fact is found for them, the judge shall then decide, nevertheless, whether the objectors shall be retained as necessary for the formation of the district, with damages, under the right of eminent domain, or shall be excluded.

Upon the facts of this case, each party will pay one-half the cost of appeal in this court. Remanded.

BROWN, J., was not present, and took no part in the decision of this case.

PARKER et al. v. JOHNSON
(Supreme Court of North Carolina.
1913.)

DRAINS (§ 14*)—DRAINAGE DISTRICT PROCEEDINGS FOR ESTABLISHMENT—APPEAL.

Under Laws 1909, c. 442, relating to the formation of drainage districts, and for an appeal by any landowner to the court upon the issue as to whether or not the land will be benefited, such issue was by the court properly submitted to a jury.

[Ed. Note.—For other cases, see Dec. Dig. §§ 5, 6; Dec. Dig. § 14.*]

Appeal from Superior Court, Wayne County; Lane, Judge.

Action by Surry Parker and others, C. R. Johnson and others. From the judgment of the Superior Court on appeal of the defendants, finding against plaintiffs. Appeal. Affirmed.

Van B. Martin, of Plymouth, and Bickett and T. H. Calvert, both of Wayne County, for appellants. A. O. Gaylord, of Wayne County, and A. D. MacLean and H. S. Warren, of Washington, N. C., for appellees.

CLARK, C. J. This is a proceeding under the General Drainage Law 1909, c. 442, to establish the "Conaby drainage district" in Wayne county. Substantially the same facts are presented that have been decided in *Shelton v. White*, 79 S. E. 2d 101, that case is decisive of this.

The record sent up is confusing. The proceedings do not appear in regular order. The defendants were brought in by the clerk as required by section 2 of said law, and filed answers, denying that they were "benefited by the improvement, and that their lands be not included" in the proposed district. This defense was sustained by the clerk, and the defendants were excluded. On the coming in of the final report of the viewers, the defendants again excepted, under section 16, because "the cost of construction, with the amount of damages assessed, would be greater than the resulting benefit which would accrue to their lands." The court overruled these objections. Upon the coming in of the final report, the superior court at term time decided the issues of fact and law involved, as required by Laws 1911, c. 67, § 3, the judgment was affirmed. On the above issue with the defendants, the court thereupon rendered judgment, finding that they should be "excluded and enjoined from said district, and enjoined the creek drainage district from issuing bonds for the construction of the canal or levee upon the lands of the defendants and plaintiffs except, on the ground that the judge should have passed upon the issue of fact, and should not have submitted the issue to the jury. In this, as already held in *Shelton v. White*, 79 S. E. 2d 101, his honor committed no error, notwithstanding the finding of the

udge might have affirmed the ruling of the clerk, if the formation of the district required such action; the objectors recovering damages. But his honor adjudged otherwise, and directed the exclusion of the objectors. No error.

WESTON et al. v. JOHN L. ROPER LUMBER CO.

Supreme Court of North Carolina. Sept. 24, 1913.)

WAR (§ 29*) — CONFISCATION OF ENEMY'S LAND.

In 1744 the King of England, having bought out the other lords proprietors of Carolina, granted to one of such proprietors one degree southward from the Virginia line; such proprietor releasing his right to participate thenceforward in the government. Section 25 of the Declaration of Rights of 1776 vested the property of the soil in the collective body of the people, excepting only the titles or possessions of "individuals" holding or claiming under the laws theretofore in force or grants theretofore made by the king or the lords proprietors or any of them. The Confiscation Acts (Laws 1777 [2d Sess.] c. 17, and Laws 1779, [2d Sess.] c. 2) confiscated the lands of certain parties without naming the proprietor in question but were not enforced because in violation of the treaty of peace with Great Britain. The Entry Act (Laws 1777 [2d Sess.] c. 1) authorized the entry and grant of all lands which had not been granted by the crown of Great Britain or the lords proprietors of Carolina, or any of them, or which had accrued or should accrue to the state by treaty or conquest, but expressly withheld from entry and grant the lands confiscated. *Held* that, notwithstanding the release of his right to participate in the government, the lord proprietor in question held the land granted him in the capacity of a quasi sovereign and not as an individual, and his title like that of the king passed to the state government by right of conquest, and the lands to which he held title were subject to entry and grant.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 186-205; Dec. Dig. § 29.*]

Appeal from Superior Court, Pasquotank County; Long, Judge.

Action by C. P. Weston and another against the John L. Roper Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. B. Rodman, of Norfolk, Va., A. D. McLean, of Washington, N. C., W. M. Bond, of Edenton, and J. K. Wilson, of Elizabeth City, for appellant. Winston & Biggs, of Raleigh, Ward & Thompson and Meekins & Tillitt, all of Elizabeth City, and Charles Whedbee, of Hertford, for appellees.

CLARK, C. J. This case was here in 160 N. C. 263, 75 S. E. 800. The plaintiffs seek to recover a tract of 1,000 acres swamp land under mesne conveyances from a grant to John Cowper in 1788 and damages for trespass thereon. The question of title by adverse possession does not arise. The defendant admits that it has cut timber on the land in con-

troversy as alleged in the complaint but denies that such cutting was wrongful or unlawful.

The defendant asked the court to submit an issue as to the true location. This contention hinges upon these words, "then running up the river to the head thereof." The plaintiffs contend that the "head of the river" is at a certain point, and that if their contention is correct the tract will contain 1,026 acres, and the outline of its boundaries will coincide almost precisely with the plot and description in the survey of the Cowper patent 125 years ago, in 1788. But that, if the "head of the river" is where the defendant contends the survey shows, there would be only 740 acres in the original grant, and that the outlines of the boundary will not correspond with said grant to Cowper. There was much evidence on this point, and the jury found in accordance with the contention of the plaintiff. We find no merit in the exceptions on this point, and we do not think it is necessary to consider in detail the other exceptions, most of which are in fact determined by the decision of this case (160 N. C. 263, 75 S. E. 800).

The real controversy now before us turns upon this point: "Were the lands of John, Lord Carteret, Earl of Granville, subject to entry and grant in July, 1788?" The plaintiffs claim under such grant and a complete chain of mesne conveyances to themselves. The defendant claims under a conveyance from the State Board of Education October, 24, 1904, to George W. Roper for 38,000 acres, including the locus in quo in consideration of \$700. The plaintiffs contend that this is less than 2 cents per acre, and that the conveyance is therefore void because Rev. § 4049, provides that the "State Board of Education * * * shall not sell swamp lands at a price less than \$.12½ per acre," and contend that at most this could be nothing more than a quitclaim or release of any interest the State Board might have in said tract. We need not, however, discuss this point if the grant to John Cowper in 1788 covered land which was then subject to entry and grant. The real controversy, therefore, turns upon the proposition whether the lands of Earl Granville were confiscated, which confiscation was rendered invalid by article 6 of the Treaty of Peace with Great Britain in 1783, or became the property of the state as a consequence of Independence.

On June 30, 1665, Charles II granted to the eight lords proprietors all the lands from the present Virginia state line to the thirty-first degree north latitude. In September, 1744, George II set apart to John, Lord Carteret, one degree of latitude southward from the Virginia line; the king having bought out the other seven lords proprietors. The southern line of Lord Granville's territory may still be traced in the southern boundary

of the counties of Chatham (until the formation of Lee), Randolph, Davidson, Rowan, and Iredell. The Confiscation Act (chapter 17, Laws 1777 [2d Sess.] 24 State Records, 123, and Laws 1779 [2d Sess.] c. 2, 24 State Records, 263), which was passed during the Revolution and which was not enforced because in violation of the Treaty, named the parties whose lands were confiscated, and among these the name of Lord Carteret does not appear. The Entry Act (chapter 1, Laws 1777 [2d Sess.] 24 State Records, 43) expressly withheld those confiscated lands from entry and grant, and the confiscation, indeed, was never enforced. The act authorized the entry and grant of all lands "which have not been granted by the crown of Great Britain, or the lords proprietors of Carolina, or any of them, in fee, before the 4th day of July, 1776, or which have accrued or shall accrue to this state, by treaty or conquest."

It is clear from the above language that the lands which were still held by Lord Granville on July 1, 1776, "had not been granted by him or any of the lords proprietors in fee, nor by the crown," and therefore those lands were subject to entry and grant. This was the contemporaneous construction put by the Legislature on section 25 of the Bill of Rights prefatory to the Constitution, adopted at Halifax in 1776. That section vested the property of the soil within the limits of the state, as there laid down, in the "collective body of the people," excepting only "the titles or possessions of *individuals* holding or claiming under the laws heretofore in force or grants heretofore made by King George III or his predecessors, or the late lords proprietors, or any of them." This is an explicit recognition that whatever titles George III or any of the lords proprietors retained in themselves ungranted at that date had passed to the sovereign people of this state, and by the subsequent act of 1777 above referred to all such lands, having become the property of the state, became the subject of entry and grant.

The point was directly presented to this court in *Taylor v. Shufford*, 11 N. C. 116, 15 Am. Dec. 512, and the court held: "The sovereign power cannot be estopped. Where the king in 1768 granted lands to A. which he had previously granted to Lord Granville, the grant to A. was void; and, as the state succeeded upon the Revolution to Lord Granville's right to the land, a grant made by the state since shall be preferred to the royal grant to A." It is true that, when the seven lords proprietors conveyed their interest to the king, Lord Granville, while retaining his one-eighth interest in the land, released his right to participate thenceforward in the

government. But that did not change the fact that he held the land in the capacity of a quasi sovereign as lord proprietor under the patent of 1665 and as a co-owner with the king, though a partition was made in 1744, and not as an individual. He continued to make grants till 1776.

The contention that the Earl of Granville did not hold the land in this quasi sovereign capacity but that he was a mere individual grantee, and therefore that his rights were protected from confiscation by the Treaty of Peace of 1783, was presented by an action brought in the United States Court for North Carolina in 1802 in the case of *Coventry v. State*. The contention of the heirs of Earl of Granville was not sustained and they did not appeal, though they were represented by able counsel. The papers are still on file at Raleigh. Some years later Judge Gaston and Judge Duncan Cameron were employed to have the cause renewed, but upon full consideration this was not done. We must presume that those eminent lawyers were satisfied that the contention of their clients could not be maintained. Indeed, though Granville had released to the king his right to share in the government, there was nothing to show that he changed in any wise the quasi sovereign capacity in which he had held the lands. The title of the king as the grantee of seven lords proprietors was on exactly the same footing as the title of the one lord proprietor who retained his lands. All lands ungranted by the king or lords proprietors to individuals on July 1, 1776, became the property of the sovereign state of North Carolina without distinction. This matter has been so long settled that indeed it now possesses only an antiquarian interest. If it were possible to change it, it would affect the titles in at least half the counties of the state except for the protection afforded by the statute of limitations.

We, however, are fully of the opinion that the title of the Earl of Granville passed, like the title of the king, by the right of conquest, and that the new state government became vested of the ungranted lands of the earl in this part of its territory in exactly the same plight and condition that it became vested with the ungranted lands in the rest of the state; i. e., by conquest of the sovereign power.

It is scarcely necessary to discuss more fully this proposition. The other exceptions require no debate. The jury found that the boundaries of the land were, as contended for by the plaintiffs, assessed the damages at \$637.50 and held that the damages were not barred by the statute of limitations.

No error.

SMITH v. ATLANTIC COAST LINE R. CO.
(Supreme Court of North Carolina. Oct. 1, 1913.)

1. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—CARRIER'S DUTIES—ORAL CONTRACT.

No receipt or bill of lading is necessary to establish a contract for the carriage of live stock, but such a contract may be shown by the fact that the carrier received the stock for shipment and was paid therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

2. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—ADMISSIBILITY OF EVIDENCE.

Where there is no bill of lading containing a valuation clause in evidence in an action for damages to live stock during a shipment, the classification of the Interstate Commerce Commission, based on such a valuation clause, is immaterial and properly excluded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

3. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT—ADMISSION OF EVIDENCE.

In an action for damages to a mule during shipment, where it was undisputed that the mule had its foot through a crack in the side of a car, testimony that there was no other crack in the side of the car large enough for a mule's foot to go through was favorable to the carrier.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

4. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—ADMISSIBILITY OF EVIDENCE.

In such an action, testimony that the plank at the point where the mule's foot had gone through had been split off and that the break was an old one was competent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

5. APPEAL AND ERROR (§ 1050*) — HARMLESS ERROR — ADMISSION OF EVIDENCE — FACTS OTHERWISE ESTABLISHED.

No exception could be taken to the admission of the evidence if it were incompetent, since it appeared that the plaintiff gave the same testimony in another part of his examination without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

6. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR—FAILURE TO ARGUE.

Errors which are assigned but not considered in the brief will be deemed to be abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Action by R. L. Smith against the Atlantic Coast Line Railroad Company to recover damages for injury to a horse and a mule. Judgment for the plaintiff, and the defendant excepts and appeals. Affirmed.

This is an action to recover damages for injury to a horse and a mule, caused by the negligence of the defendant. The following verdict was returned by the jury: "(1) Was the mule mentioned in the complaint injured

and killed by the negligence of the defendant? Answer: Yes. (2) If so, in what amount has the plaintiff been damaged thereby? Answer: \$200. (3) Was the mare mentioned in the complaint injured by the negligence of the defendant? Answer: Yes. (4) If so, in what amount has the plaintiff been damaged thereby? Answer: \$50. (5) Did the plaintiff file claims with the defendant for said injuries as set out in the complaint? Answer: Yes."

Harry Skinner, of Greenville, for appellant.
W. F. Evans, of Greenville, for appellee.

ALLEN, J. [1] The plaintiff did not introduce a bill of lading, but he offered evidence tending to prove that on January 4, 1911, he purchased several horses and mules in Richmond, which were delivered to a connecting line of railway and were delivered to him at Greenville by the defendant; that he paid the freight to the defendant; and that one mule was dead and a horse injured when the cars reached Greenville. The plaintiff further testified that he was present and saw the stock loaded on the cars in Richmond, and that no bill of lading was given to him. All of this evidence was objected to by the defendant upon the ground that the contract of carriage could not be proven by parol, and at the conclusion of the evidence there was a motion for judgment of nonsuit; the defendant contending that, as no bill of lading had been introduced, the plaintiff could not recover. The position of the defendant cannot be sustained.

In Hutchinson on Carriers, § 118, the author says: "No receipt, bill of lading, or writing of any kind is required to subject the carrier to the duties and responsibilities of an insurer of the goods. As soon as they are delivered to him for present carriage and nothing necessary to their being forwarded remains to be done by the owner, the law imposes upon him all the risk of their safe custody as well as the duty to carry as directed. He is regarded as exercising in some sort the functions of a public office, and the law is said to impose upon him his duties and obligations upon this ground as well as upon the ground of the contract; and, as soon as the delivery to him and his acceptance are shown, the law imposes the duty and responsibility in virtue of his public employment."

The Supreme Court of the United States also said in *Mobile & Mon. R. R. Co. v. Jurey*, 111 U. S. 591, 4 Sup. Ct. 569, 28 L. Ed. 527: "No particular form or solemnity of execution is required for a contract of a common carrier to transport goods. It may be by parol, or it may be in writing; in either case it is equally binding." And our own court declared in *Berry v. Railroad*, 122 N. C. 1003, 30 S. E. 14: "Delivery of a bill of lading is not necessary to fix liability upon the de-

defendant. *Wells v. Railroad*, 51 N. C. 47 [72 Am. Dec. 556]."

[2] No evidence was offered identifying the paper in possession of the plaintiff, or the one held by the defendant, or connecting either with the shipment in controversy; and, as no bill of lading containing a valuation clause was in evidence, the classifications of the Interstate Commerce Commission were immaterial and were properly excluded.

The plaintiff testified that no bill of lading was given to him, and he explained the possession of the paper, in form a bill of lading, by showing that after the defendant filed an answer setting out certain stipulations, which it alleged were in the bill of lading, under which the shipment was made, his counsel wrote to the party from whom the horses and mules were purchased in Richmond, asking for a form of bills for shipments of stock for the purpose of comparison with the allegations in the answer, and that the paper he had was the one sent him in compliance with his request. The paper in possession of the defendant's counsel purported to be a copy of a bill of lading, but no evidence was offered showing when it was made or otherwise explaining it.

[3] The defendant also excepted to the admission of the following question and answer: The plaintiff was asked, "Would it have been possible, from your observation, for that mule's foot to have gone through the crack unless there had been a piece broken out?" He answered by saying that she could not have done so in his opinion; that he noticed the car and that that was the only place that a mule could have gotten its feet through; that the plank at that point had been split off and was an old break. It is not disputed that the foot of the mule was through the crack, and it was favorable to the defendant to show that there was no other hole in the car.

[4] It follows that the only part of the answer of the witness that was material is the statement "that the plank at that point had been split off and was an old break."

[5] This evidence was, in our opinion, competent; but, if not, the defendant could not avail itself of the exception, as the same witness testified to the same facts in another part of his examination, without objection. He said: "When the shipment reached Greenville there was a mule dead in one car, and one of the horses was severely injured in another. The mule had her feet hanging in a crack of the car about waist high from the floor, and she had apparently fallen down on her back while in that position and could not get up. That the car was slatted with narrow cracks between the slats about two inches wide, but at the point where the mule's feet were hung a piece had been broken out, making the crack at that point much larger. The slats of the car were about four

inches wide, and at that point about of the slat had been broken out, making an opening about four inches wide, and enough for the mule's feet to catch in." He examined the car thoroughly, and he broke in the slat at the point mentioning the appearance of having been done at that time, as the broken slat was dirty and different from a new break."

The principles announced in *Adams Express Co. v. Croninger*, 226 U. S. 491, 10 Ct. 148, 57 L. Ed. 314, and in other cases, allowing it, are not involved in the decision in this case, as no bill of lading containing a valuation clause was in evidence.

[8] The special instructions were predicated on the presence of a bill of lading and the materiality of the classifications of the Interstate Commerce Commission, which the defendant properly refused; and, as the exceptions to the charge are not considered in this case, they are deemed to be abandoned. No error.

No error.

CITY OF RALEIGH v. DURFEE (Supreme Court of North Carolina. 1913.)

1. ADVERSE POSSESSION (§ 10*)—ACQUISITION OF TITLE—MUNICIPALITY.

A city may acquire title to land by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 58-64; Dec. Dig. § 10.*]

2. MUNICIPAL CORPORATIONS (§ 225*)—RIGHT OF PROPERTY—"SIDEWALK"—WALKS—PRESCRIPTION.

Where a municipal corporation owns a market house and placed narrow raised runways in front of the doors of the various market stalls, against which runways were backed up, the runways were not sidewalks, even though they were sometimes used by travelers for passing and repassing.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 626-641, Dec. Dig. § 225.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6505-6507; vol. 8, p. 1.

3. MUNICIPAL CORPORATIONS (§ 225*)—RIGHT OF PROPERTY—"SIDEWALK"—INTERRUPTION BY ABUTTING OWNER.

Where a municipality in building a market house placed narrow raised runways in front of the doors of the various market stalls, against which runways were backed up, objecting owners could not acquire property in the walks, such walks were not "sidewalks," although occasionally used by pedestrians for passing and repassing.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 626-641, Dec. Dig. § 225.*]

4. MUNICIPAL CORPORATIONS (§ 225*)—RIGHT OF CONVEYANCE.

The Legislature may authorize a municipality to convey the sidewalks around land owned by the city, though such sidewalks have become public ways by prescription.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 626-641, Dec. Dig. § 225.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.

MUNICIPAL CORPORATIONS (§ 225*)—SIDE-CONVEYANCE.

ers of land across the street from a block, which had been used for house, have no pecuniary interest in around such market house which will conveyance of the market house, in the walks, when the municipality is duly to convey the same.

te.—For other cases, see Municipal ons, Cent. Dig. §§ 626-641, 643; Dec. *

from Superior Court, Wake Coun- e, Judge.

versy without action between the Raleigh and Carey K. Durfey. for plaintiff, and defendant ap- firmed.

reed statement of facts is as fol-

the city of Raleigh is a municipal on, chartered under chapter 59, Laws of North Carolina, session amended, which charter was adopt- first Tuesday in April, 1913, by a of the then registered and qualified the city of Raleigh, and that James n is mayor of the city of Raleigh. at the city has undisputed posses- and claims to own property situate teville street, lying between East and East Martin streets, and run- k to Wilmington street, lying be- exchange place north, or Market d Exchange place south, and known market house, together with the lot ch the said building is situate, said measuring 40.2 feet on Fayette- et, running back in a rectangular feet to Wilmington street, measur- feet on Wilmington street.

at subsection 1, section 1, article 5 id charter, relative to the powers board of commissioners of the city h, reads as follows: 'To open new ange, widen, extend and close any t is now or may hereafter be open- dopt such ordinances for the regu- d use of the streets, squares, and d other public property belonging y as it may deem best for the pub- e of the citizens of said city.'

at Exchange street south, from ine to building line, is 50.4 feet and street north, from building line g line, is 51.6 feet. That the side- the north and south sides of the ulding measure 6.9 feet from the aid sidewalks to the building line ulding, which sidewalks run from lle street to Wilmington street on s. That Exchange street north is de from curb to curb and Exchange uth is 35 feet wide from curb to at from building line on the south uth Exchange street to the building he north side of north Exchange a distance of 155.10 feet. Said Ex-

change streets north and south are only 210 feet long.

"(5) That Exchange streets north and south are now and have for many years been used in connection with the market, produce wagons backing up to the sidewalks on either side of the market, on Exchange streets north and south; the horses to said wagons facing north and south as the case may be, and standing at right angles to the north and south sides of the said market. That the length of a horse and wagon is between 16 and 18 feet.

"(6) The Legislature of North Carolina, session 1913, authorized the city of Raleigh to sell said property, including the sidewalks on the north and south sides of said building, at a minimum price of \$80,000, said act forming chapter 315 of the Private Laws of North Carolina, session 1913, a copy of which act is hereto attached and marked 'Exhibit A.'

"(7) Said property was duly advertised for sale and sealed bids requested, together with a deposit of a certified check for \$5,000.

"(8) On August 11, 1913, said bids were duly opened by the commissioners of the city of Raleigh, when and where it was found that Carey K. Durfey, as surviving executor and trustee of the estate of Florence P. Tucker, deceased, was the highest bidder, at the price of \$90,575, and that his bid was made on condition that the title to said property should be satisfactory; a certified check for \$5,000 having accompanied said bid in accordance with the requirement aforesaid.

"(9) That the bid of said Durfey as aforesaid was accepted by the said city, and subsequent to said acceptance he assigned his bid under the same conditions as the bid was made, to Carey K. Durfey, trustee, which assignment was accepted by the said city of Raleigh.

"(10) That after reasonable time had been given the said Durfey, trustee, to investigate the title to said property, a deed in the usual form and with the usual warranty or warranties, conveying the said building and the said lot, including the sidewalks on the north and south sides, in fee simple, was tendered to said Durfey, trustee, and a demand made for the balance of the purchase price, namely \$85,575, the payment of which was refused by said Durfey for the reason that he stated that the city of Raleigh had no right, even under the act aforesaid, to sell the sidewalks on the north and south sides of said building, and for the further reason that the city of Raleigh could show no title to part of the property.

"(11) That the old maps of the city of Raleigh show that in 1834 this was a solid block of property, owned by various individuals. On the 12th day of December, 1846 Matthew Shaw gave to the commissioners of the city of Raleigh a deed conveying a tract of land 70 feet by 210 feet,

bounded on the west by Fayetteville street, on the south by the line of the late John Marshall, on the east by Wilmington street, and on the north by the line of the city market lot.

"(12) That many years ago the courthouse of Wake county was burned, together with numerous records of conveyances, etc., and that no conveyance of the city market lot referred to in the deed of Matthew Shaw to the commissioners of the city of Raleigh can be found.

"(13) That there is on record a deed, registered in book 11, at page 190, in the office of the register of deeds for Wake county, from William Hill to Fannie Murden, which states that the lot conveyed by Hill's deed to Murden faces on Martin street and runs back 68 feet to the line of lot of Matthew Shaw.

"(14) That it is 70 feet from the northeast corner of the intersection of Fayetteville and Martin streets to the southeast corner of the intersection of Exchange street south, and Fayetteville street. That so far as the records of Wake county show, the aforesaid lot conveyed by Matthew Shaw to the city of Raleigh was the only piece of property that he owned in lot No. 114, which was the south part of the old block as shown by the city maps, bounded by Hargett, Martin, Wilmington, and Fayetteville streets, and measuring about 420 by 210 feet.

"(15) That there is no record as to whether Exchange street north was opened by the city out of the property bought by the city for that purpose, or by condemnation, but the old maps show that Exchange streets north and south were not streets that were laid off by the state of North Carolina, in the plan of the city of Raleigh.

"(16) That Exchange place south covers a part of the property purchased from Matthew Shaw, the balance of said property being occupied by a portion of the market house.

"(17) That old inhabitants state that the present site, together with the streets thereon, were used for the market house prior to 1860, two wooden structures, namely the city market and the fire and police house being situate thereon. That these wooden structures were burned about 1864, and that the present building was built by the city of Raleigh as it now stands about 1867, and has been continuously used as a city market house since that date.

"(18) That the city of Raleigh has been in undisputed adverse possession under known and visible bounds of the land occupied by the market house for at least 60 years, occupying the same and collecting rents for the same.

"(19) That subsequent to the opening of Exchange streets north and south, numerous stores have been erected on the north side of Exchange street north, or Market street, with entrances facing thereon, and likewise

numerous stores have been erected on the south side of Exchange street south, with entrances facing on said street, all of which belonged to private parties.

"(20) That for many years both Exchange place north, and Exchange place south, have been shown on the maps of the city of Raleigh as being of the width above set out.

"(21) That while the sidewalks on the north and south sides of the market house are paved and curved, they are used principally by persons trading and trafficking with the produce wagons, and for giving access to the side doors of the market, and to a much less extent by persons passing to and from Fayetteville and Wilmington streets.

"The questions presented in this controversy without action, are as follows:

"(1) Has the Legislature of North Carolina the authority to authorize the city of Raleigh to include in the sale of the market house the sidewalks on the north and south sides of the market house building?

"(2) If the Legislature has no such right, does it make null and void the entire act, authorizing the sale of said property?

"(3) Has the city of Raleigh a good title to the said market property, not including the said sidewalks?

"And the parties hereto submit this controversy without action to the court and agree to abide by the decision and the termination of the same."

W. H. Pace, of Raleigh, for appellant. J. W. Hinsdale, Jr., of Raleigh, for appellee.

BROWN, J. It is contended by the defendant, as a reason why he should not be required to complete his purchase: (1) That the plaintiff has no valid title to part of the property purchased; (2) that the plaintiff has no right under the act of the Legislature to sell the sidewalks on the north and south sides of the market house building.

The property purchased by the defendant is the market house property of plaintiff, situated in the center of Exchange place. The records of Wake county were partially destroyed by fire some years ago, but it is admitted that the plaintiff has a perfect paper title to all of the property sold, except to a portion of it now covered by a part of the market house building.

[1] It is admitted that the plaintiff has been in undisputed actual adverse possession under known and visible lines and boundaries of the entire land and property for 60 years, occupying the same and collecting the rents. Upon these facts it would seem to be plain that plaintiff has acquired an absolute title to the property. One of the methods of acquiring title to land is by adverse possession. *Mobley v. Griffin*, 104 N. C. 115, 10 S. E. 142. We know of no reason or authority by which a municipality is excluded from that rule and rendered incompetent to acquire title by that method.

[2] The principal controversy seems to be as to whether plaintiff can legally convey the narrow six-foot strip on north and south sides of the market house running from Fayetteville to Wilmington streets. From the facts stated in the case agreed, it is manifest to us that these narrow strips bordering the north and south sides of the market house are not sidewalks in the ordinary acceptance of that term, or parts of the public streets of the city. They were placed there, and evidently elevated a few inches above the street, for the protection of the market house when it was built, and for the convenience of the butchers, hucksters, and other tradesmen who occupy the market house stalls. The doors to a dozen of these stalls open on these strips on each side of the market house, and are used by the occupants and their customers. If the market house itself is removed, these strips would be of no use to any one, but would be a dangerous obstruction in the center of Exchange place. It is admitted in the case agreed that the public streets on both north and south sides of this market house property are known as Exchange place north, and Exchange place south, each being about 50 feet in width. It is thus manifest that this was all an open space at one time, and that the market house was built in the center of it. These narrow strips bordering the market house are not a part of the public street, but are used daily for the numberless carts and wagons to back up against to unload their produce into the stalls opening on the strips. They afford protection as abutments to the market-house building, as well as a convenience to its occupants.

[3] It is contended that the abutting property owners on south and north sides of Exchange place have an interest in the maintenance of these strips as sidewalks which cannot be lawfully taken from them. It is almost beyond the ken of mortal man to see what benefit these narrow borders to the market house can be to those landowners on the north and south sides of Exchange place. There is a spacious sidewalk on each side in front of their property leading from Fayetteville to Wilmington streets. Their interest in these narrow strips is more imaginative than real. But as they are not in any sense public streets, they can have no interest in them.

[4] Assuming for argument's sake that these strips are public streets, the power of the General Assembly to authorize the sale of this property, including the so-called sidewalks, is undoubted; there being no constitutional restriction. *Moore v. Meroney*, 154 N. C. 158, 69 S. E. 838; *Marietta v. Henderson*, 121 Ga. 399, 49 S. W. 312, 104 Am. St. Rep. 156, 2 Ann. Cas. 83; *Williams v. Carey*, 73 Iowa, 194, 34 N. W. 813.

[5] As the landowners abutting on Exchange places are not complaining, and can

sustain no possible injury, their pecuniary rights need not be considered. As is said by the Supreme Court of Iowa in a somewhat similar case: "The owners of lots abutting on the west side of the narrowed street could not enjoin the council from carrying their proposed action into effect, on the ground that they would be damaged thereby, inasmuch as the damages relied on by them, and shown by their evidence, were imaginary rather than actual." *Williams v. Carey*, supra. In this case the court held that the taking of 12 feet from a street, thereby reducing it to 41 feet, was no injury to property owners on the other side of the street. No property is taken from these landowners, and they are not directly damaged; and, as is said in *Hyde Park v. Dunham*, 85 Ill. 569, "Municipal authorities of cities and villages are vested with complete control over streets, and may contract or widen them when in their opinion the public good shall so require; and any damages sustained in consequence of the exercise of such power when property is *neither taken nor directly damaged* thereby, are too remote and contingent to be allowed."

The cases of *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681, and *Southport v. Stanly*, 125 N. C. 466, 34 S. E. 641, cited by defendant, have no application to the facts of this case.

The judgment is affirmed.

MANN et al. v. HALL et al.

(Supreme Court of North Carolina. Sept. 24, 1913.)

1. APPEAL AND ERROR (§ 1024*)—REVIEW—QUESTIONS OF FACT.

On a motion under Revisal 1905, § 513, authorizing the trial judge upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, verdict, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, the facts found by the judge are conclusive, and the Supreme Court can review only the question whether the facts so found constitute mistake, inadvertence, surprise, or excusable neglect, authorizing the setting aside of the judgment or verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 820, 3816-3823, 3836, 3837, 4020-4022, 4025-4028; Dec. Dig. § 1024.*]

2. JUDGMENT (§ 364*)—VACATING—MISTAKE.

An owner of a tract of land conveyed to J. a part thereof, set off as a separate tract, amounting to five-sixteenths of the whole tract. J.'s husband conveyed to defendants, and after the death of the husband J.'s heirs brought suit for partition. They did not know the boundaries of the tract, and their attorney in drawing the complaint understood that the description given him by the former owner was that of the larger tract, and that his clients owned therein a five-sixteenths undivided interest, whereas the description was of the smaller tract, the whole of which was owned by them. Defendants made only a formal defense, and with plaintiffs' assent a verdict was rendered that plaintiffs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were entitled to five-sixteenths and defendants to eleven-sixteenths of the tract described and judgment entered to the same effect and appointing a commissioner to sell the land for partition. *Held*, that there was such mistake of fact as justified the setting aside of the verdict and judgment, under Revisal 1905, § 513, authorizing the court at any time within one year after notice thereof to relieve a party from a judgment, order, or verdict taken against him through his mistake, inadvertence, surprise, or excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 706; Dec. Dig. § 364.*]

3. JUDGMENT (§ 382*)—VACATING—MISTAKE.

Such verdict and judgment were against plaintiffs, within the meaning of Revisal 1905, § 513, since they adjudged that defendants were entitled to eleven-sixteenths of the tract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 684, 722, 723; Dec. Dig. § 382.*]

4. NEW TRIAL (§ 91*)—MISTAKE OF PARTY.

Under Revisal 1905, § 513, authorizing the trial judge to relieve a party from a judgment, order, verdict, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, a verdict of a jury may be set aside in cases of mistake or excusable neglect, if rendered since the passage of Laws 1893, c. 81, by which the word "verdict" was included in that section.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 184–187; Dec. Dig. § 91.*]

Walker and Brown, JJ., dissenting.

Appeal from Superior Court, Hyde County; Whidbee, Judge.

Action by T. C. Mann and others against J. M. Hall and others. From an order setting aside a verdict and judgment, defendants appeal. Affirmed.

Bond & Bond, of Edenton, for appellants. Ward & Grimes, of Washington, N. C., for appellees.

CLARK, C. J. [1] This is a motion to set aside a verdict and judgment for mistake. Revisal, § 513, empowers the judge, "upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, verdict or other proceedings taken against him, through his mistake, inadvertence, surprise or excusable neglect." On such motion the facts found by the judge are conclusive. This court can review only the question whether the facts so found constitute such mistake, or inadvertence or surprise, or excusable neglect, which would authorize setting aside the judgment or verdict. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269. The mistake must be one of fact, not one of law. *Phifer v. Insurance Co.*, 123 N. C. 405, 31 S. E. 715; *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

[2, 3] The facts found by the judge are those set out in the affidavit of H. S. Ward, which are in substance that several years ago one B. B. Sanderson owned a large tract of land in Hyde county and conveyed eleven-sixteenths thereof to his children and conveyed the other five-sixteenths, which had been surveyed and set off by metes and bounds

as a separate tract, to his sister, J. Jones; that after her death her son, who was tenant by the curtesy, said last-named tract in fee simple to defendants in this action. After his death plaintiffs, who are the heirs at law of Josephine Jones, instituted this action to know nothing of the bounds of the said tract and their lawyer, said H. S. Ward, made a complaint from the description given by B. B. Sanderson. Said Sanderson told him the boundaries for the complaint. His testimony at the trial spoke of "five-sixteenths interest" to which plaintiffs were entitled, and their counsel did not understand that he meant to give or was to set the boundaries of the new tract of five-sixteenths of the original tract which was cut off and conveyed to Josephine Jones. Sanderson understood that Sanderson was giving the boundaries of the whole of the original tract and that plaintiffs were entitled to five-sixteenths interest therein. His counsel being without other information as to the boundaries asked in the complaint for a partition of said tract and an award of five-sixteenths to his clients. The complaint was submitted to the jury under the verdict, the defendants made only a formal objection, and with the assent of the jury the verdict was rendered and judgment entered that plaintiffs were entitled to five-sixteenths and that the defendants were entitled to eleven-sixteenths in said tract. A locutory decree was entered in accordance therewith appointing H. S. Ward, commissioner, to sell the premises for partition. The affidavit of H. S. Ward, which the judge finds to be true, avers that in drawing the complaint he had described the whole of the original Sanderson tract and that plaintiffs were entitled to an undivided five-sixteenths therein, whereas under this mistake he only described in the complaint the five-sixteenths tract, which has been cut off and conveyed as a separate tract to Josephine Jones, the whole of the original tract his clients were entitled to receive for which this action was brought.

The judge found as a fact that the complaint was thus drawn by mistake, and that the verdict and judgment had been taken under the same mistake of fact, and that the verdict and judgment should be set aside. It would be difficult to find facts in which the facts would authorize setting aside any verdict and judgment for mistake if the facts found by his honor in this case are insufficient.

[4] Prior to chapter 81, Laws 1905, the word "verdict" was not in this section of the Revisal, § 513, and there were cases in which the subsequent judge could not set aside a verdict in such cases when there had been a verdict of a jury. But it has now been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.

dict can be set aside in cases of or excusable neglect if the verdict rendered since the passage of that *Trarrison v. McDonald*, 113 N. C. 327, 1904; *Brown v. Rhinehart*, 112 N. C. 5, E. 840.

In this case the interlocutory judgment for a sale for partition and a report and retaining the cause for further sale was made at fall term of Hyde County November 18, 1912. The plaintiff discovered the mistake before the third parties had intervened and promptly made this motion to set aside the judgment and verdict in January, 1913. The verdict and judgment were against the plaintiff, in that it was adjudged that the defendants were entitled to eleven-sixteenths of the tract, and on the facts found the judge held that there was mistake which entitled the plaintiffs to the relief sought.

Section 513, authorizing the judge to set aside judgment and verdict or other proceeding within one year after notice, is not limited to cases of "excusable neglect," but embraces cases where the judgment or proceeding has been taken "through mistake, inadvertence or surprise." These are not mere surplusage but mean different things, though, of course, the common instance in which this section is invoked has been in cases of excusable neglect. In *Skinner v. Terry*, 107 N. C. 3, E. 119, it is held that it embraces where the party "was reasonably misled by matters of fact," but that it does not embrace ignorance or mistake as to

fact. In this case the counsel was misled by a mistake of fact, in understanding the witness's information he drew the complaint for the cause, to give the boundaries of the larger tract, and that his clients were entitled to five-sixteenths therein (neither the plaintiff nor his other clients having any knowledge of said boundaries); whereas, the fact was giving him the boundaries of the smaller tract, which was five-sixteenths of the larger tract, but which had been set off, and of which, if his contention was correct, the plaintiffs were entitled to the whole. If this judgment is not set aside, the plaintiff will be deprived by such mistake, of fact, of eleven-sixteenths of land and their heirs (if their contention is right by law); whereas, if the judgment is set aside the defendants can lose nothing of their land and the controversy will be decided on its merits.

It is not the invocation of the doctrine of mistake in equity, but a statutory remedy for correcting a "mistake or inadvertence" in legal proceedings whereby an advantage would accrue to a party. In *Lutz v. Lutz* (N. J. Ch.) 55 Atl. 1041, which was a motion to reform a contract for sale of land for specific performance so as to include

10 feet not in the description of the contract, the counsel overlooked the prayer to include the 10 feet and took judgment omitting it. The court held that this was a case of surprise and that the decree should be opened to allow that matter to be litigated. This case is much stronger because here, as a matter of fact, the counsel misunderstood the description as embracing the whole tract and understood that his clients had an *undivided* five-sixteenths therein, by reason of such mistake and inadvertence. The defendants who put in a mere formal defense have not been prejudiced and cannot in good conscience claim to hold the land for which they have obtained judgment by such mistake. If they have a good claim to said property, they ought to be afforded an opportunity to have it understoodly passed upon by the court and jury.

The party who has obtained judgment for an amount less than his claim is nevertheless entitled to prosecute an appeal therefrom. This is equally true on a motion to set aside a judgment under this section where the judgment by reason of mistake, etc., is for less than it should have been otherwise. This has been held in *Montgomery v. Ellis*, 6 How. Prac. 326, in New York, in which this section of the Code is the same as ours. It is there said: "A party who has a judgment *in his favor* may, on application to the court, under section 174 (our section 513) of the Code, have redress, or be relieved, the same as if the judgment was *against* him." This case is much stronger, for here not only the judgment was for less than the plaintiff was entitled, being for five-sixteenths of the tract when he was seeking to recover the whole tract, but the verdict and judgment go further and adjudge that the defendants are entitled to eleven-sixteenths of the land. This certainly is *against* the plaintiffs.

His honor properly set aside the verdict and judgment by reason of the palpable mistake made, on the facts as found by the judge, and directed that the real controversy should be tried out on its merits. If the defendants are not entitled to the eleven-sixteenths, they ought not to obtain it by such mistake and inadvertence. Revisal, § 513. If the plaintiffs are not entitled to recover said eleven-sixteenths, they are not entitled to recover anything. The ready assent of defendants to the judgment therefore is significant.

The motion was properly granted.

Affirmed.

WALKER and BROWN, JJ., dissent.

BROWN, J. (dissenting). I regret I cannot agree to the conclusion of my Brethren. I will state the case as I understand it.

This is a motion made by plaintiff to set aside a verdict and judgment rendered at the fall term, 1912, by Lane, judge of the superior court of Hyde county, in favor of the plaintiff against the defendant, and on

the ground of *excusable* neglect. The motion was made before Whidbee, judge, spring term, 1913, and based upon the affidavit of H. S. Ward, the allegations of which were controverted in an affidavit by the defendant.

The complaint reads as follows: "Plaintiffs complain of defendants and allege: (1) That the plaintiff, B. B. Sanderson, on the _____ day of _____, 1881, conveyed a five-sixteenth ($\frac{5}{16}$) undivided interest in the land hereinafter described, then being the owner of same in fee simple, to one Josephine Jones, née Sanderson. (2) That said Josephine Jones died intestate and without lineal descendants surviving. (3) That the plaintiffs are the owners of said five-sixteenth ($\frac{5}{16}$) interest in said land, referred to in section one, aforesaid, and defined and described as follows: Lying in Hyde county, bounded on the north by the lands of Charlie Jennette, on the east by the Pamlico Sound, on the south by the lands of the heirs of R. E. Carter, and on the west by the public road from Englehard to Middletown. (4) That defendants are in the possession of the entire tract and assert title to same, including the five-sixteenth ($\frac{5}{16}$) interest, adversely to the title of the plaintiffs, and refuse plaintiffs the right of possession. (5) That the annual rental value of said land is \$_____. Wherefore, plaintiffs pray judgment that they be adjudged the owners of the five-sixteenths ($\frac{5}{16}$) interest in said land, and that they be let in possession of same and for \$_____ for rents and for costs and general relief. Ward & Grimes, Attorneys for Plaintiffs." This complaint is duly verified. The defendants answered under oath, denying the several allegations of the complaint alleging title in plaintiff, and admitting possession of the land described in the complaint.

Upon such pleadings, these issues were submitted by consent as the issues raised by the pleadings:

Are the plaintiffs owners of an undivided five-sixteenth interest as tenants in common with defendants, in that part of land described in complaint conveyed by W. H. Jones to J. M. Hall? Answer: Yes.

Are plaintiffs owners of an undivided five-sixteenth interest as tenants in common with defendants in that part of land described in complaint, conveyed by W. H. Jones to Redmond Turner? Answer: Yes.

Are plaintiffs owners of an undivided five-sixteenth interest as tenants in common with defendants in that part of land described in complaint, conveyed by W. H. Jones to heirs of Arnold Whitfield? Answer: Yes.

Do defendants, according to their respective interests, own the other eleven-sixteenths of said pieces of land? Answer: Yes.

Upon those issues this judgment was rendered *upon motion* of Ward & Grimes, plaintiffs' attorneys: "Present: Hon. Henry P.

Lane, judge presiding. This cause coming on for trial at this term, and the jury having answered the issues as appears in the record, it is on motion of Ward & Grimes, counsel for plaintiffs, ordered, adjudged and decreed that the plaintiffs are the owners of a five-sixteenth undivided interest in the lands described in the complaint, as tenants in common with defendants, who, according to their respective interests, own the other eleven-sixteenths, plaintiffs' interest in said five-sixteenths being as follows: B. B. Sanderson one-half thereof, T. C. Mann one-tenth thereof, J. E. Mann one-eighteenth thereof, Preston Gibbs, Seth Gibbs, Ella G. and Florence O'Neal one-tenth, Carroll Mann and Clyde Wade one-tenth, Mary Carter, Isabelle Carter, D. M. Carter, Jr., John Carter, and Rufus Carter one-tenth." Then follows a clause appointing H. S. Ward commissioner to sell the land described in the complaint, and by *consent* the motion to confirm report of sale may be heard at chambers, and "it is adjudged that plaintiffs recover the costs of this action up to and including the recording this judgment. It is further adjudged that plaintiffs recover of defendant J. M. Hall \$12.50, of defendant Riley Midgette \$62.50, of the other defendant \$19.74. Henry P. Lane, Judge Presiding."

It must be admitted that the plaintiff obtained a sweeping victory, and recovered judgment against the defendants for every foot of land and every dollar he claimed. I have stated this case very fully so it can be seen how extraordinary this proceeding is, and how utterly destructive of all stability in judicial procedure it will be if established as a precedent.

The ground upon which the plaintiff bases his motion is that in drawing the complaint in the case his attorney did not claim enough. This is undoubtedly a very novel and unusual accusation to make against a member of our profession; but whose fault was it that he did not claim enough? It was either the fault of the attorney, or of the client (it is immaterial which) that they did not describe the entire land conveyed by Jones to the defendants. The affidavit states: "This affiant all the time believed he had described in his complaint the entire original Sanderson tract, and did not know he had described only the tract conveyed by Jones to the defendants. That he was entitled to recover the land described in his complaint and not a five-sixteenths ($\frac{5}{16}$) interest therein, and this he is informed and believes the defendants knew at the time he wrote the judgment. That he saw the defendant Hall smiling at his attorney when the judgment was written and read, and did not know the meaning of it, and by reason of his mistake in drawing the judgment and in thinking that his complaint described the entire Sanderson tract, as aforesaid, he has failed to have his clients adjudged the owner of the eleven-sixteenths ($\frac{11}{16}$) interest to which they are

as justly entitled as to the five-sixteenths ($\frac{5}{16}$) interest recovered. That the said judgment is erroneous by reason of the mistake of the draftsman and the mistake of B. B. Sanderson, who, as above stated, was all the time referring to the land as a five-sixteenth ($\frac{5}{16}$) interest."

It is true that, if the judgment did not conform to the pleadings and issues it could be corrected as an irregular judgment; but it is a carefully drawn decree and conforms closely to the pleadings and issues.

It is unnecessary to consider the question as to whether there is any excusable neglect shown in the affidavit. In my view the statute does not cover the case, and it must be admitted that words should not be read into the statute to make it cover it.

The language of the statute is as follows: Revisal, § 513: "Mistake, Surprise, Excusable Neglect.—The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

The decisions under this section are too numerous to cite, but they all agree that the only party who can avail himself of such relief under the section must be *one against whom a judgment* is rendered, and no party who has had a trial in court and recovered all he claimed can appeal to this section because he did not claim enough. The decisions are collected in Pell's Revisal, § 513.

Prior to the amendment of the statute as now contained in Revisal, § 513, it was held that the statute applied only to judgments by default, and then only for the relief of a defendant against whom judgment had been taken, and that the statute did not apply to a judgment rendered conformable to a verdict. *Morrison v. McDonald*, 113 N. C. 327, 18 S. E. 704; *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840; *Beck v. Bellamy*, 93 N. C. 129; *Clemmons v. Field*, 99 N. C. 400, 6 S. E. 790, 6 Am. St. Rep. 529. Afterwards the statute was amended so as to relieve the party from "a judgment, order, verdict or other proceeding" as now set out in Revisal, § 513, but the words, "*taken against him* through his mistake, surprise or excusable neglect," are now, and always have been, in the statute since it was first enacted. Code, § 274; Acts 1893, c. 8; C. C. P. § 133.

In this case, as appears from the record, no judgment or verdict has ever been rendered *against* the plaintiff. The issues were formulated and submitted at instance of plaintiffs' counsel, the verdict on each issue

was in favor of the plaintiffs, the judgment was drawn by plaintiffs' counsel, and entered up as the court's decree upon their motion.

It is well settled that "a judgment entered by consent of counsel of record in a matter coming within the scope of his authority is regular and binding on the client, and will not be set aside on the ground of excusable neglect." *Hairston v. Garwood*, 23 N. C. 345, 31 S. E. 653; *Westhall v. Hoyle*, 141 N. C. 338, 53 S. E. 863; *Harrill v. Railroad*, 144 N. C. 544, 57 S. E. 382.

The judgment in this case is neither an irregular nor an erroneous judgment. It was rendered after a trial upon the verdict and pleadings, and is strictly conformable to both. It cannot be set aside under this statute. *May v. Lumber Co.*, 119 N. C. 97, 25 S. E. 721. Had it been an erroneous judgment, and rendered for too much or too little, but according to the course of the court, the only remedy is by appeal. *Wolfe v. Davis*, 74 N. C. 597. So far as the plaintiff is concerned, this is a consent judgment, as it was entered upon his motion and at his request. Therefore it cannot be set aside except for fraud, or the mistake of *both parties*, and then only by a civil action brought for the purpose, except in a partition proceeding it may be done by petition in the cause, but that does not change the elementary principles governing such cases. *Vaughan v. Gooch*, 92 N. C. 524; *Kerchner v. McEachern*, 93 N. C. 447.

This subject is forcibly discussed by Justice Reade in *Simmons v. Dowd*, 77 N. C. 156, in a case practically on all fours with this, in which he says: "The motion of defendant and the action of the court below were evidently based upon the idea that C. C. P. § 133, now Revisal, § 513, applied to the case, but was a mistake. * * * It is common learning that all judgments and proceedings of the court are in the breast of the court during the term and may be vacated and amended in any way, but after the term closes they are sealed forever. This applies to all proceedings of the court which are regular and according to the course and practice of the court, however erroneous the same may be. And note, that an erroneous judgment may be just as regular as one which is free from error. If I sue a man and recover \$100 my judgment is regular. If I ought to have recovered \$200, or ought to have recovered only \$50, my judgment for \$100 is erroneous, but still it is regular. And after the term of the court when it is rendered, I cannot have it increased, and the defendant cannot have it diminished. If this were not so, there would be no end to litigation."

WALKER, J., concurs in this dissent.

**BOARD OF COM'RS OF VANCE COUNTY
v. TOWN OF HENDERSON.**

(Supreme Court of North Carolina. Sept. 24, 1913.)

1. COUNTIES (§ 21½*)—MUNICIPAL CORPORATIONS (§ 57*)—GOVERNMENTAL POWER.

Counties, cities, and towns have only such powers and capacities as have been conferred upon them by law.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 21½; Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

2. HEALTH (§ 16*)—LIABILITY FOR QUARANTINE EXPENSES—STATUTE—CONSTRUCTION.

Laws 1911, c. 62, provides for a system of quarantine by which persons can be isolated and treated, and section 15 provides that the duties of municipal health officer shall be identical with those of the county superintendent of health, and that any city may assign the duties of quarantine officer to such health officer. Section 21 provides that all expenses of quarantine shall be borne by the town or county employing a quarantine officer. *Held* that, unless a city has appointed a quarantine officer as provided, thus adopting a system of quarantine of its own, it is not liable for quarantine expenses, but such expense is to be borne by the county.

[Ed. Note.—For other cases, see Health, Cent. Dig. §§ 18, 14; Dec. Dig. § 16.*]

3. STATUTES (§ 190*)—CONSTRUCTION—MEANING OF LANGUAGE — LITERAL INTERPRETATION.

Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts should not hesitate to give it a literal interpretation merely because they may question the wisdom or expediency of the enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. § 190.*]

4. STATUTES (§ 181*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

If a statute is ambiguous so as to be fairly susceptible of more than one interpretation, then the courts may exercise the power of construing its language so as to give effect to the intention of the Legislature, but such intention is to be ascertained by reasonable construction of the act and not founded on mere arbitrary conjecture.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

5. HEALTH (§ 16*)—STATUTES — EXPENSE OF QUARANTINE—IMPLIED REPEAL.

If Revisal 1906, § 4503, providing that the expense of quarantine shall be borne by the householder in whose family the case occurred, if able, otherwise by the city, town, or county of which he is a resident, imposes a liability upon a city which has no quarantine officer, it is incompatible with and repealed by Laws 1911, c. 62, § 21, providing that all expenses of quarantine shall be borne by the town or county employing a quarantine officer.

[Ed. Note.—For other cases, see Health, Cent. Dig. §§ 13, 14; Dec. Dig. § 16.*]

6. STATUTES (§ 159*)—IMPLIED REPEAL.

Where two statutes are in conflict and cannot reasonably be reconciled, the later one repeals the one of earlier date to the extent of the repugnance.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 159.*]

Appeal from Superior Court, Vance County; Cline, Judge.

Action by the Board of Commissioners of Vance County against the Town of Hender-

son. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This action was brought to recover certain expenses incurred and paid by the county of Vance in executing the provisions of law in regard to quarantine during an outbreak of smallpox in said county and in the town of Henderson, which is in the said county, in the years 1911 and 1912. The complaint is lengthy, and necessarily so, but we need not set out even the substance of all the allegations in order to show clearly the matter involved in the appeal. Defendant demurred, and, as the complaint is thereby admitted for the purpose of deciding the question of law presented in the case, it may be briefly stated, as appears therefrom, that the county, between June 1, 1911, and October 1, 1912, removed to its pesthouse outside the corporate limits of Henderson, and cared for, a number of smallpox patients from the town, and also had under its care in the town, at the same time, other patients who were treated at their homes in Henderson under the county quarantine; the total number of patients being 62. The county paid out for the care and cure of these patients the sum of \$1,814.12 and made a proper demand for the same, but payment was refused by the defendant. What is actually due would, of course, have to be ascertained by a jury or otherwise if the defendant is liable at all. The county had a quarantine officer, but the city of Henderson had none at the time stated. The court overruled the demurrer, and defendant appealed.

Henry T. Powell and T. M. Pittman, both of Henderson, for appellant. A. O. & J. P. Zollicoffer, of Henderson, for appellee.

WALKER, J. (after stating the facts as above). Our opinion is that the city of Henderson is not liable for the amount paid by the county of Vance on account of the maintenance and care of the persons afflicted with smallpox, while they were quarantined, nor for any part of it. The plaintiff's claim is based upon the provisions of Revisal, § 4508, and this, with the statute cited by defendant (Acts of 1911, c. 62, § 2, ratified March 7, 1911), will be discussed presently.

[1] The counties, cities, and towns of the state have only such powers and capacities as have been conferred upon them by law. Dillon on Mun. Corporations (5th Ed.) § 59; *Fidelity Co. v. Flemming*, 132 N. C. 337, 43 S. E. 899; *State v. Webber*, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920; *Harrington v. Greenville*, 159 N. C. 634, 75 S. E. 849. "It has been too often decided to be now questioned that the liability of towns to support poor persons is founded upon and limited by statute and is not to be enlarged or modified by any supposed moral obligation." *Smith v. Colerain*, 9 Metc. (Mass.) 492. In

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an action to recover the expenses of caring for a smallpox patient, Justice Hoke, for this court, said: "So far as municipal obligation is concerned, it is accepted doctrine that the care and support of the indigent and infirm is a matter of statutory provision." *Copple v. Commissioners*, 138 N. C. 131, 50 S. E. 574. But it is unnecessary to pursue this line of thought any further, as the plaintiff bases his right of recovery upon the statute. The Legislature, some years ago, provided an entire scheme for the preservation of the public health in the proper exercise of its police power, and especially for quarantining and caring for persons afflicted with smallpox and other contagious and infectious diseases. This statute will be found in *Revisal* of 1905, vol. 2, c. 95. In section 4508 of that chapter it is enacted that "the expense of the quarantine and of the disinfection shall be borne by the householder in whose family the case occurs, if able, otherwise by the city, town or county of which he is a resident." There was a superintendent of health for Vance county, who was also quarantine officer of the county, duly appointed according to law, and there was a superintendent of health for the town of Henderson, but he had not been appointed quarantine officer.

[2] By the Acts of 1911, c. 62, the Legislature adopted a new scheme for the preservation of the public health, and especially for a system of quarantine by which persons are allowed to be isolated and treated, for the purpose of preventing the spread of contagious and other diseases, and it concludes with this section: "All laws and clauses of laws in conflict with this act are hereby repealed." It is provided by section 15 of the act as follows: "The duties of the municipal health officer, within the jurisdiction of the town or city for which he is elected, shall be identical with those of the county superintendent of health for the county, with the exception of the duties of the county superintendent of health pertaining to the jail, convict camp, and county home. The authorities of any city or town shall have the power to assign the duties of quarantine officer to the municipal health officer, and in such cases the municipal health officer shall faithfully perform the duties of the quarantine officer as prescribed in sections twenty and twenty-one of this act." And in section 21 there is this provision: "All expenses of quarantine and disinfection shall be borne by the town or county employing a quarantine officer."

We conclude from a perusal of the two statutes (*Revisal*, c. 95, § 4508, and Acts of 1911, c. 62, § 21) that, if the former statute ever imposed any liability upon a city without a quarantine officer, the Legislature intended to establish a new rule of liability by the latter section for the expenses of quarantining diseased persons and to require that

they shall be paid by the county which has a quarantine officer, unless the town in that county, where the expenses are incurred, has appointed a quarantine officer and undertaken for itself, by a system of quarantine, to isolate or segregate persons having contagious and other diseases, which are mentioned in the act, within its corporate limits, or, if possible, to take charge and supervision of the patients at their respective homes; but if it should elect, as in this case, not to exercise its power of appointing a quarantine officer for said purpose, it is the duty of the county to perform this service, the expenses thereof to be paid by the county which has a quarantine officer. In other words, the town is entitled, under the provisions of the new act, to the same rights in respect to quarantine and the prevention of the spread of diseases as any other part of the county, if it has not assumed to act for itself in the matter of the appointment of a quarantine officer. This, no doubt, was deemed by the Legislature more just than the former provision, if the true construction of the latter be that it imposed the burden of paying quarantine expenses upon the town, whether it had its own quarantine system or not. It may have occurred to the legislative mind that there was no reason why the town should pay the expense of its own indigent residents, when it was required by law to contribute its full proportion to the taxes of the county, and should therefore be entitled to its proper share in the benefits of the county quarantine without any additional charge.

[3] Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts should not hesitate to give it a literal interpretation merely because they may question the wisdom or expediency of the enactment. In such a case, these are not pertinent inquiries for the judicial tribunal. If there be any unwisdom or injustice in the law, it is for the Legislature to remedy it. For the courts, the only rule is *ita lex scripta est*.

[4] If, though, the statute is ambiguous, so as to be fairly susceptible of more than one interpretation, then the courts may rightfully exercise the power of construing its language, so as to give effect to the intention of the Legislature, as the same shall be ascertained and determined from relevant and admissible considerations. But it should be understood that the intention of the law-making power is to be ascertained by a reasonable construction of the act and not one founded on mere arbitrary conjecture. And it is always the actual meaning of the Legislature which must be sought out and followed, and not the judge's own idea as to what the law should be. Finally, although every law must be construed according to the intention of the makers, as evidenced by the language employed to express it, that inten-

tion is never resorted to for any other purpose than to ascertain what, in fact, was meant to be done, and not for the purpose of ascertaining what they have done, with the view of determining whether it is politic or expedient, for with that we have nothing to do. We have reached the limit of our jurisdiction when we have certainly found and declared the meaning, as the object is to ascertain what the Legislature intended to enact and not what is the legal consequence and effect of what they did enact. Black's Interpretation of Laws, pp. 38 and 41. We think the purpose of this statute is clear and free from uncertainty, but, if it is doubtful, the application of the well-settled rule of construction just stated leads us to think that it was not intended to charge the town with the expenses of the quarantine service, unless it has adopted a system of its own, in which latter case it appears reasonable and just that it should be so charged.

[5] We are also of the opinion that the provision in section 21 of the Acts of 1911, c. 62, for paying the expenses of the quarantine is incompatible with the like provision in section 4508 of the Revisal, if the latter imposes a liability for the same upon the town in which there is no quarantine officer, for the act of 1911 explicitly provides that the expenses shall be paid "by the town or county employing a quarantine officer," and the town of Henderson has not employed one, though the county has.

[6] Where two statutes are thus in conflict and cannot reasonably be reconciled, the later one repeals the one of earlier date to the extent of the repugnance. *State v. Perkins*, 141 N. C. 797, 53 S. E. 735, 9 L. R. A. (N. S.) 165. We believe that our view of the law in this case accords with the clear intent of the Legislature and responds also to the dictates of justice and right. There is no good reason why the town or city should be charged with the double burden of paying its full lawful share of the county taxes and also the expenses of quarantine within its limits, from which it receives no more benefit or advantage than other sections of the county. But if it is not satisfied with the county system of quarantine or for any other reason it establishes one of its own, and thus chooses to regulate its own affairs in this respect, it is proper that it should bear the expense and not the county. It is not just that the county should pay the expenses of the city quarantine when it can have no part in fixing or controlling the amount to be incurred or in adopting regulations or methods for the economical administration of the law, and the same rule applies with equal force to the city, when entire control is in the hands of the county authorities. Taxation without representation often leads to the exercise of arbitrary and even despotic power and is not tolerated or permitted in our system of government. He who pays the taxes should

have some voice, directly or indirectly, in deciding how they should be laid and how and for what purposes they should be expended. The Legislature evidently did not intend that the county should place this burden upon the city, as a separate corporation, without its consent or its participation in the exercise of the power by which it was created or imposed. In respect to this matter, the county and the city must be treated, under the statute, as distinct bodies; each exercising its own powers of taxation, within its prescribed sphere, and each liable for its own expenses. When the city does not elect to act for itself by appointing a quarantine officer, it must be regarded as a part of the county and is entitled to its share of benefits as such in return for its contribution to the county revenue; it is otherwise, though, when it undertakes to exercise sole authority with respect to quarantine within its corporate limits by virtue of the powers given in the act of 1911. These reasons, of course, have influence with us only when there is ambiguity in the statute, but we think it clear that the later provision in the act of 1911 was intended to take the place of the earlier one in the Revisal and to repeal the latter.

But we are also of the opinion that Revisal, § 4508, will not bear the construction upon which the plaintiff relies. It will be seen that by section 4509 the city health officer is also quarantine officer of the city just as the county health officer is quarantine officer of the county. This throws a flood of light upon the language of section 4508 and clearly reveals its true meaning to be that, when the householder is indigent and unable to pay the expenses of patients in his family, they shall be borne by the city, if he resides therein, and, if not, by the county, but the city is not liable to the county for the expenses of its patients any more than the county is to the city for the expenses of its patients. Each provides for its own patients and pays their expenses, but not to the other. It could not mean that one of them can officiously pay the expenses of the other and recover them from the latter. Neither one of them is charged with the duty of attending to the affairs of the other in this respect, but each must provide for and pay its own expenses in such cases. But, as we have said, this is all changed by the act of 1911, and the town is not liable if it has not employed a quarantine officer. The general subject is discussed in *McNorton v. Val Verde County* (Tex. Civ. App.) 25 S. W. 653, which presented somewhat an analogous case, and the court reached the same conclusion as we do now. If the city of Henderson was not liable and the county, therefore, paid the expenses officiously, it cannot recover them of the city. This we decided in *Copple v. Commissioners*, 138 N. C. 131, 50 S. E. 574.

It seems that section 21 of chapter 62 of

the act of 1911 has been repealed by Acts 1913, c. 181, § 9. This matter was not called to our attention, and we suppose the learned counsel attached no importance to it, as the county paid the expenses for which it now sues in 1911 and 1912, before the passage of the act of 1913, which should be given prospective operation. We merely refer to it to show that we had not overlooked the repealing act.

It follows that, in any view, the court erred in overruling the demurrer. It should have been sustained and the action dismissed. This result makes it unnecessary to consider more particularly the question raised on the argument as to whether the payment by the county of the quarantine expenses incurred in Henderson was officious, nor need we refer to the other matters discussed by counsel.

Reversed.

McKEEL v. HOLLOMAN et al.

(Supreme Court of North Carolina. Oct. 1, 1913.)

1. PARTITION (§ 48*)—PROPER PARTIES.

Revisal 1905, § 410, provides that any person may be made defendant who claims an interest adverse to the plaintiff or who is a necessary party to a complete determination of the questions involved. Section 414 provides that, when a complete determination cannot be had without the presence of other parties, they must be brought in, while section 76 provides that, whenever land which is sought to be sold is claimed by another person, such claimant shall be heard as a party. *Held*, that one claiming to be a tenant in common of land which plaintiffs desired sold for partition was properly made a defendant by the court upon motion.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 118-129; Dec. Dig. § 48.*]

2. PARTITION (§ 63*)—PROCEEDINGS—BURDEN OF PROOF.

Where defendant, who claimed to be the owner of one-third interest in land which plaintiffs desired sold for partition upon being brought in as a party defendant, set up his claim in derogation of plaintiff's title to one-third of the property, he has the burden of proof.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 183-185; Dec. Dig. § 63.*]

3. PARTITION (§ 63*)—EVIDENCE—ADMISSIBILITY—WILL—IDENTIFICATION.

In partition for land of which defendant claimed to be a tenant in common of one-third, a will under which defendant claimed is properly rejected, where there was no sufficient identification of the land described in the will as being that in controversy.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 183-185; Dec. Dig. § 63.*]

4. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION.

While the possession of one tenant in common is, in law, the possession of all, one may oust the others, and a tenant who makes no demand for possession or participation in the rents and profits for 20 years loses his right to the land by adverse possession.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

5. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS—DISCRETION OF TRIAL COURT.

The trial court may in its discretion exclude leading questions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

6. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR.

Technical errors will be considered harmless where a reversal could not result in a different verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.*]

Appeal from Superior Court, Greene County; Allen, Judge.

Action for petition by John O. McKeel, as administrator, against W. J. Sawry and others, in which Henry Holloman was made a party, on motion. From a judgment against defendant Holloman, he appeals. *Affirmed*.

This is a proceeding for the sale of land for partition and to pay the debts of the two original tenants in common out of the proceeds of sale; the balance to be divided among the tenants according to the several and respective interests. All parties have been duly brought into court by the service of process, as the court finds and adjudges in its order, October 15, 1912. It was ascertained that one Henry Holloman claimed a one-third interest in the land, as heir to Nancy Holloman, daughter of himself and his wife, Rachel Holloman (formerly Rachel Evans), who was the daughter of John Evans and his wife, Harriet Evans (formerly Harriet McKeel), who was one of the original tenants in common. Henry Holloman's wife predeceased him. The court, on motion, ordered that Henry Holloman be made a party to the end that his claim might be determined and the land sold free from any claim upon the title. He was brought in and pleaded that he was owner of one-third of the land. The court thereupon directed the following issue to be submitted to the jury: "Has the defendant, Henry Holloman, any interest in the land?" Under the instructions of the court, the jury answered this issue in the negative. There was no objection to the issue. Judgment on the verdict, and appeal by Henry Holloman, the intervener. The other facts are stated in the opinion of the court.

Geo. M. Lindsay, of Snow Hill, and L. I. Moore, of Greenville, for appellant. Finch & Connor, of Wilson, and L. V. Morrill, of Snow Hill, for appellee.

WALKER, J. (after stating the facts as above). [1] We find no error in the record. The court properly ordered or permitted Henry Holloman to be made a party. The Code provides that any person may be made a party who has or claims an interest in the controversy adverse to the plaintiff or whose

presence is necessary to a complete determination or settlement of the questions involved therein, and any person claiming title or right of possession to real estate may be made a party, as the case may require, to any such action. Revisal, § 410. When a complete determination of the matter cannot be had without the presence of other parties, the court *must* cause them to be brought in. Revisal, § 414. The power to make an adverse claimant a party to proceedings for the sale of land for assets, as this is in part, is expressly recognized. Revisal, § 76. It would be strange if it were not so under our wise and liberal system of procedure, which seeks to settle all controverted matters in one action and without circumlocution, and further it is better for all parties concerned that it should be so, in an action of this kind, in order that a good title to the land may be sold, as it will secure a better price.

[2] The order being valid, the issue, submitted without objection, both in form and substance necessarily placed the burden of proof upon Henry Holloman, who asserted his title and ownership to a one-third interest in the property, and the judge ruled correctly in this respect. Holloman virtually admitted that plaintiffs had the other two-thirds interest, and the whole if he is not their cotenant, and the real question was whether they were entitled to the whole or to only two-thirds. Their proof tended to show, and at least made out a *prima facie* case, that they were entitled to all of it. One test by which to determine where the burden of proof rests has been said to be: Which party would be successful, in law, if no evidence or no more evidence were given? *Amos v. Hughes*, 1 M. & Rob. 464. This court has once adopted the rule laid down by Taylor, for it says in *Walker v. Carpenter*, 144 N. C. at page 676, 57 S. E. 461, quoting from *Bailey's Onus Probandi*, p. 2: "In every mode of litigation an assertion of fact avails nothing without proof. Some party to it must commence by producing proof to sustain his allegation. The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative. Of course such affirmative must be one in substance and not merely in form. An eminent writer on the law of evidence says: 'This rule of convenience, which in the Roman law is thus expressed, "*Si incumbit probatio, qui dicit, non qui negat*," has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable; and moreover it is but reasonable and just that the party who relies upon the existence of a fact should be called upon to prove his own case.'" See, also, *Cox v. Lumber Co.*, 124 N. C. 78, 32 S. E. 381.

Plaintiffs were owners of the property, according to the proof in the case, by reason

of their continuous adverse possession for more than 20 years, unless Holloman was their cotenant. He alleged that he is the owner of one-third, and they denied it. It was therefore a claim by him to be let into possession of his one-third, from which they had ousted him, and practically an action of ejectment for that purpose; plaintiffs denying that he ever had any interest in the land. *Whitfield v. Boyd*, 158 N. C. 451, 74 S. E. 452; *Daniel v. Dixon*, 79 S. E. 425, at this term. In this case Holloman is substantially an intervener, asserting his right to one-third of the property, and has the affirmative of the issue as to the title. *Redman v. Ray*, 123 N. C. 502, 31 S. E. 831; *Maynard v. Insurance Co.*, 182 N. C. 711, 44 S. E. 405; *Manufacturing Co. v. Tierney*, 133 N. C. 630, 45 S. E. 1026. He asserts title to one-third as tenant in common, and the other parties deny his right and plead sole seisin (*non tenent insimul*), and the case is thus brought within the principle of *Huneycutt v. Brooks*, 116 N. C. 788, 21 S. E. 558. The burden, according to the facts and circumstances as they appear and in any view of them, was upon Holloman.

[3] As the burden was upon Holloman, he failed to show any title. He relied on the will of R. D. S. Dixon; but as the evidence by which he offered to show his interest, under the will, was properly excluded, there was nothing left upon which his claim could stand. There was no sufficient identification of the land described in the will. Some of the evidence rejected did not have sufficient probative force to show what land it was. There was no evidence that Dixon owned the land.

[4] The undisputed evidence of plaintiffs shows that they are the owners of the land. If Holloman ever had any interest as tenant in common with them, he lost it by their adverse possession for more than 20 years; he admitting that he did not make any claim to be let into possession of his share nor any demand for his share of the rents and profits within said time. *Dobbins v. Dobbins*, 141 N. C. 214, 53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682.

[5] It may be well to say, before concluding, that the court had a discretion to exclude leading questions, and we will not review the ruling for that reason. We may safely place our decision upon the single ground that the answer of Holloman shows that the title of his adversaries is not denied unless he is owner of one-third as tenant in common, and it further appears in the case that they have held possession of the premises adversely and have been in the pernamcy of the rents and profits for more than 20 years, title being out of the state, and he has taken no steps to recover possession of his alleged share, or his share of the rents and profits, within that time, although he had visited them occasionally. If they kept him out of possession of his share of the land

and the rents, he was put to his action, and, if not prosecuted within the 20 years, the law raised a legal presumption of title in those having the possession and barred his entry. *Dobbins v. Dobbins*, supra; *Bullin v. Hancock*, 138 N. C. 198, 50 S. E. 621; *Whitaker v. Jenkins*, 138 N. C. 478, 51 S. E. 104. "The possession of one tenant in common is in law the possession of all the tenants in common. One may, however, disseise or oust the others, and from the time of such ouster the possession of him who keeps out the rest is not their possession but is adverse to their claims of possession. The sole silent occupation by one of the entire property, without an account to or claim by the others, is not in law an ouster, nor furnishes evidence from which an ouster can be inferred, unless it has been continued for that length of time, which furnishes a legal presumption of the facts necessary to uphold an exclusive possession."

[8] If there were any technical errors in the rulings upon the evidence, the facts so plainly appear, and the legal inference thereupon is so well settled by the cases, that a reversal, if there was error in the respects indicated, would be vain and useless. The court would again reach the same result. We therefore sustain the judgment.

No error.

STATE et al. v. ATLANTIC & N. C. R. CO. et al.

(Supreme Court of North Carolina. Oct. 1, 1913.)

1. RAILROADS (§ 95*)—REGULATION—VALIDITY OF ORDINANCE.

An ordinance requiring railroads on a certain street to fill the ditches beside the tracks and maintain the right of way on a reasonable grade with the street, so as to render it safe to cross the same at all points, is reasonable and valid where, although the ditches are necessary for drainage, they can be covered over or tiled at moderate expense.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 274-283; Dec. Dig. § 95.*]

2. RAILROADS (§ 94*)—REGULATION—VALIDITY OF ORDINANCE.

A railroad, though operating under legislative franchise, is subject to all reasonable police regulations that are lawfully enacted for the protection of life and property, and the acceptance of its charter is upon the implied condition that it will comply with all reasonable regulations of a town regarding the use of its streets.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 266-273; Dec. Dig. § 94.*]

Appeal from Superior Court, Carteret County; Allen, Judge.

The Atlantic & North Carolina Railroad Company and the Norfolk Southern Railway Company appealed from a conviction of violating the following ordinance of Morehead City: "Be it ordained that all railroad companies having ditches along its right of way and along Arendell street are hereby requir-

ed to fill the same up to a grade with the streets, and further required to maintain such right of way in a reasonable grade with said street as to render it in a condition that it can be crossed at all points with ease and safety." Affirmed.

J. F. Duncan, of Beaufort, and L. I. Moore, of New Bern, for appellants. The Attorney General and the Assistant Attorney General, for the State. E. H. Gorham, of Morehead City, for Morehead City.

BROWN, J. [1] The only matter of law presented by the several assignments of error relates to the validity of the above ordinance.

The defendant the Atlantic & North Carolina Railroad was incorporated in 1854 and constructed its railroad in 1858. The defendant the Norfolk Southern is its lessee and of course bound to observe any municipal regulation that would bind its lessor. At the time the road was constructed, Morehead City was not in existence. It was incorporated in 1860 and has since grown up on both sides of the railroad for some considerable distance until it has become a flourishing town of 3,000 inhabitants.

All the evidence shows that from Twelfth street to the corporate limits of the town, at Twenty-Fourth street, ditches were opened on each side of the railroad track on the right of way, and that these ditches were necessary for the drainage of the roadbed, but that they could be covered and closed up or tiled at moderate expense. This would not only beautify the town by closing up unsightly ditches but would render the crossing of the railroad at any point by pedestrians very much safer.

[2] When the defendant accepted its charter from the state, it did so upon the condition, necessarily implied, that it would conform at its own expense to all reasonable and authorized regulations of the town as to the use of the streets and thoroughfares rendered necessary by its growth for the safety of the people and the promotion of the public convenience. It is settled beyond controversy that railroad corporations, although operating under a legislative franchise, come necessarily within the operation of all reasonable police regulations that are lawfully enacted for the protection of life and property. *Railway v. Connersville*, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. Ed. 1060, 20 Ann. Cas. 1206.

The Supreme Court of the United States has said: "The power, whether called police, governmental, or legislative, exists in each state by appropriating enactments not forbidden by its own Constitution or by the Constitution of the United States to regulate the relative rights and duties of all persons and corporations within its jurisdiction and therefore to provide for the public convenience

and the public good." *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Railroad v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702.

We think the validity of this ordinance and its reasonableness is fully sustained by the decision of this court in *Railroad v. Goldsboro*, 155 N. C. 358, 71 S. E. 514. It is no great hardship upon the defendants to require them to tile these ditches at their own expense. Railways not only expect cities and towns to grow up along their lines but they do much to promote their development, because they get the benefits to be derived from such growth in greatly increased business. It is simple justice, therefore, to require them to conform to such reasonable regulations of such municipalities as are necessary for the safety and convenience of the public.

No error.

BIRD v. BELL LUMBER CO. et al.
(Supreme Court of North Carolina. Oct. 1, 1913.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—MACHINERY—DUTY OF MASTER.

A master operating machinery such as is used in cotton gins must supply his servants with such equipment and appliances as are known, approved, and in general use, and a failure so to do will constitute negligence, or afford evidence from which negligence may be inferred.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 238*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a servant who had charge of a cotton gin, and whose duty it was to attend to repairs, used a hoe handle to shift the power belt after the shifting levers were broken, and was injured, he cannot recover from the master, as his injury was due to his own failure to have the levers repaired.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.*]

3. MASTER AND SERVANT (§ 297*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—COMPLIANCE WITH COMMANDS.

While the orders of the master may sometimes justify conduct of a servant which would otherwise be contributory negligence, where the question of whether the master had given orders was submitted to the jury, the jury, in finding that the master was not negligent, must necessarily have determined that no order was given, and the servant cannot recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

4. MASTER AND SERVANT (§ 267*)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action by a servant for injuries received in his employment, there was no error in permitting the master to state when he first received notice of the servant's claim, as the time elapsed has a direct bearing on the recol-

lection of the witnesses, and may be a relative circumstance affecting the validity of the claim.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 909, 911; Dec. Dig. § 267.*]

5. APPEAL AND ERROR (§ 1062*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error, if any, in the admission of certain testimony tending to show contributory negligence of plaintiff was harmless, where the jury found that defendant was not negligent.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

6. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In passing upon objections to the instructions, the charge as a whole is to be considered; and, where every position available to appellant was correctly referred to the jury, that portions of the instructions standing by themselves might be open to criticism does not constitute reversible error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

Appeal from Superior Court, Wayne County; Carter, Judge.

Action by J. W. Bird against the Bell Lumber Company and others. From a judgment for the defendants, plaintiff appeals. Affirmed.

The action was to recover damages from defendant company for physical injuries caused by reason of the alleged negligence of said defendant in failing to supply safe and suitable equipment for a cotton gin owned by the company and operated for their benefit. The cause was submitted on the three issues: First, of negligence; second, of contributory negligence; third, damage. The jury answered the first issue in favor of defendant.

W. C. Munroe and G. E. Hood, both of Goldsboro, for appellant. Dortch & Barham and Langston & Allen, all of Goldsboro, for appellees.

HOKE, J. [1, 2] We find no reversible error on the record, assuredly none which gives plaintiff any just ground of complaint. From the facts in evidence it appears: That on the 29th day of November, 1911, plaintiff received serious physical injuries while engaged in running a cotton gin for defendant company; the said injuries being caused by reason of the endeavor on part of plaintiff to shift the power belt of the gin, using a hoe handle for the purpose. That the gin when in order was equipped with levers for the purpose, and by which the belt could be shifted without appreciable risk. We have repeatedly held that in the operation of machinery of this character the employer must supply his employés with equipment and appliances which are known, approved, and in general use, and that a failure to do so will amount to negligence, or will afford evidence from which such negligence may be inferred. In the present case, however, it was further made to appear that defendant com-

med and controlled by the other de- John R. Bell and L. A. Bird, were in an extensive business, operating three large farms, two cotton gins, or three sawmills, etc.; that at the this occurrence the plaintiff, who was r of one of the defendants, was over- one of these farms, having separate of the same and the gin situate as foreman and general manager; ntiff was fully aware of the dan- dent to the defect, and while the thereby much increased, the device ple in structure, and plaintiff had ority and it was part of his duty to s and other necessary repairs made, material, tools, and facilities were for the purpose, or could have been procured. There is also evidence on of the defendant unchallenged in d that a repair shop was accessible, n this a machinist or mechanic could n had to do this work. In this aspect testimony it could very properly be ed that the plaintiff has suffered by f his own default, the case coming in the decision of *Lane v. N. C. R. 54 N. C. 91, 69 S. E. 780*, as follows: oyé whose duty it is to make a sec- tion of freight cars before they e railroad yards in a train, and to the car doors are properly fastened, and in condition, assumes the risks mployment, and cannot recover dam- sed by a car door swinging loose n at one end of the rail at the top, ich the door runs upon wheels, when nished with appliances sufficient to defect at the bottom of the door, discernible, and when its repair ve prevented the injury complain-

was insisted for plaintiff that this should not prevail against him by certain testimony tending to show cted at the time under the immedi- and of the proprietors, or one of ing him at the same time assurances repairs would be made. The prin- ound under certain conditions. We quently held that the orders of a may, at times, justify conduct which urtherwise be imputed for contribu- gence (*Allison v. Railroad, 129 N. 0 S. E. 91; Patton v. Railroad, 96 1 S. E. 863*), but there is no doubt if interpretation of the evidence is le in the present case. Speaking matter the plaintiff, a witness in his alf, having stated that he was in the farm and gin, and had the re- de, etc., testified that on one occa- Bell was down there when one of s had broken off, and he asked wit- this made it very dangerous, and eplied, "No, not very" and Mr. Bell If you can do so, keep on and may-

be things will slack up and you can fix it." Recalled, the witness in reference to this conversation said, "Mr. Bell asked me if there was any danger about the broken lever," and witness replied, "Not very much," and Mr. Bell replied, "Well, go ahead, and maybe there will come a rainy day and we could catch up and fix it." Witness further said that on one occasion his brother, Mr. Bird, was down there when both levers had broken, and witness told him about it, and he said he didn't have any timber, and would have Mr. Summerlin to fix them next morning and for witness to go ahead. It does not distinctly appear at what time this conversation with Bird took place, whether at the time of the occurrence or not. Both of the proprietors deny that they had any such conversa- tion, and testify that, being there on different occasions, they noted that the levers were broken, and suggested or directed that they be properly repaired. It does not seem that either one of them was intending to take charge of matters, or that they were acting in displacement of plaintiff's authority as man- ager. Certainly under the circumstances in- dicated the only view of the case that would justify imputing responsibility to defendant for the injury would be that plaintiff acted on the requirement of the proprietors, or one of them, and this question was referred to the jury under a proper charge on the first is- sue, and they have determined the fact against the plaintiff. They have necessarily said that no such command was given, and, this being true, the plaintiff has shown no right to redress. There are objections to the rulings of the court on questions of evidence, but they do not affect the result.

[4] The defendant was allowed to ask the witness Bell when he first received notice that any claim was made against the company, and who made answer, "Nearly a year later." The time elapsed in preferring a claim has direct bearing on the recollection of the witnesses, and under certain conditions may, in itself, be a relevant circumstance affecting the validity of the claim. *Wigmore on Evi- dence, § 284.*

[5, 6] It was earnestly urged that the court improperly allowed reception of testimony tending to show careless conduct of plaintiff about the machinery on other occasions. This was evidence chiefly bearing on the second issue, that in reference to contributory negligence; and, the jury having answered the first issue in favor of plaintiff, the error if committed has become harmless. It is true his honor referred to this testimony in charg- ing the jury on the first issue, but a perusal of the record will show that his honor was then giving a general statement of the de- fendants' contentions, and that he only gave the testimony legal significance in his charge on the second issue. Considering the charge as a whole, and it is right so to consider it (*Kornegay v. Railroad, 154 N. C. 390, 70 S. E.*

731; *State v. Exum*, 138 N. C. 599, 50 S. E. 283), we are of opinion that every position available to plaintiff has been fairly and correctly referred to the jury, and no reason appears for disturbing the results of the trial.

No error.

O'HAGAN et ux. v. JOHNSON et al.
(Supreme Court of North Carolina. Oct. 1, 1913.)

REMAINDERS (§ 16*) — SALE FOR REINVESTMENT.

Where land was limited to plaintiff for life, remainder to the heirs of his body, with a remainder over in case of death without issue, it may, under Revisal 1906, § 1590, authorizing the sale of contingent interests, be sold for reinvestment in a proceeding in which the contingent remaindermen are parties and any heirs of plaintiff's body now in esse, as well as those who may be born, are represented by a guardian ad litem.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 11; Dec. Dig. § 16.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Action by Charles J. O'Hagan and wife against Adelaide Johnson and others to sell land for reinvestment. From a decree of sale, defendants appeal. Affirmed.

This is an action instituted for the purpose of selling certain lands for reinvestment under the provisions of section 1590 of the Revisal. The land ordered by the court to be sold for reinvestment was devised in item 1 of the last will and testament of Elvira O'Hagan, and said devise is in words as follows: "I give, devise and bequeath to my children who shall survive me, if any, all my estate, real, personal or mixed, of every kind and description, to have and to hold unto them and the heirs of their bodies forever. And should they die without heirs of their body surviving them, then and in that event, I give, devise and bequeath the same to all my brothers and sisters equally, share and share alike, and if any of my brothers and sisters shall die before my decease or the decease of my children, if I leave any, then and in that event it is my will and desire that the bodily heirs of such brother or sister shall have such a part of my estate as their parent would have taken had they been living."

The testatrix left surviving her one child, Charles J. O'Hagan, Sr., one of the parties plaintiff, who is now living, and such estate as he has by reason of said devise in said property he has conveyed to his wife, the other plaintiff herein; and the said plaintiffs commenced this action against the defendants, who are the brothers and sisters of the late Elvira O'Hagan, and the children of certain brothers and sisters, as fully set out in the complaint, and summons has been duly served upon all of the defendants as required

by the statute, together with all persons who in any event may become interested in the property sought to be sold upon the happening of any contingency, and these latter persons are duly represented by a guardian ad litem, who has filed an answer in the cause.

All parties who would be interested in said land, provided the plaintiff, Charles J. O'Hagan, Sr., should die without issue, have been made parties defendant, and have been duly served with process; and all parties who might hereafter become interested in said land upon the happening of said contingency have been made parties defendant and are represented herein by a duly appointed guardian ad litem. Upon the filing of the answers the court rendered a judgment directing the sale of the property, from which the defendants appealed.

Don Gilliam, of Tarboro, for appellants. Harry Skinner and Albion Dunn, both of Greenville, for appellees.

ALLEN, J. We have examined the record, and see no reason for disturbing the decree entered in the superior court. The proceedings are regular, and have been prepared with great care, indicating patient investigation and a familiarity with the legal principles involved. The decree is fully sustained by *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116, *Hodges v. Lipcomb*, 133 N. C. 199, 45 S. E. 556, and *Trust Co. v. Nicholson*, 162 N. C. —, 78 S. E. 152; and upon the authority of these cases the judgment is affirmed.

Affirmed.

HOLT v. WELLONS.
(Supreme Court of North Carolina. Oct. 1, 1913.)

1. CONTRACTS (§ 10*)—CONSIDERATION—MUTUALITY.

That letters of the seller evidencing a contract of sale do not bind the purchaser to pay the consideration does not make the contract unilateral, where the letters are merely in confirmation of an agreement for the sale, and the complaint contains other allegations showing the buyer's promise to pay, which is a sufficient consideration.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

2. APPEAL AND ERROR (§ 1060*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action by a buyer for breach of a contract of sale, the admission of evidence that an agent of the seller asked to be notified if the buyer ever wanted any cotton, if incompetent, was harmless, as the conversation was only preliminary or preparatory to the negotiations.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

3. GAMING (§ 49*)—GAMBLING CONTRACTS—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action by the buyer for breach of a contract for the sale of cotton for future de-

aimed by the seller to be a gambling contract, the buyer's testimony that the seller to be notified if the buyer ever wanted cotton was admissible, as it tended, if anything, to show that an actual delivery of cotton was intended.

Note.—For other cases, see *Gaming*, 100-102; Dec. Dig. § 49.*]

(§ 296*)—INSTRUCTIONS—SUFFICIENT BURDEN OF PROOF.

In an action for breach of contract, an instruction that the jury must be convinced that the contract was made as alleged by plaintiff is correct, if the evidence is sufficient to show that the contract was made in connection with another contract, distinctly placing the burden of proof on the plaintiff.

Note.—For other cases, see *Trial*, Cent. Dig. § 705-713, 715, 716, 718; Dec. Dig. § 49.*]

(§ 49*)—GAMBLING CONTRACTS—BURDEN OF PROOF.

In an action for breach of contract, the direct provisions of the Revised Code of 1889-1891, where the defendant alleges that the cause of action is founded on a contract for the sale of cotton for delivery, entered into without any actual delivery being intended, the burden of proof is on the plaintiff to show that the contract is of its nature and purpose.

Note.—For other cases, see *Gaming*, 100-102; Dec. Dig. § 49.*]

(§ 12*)—GAMBLING CONTRACTS—BURDEN OF PROOF.

In an action for breach of a contract for the sale of cotton for future delivery, the burden of proof is on the plaintiff to show that the contract was entered into as a speculation on the future price of cotton, rather than to the form, of the contract.

Note.—For other cases, see *Gaming*, 100-102; Dec. Dig. § 12.*]

(§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

An instruction that, "if the jury believed the evidence, they should answer a certain issue in the affirmative, though not a commendation of expression, was harmless error, and the evidence was all one way and practically undisputed."

Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

from Superior Court, Johnston County, N. C., Carter, Judge.

by S. S. Holt against J. A. Wellons, of Keen & Co. From a judgment for defendant appeals. Affirmed.

A writ of habeas corpus was brought to recover damages for the breach of a contract to sell and deliver cotton. The complaint alleges that the plaintiff contracted to sell to Austin-Stephenson Company 200 bales of cotton at 100 cents per pound, 100 of the bales delivered on September 20, 1907, and the other 100 bales on October 20, 1907; that the cotton was afterwards sold and transferred to Austin-Stephenson Company to the plaintiff, S. S. Holt, and that Keen Company refused to deliver the cotton as they had contracted to do. Plaintiff sues for the difference between the contract price and the market price on the delivery dates, which, as

he alleges, is \$1,500. Keen Company wrote the following letter to Austin-Stephenson Company on March 1, 1907: "Gentlemen: This is to confirm sale to you of 200 bales good white cotton, f. o. b. Four Oaks, N. C., 100 bales to be delivered September 20, 1907, and 100 bales to be delivered October 20, 1907, at 10½ cents per pound." The plaintiff also alleges the breach of another contract, made by Keen Company on March 11, 1907, to sell and deliver 100 bales of cotton to Austin-Stephenson Company at 10½ cents per pound, and its assignment to him by them, the difference between the market and contract prices being \$500. Keen Company wrote the following letter to Austin-Stephenson Company on March 11, 1907: "Gentlemen: This is to confirm sale to you of 100 bales of cotton to be delivered f. o. b. Four Oaks, N. C., during the month of November, 1907, at 10½ cents per pound. This cotton is to be delivered as you buy it, and not to be picked or classified." Plaintiff alleges a tender of the full price fixed by the contracts of sale and a demand for the cotton, with which defendant refused to comply. He prays judgment for \$2,000. Defendant demurred because the contracts, as alleged in the complaint, are unilateral, without consideration, and void. The demurrer was overruled, and defendant excepted. He answered that they were gambling contracts and ultra vires, and were not legally sold and transferred to the plaintiff. Upon issues submitted to them, the jury found that the contracts were made as alleged, that said contracts were sold and transferred to plaintiff, Holt, that they were not gambling contracts, that plaintiff was ready, able, and willing to perform said contracts on his part, that defendant failed and refused to perform the same, and that plaintiff was damaged in the sum of \$1,687.50, with interest. Judgment, and appeal by defendant.

F. H. Brooks, of Smithfield, and N. Y. Guley & Son, of Wake Forest, for appellant. Winston & Biggs, of Raleigh, and Abell & Ward and W. W. Cole, all of Smithfield, for appellee.

WALKER, J. (after stating the facts as above). We will consider the errors in the order assigned.

[1] 1. The demurrer was properly overruled. The contract, as alleged in the complaint, was not unilateral, or without consideration, or void. It was bilateral, and bound both parties, the defendant to deliver the cotton, and the plaintiff to pay the price; and for this reason, also, it was based upon a sufficient consideration, the mutual promises of the parties being considerations for each other. 9 Cyc. 323. The promise to sell and deliver the cotton was founded upon the reciprocal promise to pay the price as its con-

sideration. The contract is not void, but valid, on its face. It is argued that the plaintiff is bound by the form of the contract as contained in the letters copied into the complaint. If this be so, it does not help the defendant. The contract is still not unilateral, a nudum pactum, or otherwise void on its face, but, on the contrary, is apparently valid and binding. The letters merely confirm the sale, implying that one had already been made, and its validity was then recognized. But in the complaint distinct allegations of a binding contract are made, apart from the letters, so that in any view the demurrer must fail of its purpose. Defendants cited *Rankin v. Mitchem*, 141 N. C. 277, 53 S. E. 854, in support of the demurrer; but we do not see how it applies to the question now raised. The promise of the seller in that case to take the cotton back at a given price on a certain date was clearly unilateral, not binding the buyer. That is not the contract here, for this one is mutually binding.

[2, 3] 2. The testimony of W. H. Austin, manager of the Austin-Stephenson Company, as to his conversation with Allen K. Smith, president of the Keen Company, objected to by defendant and admitted, was harmless, if incompetent. It tended to prove only a request by Smith of Austin to notify the Keen Company if his company ever wished to buy any cotton. It was a mere preliminary, and only preparatory to negotiations. The contract itself was afterwards made by the Austin Company with the Keen Company, through J. W. Keen, its secretary, treasurer, and general manager. It also was relevant, as bearing upon the issue of the lawfulness of the contract, which was raised by the defendant. It tended, even if slightly, to show that an actual delivery of the cotton was intended by the parties.

3. The objection that the court admitted the indorsement on the contract to show the transfer is not meritorious. There was proof of the genuine execution of the same by the Austin-Stephenson Company to plaintiff. The handwriting was properly shown.

[4] 4. The charge on the first issue, as to the making of the contract by the parties, was correct. The court told the jury that the evidence must be believed by them, and produce in their minds a conviction that the contracts were made as alleged by the plaintiff, before they were authorized to answer the issue in favor of the plaintiff, and, if it did not produce such a conviction, they should answer the issue, "No;" if it did, their answer would be "Yes." This is sufficient, as the judge, later in the charge, distinctly placed the burden of that issue upon the plaintiff.

[5, 6] This exception is that the charge on the third issue, as to whether the contracts were founded upon a gaming consideration—a dealing in "futures"—was also sufficiently full and explicit. The burden was put

upon the plaintiff to establish that they were not, or the negative of the issue, in accordance with the terms of the statute. Revisal, §§ 1689, 1690, 1691. The charge, in substance and effect, was that if the jury believed the evidence, and were convinced thereby that the parties to the contract really and in good faith contemplated an actual delivery of the cotton, and that they were not merely gambling transactions under the guise of fair and lawful dealings between them, they should answer, "No;" otherwise, their answer should be, "Yes," that they were gambling contracts, forbidden by law. This, while briefly expressed, was sufficient, and the jury could not well have failed to understand from it what was the law of the case. We think the instruction stated the general rule correctly. The contract, by its terms, not disclosing any gambling element, the matter is to be settled by ascertaining the true underlying purpose of the parties. Was it the intention of both parties that the cotton should not be delivered, and did they conceal, in the deceptive terms of a fair and lawful contract, a gambling agreement, by which they contemplated no real transaction as to the article contracted to be delivered. *Edgerton v. Edgerton*, 153 N. C. 167, 69 S. E. 53; *Harvey v. Pettaway*, 156 N. C. 375, 72 S. E. 364; *Rodgers v. Bell*, 156 N. C. 378, 72 S. E. 817; *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614; *Rankin v. Mitchem*, *supra*. Of course, the law deals only with realities, and not appearances—the substance, and not the shadow. It will not be misled by a mere pretense, but strips a transaction of its artificial disguise, in order to reveal its true character. It goes beneath the false and deceitful presentment to discover what the parties actually intended and agreed, knowing that "the knave counterfeits well—a good knave." It always rejects the ostensible for the real, in looking for fraud or a violation of law. The essential inquiry, therefore, in every case, is as to the necessary effect of the contract and its true purpose. We said in *Edgerton v. Edgerton*, *supra*: "The form of the contract is not conclusive in determining its validity, when it is assailed as being founded upon an illegal consideration, and as having been made in contravention of public policy. If, under the guise of a contract of sale, the real intent of the parties is merely to speculate in the rise or fall of the price, and the property is not to be delivered, but only money is to be paid by the party who loses in the venture, it is a gambling contract, and void." The rule is fully stated in 20 Cyc. 930. See, also, *Williams v. Carr*, 80 N. C. 295; *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *State v. Clayton*, 138 N. C. 732, 50 S. E. 866. The principle was strongly and tersely expressed by the court in *Dillaway v. Alden*, 88 Me. 230, 33 Atl. 981: "When, however, there is no real transaction, no real contract for purchase or sale, but only a bet upon the rise or fall of the

stock, or article of merchandise, in large or market, one party agreeing there is a rise, and the other party to pay if there is a fall in price, is a pure wager. No business anything is bought or sold, or contract. There is only a bet." Other cases on the subject are cited in *Harvey v. Harvey*, supra. We think the court stated substantially at least.

The defendant objected because the court instructed the jury that, "if they believe the evidence," their answer to the issue should be "Yes." That issue was the corporate power of Keen Company to make the contracts. The words, "if they believe the evidence," are specially asserted as error, on the ground of being a dictum; but we do not think it so construed. The evidence was all in favor of the defendant and besides was practically undisputed. There was but one inference to be drawn from it, and while we have often said in other cases that such a form of expression is more desirable than resort to such words is not erroneous, if it has worked no prejudice, and no harm done in this case to the jury by the use of these words, even if it is able to commend them for general use.

In *Merrell v. Dudley*, 139 N. C. 777, Justice Brown (referring to the case) said: "The plaintiff also excepted to certain expressions used by the defendant in charging the jury: 'If you believe the evidence,' * * * is an expression urged upon our attention by the defendant as erroneous and prejudicial. It is in the language is inexact, and this expression should be eschewed by the defendant in charging juries. This court has called attention to it in a number of cases. * * * We do not regard the use of such language as reversible error, unless it appears that the appellant was prejudiced thereby, which does not appear in this case. We trust the defendant in the superior court will in future conform to these views as repeatedly expressed by this court"—citing cases. See *Edwin v. Edwin*, 145 N. C. 461, 59 S. E. 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

consideration of the whole case, nor does it appear.

r.

SOUTHERN POWER CO. v. CASSELS.
(Supreme Court of South Carolina. Sept. 26, 1913.)

1. VENDOR AND PURCHASER (§ 849*)—ACTIONS FOR DEFICIENCY—MODE OF PLEADING DEFENSES.

Where a purchaser of land brought an action for an alleged deficiency which was discovered upon the subsequent survey, the purchaser having the burden of proving the deficiency, the defendant might under a general denial show that the survey was only partial, and it was unnecessary to set up that fact by way of counterclaim or an answer containing new matter.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1033, 1039-1042; Dec. Dig. § 349.*]

2. WATERS AND WATER COURSES (§ 89*) — RIGHTS OF RIPARIAN OWNER.

An owner of land abutting on a nonnavigable stream owns to the middle of the bed of the stream, and upon conveyance of his land as including a given number of acres, the submerged land should be included in the survey.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 91, 92, 107; Dec. Dig. § 89.*]

3. VENDOR AND PURCHASER (§ 343*)—ACTION BY PURCHASER—DEFICIENCY—WAIVER.

Where a vendor of land, upon being informed that there was a deficiency, insisted that land underneath the nonnavigable stream upon which the tract bordered should be surveyed and included, there was no waiver on his part of the right to have such land included, though he was not present at the survey, for he was entitled to assume that the surveyor would include the whole tract and everything within the metes and bounds of the deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1023-1029; Dec. Dig. § 343.*]

Appeal from Common Pleas Circuit Court of Fairfield County; Ernest Moore, Special Judge.

Action by the Southern Power Company against B. F. Cassels. From a judgment for defendant and from an order denying defendant's motion for new trial, plaintiff appeals. Affirmed.

Plaintiff's requested charge that the defendant might waive having a survey made over that portion of the property conveyed which was covered by a nonnavigable stream was refused.

Osborne, Lucas & Cocke, of Charlotte, and McDonald & McDonald, of Winnsboro, for appellant. James W. Hanahan and McCants & McCants, all of Winnsboro, for respondent.

WATTS, J. This was an action tried before Special Judge Ernest Moore and a jury at the September term of court for Fairfield county. It was for an alleged deficiency of \$1,692 overpaid in the purchase of a tract of land purchased by the plaintiff appellant from the defendant respondent.

[1] The jury found for the defendant, a motion for new trial was duly made and refused, and plaintiff appeals and by six excep-

tions challenges the correctness of his honor's ruling. By the first three he complains of error on the part of his honor in his charge to the jury; and by the fourth exception he complains of error on the part of his honor in not charging plaintiff's request as to the law of waiver; and by his fifth and sixth exceptions complains of error in not granting a new trial on the grounds set out in the motion for new trial. The appellant contends that the defendant should have answered by way of counterclaim, or set up by way of new matter, the fact that the resurvey, by which the alleged deficiency was ascertained, was partial or incomplete before he could offer evidence challenging the correctness of the survey. Plaintiff by complaint alleged that the number of acres paid for was not in the tract purchased, that it paid for 832½ acres, whereas there was only 738½, a deficiency of 94 acres. This was denied by the defendant, and defendant by his second defense alleged that there was no deficiency, but all the land he conveyed, to wit, 832½ acres, was there, and there was no deficiency under the issuable facts as made by the pleadings. The defendant could offer testimony to show there was no deficiency. The defendant asked for no judgment against the plaintiff. He had no counterclaim. He by answer denied the allegations of plaintiff's complaint as to deficiency and set up, as a special defense, that within the boundaries conveyed there was 832½ acres; and, plaintiff having alleged there was a deficiency of 94 acres within the boundaries conveyed, the burden was on it to show the deficiency. In showing this it should have had all of the boundaries resurveyed, not part. It comes into court with a partial survey of the lands purchased. It is admitted that Wateree river at this point is a nonnavigable stream. The appellant by its deed from the respondent owns to the middle of stream, and in the resurvey the land covered by this stream is not included in the resurvey. The appellant claims a deficiency, has a resurvey, and does not include in the resurvey all of the land that it purchased and is entitled to possess. We think his honor clearly was right in his construction of the pleadings and in his charge to the jury in the matters complained of and made by these exceptions. Long v. Railway Co., 50 S. C. 53, 27 S. E. 531; Latimer v. Cotton Mills, 66 S. C. 139, 44 S. E. 559; Hutchings v. Manufacturing Co., 68 S. C. 514, 47 S. E. 710. These exceptions are overruled.

[2, 3] The fourth exception complains of error on the part of his honor in not charging the plaintiff's request as to the law of waiver, etc. There was an agreement to sell, first in writing, and later a deed of conveyance made in pursuance of this agreement. Both the agreement to sell and the

deed of conveyance contain the same description and boundaries. These agreements and deeds speak for themselves; and an examination of what his honor said when the request was made of him to charge the jury by the appellant convinces us that he was not in error and did or said nothing that was prejudicial to the appellant. The defendant was present and assisted at first survey. He was not present at the resurvey. He had a right to assume that the surveyor knew his business and would include the whole tract and everything in the metes and bounds set out in the deed of conveyance made by him to the appellant. There was nothing on his part to show an intentional relinquishment of a known right or such conduct on his part as to warrant such an inference. That the land was not included in the survey that was under the water of the river was the act of the surveyor and not his act. When defendant was notified that survey was unsatisfactory, he insisted that this stream be surveyed and included. This the appellant has not done, but is now in court claiming a deficiency, and does not have all that it is entitled to surveyed, and give to the court the exact deficiency, if any, although it was in its power to do so. There is no doubt that Cassels, when he conveyed, owned the land to the middle of the stream. This doctrine is fully recognized in *Shands v. Triplet*, 5 Rich. Eq. 76; *Noble v. Cunningham*, McMul. Eq. 294; *State v. City of Columbia*, 27 S. C. 137, 3 S. E. 55; *McDaniel v. Power Co.*, 95 S. C. 268, 78 S. E. 980. This exception is overruled. The fifth and sixth exceptions, which complain of error in not granting a new trial, are overruled for the satisfactory reasons set out by the circuit judge in his order refusing the same.

Judgment affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

ANSLEY v. DAVIS et al.

(Supreme Court of Georgia. Sept. 27, 1913.)

(Syllabus by the Court.)

ACTION (§ 50*)—JOINDER OF CAUSES.

A plaintiff cannot join in one action two separate claims against separate defendants.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 511-547; *Dec. Dig.* § 50.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by William S. Ansley against William J. Davis and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Anderson, Felder, Bountree & Wilson, of Atlanta, for plaintiff in error. E. V. Carter and Rosser & Brandon, all of Atlanta, for defendants in error.

ATKINSON, J. The allegations of the petition take a wide scope, and state much that need not be alleged upon any theory of the case. The grounds of demurrer are numerous, extending to various phases of the case. The petition was dismissed on demurrer, upon what grounds it is not stated; but, if the ruling was proper upon any ground, the judgment will be affirmed.

Some of the grounds of demurrer complained that the petition was multifarious. The petition was open to that criticism. In affirming the judgment, we will not enter into a discussion of the separate claims of the plaintiff, which ought not have been joined in the first instance. One claim which the plaintiff makes by his allegations is against Davis individually. This is based upon an alleged enterprise in the nature of a partnership between the plaintiff and Davis, whereby the two were to divide in certain proportions the net profits of land bought from the Ontario Land Company, the deed conveying which was taken in the name of Davis, who paid the whole of the purchase price under the agreement between them for division of net profits after the sale of the property and deduction of the costs and expenses of the development and sale. On the strength of the allegations setting forth such relation to Davis, it was sought, among other things, to compel him to enter into an accounting with the plaintiff, and to have a court decree in favor of plaintiff for a third interest in the profits. Under the plaintiff's theory it was not an interest in the land which he was seeking to recover, but it was merely an interest in the net profits from the sale of the land, based on the alleged contract forming the joint enterprise.

Another claim of the plaintiff was that based on his right as a stockholder in the West End Park Company. It was alleged that the corporation had acquired a large amount of land, 80 per cent. of which was a part of the land included in the Ontario purchase, which had been obtained from Davis, and that the corporation had conducted a real estate business, developing and selling its property, realizing large sums from the sales, and the like. Based on such allegations, and others complaining of improper conduct on the part of Davis, Wesley, and Campbell, as officers of the company, it was sought to reduce the capital stock of the corporation, and to protect the corporation from maladministration or misfeasance of its officers. It is needless to analyze the case further to ascertain what else the plaintiff would have the court decree. The case clearly falls within the principle of Civil Code, § 5515, which prevents the joining in one action of distinct and separate claims against different persons. *White v. North Ga. El. Co.*, 128 Ga. 539, 58 S. E. 33; *Ramey v. O'Byrne*, 121 Ga. 516, 49 S. E. 595; *Martin v.*

Brown, 129 Ga. 562, 59 S. E. 302. See, also, 16 Cyc. 239, G, (4).

It is not decided that the allegations relative to the claim against Davis, or those against the West End Park Company, set forth a cause of action, but merely that the claims were improperly drawn in one petition. If we should pass upon the merits of the several claims, it would be possible for a plaintiff to include in one action a multitude of disconnected claims against as many separate persons, and thus procure a decision upon the merits of each, and in effect avoid the rule above announced against joining in one action separate claims against separate persons.

Inasmuch as we affirm the judgment dismissing the action on the ground alone that it was multifarious, direction is given that the judgment be so modified as to rest upon that ground only, and so as not to prejudice any right of the plaintiff as to other grounds as being adjudicated by reason of the general form of the judgment originally entered.

Judgment affirmed, with direction. All the Justices concur.

SOUTHERN RY. CO. v. GARLAND.

(Supreme Court of Georgia. Sept. 24, 1913.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The exceptions to the charge of the court and to the rulings made during the trial are without merit.

2. SUFFICIENCY OF EVIDENCE.

The evidence is sufficient to support the verdict.

Error from Superior Court, Stephens County; J. B. Jones, Judge.

Action between the Southern Railway Company and N. L. Garland. Judgment for the latter, and the former brings error. Affirmed.

Fermor Barrett and De W. Owen, both of Toccoa, and A. G. & Julian McCurry, of Hartwell, for plaintiff in error. Claude Bond, of Toccoa, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

ROBINSON v. FURR.

(Supreme Court of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 979*)—REVIEW—DISCRETION OF TRIAL COURT—MOTION FOR NEW TRIAL.

No error of law being complained of, and the evidence being sufficient to support the verdict, the discretion of the trial judge in refusing a new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

Error from Superior Court, White County; K. B. Jones, Judge.

Action between M. L. Robinson and W. P. Furr. From a judgment for Furr, Robinson brings error. Affirmed.

G. S. Kytie and C. H. Edwards, both of Cleveland, for plaintiff in error. J. C. Edwards, of Clarkesville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

MACKLE-CRAWFORD CONST. CO. v.
WARD.

(Supreme Court of Georgia. Sept. 24, 1913.)

(*Syllabus by the Court.*)

1. PETITION NOT SUBJECT TO DEMURRER.

All of the Justices are of the opinion that the petition was not subject to general demurrer.

2. SPECIAL DEMURRER—PROPRIETY OF RULING ON—CURE BY AMENDMENT.

Fish, C. J., and Beck and Atkinson, JJ., are of the opinion that the special demurrers should have been sustained. Evans, P. J., and Lumpkin and Hill, JJ., are of the opinion that the special demurrers were properly overruled.

(a) As to the demurrer based on the ground that conflicting theories were presented, it is conceded in the brief of counsel for plaintiff in error that this was cured by amendment.

3. SUFFICIENCY OF EVIDENCE.

All of the Justices are of the opinion that there was sufficient evidence to authorize the verdict.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Andrew Ward against the Mackle-Crawford Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Hammond & Smith, of Atlanta, for plaintiff in error. W. R. Hammond, of Atlanta, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

BUTLER v. TATTNALL BANK et al.
(Supreme Court of Georgia. Sept. 24, 1913.)

(*Syllabus by the Court.*)

FALSE IMPRISONMENT (§ 7*)—ARREST ON ORDER ABSOLUTE—GOOD FAITH—PERSONS LIABLE.

A judge of the superior court made an order in a case against a sheriff for failing to pay over money in his hands and directed the clerk of the court to issue instantan "an attachment for contempt of court against the said * * * sheriff, as provided in section 4774 of the Civil Code" of 1895 (Civ. Code 1910, § 5346), and in pursuance of the order the clerk issued an attachment absolute against the sheriff named, which was directed to the coroner and to all and singular the sheriffs of the state, except the sheriff of the county against whom

the attachment was issued, and the sheriff of an adjoining county executed the attachment by arresting the sheriff named therein and placing him in jail. Upon habeas corpus proceedings being brought against the jailor, the judge hearing the case discharged the sheriff. The sheriff then brought suit against the clerk of the superior court issuing the attachment, the sheriff making the arrest, and the bank ordering the arrest, for damages for false imprisonment. There was no allegation in the petition that the proceedings against the sheriff were not in good faith, nor was there anything in the petition to show bad faith on the part of the defendants. A demurrer to the petition was filed by all of the defendants, which was sustained by the court. *Held*, that the order directing the clerk of the superior court to issue an attachment for contempt is to be construed as an order absolute.

(a) The clerk of the court was authorized and required to issue the attachment absolute under which the plaintiff was arrested, and his doing so would not subject him to a suit for damages.

(b) Neither the bank directing the arrest to be made nor the sheriff making the arrest was liable in damages therefor; no bad faith being alleged against either.

(c) The court did not err in sustaining the demurrer.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.*]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action by C. C. Butler against P. I. Rimes and others. A demurrer to the petition was sustained, and plaintiff brings error. Affirmed.

C. C. Butler brought suit against P. I. Rimes of Bryan county, J. A. Kennedy of Tattnall county, and the Tattnall Bank, and alleged substantially as follows: The defendants have damaged him in the sum of \$10,129.75, as hereinafter set out. On the 16th day of December, Judge Seabrook, of the Atlantic circuit, upon the petition of the Tattnall Bank, issued an order directing P. I. Rimes, as clerk of the superior court of Bryan county, to issue an attachment for contempt of court against the plaintiff as sheriff of Bryan county, under section 4774 of the Civil Code of 1895. The Tattnall Bank caused P. I. Rimes, as clerk, to disobey the order of the judge and caused the clerk to issue a process or proceeding directed to the coroner of Bryan county and to the sheriffs of the state, excepting the county of Bryan, commanding them to arrest the body of petitioner and imprison him in the common jail of Bryan county. Kennedy, the sheriff of Tattnall county, at the instance of the Tattnall Bank, came to Bryan county and arrested petitioner and placed him in Chatham county jail. A writ of habeas corpus was sued out before Judge Charlton, of the superior court of Chatham county, and he sustained the grounds of the habeas corpus and ordered petitioner discharged. No exceptions were taken to the order of discharge. The Tattnall Bank had no legal right to cause

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the clerk of the superior court of Bryan county to issue any process or proceeding for the imprisonment of the plaintiff and had no right to cause the sheriff, Kennedy, of Tatt-nall county to arrest and imprison him in the jail of Chatham county. Rimes, the clerk, had no legal right to issue process for the imprisonment of plaintiff, and Kennedy had no legal right to come to Bryan county and arrest plaintiff and imprison him. All these acts were done at the instance of the Tatt-nall Bank and its officers for the purpose of enforcing the collection of a debt and in furtherance of a desire on the part of the defendants to imprison the plaintiff. At the time of his imprisonment plaintiff's time was worth \$2 per day, and he was imprisoned 12 days. While he was in prison he was forced to employ counsel at an expense of \$100 and to pay the sum of \$5.75 costs, etc. By reason of the illegal arrest and imprisonment plaintiff was subjected to public ridicule, scorn, and contempt, and thus he suffered great humiliation, mortification, shame, and mental pain in the sum of \$10,000.

The petition for habeas corpus, addressed to Judge Charlton, of the superior court of the Eastern judicial circuit, together with the proceedings thereunder, was attached to the petition as an exhibit and showed in substance that petitioner was the duly elected, commissioned, and bonded sheriff of Bryan county for and during the years 1909 and 1910, and that he was restrained of his liberty under a certain attachment or process issued by the clerk of the superior court of Bryan county commanding them to arrest the body of petitioner and to commit him to jail until he purged himself of an alleged contempt of court. He was arrested under this attachment by Kennedy, the sheriff of Tatt-nall county. On May 5, 1910, petitioner was served with a rule nisi to show cause, on May 21st, why he should not pay over to the Tatt-nall Bank certain money held by him and claimed by the bank to be due on a *fi. fa.*, or why, in default thereof, he should not be attached for contempt. On May 21st, in obedience to the rule nisi, the plaintiff appeared before the court and filed his sworn answer to the rule and denied that the money had ever been demanded of him by the Tatt-nall Bank or that he had ever refused to pay over the money. He also showed that certain claims had been lodged with him against the money, and that he had declined to pay it over except by direction of court.

At the November term, 1910, of Bryan superior court (Judge Parker presiding), the following order was passed: "Upon the answer filed by the sheriff, and Solomon Moody by his attorney, R. F. C. Smith, Esquire, consenting, it is ordered that the funds in the hands of Charles C. Butler, sheriff, \$427.50 be paid out as follows: ——— dollars and cents costs of this rule, \$28 to the satisfaction of balance due upon the *fi. fa.* the Tatt-nall Bank v. Solomon Moody, Maker, and R. H. Levant,

E. J. Stafford, and Jackson Bacon, Endorsers, and that the remainder of said \$427.50 be paid over to the Tatt-nall Bank, or its attorneys of record, Kelly & Smith, on the execution of the Tatt-nall Bank v. E. J. Stafford, Maker, Alex Nail and Solomon Moody, Endorsers. It is further ordered by the court that the funds herein directed to be paid be paid within ten days from this date. This November 8, 1910. T. A. Parker, Judge Waycross Circuit, presiding. R. F. C. Smith, Attorney for Solomon Moody, consenting."

On December 16th Judge Seabrook made the following order: "It appearing to the court that on November 8th, and during the November term, 1910, of the superior court of Bryan county, the honorable T. A. Parker, judge of the Waycross circuit, presiding, the court in the foregoing stated proceedings granted an order absolute, directing Charles C. Butler, sheriff of Bryan county, to pay over to the Tatt-nall Bank or its attorneys of record, Kelly & Smith, \$427.50, and that said amount should be paid within ten days from the date of said order, and it further appearing that no part of said amount has been paid except \$28, and of said amount ordered to be paid over the said Charles C. Butler has failed and refuses to pay over the sum of \$399.50 so ordered to be paid, it is therefore, upon motion of movant's attorneys, ordered that the clerk of this court do issue instantan an attachment for contempt of court against the said Charles C. Butler, sheriff, as provided in section 4774 of the Civil Code. This December 16, 1910. Paul E. Seabrook, Judge S. C., A. J. C. Ga."

On December 19, 1910, the clerk of the superior court of Bryan county issued the following attachment and process: "Georgia, Bryan County. To the Coroner of Said County of Bryan and to All and Singular the Sheriffs of said State, Excepting the Sheriff of the County of Bryan—Greeting: A rule absolute, having, at the November term, 1910, of the superior court of said county, held on the 8th day of November, 1910, been granted against Charles C. Butler, sheriff of said county of Bryan, requiring him to pay over, within ten days from the date of said order, November 8, 1910, to the Tatt-nall Bank or its attorneys of record, Kelly & Smith, the sum of \$399.50, and he having made default in the payment of said funds, and the honorable Paul E. Seabrook, judge of the superior court of Bryan county, having ordered an attachment for contempt of court to issue: These are therefore to command you to arrest the body of the said Charles C. Butler, sheriff of Bryan county, as aforesaid, and commit him to the common jail of said county, or to such jail as in which the prisoners of Bryan county are usually kept, and there to be confined and safely kept without bail or mainprize until he purge himself of the said contempt aforesaid by paying over the aforesaid sums of money with 20 per cent.

interest thereon from December 19, 1910, to the said Tattnall Bank or its lawful attorneys. Witness the honorable Paul E. Seabrook, judge of said court, this the 19th day of December, 1910. P. I. Rimes, Clerk Superior Court, Bryan County, Ga. J. A. Kennedy, Sheriff, Tattnall County." By virtue of this attachment, J. A. Kennedy, the sheriff of Tattnall county, arrested petitioner and placed him in Chatham county jail.

The petition for habeas corpus alleges that the attachment proceedings against petitioner were not called in open court at the November term, 1910, of Bryan superior court; that he was not a party to the consent order as taken by the attorneys for the Tattnall Bank and the attorneys for Solomon Moody; that he did not know that the order or rule absolute for the payment of the money had been taken until afterwards; that, after his answer of May 21, 1910, had been filed, the jail and jailor's residence in Bryan county were destroyed by fire, and the money which he was holding was burned up and destroyed in the fire, along with his household and other personal effects; that the money has not been and is not now in his possession, custody, or control since the fire, and it is not within his power to produce it, and from his poverty he cannot replace it; that his answer of May 21st has never been amended, and he has never pleaded as a defense that the money was destroyed by fire, etc.; that the rule nisi as served upon him has never been concluded against him, except in so far as making the rule absolute, requiring the payment of the money within ten days; and that there has never been any rule absolute in attachment for contempt of court against him, nor has he ever been adjudged in contempt of court upon such proceedings, etc.

A demurrer to the suit for damages was filed by all of the defendants. It was sustained, and the case was dismissed, whereupon the plaintiff excepted.

J. H. Smith and R. F. C. Smith, both of Eden, for plaintiff in error. P. W. Meldrim, of Savannah, and Kelley & Smith and H. H. Elders, all of Reidsville, for defendants in error.

HILL, J. (after stating the facts as above). Section 4447 of the Civil Code provides as follows: "False imprisonment consists in the unlawful detention of the person of another, for any length of time, whereby he is deprived of his personal liberty." Section 4448 provides: "If the imprisonment is by virtue of a warrant, neither the party bona fide suing out nor the officer who in good faith executes the same is guilty of false imprisonment, though the warrant be defective in form, or be void for want of jurisdiction. In such cases the good faith must be determined from the circumstances of each case. The same is true of the judicial officer issuing the warrant, the presumption

being always against him, as to good faith when he has no jurisdiction."

The process issued by the clerk of the superior court of Bryan county, under which the plaintiff was arrested and placed in jail, was in the nature of a warrant. *Williams v. Sewell*, 121 Ga. 665 (6), 49 S. E. 326; *Page v. Citizens' Banking Co.*, 113 Ga. 869, 871, 38 S. E. 73, 86, 86 S. E. 418, 423 (51 L. R. A. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The order being held to be an order absolute, and it directing the clerk to issue an attachment for contempt of court," etc., the clerk was within his authority in issuing the attachment absolute, which the plaintiff was arrested. As being so, he would not be subject to a writ of damages brought against him for issuing an attachment absolute. Nor would the sheriff who arrested the plaintiff under this order, nor the bank which directed the arrest to be made, be liable in damages for acting in good faith in so doing, believing the order to be a valid one. The ground of Judge Charlton's decision in the habeas corpus case, by which the plaintiff was released from jail, does not appear; but, on the basis of that decision, neither the plaintiff nor the defendants was a party to that case, and they are not bound by the judgment there rendered. It is not alleged in the petition for damages that the sheriff who made the arrest, nor the bank which ordered the arrest, acted in bad faith, and there are no facts in the record tending to show that either of them, acted otherwise than in good faith; and, this being true, the petition does not set forth a good cause of action. Code, § 4448. It follows from what is

the court did not err in sustaining the error and dismissing the case. The court affirmed. All the Justices con-

THERTON v. STRICKLIN.

Court of Georgia. Sept. 26, 1913.

(Syllabus by the Court.)

AND ERROR (§ 728*)—ASSIGNMENT OF ERROR—RULINGS AS TO EVIDENCE—SET-ASIDE.

Defendant in a suit for breach of marriage was offered as a witness on behalf of the plaintiff, who had testified "as to the alleged breach of the alleged marriage." The court declined to allow the defendant to testify, and error is assigned on this ruling. What the witness testified is not set out in the record, nor what the defendant would have testified, that this is not a good assignment of error. 1 Michie's Dig. Ga. R. 636;

—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012; Dec. Dig. § 3010.

ON CHARGE—INSUFFICIENCY OF EVIDENCE.

Charges of the court complained of as erroneous for any of the reasons assigned, and the verdict is supported by the evidence, the court did not err in refusing a new trial.

From Superior Court, Catoosa County. Fite, Judge.

Beatrice Stricklin against Napo-therton for breach of promise of marriage. Judgment for the plaintiff, and defendant brings error. Affirmed.

McCamy & Shumate, of Dalton, in error. Foust & Payne, of Dalton, Tenn., and W. E. Mann, of Dalton, in error.

J. Judgment affirmed. All the Justices concur.

ELLARD v. SMITH.

Court of Georgia. Sept. 24, 1913.

(Syllabus by the Court.)

§ 176*)—ACTION BY SELLER—INSPECTION BY BUYER.

Action for the purchase price of ties. There was evidence to the effect that the ties were to be delivered in wagon load at place designated, and that the purchaser was to inspect the ties as each load was delivered. There was no error in charging error as follows: "I charge you that if the ties were to be delivered by Mr. Smith, the defendant, and that the defendant is to inspect them as they were delivered in wagon load, and if he had an opportunity of so inspecting them, and that if the ties were not coming according to contract,

that then it was his duty to have notified the plaintiff of that fact."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

2. SALES (§ 398*)—ACTION BY SELLER—INSTRUCTIONS—CONFORMITY OF PROPERTY TO SPECIFICATIONS.

The contract provided that the ties should be of specific dimensions. There was evidence, though contradicted, to the effect that a large number did not conform to the specifications; also to the effect that the purchaser did not accept any of the ties. It was error to charge as follows: (a) "I charge you, on the other hand, if the ties were reasonably within the measurements of the contract between the parties as to size, and were of the class, reasonably of the class, and sort of ties that were to be delivered to him, and if they were delivered, then it would have been the duty of Mr. Ellard, the purchaser, if he was the purchaser, to have received the ties and paid for them." (b) "Now, if the ties were delivered to Mr. Ellard where he pointed out they should have been, and they were reasonably up to the contract as to specifications, size and kind of timber, and it was his duty to receive them, and you find him liable for them, then you could not credit that account for any amount that he claims he is damaged, but it would be your duty to find the full purchase price of the amount against the defendant."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1137-1139; Dec. Dig. § 398.*]

3. GROUNDS OF MOTION FOR NEW TRIAL.

The other grounds of the amended motion for a new trial are without merit.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by P. B. Smith against Thomas H. Ellard. Judgment for plaintiff, and defendant brings error. Reversed.

Sam Kimzey, of Cornelia, and McMillan & Erwin, of Clarkesville, for plaintiff in error. J. C. Edwards & Sons and I. H. Sutton, all of Clarkesville, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

BANK OF LAVONIA v. BUSH et al.

(Supreme Court of Georgia. Sept. 26, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1078*) — ASSIGNMENTS OF ERROR — WAIVER — FAILURE TO ARGUE.

Assignments of error which are not referred to in the brief of counsel for plaintiff in error will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. EVIDENCE (§ 397*) — PAROL EVIDENCE — WRITTEN CONTRACT.

A written contract, apparently containing the entire agreement of the parties, and disclosing no incompleteness, cannot be enlarged by parol so as to include additional terms and stipulations, in the absence of fraud or mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

3. TIME (§ 9*)—COMPUTATION — DAYS — NOTICE OF DEPOSITIONS.

In taking depositions of certain witnesses, there was no compliance with the statute in regard to the time of giving notice to the opposite party, and on appropriate objection it was erroneous to admit the depositions in evidence at the trial of the case.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

4. EVIDENCE (§ 434*)—PAROL—FRAUD—NOTES.

Testimony tending to show that the defendant was induced to sign the note for the stock by false statements of the agents of the payee, in regard to the financial worth of the corporation, and the personnel of its directors, was not inadmissible on the ground that the evidence failed to show fraud in the procurement of the note, or that it tended to vary the terms of the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

There was no evidence of failure of consideration. There was evidence of fraud upon the maker, practiced by the agent of the payee, which induced execution of the note; but there was no evidence to show notice thereof to the plaintiff at the time it took the note, or to charge it with notice of the fraud. There being no evidence to authorize it, the judge erred in charging on subject of failure of consideration, and on the subject of fraud perpetrated by the payee upon the maker of the note.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Error from Superior Court, Franklin County; D. W. Meadows, Judge.

Action by the Bank of Lavonia against G. F. Bush and others. Judgment for defendants, and plaintiff brings error. Reversed.

The Bank of Lavonia, a corporation located in Franklin county, Ga., instituted an action in the superior court of that county upon a negotiable promissory note against George F. Bush, as principle, the Ulaca Company, a corporation of the county of Fulton, as indorser, and Moorefield & Bishop, a partnership of Fulton county, as sureties. The note was dated February 16, 1910, and due December 16, 1910. It was signed by Bush, as maker, was payable to the order of the Ulaca Company, and recited the consideration "for value received." It was alleged in the petition that the note was indorsed over to the plaintiff on the 5th day of March, 1910, and that on the same day it was signed by Moorefield & Bishop, as sureties. No defense was filed except by Bush, who interposed an answer alleging, among other things, that the Ulaca Company, through its agents, represented to the defendant that the company was solvent, and had \$40,000 or \$50,000 cash in bank with which to do business, did not need the money from defendant's note, and would not discount it, and that the agent in the name of the company entered into a contract with the defendant that the stock was bought upon the condition that, if defendant was dissatisfied with the stock by the fall of

1910, the note would be returned to him, and the subscription canceled, and further guaranteed to defendant a dividend of 15 per cent. on the stock, and agreed that, if the dividend was not paid, the note would be returned and canceled. Other allegations were: That the agent represented that designated persons were directors of the company; that defendant knew the persons to be of high integrity and financial responsibility, and was influenced thereby to give the note; that all of the representations so made by the Ulaca Company, through its agent, were false and fraudulently made to procure the note, and defendant rescinded the transaction entirely as soon as he learned that he had been deceived; that the consideration for which the note had been given entirely failed; and that the plaintiff bought the note, at a discount of about 33½ per cent. from the face value, from an entire stranger, knowing that the defendant was entirely solvent, and having notice that there were conditions which, if not fulfilled, would relieve defendant of liability, and notice of defendant's defenses to the note before it purchased the same. A verdict was returned in favor of the defendant. The plaintiff made a motion for a new trial, which contained the usual general grounds, and by amendment others which complained of rulings on the admissibility of evidence and the charge of the court. Other facts will sufficiently appear from the opinion.

H. H. Chandler, of Lavonia, and Jas. H. Skelton, of Hartwell, for plaintiff in error. Watkins & Lattimer, of Atlanta, George L. Goode and W. R. Little, both of Carnesville, for defendants in error.

ATKINSON, J. [1] 1. The general grounds are not referred to in the brief of counsel for plaintiff in error, and will be treated as abandoned.

[2] 2. The fourth, fifth, and sixth grounds of the amended motion for new trial complain of the admission of the testimony of the defendant, to the effect that the company guaranteed him a specified dividend, and if it was not paid his note would be returned, and that if he became dissatisfied at any time before the note became due the company would return his note, and take up the stock. The objection urged to the admissibility of the testimony was that it was irrelevant, and sought to vary the terms expressed in the note. The note was an unconditional promise to pay a specified sum for value received, and apparently expressed the entire agreement between the parties. The testimony would in effect ingraft conditions upon it which would materially change the contract, and there was no pleading or evidence that the conditions thus sought to be ingrafted were intended to be put in the note and were omitted therefrom

through fraud or mistake. It was erroneous, therefore, to admit the evidence. *Smith v. Baker*, 137 Ga. 298, 72 S. E. 1093; *L. & N. R. Co. v. Willbanks*, 133 Ga. 15, 65 S. E. 86, 24 L. R. A. (N. S.) 374, 17 Ann. Cas. 860.

[3] 3. The seventh and eighth grounds complain that the court erred in admitting the depositions of designated witnesses over objection made by plaintiff's attorney, which was that the depositions were taken without giving the plaintiff the five days' notice as required by section 5810 of the Civil Code. The notice was given on the 19th, and it appointed the 23d day of the same month for taking the depositions of witnesses. It thus appeared that the statute was not complied with. The plaintiff, being the party notified, did not waive the point, but made objection to the taking of the depositions at the commencement of the examination of the witnesses, and thereafter on the trial appropriately objected to the testimony.

[4] 4. The next three grounds complain of the admission of evidence which tended to show that the Ulaca Company did not have on hand at any time as much money as defendant testified the agents of the company represented to him the company had at the time he took the stock and gave his note. The objection to this testimony was that it was irrelevant. The twelfth ground complains of the court's ruling in allowing the defendant to testify as to the circumstances under which he was induced to give the note. He testified that the agent of the company represented to him that the company was organized at \$100,000 capital stock, and had about \$40,000 or \$50,000 to do business on, that this amount was in cash in the treasury, that there were several men that he (the agent) wished to become stockholders, including defendant, so that he would get stock scattered throughout north Georgia in order to strengthen the influence of the corporation, and that designated persons were directors; and, in response to the question of how much stock any one person could hold, the agent replied to the defendant, "Not over \$6,500." As to the effect that the statement that designated persons were stockholders had on the defendant, "that was one of the main points why [he] agreed to take the stock." This evidence was objected to on the ground that it did not show fraud in the procurement of the note, and that it was in conflict with the terms of the note, and sought to vary the contract between the parties. When considered in connection with other evidence in the case, to the effect that the Ulaca Company did not have the amount of money which the agent represented to defendant, and that the persons designated as directors were not such, and that the defendant was induced to take the stock and execute the note on the strength of such representations, the objection to the evidence was not well founded.

[5] 5. The thirteenth ground of the amended motion complains that the judge charged the following: "Now, if you believe that the circumstances under which this note was bought by the bank were sufficient to put the bank on notice that these defenses existed, and if you believe that the bank by proper inquiry could have determined before purchasing the notes that these defenses did exist from any of these circumstances, why, then, in that event, you go further in your investigation, and determine whether or not the signature was procured by fraud, whether or not the maker of this note could defend, under the rules of law, against the payees of the note, the Ulaca Company. If you should determine there was such fraud in the procurement of the signature of this note practiced by the Ulaca Company or its agents, and such failure of consideration as is pleaded, and believe that the other pleas filed in the case are sustained, any one or all of them, then the defendant could resist the payment of this note; and if you believe they were such as to make this note uncollectible against the defendant in the hands of the Ulaca Company, and the Lavonia Bank had notice or could have had it of the existence of this, then you would be authorized to find for the defendant in this case." The criticism upon the charge was that it was unauthorized by the evidence. In that portion of the charge the judge made reference to the plea of failure of consideration. There was no evidence to authorize the charge on failure of consideration. The defendant bought the stock of the corporation, for which he gave the note, and received and retained the stock. It would not constitute a failure of consideration merely because the purchase of the stock was not a good investment. The charge also invoked the question raised by the defendant as to fraud of the Ulaca Company perpetrated on defendant, by which he was induced to buy the stock, for which he gave the note. Concerning this question, there was evidence to the effect that the agent of the corporation, in making the sale of the stock to the defendant, and procuring the note, falsely represented that designated persons of good character and financial standing were directors of the corporation, whose connection with the corporation would give it prestige, and that the agent also made false representations to the effect that the corporation had ample capital with which to conduct its business, and thereby induced the defendant to have faith in the enterprise, and subscribe for its stock. Evidence to this effect did not tend merely to contradict the note, or vary its terms; but its effect was to go behind the note, and show that defendant was induced to make it on account of false representations, upon which he acted to his injury. Other evidence was to the effect that the company did not at any time have money on hand approaching even remotely

the amount that it was represented to have, and was never able to declare a dividend, but, after being engaged in business for about a year, was insolvent, and to avoid being closed up sold out to a new corporation, taking in payment the stock of such corporation, and the latter company was then declared a bankrupt. It could not be said that there was no evidence of fraud. Fraud of this character, however, would not affect the plaintiff, who was shown to be a purchaser of the note for value before its maturity, unless the plaintiff had notice or was charged with notice of the fraud at the time it became the holder. The burden of showing notice to the plaintiff was on the defendant, the maker of the note. There was no evidence of actual notice. It is contended that the facts shown to have been known by the plaintiff were sufficient to charge notice. The evidence on this subject was to the following effect: Moorefield and Bishop were partners. They, with others, applied for a charter in the superior court of Fulton county for the Ulaca Company, and organized thereunder for the manufacture and sale of nonalcoholic drinks. The amount of capital stock authorized to be issued was \$100,000. Several agents were sent out to sell stock in the state at large. The defendant resided in Franklin county. He and a number of other citizens were canvassed, and became purchasers of the stock. Notes were generally taken in payment for the stock, and afterwards sold by other agents, including Moorefield and Bishop, wherever they could get them discounted. Moorefield applied to the plaintiff, a bank located in Franklin county, to discount the note of the defendant and a number of notes of other citizens of the county, amounting in the aggregate to about \$5,000, and they were all discounted at the same time. This was about the time Moorefield met the cashier of the bank, and was his first transaction with him, though not Bishop's first transaction with that institution. The cashier knew that the Ulaca Company was selling stock in that county through Moorefield and Bishop, and knew the defendant by reputation. The defendant's note was for \$1,000, payable to the Ulaca Company one year after date, and was discounted shortly after its execution, according to the testimony of Moorefield, at about 25 per cent. from its face value. Moorefield also testified that the cashier knew that the note was given for the stock in the Ulaca Company, and assigned as a reason for charging a high discount that it was "stock paper," and there was risk about it, and "the thing may bust." The cashier testified that before taking any of the notes he tried to telephone each of the several makers to inquire about their respective notes, and each stated that his note was all right, except the defendant and one

other whom he could not reach. He inquired of another to know if the defendant's note was good for \$1,000, and was informed that it was. Two days after the notes were discounted the cashier wrote defendant a letter, advising him that the bank held the note which it had bought and paid for, and asked to be advised "if there were any conditions to it." Two days later a reply came, announcing that "there are conditions which I expect to be fulfilled before paying the note." There is nothing in these facts pointing to the fraud of which the defendant complains, namely, fraud of the agent of the Ulaca Company in misrepresenting to the defendant the personnel of the directors of the corporation, and the amount of its cash assets. Representations of this character primarily were in the breast of the original parties, and would remain so unless communicated to others. While the plaintiff's cashier made some inquiry about the notes which he discounted, the responses so far as obtained were favorable to the negotiability of the notes. And whatever weight might be attributed to the circumstances that, two days after discounting defendant's note, the cashier wrote to the defendant to know if there were any conditions to it, the answer received did not suggest that there had been representations as to the personnel of the directorship, or as to the cash of the corporation on hand, or that any representations made by the agent selling the stock were false. The circumstances were insufficient to charge notice of the fraud.

The plaintiff being holder for value, and there being no evidence to show that it took the note with notice of fraud perpetrated on the maker by the agent of the payee, or evidence to charge notice of such fraud, it was error to charge on the subject. Civil Code, §§ 4288, 4291; Morrison v. Hart, 122 Ga. 660, 50 S. E. 471; Oliver v. Miller, 130 Ga. 72, 60 S. E. 254. This ruling disposes also of the fourteenth and fifteenth grounds of the motion for new trial, which complain of the charge of fraud, and notice thereof.

Judgment reversed. All the Justices concur.

HODGES v. STUART LUMBER CO.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 668*)—RES JUDICATA—ACTIONS AGAINST CORPORATIONS—ADMISSIBILITY OF EVIDENCE.

The court did not err in excluding from evidence the following entry of service of another suit previously brought by the plaintiff in the present case against another party: "Georgia, Decatur County. I have this day served H. M. Graham personally with a copy of the within original, and T. C. Wainman by leaving a copy of the within original at his most notorious place of abode. This May 8,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1902. A. W. Fordham, Sheriff." This entry of service did not show service upon the defendant so as to make it bound by the judgment in the other suit, under the provision of the Civil Code 1910, § 5579.

[Ed. Note.—For other cases, see Judgment. Cent. Dig. §§ 1181-1183, 1188; Dec. Dig. § 668.*]

2. PROCESS (§ 148*)—SERVICE—EVIDENCE AS TO SERVICE—CONTRADICTING RETURN.

Nor did the court err in refusing to permit one who was the attorney at law for the plaintiff in the other suit to testify that he had instructed the sheriff to serve the defendant in the present suit.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 201; Dec. Dig. § 148.*]

3. PROCESS (§ 164*)—PROOF OF SERVICE—AMENDMENT.

The court did not err in refusing to allow an amendment of the entry of service (the entry of service just quoted above) so as to show that the "service was on the Stuart Lumber Company by serving H. M. Graham, the general manager."

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 176, 239-248; Dec. Dig. § 164.*]

4. EXECUTORS AND ADMINISTRATORS (§ 130*)—PROPERTY—RIGHT OF POSSESSION—EVIDENCE.

The plaintiff having failed to produce any evidence to establish facts which were held, when this case was formerly before the Supreme Court, to be essential for him to show in order to make out a case, he was not entitled to recover on the last hearing.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 535, 537-540; Dec. Dig. § 130.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by C. S. Hodges, administrator, against the Stuart Lumber Company. Judgment for the defendant, and plaintiff brings error. Affirmed.

G. G. Bower, Russell & Custer, and Bower & Bower, all of Bainbridge, for plaintiff in error. M. E. O'Neal, Donalson & Donalson, and Erle M. Donalson, all of Bainbridge, for defendant in error.

BECK, J. Hodges, as administrator of Alley Huguley, brought suit against the Stuart Lumber Company to recover damages for alleged trespass, which consisted in the cutting of timbers on certain described lands. There was proof submitted showing that the defendants had cut and removed timber of the alleged value. At the conclusion of the evidence the court directed a verdict for the defendant, and the plaintiff excepted.

[1] 1. Suit had been previously brought against Sharpe & Drake by the plaintiff in the present case to recover the land from which it is alleged timber had been cut and carried away. That suit resulted in a verdict for the plaintiff. Upon the petition in that former suit there was the following entry: "Georgia, Decatur County. I have this day served H. M. Graham personally with a copy of the within original, and T.

C. Wainman by leaving a copy of the within original at his most notorious place of abode This May 8, 1902. A. W. Fordham, Sheriff." And when this was offered in evidence by the plaintiff, it was objected to on the ground that it was irrelevant and immaterial, and this objection was sustained. We think the court correctly held that the evidence was inadmissible. The purpose of offering the entry of service in evidence was to show that the defendant in the present case was bound by the judgment in the former suit of Hodges, Administrator, v. Sharpe & Drake, under the provision of the Civil Code, § 5579, which reads as follows: "A plaintiff in ejectment may in all cases make the true claimant defendant by serving a copy of the pending action upon him, and the person so notified shall be bound by the judgment." But the service upon Graham personally, or upon Wainman personally, was not service upon the Stuart Lumber Company, and did not make the Stuart Lumber Company a party to that suit, so as to have the effect of making the judgment rendered in that suit binding upon the defendant in the present suit.

[2] 2. Nor did the court err in refusing to permit one who was the attorney at law for the plaintiff in the other suit to testify that he had instructed the sheriff to serve the defendant in the present suit.

[3] 3. The plaintiff then introduced the following evidence: "Amos Fordham, sworn for the plaintiff, testified: 'I wrote that entry myself. I think I served H. M. Graham. Mr. Graham was working with the Stuart Lumber Company. I left a copy with him; he was at his office at Brinson, the office of the Stuart Lumber Company.' C. S. Hodges, recalled for the plaintiff, testified: 'That Graham was in charge of the Stuart Lumber Company's business as general manager.'" And after this evidence was introduced, the plaintiff moved the court "to allow Amos Fordham, as sheriff of Decatur county, to amend his original entry of service [the entry of service just quoted] in the suit of Hodges, Administrator, v. Sharpe & Drake, so as to show that said service was on the Stuart Lumber Company by serving H. M. Graham, the general manager." The court refused to allow the amendment, and this is excepted to. Even if it would have been competent to make an amendment of this character to the entry of service by one shown to be in office at the time of making the amendment, the court did not err in refusing to allow this amendment in the absence of proof that Fordham was at the time of the trial the sheriff of Decatur county. The motion to allow Fordham, "as sheriff of Decatur county," was not evidence that he was in fact sheriff at that time, nor did the fact that Fordham was sheriff in 1902 afford a presumption that he was sheriff on the 14th day of November, 1911, at

which time it was proposed to have him amend the entry of service.

[4] 4. Having failed to amend the entry of service upon the petition in the case of Hodges, Administrator, v. Sharpe & Drake, there was no competent evidence in the case that Stuart Lumber Company had been served with a copy of that action, and, that being true, the Stuart Lumber Company was not bound by the verdict and judgment therein. Hence the Stuart Lumber Company was let into its defense, and had the right to show that the administration of Hodges was a stale administration, and it was actually shown by evidence introduced by the defendant in this case that the will of Alley Huguley had been probated in the year 1847, that the executor qualified, and that the present administrator, Hodges, took out the letters of administration in the year 1900. The administrator, Hodges, testified that he knows the lot of land No. 186 in the Twenty-First district of Decatur county; that the same belongs to the estate of Alley Huguley; that the same is in the possession of the administrator; that the timber was cut on this lot of land by the Stuart Lumber Company while the lot was in his possession as administrator in 1903 and 1904; that the damage to said land was the value of the timber, which he estimated to be worth \$1,200, and he knew how to estimate timber, and knew the value of the timber at that time; that at the time that the original suit was brought for the lot of land he was in the turpentine business, and needed the lot for turpentine purposes; that he got appointed administrator; that no one asked him to become administrator; that he went to Wilkes county to see about it; that he never saw any of the heirs of Alley Huguley; that there were no debts against the estate of Alley Huguley that he knew of, nor were there any debts owing to the estate of Alley Huguley; and that he did not know how long Alley Huguley had been dead when he was appointed administrator.

When this case was here before, on a bill of exceptions sued out by this same plaintiff in error to review the judgment of the court below granting the defendant in the present case a new trial, it was said, in the course of the decision affirming that judgment, that: "The case turns upon the question whether the administrator with the will annexed is vested with the right to recover the possession of the land. If not, he cannot bring an action of trespass. The administrator with the will annexed has all the power of the executor, except such as arises from personal trust and confidence. Civil Code [1895] § 3309. When an executor assents to a devise or a legacy, all interest of the estate in the property passes out of him. The assent is generally irrevocable, and this is true although the remainder of the assets are in-

sufficient to pay the debts. *Watkins v. Gilmore*, 121 Ga. 488 [49 S. E. 598]. After the lapse of 20 years there is a presumption that the executor has assented to a legacy. *Flemister v. Flemister*, 83 Ga. 79 [9 S. E. 724]; *Phillips v. Smith*, 119 Ga. 556 [46 S. E. 640]. After the lapse of 20 years it is legitimate to presume that all the debts of the estate have been paid. *Coleman v. Lane*, 26 Ga. 515. Should there not be, also, after such lapse of time, a presumption that there has been a distribution, either in kind or in money, if the will requires a sale and a division of the proceeds? * * * Certainly it must be the law that as against a second administration, granted more than 20 years after the death of the decedent and the time for final settlement under the first administration, it is legitimate to presume, in behalf of a possessor, that there has been a final settlement, and that the right of the legal representative to recover had passed out of him, either by assent to legacies or sales in conformity to the provisions in the will, or in some other way known to the law, and cast upon the legal representative, whose appointment was so long delayed, the burden of showing that there had been no final settlement by his predecessor. See, in this connection, *Bullock v. Dunbar*, 114 Ga. 754, 40 S. E. 783; *Woolfolk v. Beatty*, 18 Ga. 520; *Daniel v. Sapp*, 20 Ga. 514. To quiet title such a presumption is absolutely necessary." *Hodges v. Stuart Lumber Co.*, 128 Ga. 735, 58 S. E. 355. We think that the doctrine here announced is entirely sound, and an examination of the record shows that the administrator, Hodges, failed entirely to carry the burden which this decision declared rested upon him, and, having failed to carry the burden, he has failed to show that he is entitled to recover in this case. The Stuart Lumber Company relied, in part, upon a deed in this case from Wainman, which was executed in the year 1901, before service of a copy of the action of Hodges, administrator, against Sharpe & Drake was effected upon Wainman. And, even if the entry of service of that suit should have been admitted to show that Wainman was bound by the judgment in the Sharpe & Drake Case, this would not have affected the Stuart Lumber Company's case, or their right to rely upon the deed of Wainman for whatever it was worth. But we are of the opinion that, independently of this deed from Wainman, the Stuart Lumber Company could rely upon a defense that Hodges, as administrator, had no right, under the facts and circumstances of this case, to maintain, as administrator (whatever are his rights now as a party in possession), an action against them for the recovery of the land or any timber that they may have cut from it.

Judgment affirmed. All the Justices concur

JAMES G. WILSON MFG. CO. v. OHAM-BERLIN-JOHNSON-DU BOSE CO.

(Supreme Court of Georgia. Sept. 26, 1913.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§§ 191, 253*)—FORECLOSURE—DEFENSE—PROPERTY SUBJECT TO LIEN.

"Want of title in the defendant to the premises on which the lien is claimed, and alleged title in a third person, who is no party to the suit, will not bar an action for foreclosing and enforcing the statutory lien of a materialman." If the defendant "has any interest in the premises upon which the lien can take effect, that interest is bound." *Ford v. Wilson*, 85 Ga. 109, 11 S. E. 559; *Porter v. Wilder*, 62 Ga. 521 (6), 527. See *Jennings v. Huggins*, 125 Ga. 338, 340, 54 S. E. 169.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 333, 444-446; Dec. Dig. §§ 191, 253.*]

2. EXECUTION (§ 31*)—PROPERTY SUBJECT TO SEIZURE AND SALE.

"Every legal interest in real and personal property can be" seized and sold. "The debtor and defendant will not be permitted to deny the title, or set it up in any one else." *Pitts v. Hendrix*, 6 Ga. 452; *Whitley v. Newsom*, 10 Ga. 74; *Jackson v. Graham*, 3 Caines (N. Y.) 188. An estate for years may be bought and sold as any other estate. *Clark v. Herring*, 43 Ga. 227.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 76-82, 86, 87; Dec. Dig. § 31.*]

3. MECHANICS' LIENS (§ 191*)—PROPERTY SUBJECT—LEASEHOLD ESTATE—"TRUE OWNER."

The words "true owner," as used in Civil Code 1910, § 3352, providing for liens of materialmen and all persons furnishing material for the improvement of real estate, are sufficiently comprehensive to include the owner of a leasehold estate, and the liens therein provided for may attach to the interest of a lessee, who has an estate for years in the demised premises, subject to the conditions of the lease. 2 *Jones on Liens*, § 1272; *Phillips on Mechanics' Liens*, § 39; 27 *Cyc.* 30; 20 *Am. & Eng. Enc. Law*, 301, 303; the numerous cases cited by these authorities in support of the proposition announced; also the note to *Crutcher v. Block* in 14 *Ann. Cas.* 1029 (19 *Okl.* 246, 91 *Pac.* 895). That a laborer or mechanic is entitled to a lien on whatever interest his employer had in the property at the time the work was done or the materials were furnished has been recognized by this court in a number of cases, namely: *Harman v. Allen*, 11 Ga. 45; *Callaway v. Freeman*, 29 Ga. 408, 410; *Breed v. Nagle*, 46 Ga. 112 (3); *Walker v. Burt*, 57 Ga. 20 (2); *Gaskill v. Davis*, 61 Ga. 645 (3); *Reppard v. Morrison*, 120 Ga. 28, 47 S. E. 554; *Central of Ga. Ry. Co. v. Shiver*, 125 Ga. 218, 53 S. E. 610.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 333; Dec. Dig. § 191.*]

4. MECHANICS' LIENS (§ 191*)—LEASE—ESTATE FOR YEARS—MATERIALMAN'S LIEN.

In 1910 a private corporation leased from the owners thereof certain city lots for a term of 21 years, agreeing to pay specified annual rentals, and, after the first year, all taxes, assessments, insurance premiums, and expenses for repairs, and agreeing, further, to tear down the building then on the premises, and to erect in its stead a building in accordance with certain plans and specifications, with the right to add improvements thereto, or to replace it with

a building or buildings to cost not less than the one replaced, and equally adaptable to general business purposes; also stipulating to keep the building or buildings insured to three-fourths of their value and for the lessor's protection, and, should the same be injured or destroyed by fire or other casualty during the term, to have them repaired or replaced, and, at the expiration of the lease, to deliver the premises in good condition to the lessors, the building then on the premises to become their property; the lessee having the right to sublet the premises, provided "the business to be conducted therein be not of an objectionable character." *Held*, that the lessee had an estate for years in the leased premises, and that a materialman's lien could attach to and be enforced against such interest, subject to the conditions of the lease.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 333; Dec. Dig. § 191.*]

5. NONSUIT—ERROR.

Under the evidence for the plaintiff, the court erred in granting a nonsuit.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the James G. Wilson Manufacturing Company against the Chamberlin-Johnson-Du Bose Company. Judgment for defendant, and plaintiff brings error. Reversed.

Leonard Haas, of Atlanta, for plaintiff in error. Smith, Hammond & Smith and Dodd & Dodd, all of Atlanta, for defendant in error.

FISH, C. J. Judgment reversed.

ATKINSON and HILL, JJ., disqualified. The other Justices concur.

PENTON et al. v. HALL.

(Supreme Court of Georgia. Sept. 23, 1913.)

(Syllabus by the Court.)

RECEIVERS (§ 77*)—CUSTODY OF PROPERTY—BAILMENT—RESTORATION TO OWNER.

Where the status of a receiver with respect to property which has come into his hands by virtue of the receivership is that of a mere bailee, equity will restore possession of the property to one whom it has permitted to file an intervention setting up a claim thereto, where the latter establishes the right of possession and a title superior to all others, except the owner of a note and agreement of conditional sale, who has the legal title until a balance of the purchase price is paid by the intervenor.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 91, 138-144; Dec. Dig. § 77.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by George R. Penton against Leo G. Hall and others in which a receiver was appointed and J. R. Hall intervened. Judgment for intervenor, and plaintiff and the receiver bring error. Affirmed.

Edward S. Elliott, of Savannah, for plaintiffs in error. Thos. F. Walsh, Jr., of Savannah, for defendant in error.

HILL, J. In proceedings brought by George R. Penton against Leo G. Hall and others, a receiver was appointed, who took charge of certain property as being that of the defendants. By leave of court, J. R. Hall filed an intervention, setting up that two horses which thus went into the custody of the receiver belonged to him, and asked that they be taken from the custody of the receiver and returned to him, alleging that the defendants had no interest, title, or property therein. Upon the trial of the intervention the court directed a verdict finding the two horses to be the property of the intervenor. A motion for a new trial, made by the plaintiff and the receiver, was overruled, and they excepted.

The only testimony introduced on the trial was that of the intervenor, which was to the effect that he bought one of the horses from a named person, and that it belonged to him; that he bought the other horse under a conditional sale agreement, and still owed a portion of the purchase price to the holder of the note and agreement; and that he had loaned the horses to the defendants. The special assignments of error were to the effect that the intervenor could not recover without showing title in himself; that as to one horse the evidence showed the title was in the holder of the conditional sale agreement; and that, possession being shown in the receiver, the intervenor was not entitled to possession without showing title in himself, or a higher right than the receiver's, which he failed to do, having shown title to a third person. Under the evidence, one of the horses belonged outright to the intervenor; and the question is whether the court was authorized to direct a verdict in favor of the intervenor for both horses, the legal title to one of them being in a third person.

In an ordinary claim case, where an execution has been levied on property, it has been held that "the interest which will support a claim under our statute is any interest which renders the property not subject to the levying *fi. fa.* or attachment, or which is inconsistent with the plaintiff's right to proceed in selling the property." *Wade v. Hamilton*, 30 Ga. 450. And see *Hurley v. Epps*, 69 Ga. 611; *Rowland v. Gregg*, 122 Ga. 819, 50 S. E. 949. Under these decisions, had the property been levied on while in the custody of the defendants, for whom the receiver was appointed, J. R. Hall (the intervenor) would have had such an interest therein that he could have arrested the proceedings by filing a claim to the property. Property duly acquired by a receiver is in *custodia legis*. *Tindall v. Nisbet*, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225; *Wikle v. Silva*, 70 Ga. 717. The receiver, of course, took only such rights in the property as were held by those for whom he was appointed receiver (*Moise v. Chapman*, 24 Ga. 249; *Crine v. Davis*, 68 Ga. 138), and, according to the

evidence, the defendants were mere bailees of the horses, as borrowers from the intervenor. Equity, of course, will protect the receiver's possession from unauthorized interference. *Marshall v. Lockett*, 76 Ga. 289; *Woodburn v. Smith*, 96 Ga. 241, 22 S. E. 964.

But where, as in this case, it permits one claiming the property to file his intervention, seeking to have its possession restored to him, and on the trial it is made to appear that the only right of the receiver is that of a mere bailee, as successor to the status of those from whom he acquired the property, and the intervenor further shows in himself a right of possession and a superior title as against every one other than the holder of a note and agreement of conditional sale, who retains the legal title pending the payment of the balance of the purchase money by the intervenor—facts which would be sufficient to sustain a claim at law—equity will restore the possession where it rightfully belongs, to wit, to the intervenor. It follows that the court properly directed a verdict awarding the property to the intervenor.

Judgment affirmed. All the Justices concur.

PEEPLS et al. v. WILSON.

(Supreme Court of Georgia. Sept. 26, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1052*)—RULINGS ON EVIDENCE—PREJUDICE.

By Civil Code 1910, § 4212, it is declared: "If the original deed be lost, a copy from the registry, if duly recorded, shall be admitted in evidence whenever the court is satisfied of the fact of loss or destruction; and to this fact the party may be a witness."

(a) No question as to the correctness of the record being involved, it is not proper, over objection, to admit the original record to show the contents of a lost deed; but the admission of such record will not require a new trial, where a certified copy of the record was subsequently introduced in evidence during the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

2. ADVERSE POSSESSION (§ 79*)—COLOR OF TITLE—SHERIFF'S DEED.

A sheriff's deed to land, executed to one who purchases at a tax sale, though not accompanied by the tax *fi. fa.* under which the land was sold, is good as color of title. *Beverly v. Burke*, 14 Ga. 70; *Burkhalter v. Edwards*, 16 Ga. 593 (2), 596, 60 Am. Dec. 744; *Hester v. Coats*, 22 Ga. 56 (1), 58; *Sutton v. McLoud*, 26 Ga. 638 (2); *Hammond v. Crosby*, 68 Ga. 767 (1); *Wade v. Garrett*, 109 Ga. 270, 34 S. E. 572.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.*]

3. APPEAL AND ERROR (§ 1041*)—PLEADINGS—AMENDMENTS—HARMLESS ERROR.

Even if an amendment to the plaintiff's petition, praying that the defendant be required to bring his title deeds under which he claimed the land in controversy into court to be surren-

ceeded, ought not to have been allowance was not error requiring a re the jury did not find in favor illation, and the court did not de deeds be canceled.

—For other cases, see Appeal and Dig. §§ 4106-4109; Dec. Dig. §

POINTS OF ERROR—EVIDENCE—VER-

er assignments of error are with- evidence required a verdict for and the court did not err in re- trial.

a Superior Court, Murray Coun- ite, Judge.

etween William Peeples and others Willson. Judgment for the latter, ner bring error. Affirmed.

g and W. W. Sampler, both of e, for plaintiffs in error. Mad- y & Shumate, of Dalton, and of Spring Place, for defendant in

Judgment affirmed. All the cur.

JEFFERSON FIRE INS. CO. OF PHILADELPHIA v. BRACKIN.

Court of Georgia. Oct. 2, 1913.)

Syllabus by the Court.)

E (§ 618*)—CONSTITUTIONAL LAW 19, 305*) — VENUE OF ACTIONS COMPANIES — STATUTORY PROVI- E PROCESS OF LAW — PRIVILEGES S—EQUAL PROTECTION OF LAWS. e 1910, § 2563, provides that suit mand against an insurance com- agencies or more than one place of in this state may be brought in re an agent or place of doing busi- company was located at the time the ion accrued, or the contract was which said cause of action arose, company may have no agent or gress business in such county at the on is instituted. *Held:*

is portion of said section is not in the provision of the Constitution requiring that all civil cases, other pecifically excepted, shall be tried y where the defendant resides. tral R., etc., Co., 17 Ga. 323; Ga. 52 Ga. 410 (2); Merritt v. Cotton ns. Co., 55 Ga. 103, 110; Savan- Co. v. Atkinson, 94 Ga. 780-783, O.; Gilbert v. Ga. R., etc., Co., 104 415, 30 S. E. 673; Ga. R., etc., field, 138 Ga. 670, 75 S. E. 981. f Empire State Insurance Co. v. a. 376, and Atlanta Home Insur- Tullis, 99 Ga. 225, 25 S. E. 401, ted on and explained in Peters v. ance Co., 137 Ga. 440, 73 S. E.

ws that the portion of the Code e referred to does not contravene n in the Constitution of this state n shall be deprived of property ex- process of law.

t in conflict with the clause of the of the United States which de- state shall make or enforce any all abridge the privileges and im-

munities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws." The part of the Code section under consideration applies a like to all insurance companies doing business in this state, domestic as well as foreign.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1536-1539; Dec. Dig. § 618; * Constitutional Law, Cent. Dig. §§ 625-648, 710, 925-927; Dec. Dig. §§ 206, 249, 305.*]

2. CONSTITUTIONAL LAW (§ 309*)—"DUE PROCESS OF LAW"—SERVICE OF PROCESS.

Civ. Code 1910, § 2564, provides that, in an action of the character referred to in the preceding note, service may be perfected upon the insurance company by leaving a copy of the petition or writ where the agency or place of doing business was located in the county at the time the cause of action accrued, or the contract was made out of which the same arose. This provision of the Code section is unconstitutional, because violative of the due process clause of both the state and federal Constitutions. One of the essential elements of "due process of law," to which every one is entitled before he can be lawfully deprived of his property, is notice of the procedure against him. This notice must not be dependent upon chance, and must at least be such as with reasonable probability will apprise him of the pendency of the proceeding. McElreath of the Constitution of Georgia, § 1104; 3 Words and Phrases, 2227 et seq. Manifestly, leaving a copy of the petition or writ at the place where the insurance company had formerly an agency or place of doing business in a county, but where the company had no agent or place of doing business at the time of the bringing of the suit, cannot be such notice as in this respect will constitute due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

3. INSURANCE (§ 626*) — ACTIONS AGAINST COMPANIES—SERVICE OF PROCESS.

An action was brought against a foreign insurance company on a fire policy, in the superior court of the county wherein an agent and place of doing business were located when the policy was issued and the cause of action arose thereon; there being, however, no agent or place of doing business in such county at the time the suit was instituted. The petition alleged that the defendant company had duly appointed and authorized a named person resident in another county of the state to acknowledge or receive service of process and upon whom process might be served in suits against the company. A second original and process thereon were issued by the clerk of the court in which the suit was brought, for the county in which such agent resided, the process being directed to the sheriff and his deputies of that county; and such agent was there duly served, and the second original and process, with entry of service, were duly returned to the court wherein the suit was pending. *Held*, that this constituted legal service upon the defendant, and that a motion to dismiss the case for want of lawful service was properly denied. See *Devereux v. Atlanta Railway, etc., Co.*, 111 Ga. 855, 36 S. E. 939, wherein, as the record filed in this court shows, service was perfected in exactly the same way as in the case at bar; also *Ga. R., etc., Co. v. Bennetfield*, 138 Ga. 670, 75 S. E. 981, and cases cited. There was no ruling made in the case of *United States Casualty Co. v. Newman*, 137 Ga. 447, 73 S. E. 667, which conflicts with what we now hold. In that case no question was made as to the constitu-

tionality of the provision in Civ. Code 1910, § 2564, for effecting service by leaving a copy of the original suit and process at the agency or place of doing business of a defendant insurance company at the time of the making of the contract out of which the suit arose, and therefore it was said that, as the statute provided a plain method of perfecting service in the county where the suit was brought, there was no necessity or authority for the issuance of a second original for service upon the person resident in another county, who had been designated by the defendant company as its agent and attorney upon whom service could be made. As we have now held such method of service not to be lawful, there is a necessity, as was held in *Devereux v. Atlanta Railway, etc., Co.*, supra, that service be perfected by the issuance of a second original, as was done in the present case.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1572; Dec. Dig. § 626.*]

Evans, P. J., dissenting.

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by J. B. Brackin against the Jefferson Fire Insurance Company of Philadelphia. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Hammond & Smith, of Atlanta, for plaintiff in error. T. S. Hawes, of Bainbridge, for defendant in error.

FISH, C. J. Judgment affirmed. The other Justices concur, except

EVANS, P. J. (dissenting). I cannot agree that the Legislature may constitutionally enact that the venue of an action against a corporation may be located in a county other than where the corporation is doing business at the time suit is filed. I agree that the Legislature may fix the residence of a corporation which it creates, but this privilege and right is subordinate to the constitutional command that suits (with certain exceptions) must be located in the county of the defendant's residence. The Legislature may declare a corporation to be a resident of a county where it is engaged in business at the time of the suit, but cannot declare a corporation to be a resident of a county for purposes of suit, where it neither has property nor agency or agent, nor is engaged in transacting any business, without violating the Constitution.

BROTHERS et al. v. HORNE.

(Supreme Court of Georgia. Sept. 27, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 596*)—DEGREE OF PROOF—NATURE OF ACTION.

"In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction. In criminal cases a greater strength of mental conviction is held necessary to justify a verdict of guilty." Civ. Code 1910, § 5730.

(a) Trover being a civil case, a preponderance of evidence in favor of the plaintiff is sufficient

to authorize a recovery, although the contention of the plaintiff be that the defendant came into possession of the property sued for by committing a crime. *Atlanta Journal v. Mayson*, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104; *Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833.

(b) The court in such a case having correctly instructed the jury as to the meaning and application of the rule of preponderance of evidence, it was not cause for a new trial to refuse a written request to give a charge to the effect that, before the plaintiff could recover, the evidence must be sufficient to establish the crime and that the defendants committed it, not beyond a reasonable doubt, but to the reasonable satisfaction of the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2446-2448; Dec. Dig. § 596.*]

2. TROVER AND CONVERSION (§ 25*)—PERSONS LIABLE—STOLEN PROPERTY—CONSPIRACY.

If two persons conspire to steal certain personality, and one of them actually commits the larceny, while the other is present aiding and abetting the theft in pursuance of the conspiracy, both are liable in trover brought by the owner against them; and the fact that the abettor never takes actual possession of the stolen property, or any portion thereof, but all of it is appropriated to his own use by the one who actually commits the theft, does not relieve the abettor from liability in trover for all of the stolen property. See *Merchants', etc., Transportation Co. v. Moore*, 124 Ga. 482, 52 S. E. 802, wherein it was held: "Any distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a 'conversion.' It is unnecessary to show that the defendant applied it to his own use, if he exercised dominion over it in defiance of the owner's right, or in a manner inconsistent with it. It is in law a conversion, whether it be for his own or any other's use." The instructions on this theory of the case were not erroneous for any reason assigned.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 173-180; Dec. Dig. § 25.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

3. TRIAL (§§ 194, 252*)—DUTY TO PRODUCE—EFFECT OF FAILURE—INSTRUCTIONS.

The following instruction was given to the jury: "The defendant Wilson contends that the diamond introduced in evidence is not the diamond of the plaintiff, but is the diamond he received from one Rembert. * * * I charge you * * * that if he chooses to rely upon his own evidence, and not produce the witness Rembert, if within his power, the presumption of law is that Rembert would not so swear if he were here; the presumption is against him, and you would consider that as a circumstance in determining whether or not he is liable in this case." The judge then read to the jury Civ. Code 1910, § 5749, which is as follows: "Where a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, or, having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted." It appeared on the trial that Rembert was not, at the time of the trial, a resident of the county of Whitfield, where the case was tried. There was no positive evidence as to where he resided, though a witness for the plaintiff testified that he thought Rembert was then in Atlanta; but it does not appear that Wilson knew where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Rembert then resided. It further appeared that Wilson on previous trials where the ownership of the diamond was in issue, stated that he got it from Rembert. The presumption against a party for withholding or suppressing evidence within his control or reach is not one of law, but of fact. *Savannah, etc., R. Co. v. Gray*, 77 Ga. 440, 3 S. E. 158, citing *Starkie's Evidence*, 486. See *Weinkle v. Brunswick, etc., R. Co.*, 107 Ga. 367 (4), 372, 33 S. E. 471. There was nothing to show that Rembert was in any way under the power and control of the defendant Wilson, or that as a witness, if he were accessible at all, he was not as much so to the plaintiff as to Wilson. It was therefore reversible error, as to Wilson, to read the Code section to the jury. *Anderson v. Southern Ry. Co.*, 107 Ga. 500 (2), 508, 33 S. E. 644; *Central Ry. Co. v. Bernstein*, 113 Ga. 175 (5), 180, 38 S. E. 394.

Moreover, the instruction was erroneous for the reason that it informed the jury, in effect, that the testimony of the defendant Wilson was of a weaker and inferior nature than the testimony of Rembert would have been, had he testified in the case.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466, 505, 596-612; Dec. Dig. §§ 194, 252.*]

4. EXCEPTIONS—INSTRUCTIONS.

The exceptions to other instructions were not meritorious.

5. TROVER AND CONVERSION (§ 40*)—REQUISITES OF ACTION—POSSESSION.

There was no evidence that the defendant Brothers was ever in possession of any of the jewelry for which the action was brought; nor was there any evidence connecting him with its theft, sufficient to authorize a verdict against him.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 232-244; Dec. Dig. § 40.*]

6. RIGHT TO NEW TRIAL.

Both defendants should have been granted a new trial.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Mrs. M. M. Horne against Frank Brothers and others. Judgment for plaintiff, and defendants bring error. Reversed.

Maddox, McCamy & Shumate, of Dalton, for plaintiffs in error. M. C. Tarver, of Dalton, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

SEDLMEYR v. CITY OF FITZGERALD. (Supreme Court of Georgia. Sept. 27, 1913.)

(Syllabus by the Court.)

ELECTRICITY (§ 19*)—ELECTRIC LIGHT WIRES —DEFECTIVE INSULATION—DEATH—ACTION —PETITION.

Bertha Sedlmeyr instituted suit against the city of Fitzgerald for damages on account of the homicide of her 16 year old unmarried son, on whom she was dependent, and who contributed substantially to her support, alleging in substance as follows: The defendant owned and operated an electric light system, and main-

tained certain electric wires stretched on poles along a designated alley, 20 feet and 4 inches above and parallel with the ground, which wires on a designated day were heavily charged with electricity. J. J. Terry owned a house, 20 feet high, which he decided to remove to a new location, and in order to do so it was necessary to cross the alley at a designated place. He obtained permission from the defendant, through its mayor, "who was authorized to grant such permission," to move the house across the alley to a new location. Plaintiff's son was employed by Terry's contractor as a common laborer to assist in moving the house. In moving the house across the alley, the chimney came in contact with the wires, and it became necessary to lift them over the chimney. The contractor furnished plaintiff's son with a wooden stick, about 3 feet long, and directed him to go upon the house and lift the wires above the chimney. He proceeded to execute the command, and touched the wires with the stick, releasing them, whereupon they rebounded and came in contact with him, and an electric current passed through his body, killing him instantly. The wires, at the place of the catastrophe, were not insulated at all; the insulation having rotted or worn off, and having been permitted to exist in such condition for a sufficient length of time to bring notice home to the city of the defective condition. They had been permitted to remain with the same insulation from the time they were insulated in 1899 until 1909, without any inspection or repairs. If the wires had been properly insulated, the injury could not have occurred. Ordinary inspection by the city would have disclosed the defective insulation of the wires. The dangerous condition of the wires left without insulation was the proximate cause of the injury. Plaintiff's son was inexperienced and unacquainted with the dangers incident to electricity, and of coming in contact with wires of an electric plant, and could not by the exercise of ordinary care have known that it was dangerous for him to touch the wires with a wooden stick, when the defendant's wires were in the condition in which they were afterwards ascertained to be. *Held*:

1. The petition as amended set forth a cause of action, and was not subject to general demurrer. See *Atlanta Con. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; *Denson v. Ga. Ry. & El. Co.*, 135 Ga. 132, 68 S. E. 1113; *Shearman & Redfield on Negligence*, § 698; *Minneapolis Gen. El. Co. v. Cronon*, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816; *Cyc.* 475 (III).

2. The several grounds of special demurrer were met by amendment.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

Beck, J., dissenting.

Error from Superior Court, Ben Hill County; W. F. George, Judge.

Action by Bertha Sedlmeyr against the City of Fitzgerald. From an order sustaining a demurrer to the petition, plaintiff brings error. Reversed.

Max Isaac, of Brunswick, for plaintiff in error. Elkins & Wall, of Fitzgerald, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except BECK, J., dissenting.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rev'r Indexes

ARNOLD GROCERY CO. v. SHACKELFORD.

(Supreme Court of Georgia. Sept. 24, 1913.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§§ 21, 29*)—CONTRACTS—ACCOUNT—ACTIONS BY TRUSTEE IN BANKRUPTCY.

The statute of limitations for the institution of actions on open accounts or for breach of contract, express or implied, as set forth in the Civil Code 1910, §§ 4362, 4368, does not apply to an action by a trustee in bankruptcy, under section 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), against a transferee for value of goods received from the bankrupt in payment of a pre-existing debt less than four months prior to the filing of the petition in bankruptcy.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 90-99, 552; Dec. Dig. §§ 21, 29.*]

2. BANKRUPTCY (§ 298*)—BANKRUPT'S TRUSTEE—ACTIONS—LIMITATIONS.

The Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), which conferred upon trustees in bankruptcy the right to institute actions of the character mentioned in the preceding note, also fixed a statute of limitations applicable to such cases.

(a) The action was not barred.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 430-443; Dec. Dig. § 298.*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by T. J. Shackelford, trustee, against the Arnold Grocery Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On March 15, 1907, upon an involuntary petition in bankruptcy, T. H. Wofford upon his admission of insolvency was adjudged a bankrupt. T. J. Shackelford was duly appointed trustee. On February 8, 1907, the Arnold Grocery Company received from Wofford various and sundry dry goods, clothing, hats, etc., from his stock of merchandise in settlement of a pre-existing debt. Before the estate in bankruptcy was closed, the trustee filed a suit in the superior court against the Arnold Grocery Company on March 4, 1911, for the recovery of the alleged value of the goods, on the ground that the transfer of the goods was preferential and fraudulent as against the creditors, and void under the bankrupt act. The defendant filed an answer, which, so far as material to be stated, alleged "that, as more than four years have elapsed between said date (the date of transfer, February 8, 1907) and the time of the filing of this suit, said claim of trustee, if any ever existed, became barred by the statute of limitations, and this defendant pleads that fact in bar of the plaintiff's cause of action in this case." When the case came on for trial, it was submitted to the judge for decision, without the intervention of a jury, on an agreed statement that the facts were to the effect above stated, and that settlement

of the account by delivery of the goods constituted a preference voidable under the bankrupt act, if the action was brought within the proper time. Judgment was rendered against the plea, setting up the bar by the statute of limitations, and in favor of the plaintiff for the amount set forth in the agreed statement of facts. The defendant excepted.

Cobb & Erwin, of Athens, for plaintiff in error. G. A. Johns, of Winder, for defendant in error.

ATKINSON, J. [1] 1. The defendant below, who became the plaintiff in error in the Supreme Court, contends that under the statute of limitations of this state (Civil Code, §§ 4362, 4368), more than four years having intervened between the date of the transfer of the goods and the date of the commencement of the action by the trustee for the recovery of their value, the action was barred. The plaintiff below, who became the defendant in error, insisted that, on account of the provision of section 11d of the bankrupt act of 1898, "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed," the trustee was not barred. In the brief of counsel for plaintiff in error it was stated that the question for decision is whether the suit instituted by the trustee is barred under the four-year limitation act of the state statute, or whether the trustee has two years after the closing of the estate in which to bring suit, regardless of the running of the state statute of limitations, and regardless of the length of time that may issue before the estate is closed. This was conceded in the brief of the plaintiff in error to be the only question involved, and no other was discussed. Civil Code, § 4362, declares: "All actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, shall be brought within four years after the right of action accrues;" and section 4368 declares: "All other actions upon contracts express or implied, not hereinbefore provided for, must be brought within four years from the accrual of the right of action." The limitations for the institution of actions provided for by these statutes of the state do not apply to the present case. The Arnold Grocery Company bought the goods in payment of a pre-existing debt, and consequently there was no contract, either express or implied, to pay for them. It was not suggested that the purchase was made to defraud creditors, or for other reasons that it was void at common law or under the statutes of this state. The action was therefore in no sense upon the open account, or for breach of contract, either express or implied, and would not be barred under state law as embodied

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the above sections of the Code. Except for the Bankruptcy Act, the trustee could have had no action on account of the purchase of these goods by the Arnold Grocery Company. That act contained provisions under which the trustee was authorized to sue the Arnold Grocery Company for the value of the goods, merely by reason of the fact that the transfer was made within less than four months from the filing of the petition in bankruptcy, notwithstanding it was made in pursuance of a sale in payment of a pre-existing debt, which was in other respects valid.

[2] 2. It was declared in section 60b of the Bankruptcy Act of 1898: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after filing the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." 30 Stat. 562 (1 Fed. Stat. Ann. 674, U. S. Comp. Stat. 1901, p. 3445). This was amended in 1903 (32 Stat. part 1, p. 799, 10 Fed. Stat. Ann. 47, U. S. Comp. Stat. Supp. 1911, p. 1506) by adding thereto the following: "And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Section 60b, thus amended, was further amended by the act of 1910. 36 Stat. 842 (1 Fed. Stat. Ann. Supp. 1912, p. 729, U. S. Comp. Stat. Supp. 1911, p. 1507). The last amendment added new matter not affecting the case, without repealing any of the existing provisions of the act. The transfer was made in 1907, and all the right the trustee had to sue the transferee was by virtue of section 60b of the Bankruptcy Act of 1898, as amended in 1903. The action was brought under this law. Article 1, § 8, par. 4, of the Constitution of the United States, confers upon Congress the power "to establish uniform laws on the subject of bankruptcy throughout the United States." In pursuance of this power Congress has established the law hereinbefore designated, upon which the plaintiff's action is based. Had it not been for this law, conceding, as the plaintiff does, that the Arnold Grocery Company received the goods in good faith, in payment of the debt, unaffected with fraud against creditors, the act of the Arnold Grocery Company would not have been actionable, and, except for this law, the trustee in bankruptcy would have had no power to sue. The law so adopted by Congress, in addition to conferring upon a trustee in bankruptcy the right to sue a transferee of the property received from the bankrupt under specified conditions, also expressly declared that the state courts and bankruptcy courts should have concurrent jurisdiction

of suits under the Bankrupt Act, and also provided, as set forth in section 11d, a statute of limitations for actions against the trustee or by the trustee.

Counsel for plaintiff in error concede that, if the terms of the statute are to be construed as conflicting with the state law on the subject of limitations of actions, it will prevail over the state law. Relative to conflicting laws of this character, see *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. 170, 312, 28 L. Ed. 279; *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. 184, 27 L. Ed. 920; *State v. Gatzweiler*, 49 Mo. 17, 8 Am. Rep. 119; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606. But counsel insist that under a proper construction there is no conflict, and that section 11d of the bankrupt act does not affect the statute of limitations adopted by the state. The burden of argument of counsel is upon the construction of this statute. Attention is called to the policy of the law to have the causes speedily determined, and of the hardships that might occur where a trustee should keep a bankrupt estate open for a great length of time. Under the bankrupt act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517; Revised Stat. U. S. 5057) the actions by or against an assignee in bankruptcy, touching any property transferred to or invested in such assignee, were required to be brought within two years from the time when the cause of action accrued for or against the assignee. This was applied as a statute of limitations. *Freelander v. Holloman*, 9 N. B. R. 331, Fed. Cas. No. 5081; *Avery v. Cleary*, 132 U. S. 604, 10 Sup. Ct. 220, 33 L. Ed. 469; *Jenkins v. International Bank*, 106 U. S. 571, 2 Sup. Ct. 1, 27 L. Ed. 304; *Bailey v. Glover*, 88 U. S. (21 Wall.) 342, 22 L. Ed. 636. In the last case the statute was construed, and the policy of the law declared; Mr. Justice Miller, among other things, saying that, to prevent the estate being wasted in litigation and delay: "Congress has said to the assignee: You shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed." After the decision of that case, when the bankrupt act of 1898 was adopted, it contained no provision limiting the time of commencing the actions by or against the trustee in bankruptcy to two years from the time the cause of action originated, but in lieu thereof contained the provision hereinbefore set forth, section 11d, which was substantially different, particularly in that the time in which suits were to be instituted by or against the trustee was restricted to two years from the time of the closing of the estate. Like the former statute, this was undoubtedly intended as a statute of limitations, relatively to actions by the

trustee, growing out of the bankrupt act, and to enforce that law; but it contemplated a change of the time concerning such matters as to which a trustee might sue or be sued, so that there would be no bar relatively to them while the estate was being administered by the trustee, nor until two years after it had been closed. Section 60b of the bankrupt act was not designed in any event to give the bankrupt a cause of action against the transferee, and therefore a case under that statute would stand on a different footing from a suit on some right of the bankrupt which might, by operation of law under section 70a of the bankrupt act, have passed from the bankrupt to the trustee. Section 11d was manifestly intended to apply, among others, to cases falling under section 60b of the act, to the exclusion of any other statute of limitations. Under this view the action was not barred, and the judge committed no error in so holding.

Judgment affirmed. All the Justices concur.

KELLY et al. v. WHITLEY et al.
(Supreme Court of Georgia. Oct. 2, 1913.)

(*Syllabus by the Court.*)

EXECUTION (§ 168*)—STAY—AFFIDAVIT OF ILLEGALITY—DISMISSAL IN VACATION.

The court did not err in granting the interlocutory injunction prayed for.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 487, 490-496; Dec. Dig. § 168.*]

Error from Superior Court, Douglas County; Geo. L. Bell, Judge.

Action by T. R. Whitley and others against W. P. Kelly and others. From an interlocutory injunction granted to petitioners, defendants bring error. Affirmed.

Anderson, Felder, Rountree & Wilson, of Atlanta, and W. T. Roberts and J. R. Hutcheson, both of Douglasville, for plaintiffs in error. J. S. James and Scott & Davis, all of Atlanta, for defendants in error.

BECK, J. T. R. Whitley filed his petition in the superior court of Douglas county against W. P. Kelly, A. S. Baggett, sheriff, and Mrs. M. L. Duke, praying for an injunction to prevent the enforcement of a certain *fi. fa.* issued upon a judgment obtained by Kelly against Whitley in September, 1909, which judgment was based on a note given by Whitley to Mrs. M. L. Duke and indorsed by her to Kelly. This *fi. fa.* was levied on the 8th day of February, 1912; that levy was dismissed; and afterwards, on the same day, it was levied on other property as belonging to Whitley, who, on February 17, 1912, filed his affidavit of illegality. This affidavit was accepted by the sheriff, filed with the clerk, and entered upon the proper docket in the superior court, where the questions raised by

it stood for trial until the March term, 1912. On May 17, 1912, Hon. Price Edwards, judge of the superior court, passed the following order: "This case came up to be heard at the regular March term, 1912, of said superior court, and thereupon counsel for plaintiff in the *fi. fa.* moved to dismiss said affidavit of illegality, for the reason that none of the grounds set forth therein was valid, and constituted no reason why said execution and the proceedings thereon should not proceed, and after argument of counsel, and upon the request of counsel for said T. R. Whitley, defendant in execution, who desired to submit additional authorities, the further hearing of said case was postponed and the decision of the court reserved; and upon the consideration of the argument and authorities cited by counsel, and of the pleadings, and it appearing to the court that none of the grounds in said affidavit of illegality are meritorious are [or?] valid, it is thereupon ordered and adjudged by the court that said affidavit of illegality be and the same is hereby dismissed, and the sheriff of said county is directed to proceed with the collection of said *fi. fa.*"

The petition for injunction in the present case was heard by Hon. George L. Bell, judge of the superior court of Atlanta circuit, on May 2, 1912; he taking jurisdiction on the ground that Judge Edwards was disqualified on account of relationship to one of the parties. It is alleged in the petition that the order dismissing the illegality was granted at chambers; and on the hearing evidence was introduced to show that neither the defendant in *fi. fa.* nor his sole counsel knew of the granting of the order until the day upon which the petition for injunction was heard. The petition attacks the order dismissing the affidavit of illegality as being void, and prays that it be set aside and annulled. Notwithstanding the pendency of the affidavit of illegality, the sheriff proceeded to advertise the property levied upon for sale on the first Tuesday in May, 1912. On the 2d day of May Judge Bell granted a temporary order restraining the sheriff from proceeding to advertise and sell the property levied upon; and at the interlocutory hearing upon the petition at chambers, on July 30, 1912, he passed the following order: "The case coming on to be heard, after hearing the evidence and argument of counsel, and considering the same, it is ordered that the temporary injunction be and the same is hereby granted as prayed for, and the restraining order heretofore granted is continued until the further order of the court."

The court below did not err in granting the interlocutory injunction. We do not think that the sheriff should have been permitted to proceed with the sale of the property by virtue of the *fi. fa.* while an affidavit of illegality was still pending in the court,

undisposed of. The order of Judge Edwards, set forth above, dismissing the affidavit of illegality, was apparently granted in vacation. It does not appear that any order was taken fixing the time and place at which the judge would in vacation hear and dispose of this matter after giving the notice provided for in the Civil Code, § 4853. Nor was any order granted in term, reserving the right to render a judgment in vacation, under the provisions of section 4854. This being true, the judge was without jurisdiction to pass the order disposing of the affidavit of illegality in vacation, and the order dismissing it was void and of no effect.

Judgment affirmed. All the Justices concur.

BROCK et al. v. BROCK.

(Supreme Court of Georgia. Sept. 24, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 92*)—COMPETENCY—INTEREST—PROBATE OF WILL.

The propounder of a will, who is also named in the will as executor and as one of the legatees under the will, is not disqualified from testifying to the fact of the signing of the will by the testator in the presence of the subscribing witnesses.

(a) The interest of the witness in the case affects merely his credit, leaving the question as to what weight should be given the testimony of the witness for determination by the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 221; Dec. Dig. § 92.*]

2. WILLS (§ 293*)—PROBATE—EVIDENCE.

Where the subscribing witnesses to a propounded will testify that they cannot remember whether the testator signed the will in their presence, or even where one or more of the subscribing witnesses deny that the testator did sign in their presence, the fact that the will was duly signed in their presence may be shown by other competent testimony.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 666-672, 675-678; Dec. Dig. § 293.*]

3. WILLS (§ 324*)—PROBATE—INSTRUCTIONS—ISSUES.

Where an instrument was propounded for probate as a will, and a caveat was filed, setting up want of testamentary capacity and undue influence, and denying the factum of the will, and where upon the trial abundant evidence was introduced by the propounder to show the testamentary capacity of the maker, and no evidence at all was introduced by the caveators tending to conflict therewith, and there was nothing, either in the will itself or in the facts disclosed by the evidence, authorizing an inference of want of testamentary capacity, but the issue raised by conflicting evidence was confined solely to the question of the factum of the will, it will not require a new trial that the presiding judge, after charging fully as to the question upon which the conflicting evidence was introduced, charged the jury that the question of whether the testator was of sound mind and memory was not an issue in the case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767-770; Dec. Dig. § 324.*]

4. NEW TRIAL (§ 124*)—MOTION—SUFFICIENCY.

A motion for a new trial, which complains that the judge charged the jury on the subject of the impeachment of witnesses, without stating, at least in substance, the charge as given, raises no question for determination.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 250-253; Dec. Dig. § 124.*]

5. VERDICT SUSTAINED.

The evidence authorized the verdict.

Error from Superior Court, Banks County; S. P. Gilbert, Judge.

Hattie O. Brock offered for probate the will of Lila M. Brock, and a caveat was filed by C. H. Brock and another. From a judgment for the propounder, the caveators bring error. Affirmed.

W. W. Stark and W. A. Stevenson, both of Commerce, and A. J. Griffin, of Homer, for plaintiffs in error. J. J. Strickland, of Athens, and R. L. J. Smith & S. J. Smith, Jr., of Commerce, for defendant in error.

BECK, J. Hattie O. Brock offered for probate in solemn form the will of her sister, Lila M. Brock. The propounder was named in the will as executor, and was also a legatee under the will. A caveat was filed by C. H. Brock and Mrs. Stovall, containing several grounds, among them that the will was not duly executed, that the testator did not have sufficient mental capacity to execute a will, and that at the time of the execution of the will she was unduly influenced to make the will offered by the chief beneficiary under the provisions of the instrument. On the trial of the case in the superior court, the jury rendered a verdict in favor of the propounder, and the caveators made a motion for a new trial, which was overruled.

[1, 2] 1, 2. On the trial of the case all of the subscribing witnesses were called by the propounder and sworn. One of them testified that he did not remember whether the testator signed the will in the presence of the subscribing witnesses or not. The other two attesting witnesses denied that the testator signed the will in their presence. The propounder of the will was sworn as a witness in her own behalf, and testified positively that the testator did sign the will in the presence of the attesting witnesses. No objection was made to the introduction of the witness, nor is there any ground of the motion for a new trial based upon the contention that this evidence was improperly admitted; but counsel in his brief contends that the evidence of the propounder was illegal and had no probative value. We think otherwise. Her interest in the case may go to her credit, but it did not render her incompetent, nor did it entirely destroy the probative value of her testimony, the weight of which was a question for the jury. They had a right to believe her testi-

mony, and, believing it, to find that the testator did sign the will in the presence of the subscribing witnesses. Civil Code, § 5858; *Gillis v. Gillis*, 96 Ga. 1, 15, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121; *Buchanan v. Simpson Grocery Co.*, 105 Ga. 393, 31 S. E. 105; *Deupree v. Deupree*, 45 Ga. 415.

[3-5] 3-5. The rulings made in the third, fourth, and fifth headnotes require no elaboration.

Judgment affirmed. All the Justices concur.

**FARMERS' GINNEY & MFG. CO. v.
THRASHER et al.**

(Supreme Court of Georgia. Oct. 4, 1913.)

(Syllabus by the Court.)

1. WAREHOUSEMEN (§ 22*)—LOSS OF GOODS—LIABILITY—FAILURE TO INSURE.

Where a warehouseman for hire receives goods for storage, and under an express contract or custom of trade, is under duty to insure them against loss by fire, if he commits a breach of duty imposed by the express contract or custom of trade, and his customers are damaged thereby, he will be liable.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. § 17; Dec. Dig. § 22.*]

2. WAREHOUSEMEN (§ 22*) — INSURANCE — RIGHT TO PROCEEDS.

If the warehouseman insures goods for his customers, and collects money from the insurer for the loss of the goods, he will hold the fund so collected for the benefit of the insured customers, or those who may have succeeded to their rights, subject to legitimate charges.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. § 17; Dec. Dig. § 22.*]

3. WAREHOUSEMEN (§ 22*)—INJURY TO GOODS—DAMAGE BY FIRE.

If at the time of the fire there be on storage goods of customers, some of which are insured and others not, and some of them, though not destroyed, are damaged and rendered incapable of identification, and in such condition they are sold by the warehouseman, the fund thus derived from the sale of the salvage will be held by the warehouseman for the benefit of all the owners of the goods, whether they be included among the insured or uninsured class.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. § 17; Dec. Dig. § 22.*]

4. ACTION (§ 50*)—MULTIFARIOUSNESS—PARTIES PLAINTIFF.

Where two funds were raised in the manner indicated in the second and third headnotes, but were insufficient to cover the losses of all the parties at interest, an equitable suit at the instance of a number of the customers (of whom there was a large number), suing in behalf of themselves and others similarly situated, against the warehouseman for an accounting, was not subject to demurrer on the ground that it was multifarious, or that there was a misjoinder of parties plaintiff.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

5. WAREHOUSEMEN (§ 22*)—LIABILITY — INSUFFICIENCY OF INSURANCE.

If there were a breach of a duty to insure, by failure to insure for as much as the duty required, the warehouseman would be liable in

damages to the insuring customers to the extent of the deficiency of the insurance.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. § 17; Dec. Dig. § 22.*]

6. ACTION (§ 50*)—JOINDER OF ACTIONS.

As it would be necessary, in order to recover the amount of damages recoverable from a warehouseman by each customer for breach of the duty to him to insure, to take into consideration the amount apportionable to each under the accounting, equity will enjoin a suit for an accounting with all the suits for individual recoveries of damages, and beyond the amounts apportioned to each of the customers under such accounting.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

7. WAREHOUSEMEN (§ 34*)—LOSS OF GOODS—ACTIONS—PETITION—SPECIAL DEMURRER.

Where it appears from the allegations in the petition, in a suit of the character alleged in the preceding notes, that the insurance covered only a period of 30 days, and the date of storage of the goods was erroneous to overrule a special demurrer claiming that the petition failed to state several dates on which the goods were stored.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 71-85; Dec. Dig. § 34.*]

8. WAREHOUSEMEN (§ 34*)—LOSS OF GOODS—ACTIONS—PETITION—SUFFICIENCY.

In a suit of the character above stated, which was not founded on certain allegations by the warehouseman for the goods, time they were received on storage, and was not demurrable on the ground that it failed to set forth the receipt in form or substance.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 71-85; Dec. Dig. § 34.*]

9. WAREHOUSEMEN (§ 34*)—ACTIONS—PETITION—SUFFICIENCY.

In such an action against a warehouseman based on an alleged parcel contract for insurance on the goods, the petition was not subject to special demurrer on the ground that it failed to allege the name of the corporation who made the contract.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 71-85; Dec. Dig. § 34.*]

10. WAREHOUSEMEN (§ 34*)—PETITION—SUFFICIENCY.

There being no allegation that the warehouseman was insolvent, or had been guilty of a breach of duty relatively to the fund alleged to hold for the plaintiffs, or ceased to exercise its franchise or business, or that there was danger to the property, the petition did not allege grounds for the grant of injunction or appointment of a receiver.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 71-85; Dec. Dig. § 34.*]

Error from Superior Court, Troup County; Frank Park, Judge.

Suit by C. E. Thrasher and others against the Farmers' Ginney & Manufacturing Company. Judgment for the plaintiffs. Defendant brings error. Affirmed in part, reversed in part.

Perry, Foy & Monk, of Sylvestre, for plaintiffs; Lawson, of Abbeville, for plaintiff J. A. Comer, of Ashburn, and Crum of Cordele, for defendants in error.

ATKINSON, J. Judgment affirmed in part and reversed in part. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Index.

v. GEORGIA RY. & ELECTRIC CO.

rt of Georgia. Sept. 23, 1913.)

illabus by the Court.)

STREET RAILROADS (§ 98*)—INJURIES TO
—CONTRIBUTORY NEGLIGENCE—
—STATUTES.

action against a street railway common injuries, the court instructed the effect that if they believed from that the plaintiff's own negligence mate producing cause of his injury did not recover, and, further, that he was injured by his own negligence did not recover, and that "the law the plaintiff the duty of exercising to protect himself, and ordinary ed to him, means just that care prudent man would have exercised ne or similar circumstances, and exercise such care on his part ute negligence." These instructions were to be erroneous, because they the unqualified rule that if the injured by his own negligence he over, and required the plaintiff, qualified terms, to exercise ordinary care, whereas, as movant contends, the failure to exercise ordinary care would not entirely defeat the right to recover, unless such failure the defendant's negligence was the plaintiff, or should have been apprehended." The exceptions to this rule were not meritorious. Civil Code § 2781, declares that "no person damage from a railroad company himself or his property, where one by his consent, or is caused negligence." If the plaintiff's injury was caused by his own negligence, however, whether his negligence was negligent to negligence of the defendant.

For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. §

§ 141*) — INSTRUCTIONS —
—CONTRIBUTORY NEGLIGENCE.

The instruction excepted to was to the effect that the plaintiff could by the exercise of ordinary care have avoided the consequences of the defendant's negligence, if the plaintiff was negligent, there could be no recovery. The instruction was in effect the Civil Code 1910, § 4426, and was "in not limiting the plaintiff's recovery which would be a complete bar to a recovery which occurred after the defendant's negligence became apparent to the plaintiff should have been reasonably apprehended."

For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

STREET RAILROADS (§ 118*)—INJURIES TO
—CARE REQUIRED — DUTY TO
—LISTEN.

The court was also taken to the following effect: "The law declares that the prudent man is bound to do his duty upon a railroad (and that applies to street cars, as well as other railroads) that every prudent man would do under the circumstances; and if you believe that the defendant would look and listen, so as to avoid the consequences, consequences may have been avoided." This instruction was substantially the language used in Metropolitan

Street Railroad Co. v. Johnson, 90 Ga. 500 (5), 504, 16 S. E. 49, and was not subject to the criticism that it "measured the duty of the plaintiff to stop and listen by what was required of 'every prudent man,' without specifying the degree of prudence required; whereas, all the law requires * * * is the exercise of ordinary care or prudence."

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

4. CHARGE TO JURY—STATEMENT OF ISSUES.

The court in the charge to the jury fully and accurately stated the contentions of the plaintiff as set out in the petition.

5. STREET RAILROADS (§ 118*)—INJURIES TO
TRAVELERS — CONTRIBUTORY NEGLIGENCE
—AVOIDANCE.

A further instruction was to the effect that, if the plaintiff and the defendant company were both negligent, the plaintiff could recover if his negligence was not equal to or did not exceed the negligence of the defendant, and if he could not by the exercise of ordinary care have avoided the consequences to himself of the defendant's negligence, but that in such case the damages should be diminished in proportion to the amount of negligence attributable to the plaintiff. This instruction was not subject to the exception taken, which is similar to that dealt with in the first headnote.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

6. TRIAL (§ 236*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

After stating to the jury the language of Civil Code 1910, § 5732, for determining the credibility of witnesses, the following charge was given: "You should reconcile all the testimony of all the witnesses, so as to impute perjury to no one, where it can be done. If, however, there is testimony so irreconcilable that you cannot do this, it is your duty to give the greater weight—the most credit—to that witness or those witnesses whose testimony seems to you to be the most reasonable and credible." This instruction was not erroneous, because, as was contended, "the true rule is that in cases of irreconcilable conflict the question of reasonableness and credibility is not the only criterion, but there are other elements that ought to be taken into consideration by the jury, such as interest, opportunity, manner of testifying, and others; whereas, the court restricted them to one way alone of solving the question of credibility in cases of conflict." The charge of the Code section above cited covered all the circumstances to be considered in judging the credibility of witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.*]

7. VERDICT—EVIDENCE.

There was no contention that the verdict was not authorized by the evidence.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by G. W. Collum against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. R. Hammond, of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

ARLINGTON OIL & GUANO CO. v.
SWANN.

SWANN v. ARLINGTON OIL & GUANO
CO. (Nos. 4,882, 4,900.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. AGRICULTURE (§ 7*)—NOTE GIVEN FOR FERTILIZER—VALIDITY.

A promissory note for the purchase price of fertilizer, executed after Act Dec. 18, 1901 (Civ. Code 1910, § 1771 et seq.), went into effect, is not void merely because the tax tags required by law were not attached to the packages in which the fertilizer was contained.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

2. AGRICULTURE (§ 7*)—SALE OF INFERIOR FERTILIZER—DAMAGES.

Under Act Aug. 22, 1911 (Acts 1911, p. 172), if the actual value of the fertilizer sold falls more than 3 per cent. below the guaranteed commercial value, the seller can recover only the actual value of the fertilizer, and is liable to the purchaser in damages to the extent of 25 per cent. of the purchase price.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

3. AGRICULTURE (§ 7*)—NOTE GIVEN FOR FERTILIZER—VALIDITY.

The branding of the words "High Grade" upon a package of fertilizer which actually contains less than 1.65 per cent. nitrogen does not render an obligation given for the purchase price of the fertilizer entirely void. The remedy of the purchaser is to recover the damages prescribed by the act of 1911 (Acts 1911, p. 172), and to reduce the amount of the recovery to the actual value of the fertilizer, if it falls more than 3 per cent. below the guaranteed commercial value.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

4. AGRICULTURE (§ 7*)—SALE OF INFERIOR FERTILIZER—DAMAGES RECOVERABLE.

Where the purchaser of fertilizer executes a promissory note, in which the seller expressly declines to warrant the quality of the fertilizer, but only warrants that the laws of the state have been complied with, the purchaser cannot recover damages, other than those provided by the act of 1911 (Acts 1911, p. 172) because of the inferior quality of the fertilizer, and the consequent failure of his crops.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

5. AGRICULTURE (§ 7*)—SALE OF INFERIOR FERTILIZER—ACTION FOR PRICE—EVIDENCE.

A certified copy of the official analysis of a brand of fertilizer registered with the department of agriculture is admissible in evidence in any of the courts of this state, in any case where the question of the actual ingredients contained in the fertilizer is material. After a brand of fertilizer is registered with the department of agriculture, the grade cannot be lowered, and it is therefore to be presumed that all fertilizer of that brand sold after it is thus registered with the commissioner contains substantially the same ingredients; and a certified copy of an analysis of the brand so registered, made at any time by the state chemist, is admissible in evidence. It is not essential that it should appear that the analysis was made from a sample taken from the particular lot of fertilizer for the purchase price of which recovery is sought.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

6. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—RULINGS ON DEFENSES.

As the verdict indicates that it could not have been based upon any of the defenses which the court erroneously refused to strike, the judgment overruling the plaintiff's motion for a new trial will not be reversed. The defendant's motion for a new trial was properly overruled, under the principle announced in the first headnote.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by the Arlington Oil & Guano Company against J. W. Swann. Judgment for plaintiff, and both parties bring error. Affirmed.

Smith & Miller, of Edison, and Glessner & Park, of Blakely, for plaintiff in error. G. D. Oliver and Rambo & Wright, all of Blakely, for defendant in error.

POTTLE, J. The Arlington Oil & Guano Company sued Swann on two promissory notes, one for the principal sum of \$397.58, with interest at 8 per cent. per annum from October 1, 1912, and the other for \$840 principal, with interest at 8 per cent. per annum from October 1, 1912. There was no defense as to the smaller of the two notes. The consideration of the larger note was 400 sacks of 10-2-2 commercial fertilizer. It was recited in the note that "the said payee expressly refuses to make any warranty of the same or any representation as to its quality or value, leaving me to rely solely on the fact that the laws of this state have been complied with." The defendant by answer set up the following defenses: (1) That the fertilizer was in sacks of 200 pounds each, branded "Arlington High Grade Guaranteed Analysis Available Phosphoric Acid 10.00%, Nitrogen 1.65%, Potash 2.00%," with a guaranteed commercial value of \$21 per ton, at which price the same was sold to the defendant; that the fertilizer actually contained 10 per cent. phosphoric acid, 1.32 per cent. nitrogen, and 2.04 per cent. potash, determined by an official analysis made on or before the 1st day of March, 1913, by authority of the state of Georgia from samples taken by an inspector of the state; that the actual value of the fertilizer was \$19.78 per ton, or \$1.22 less than the guaranteed commercial value, and more than 3 per cent. below such value, and for this reason the consideration of the note has failed to, the extent of the difference between the guaranteed commercial value and the actual commercial value of the fertilizer. (2) That on account of the difference as above set forth between the guaranteed commercial value and the actual commercial value of the fertilizer, the plaintiff is liable to the defendant, in addition to the difference between the two values, in the sum of \$5.25 per ton, as a penalty in accordance with the

provisions of section 2 of the act of the General Assembly, approved, August 22, 1911 (Laws 1911, p. 172). (3) That the note sued on is void, because the sacks did not have marked or branded thereon the sources and the ingredients from which the available phosphoric acid and nitrogen and potash were generated and obtained. (4) That the note sued on is void and uncollectible, because 150 of the sacks of fertilizer were not tagged with tax tags as the law provides. (5) That the note sued on is uncollectible because the words "High Grade" were branded upon each of the sacks, when the same was not a complete fertilizer, as indicated by the guaranteed analysis branded upon said sacks as hereinbefore set forth. (6) That the fertilizer was inferior in quality, and, by reason of the deficiency in the value of the crops which the defendant made below those which he would have made had the fertilizer been as guaranteed, he has been damaged in the sum of \$3,000, for which sum he prays judgment against the plaintiff.

The plaintiff demurred to the answer upon the following grounds: (1) That no meritorious defense is set forth; (2) that the defendant seeks to claim double damages by way of penalty, and also damages by reason of the fact that the commercial value of the fertilizer was more than 3 per cent. below the guaranteed value; (3) that the allegation in reference to the actual percentage of nitrogen which the fertilizer contained as determined by an official analysis is a bare conclusion of the pleader, there being no facts set forth to show that the analysis was such as by law had any binding force or effect upon the plaintiff; (4) that the defense that the plaintiff failed to brand on the sacks the sources from which the ingredients of the fertilizer were taken is not good in law; (5) that the paragraph of the answer which avers that some of the sacks of fertilizer were not tagged set forth no valid defense; (6) that the paragraph in the answer averring that the note was void because the words "High Grade" were branded upon the sacks set forth no valid defense; and (7) that the paragraphs of the answer claiming damages by reason of a deficiency in the crops set forth no defense, and, if valid as a defense at all, the defendant should be required to elect whether he will recover the penalty prescribed by the act of August 22, 1911, or actual damages. The trial judge sustained the ground raising the point that the plaintiff was not required to mark upon the sacks the sources and ingredients from which the acid, potash, and nitrogen were generated and obtained, and overruled all of the other grounds of the demurrer. To this ruling the plaintiff excepted *pendente lite*. The trial resulted in a verdict in favor of the plaintiff for \$978 principal, \$33.64 interest, and \$98.19 attorney's fees. The plaintiff and the defendant each filed a motion for a new

trial, and both motions were overruled. Each excepted. The plaintiff assigns error upon the overruling of its demurrer to the defendant's answer, and upon the overruling of its motion for a new trial, and the defendant complains of the overruling of his motion for a new trial, which was based solely upon the ground that a verdict in his favor was demanded, because the undisputed evidence showed that some of the fertilizer had not been tagged as required by law.

[1] 1. We have already held that a note given for fertilizer is not void merely because the tax tags were not attached to the packages containing the fertilizer. *Hillis v. Comer*, 13 Ga. App. —, 78 S. E. 1107. That decision was based upon the construction of the act of December 18, 1901 (Civil Code, § 1771 et seq.). The decision in *Zipperer v. Doyle*, 124 Ga. 895, 53 S. E. 505, holding that no recovery could be had for the purchase price of fertilizer which was not tagged as required by law, dealt with a sale made prior to the date upon which the act of 1901 went into effect. Under the law as it stood prior to the passage of that act, an obligation for the purchase price of fertilizer could not be collected if it appeared that the fertilizer had not been tagged as required by law. This is not true, however, under the act of 1901, nor is there anything in the act of August 22, 1911 (Acts 1911, p. 172), rendering uncollectible an obligation for fertilizer merely because it has not been tagged as required by law.

[2] 2. By the Civil Code, § 1774, it is provided that, if the commercial value of fertilizer shall fall 3 per cent. below the guaranteed total commercial value of the fertilizer, any note or obligation given in payment therefor would be collectible by law only for the amount of actual total value as ascertained by an official analysis of the fertilizer made by the department of agriculture. By section 2 of the act of August 22, 1911, it is provided that, if the actual value of the fertilizer fall more than 3 per cent. below the guaranteed commercial value, the vendor shall be liable in damages to the purchaser in the sum of 25 per cent. of the purchase price, plus the shortage of such commercial fertilizer. It is thus expressly declared that the purchaser may both recover the penalty and set off the difference between the actual value and the guaranteed value, if such difference is more than 3 per cent.

[3] 3. Section 1775 of the Civil Code provides that "the words 'High Grade' shall not appear upon any bag or other package of any complete fertilizer which complete fertilizer contains by its guaranteed analysis less than 10 per cent. available phosphoric acid, 1.65 per cent. nitrogen, * * * or a grade or analysis of equal total commercial value." Section 643 of the Penal Code makes it a misdemeanor to sell any fertilizer with-

out having complied with the provisions of law as to inspection, analysis, and sale of the fertilizer. This section seems to be broad enough to include a false brand of the words "high grade" upon a fertilizer which contains less than 10 per cent. of available phosphoric acid and 1.65 per cent. nitrogen, or a grade not of equal total commercial value. Sections 3 and 4 of the act of 1911 provide that, if there shall be a deficiency of more than 10 per cent. below the guaranteed analysis of the fertilizer as published and branded on the sacks or packages, the vendor so publishing the analysis and the fertilizer shall be liable to the purchaser in the sum of 25 per cent. of the purchase price, plus the shortage of the fertilizer. While the section of the Penal Code above referred to makes it a misdemeanor to violate any of the laws in reference to the analysis, sale, and inspection of fertilizer, yet, in construing this section in connection with the existing laws upon the subject of inspection, analysis, and sale of fertilizer, we do not think that the mere fact that the words "High Grade" were branded upon a package of fertilizer which contained less than 1.65 per cent. nitrogen renders an obligation given for the purchase price of the fertilizer entirely void. Under the act of 1901, a deficiency of less than 3 per cent. was regarded as immaterial, and as not affecting the right of the seller to recover the full amount of the purchase price. It has always been illegal for the seller of fertilizer to brand upon the package an analysis showing a value more than 3 per cent. above the actual value of the fertilizer. But in such a case the remedy of the purchaser is not to defeat collection of the entire purchase price, but simply to reduce it to an amount which would represent the difference between the guaranteed value and the actual value of the fertilizer. The act of 1911 gives an additional remedy, to wit, the collection of a penalty from the seller. Under that act, if any fertilizer shall prove deficient in any of its ingredients as guaranteed or branded thereon, and if, by reason of such deficiency, the commercial value of the fertilizer shall fall 3 per cent. below the guaranteed value, then the vendor is liable in damages to the purchaser in the sum of 25 per cent. of the purchase price, plus the shortage, and, if the vendor brand a false or incorrect analysis on the fertilizer, and there is a deficiency of more than 10 per cent. below the guaranteed analysis thus branded, he is liable to the purchaser in the sum of 25 per cent. of the purchase price plus the shortage. Where there has been a false branding, and where the fertilizer sold proves deficient, the remedy of the purchaser is to recover the damages provided for by the act of 1911, plus the difference between the actual commercial value and the guaranteed commercial value of the fertilizer. We do not think the mere marking of the words "High Grade" on a package of

fertilizer which contains less than 1.65 per cent. nitrogen would have the effect to defeat the collection of the entire purchase price. Taking all of the provisions of law upon the subject together, the remedy of the purchaser is simply to reduce the amount of recovery as provided for in the Code and the act of 1911.

[4] 4. The defendant accepted the fertilizer upon the express stipulation in the note that the payee refused to make any warranty or representation as to quality of the fertilizer, but left the purchaser to rely solely upon the fact that the laws of the state had been complied with. If, therefore, the seller had complied with all of the laws in reference to the analysis, inspection, and sale of the fertilizer, the purchaser could not defend upon the ground that the fertilizer was deficient in quality, and that he had been damaged by reason of the fact that his crops were poor. If the seller complied with the laws, then the purchaser got what he bought, that is, a fertilizer which had been sold after compliance with all the laws of the state by the seller. The seller expressly declined to warrant the quality of the fertilizer. The purchaser accepted the limited warranty. He is bound by his contract, and the only defenses available to him, in the absence of fraud, are that the seller failed to comply with some of the laws of the state, and that for this reason the purchaser has been damaged. *Jackson v. Langston*, 61 Ga. 392; *Allen v. Young*, 62 Ga. 617; *Patterson v. Ramspeck*, 81 Ga. 808, 10 S. E. 390; *Pryor v. Ludden & Bates*, 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267. The measure of the purchaser's damages is fixed by law, and is limited to a recovery of the difference between the guaranteed commercial value of the fertilizer and the actual commercial value, together with the penalty prescribed by the act of 1911. This being true, it is unnecessary to determine whether, if there had been no such stipulation in the note limiting the warranty, the defendant might have recovered the penalty and also damages for a breach of the implied warranty.

[5] 5. Error is assigned upon the admission in evidence of a certified copy, from the office of the commissioner of agriculture, of what purported to be an official analysis made by the state chemist of certain fertilizer. Upon the face of this document it appeared that the Arlington Oil & Guano Company had registered with the commissioner of agriculture during the season of 1911 and 1912 a brand of fertilizer known as the "Arlington High Grade," with a guaranteed analysis of available phosphoric acid of 10 per cent., nitrogen 1.65 per cent., and potash 2 per cent.; that upon the analysis made by the state chemist the brand thus registered actually contained 10 per cent. phosphoric acid, 1.65 per cent. nitrogen, and 2.04 per cent. potash; that the guaranteed commer-

as \$17.37, and the actual value, the state chemist, was \$16.15. Provides that all persons desiring fertilizer in this state must file with the donor of agriculture the name and of fertilizer and the guaranties thereof, and before offering for sale must brand on each package the analysis of the fertilizer. The analysis thus fixed by the state shall remain uniform throughout the state for which it is registered, and shall not be lowered, though the analysis of the constituents may be such that the decrease of one may be offset in value by the increase in another. Such change, however, to receive the approval of the commissioner of agriculture. Civil Code, §§ 1771, 1772, 1777. The brand of fertilizer thus registered and analyzed by the state chemist, and an official analysis on file in the department of agriculture is admissible in any of the courts of this state on an issue involving the merits of fertilizer. Civil Code, § 1773. The objection made by the defendant to the certified copy of the analysis does not appear to have been sustained. If any fertilizer sold to the defendant does not understand the law to require an official analysis made by the state chemist is admissible in evidence, we fear that some of the particular fertilizer sold to a purchaser has been drawn, sent to the department of agriculture and analyzed by the state chemist. The fertilizer sold under the same brand is presumed to contain substantially the same ingredients in the same proportions. It is forbidden by law to change the grade after the registration of the particular fertilizer. When, therefore, a fertilizer is registered with the commissioner of agriculture the brand of fertilizer is the "Arlington High Grade," the presumption is that all of the fertilizer of that brand contains substantially the same

elements offered in evidence shows that it contains an analysis, made by the state chemist, of the brand of fertilizer known as the "Arlington High Grade" manufactured and sold by the Arlington Oil & Guano Company. It is immaterial at what time this analysis was made, or of what particular package or lot of fertilizer the sample from which the analysis was taken. All that the law requires is that there should be an official analysis of the fertilizer put on the market. The analysis, made by the state chemist, is sufficient after the brand was registered with the department of agriculture. The law does not presume that the seller has changed the law by changing the constituent

elements of fertilizer after the brand has been registered, but will indulge the contrary presumption that no such change has been made, and that the fertilizer sold to the defendant actually contained the same constituent elements as did the fertilizer analyzed by the state chemist. Of course, as suggested by counsel for the fertilizer company, it would be quite an easy matter for every purchaser of fertilizer to withdraw a sample, and have it analyzed by the state chemist, and retain the analysis for use at any time it might become material to his interest. But we do not understand that the law places this burden on a purchaser of fertilizer. He has a right to assume that the seller has complied with the laws, and that the guaranteed analysis as branded upon the package is substantially the same as would appear from an actual analysis of the fertilizer. The official analysis made by the state chemist of any of the fertilizer at any time, which is of record in the department of agriculture, is available to any person who may desire to use it, and a certified copy of such analysis is admissible in any of the courts of this state when it becomes material to determine the actual ingredients contained in the fertilizer. Any other rule would entirely destroy the right of the purchaser to plead and prove the deficiency, if he had failed to withdraw from the particular lot sold to him a sample for the purpose of analysis by the state chemist. And we do not think the law was designed to have this effect. There is no law which prohibits a seller or manufacturer of fertilizer from raising the grade after it has been registered with the commissioner of agriculture. So that, if in a particular case the seller could show that, since the analysis relied on by the purchaser was made, the grade of the fertilizer had been raised, and the fertilizer actually sold to the purchaser did contain ingredients which were equal to those contained in the guaranteed analysis, this would be a complete reply to the official analysis made by the state chemist. There was no attempt, however, in the present case to meet the evidence of the constituent elements of the fertilizer as shown by the official analysis, and, in the absence of something to impeach its correctness, it would be conclusive upon the parties.

[6] 6. While, under our view of the law, the trial judge erred in not striking certain portions of the answer, the verdict indicates that it could not have been based upon any portions of the answer which should have been stricken, and one of the principal errors made by the court was corrected by overruling the defendant's motion for a new trial. For these reasons, the judgments overruling both motions for a new trial will be affirmed.

Judgment in both cases affirmed.

OCILLA SOUTHERN R. CO. v. MORTON.
(No. 4,888.)

(Court of Appeals of Georgia. Aug. 25, 1913.
Rehearing Denied Oct. 3, 1913.)

(*Syllabus by the Court.*)

1. BILLS AND NOTES (§ 123*)—DRAFT EXECUTED BY PRESIDENT—LIABILITY OF CORPORATION.

Recovery may be had against a railway company upon an obligation signed merely by one describing himself as "president," upon proof that both parties to the contract understood that it was the obligation of the railway company, and that the company received the consideration furnished by the other party, and either authorized the execution of the contract in its behalf or ratified it thereafter.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 260-267, 393; Dec. Dig. § 123.*]

2. CORPORATIONS (§ 426*)—CONTRACT OF PRESIDENT—RATIFICATION.

The president of a corporation has no authority, by virtue of his office alone, to contract in its behalf. But knowledge of the president is imputable to the corporation. If, therefore, the president, without authority, execute in behalf of the corporation a contract, and the corporation retain and use the consideration furnished by the other party, it cannot repudiate the contract. The principal cannot ratify so much of an unauthorized contract as operates in his favor and repudiate the obligation assumed in its behalf by the person claiming to act as its agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.*]

3. DENIAL OF CERTIORARI.

No material error was committed by the city court, and the judge of the superior court did not err in refusing to sanction the certiorari.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by J. G. Morton against the Ocilla Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. D. Lovett, of Nashville, Elkins & Wall, of Fitzgerald, and H. J. Quincey, of Ocilla, for plaintiff in error. Hendricks & Christian, of Nashville, for defendant in error.

POTTLE, J. Morton sued the Ocilla Southern Railroad Company upon a draft of which the following is a copy: "Nashville, Ga., March 22, 1912. After ten days pay to the order of Hendricks & Christian, in trust for J. G. Morton, (\$500.00) five hundred dollars. Value received. Charge to account of J. A. J. Henderson, President. To First National Bank, Ocilla, Ga." At the bottom of the draft was the following notation: "Arbitration as to consideration of this check to be had in ten days." The draft was, before suit, delivered to Morton by Hendricks & Christian, the trustees. The petition as amended made substantially the following allegations: The draft sued on is the obligation of the defendant railway company, being executed by its president, Henderson. The consideration for the draft was a right of way for

the railroad company through and adjacent to lands of plaintiff's wife, for whom he was agent in the transaction. Henderson, the president of defendant company, had exclusive control of securing rights of way for the company, and by the execution and delivery of the draft it was enabled to and did construct its road through the property of plaintiff's wife, by means of which the company was enabled to complete its railway line into Nashville. After giving said draft the company, with full knowledge thereof, built its line through the property of plaintiff's wife, and thereby ratified the contract made by its president, and it continues to ratify said contract by using the line of railway. The stipulation in the draft, for arbitration, was intended by the parties to mean that an arbitration in reference to the amount to be paid by the company should be had within 10 days. Plaintiff selected his arbitrator within due time, and the defendant neglected and refused to arbitrate. The draft was duly presented to the drawee bank and to Henderson, and payment refused by both. Henderson, in giving the draft, and Morton and his wife, in receiving it, knew and believed that it was the obligation of the defendant railway company. Demurrers to the petition as amended were overruled. At the conclusion of the evidence the court directed a verdict for the plaintiff. The defendant applied for a certiorari and the sanction of the petition was refused.

[1] 1. The main insistence of the plaintiff in error is that the draft sued on was the individual obligation of Henderson, the addition of the word "president" being merely descriptive of the person, and that no suit upon the draft can be maintained against the defendant railroad company. Where one executes a contract, it is presumed to be his individual undertaking, even though he may add after his signature such a word of description as "agent," or "president," or "administrator," and the like. Civil Code, § 3570. An obligation so signed is presumptively the individual undertaking of the person signing, and it has been held that, when sued upon it as an individual, he is estopped to deny that it is his individual undertaking, if there is nothing in the writing to indicate that he was contracting in behalf of another. *Graham v. Campbell*, 56 Ga. 262. But it does not follow that, if the individual executing the instrument in fact and within the knowledge of the other party did so in behalf of another, the real party may not be sued upon proof of these facts. The general rule and the qualification thereto are thus stated in *Burkhalter v. Perry Brown*, 127 Ga. 438, 56 S. E. 631, 119 Am. St. Rep. 343: "If an agent make a note in his own name, and add to his signature the word 'agent,' and there is nothing on the note to indicate who is the principal, the word 'agent' will be treated as

descriptio personæ, and he will be liable just as if the word 'agent' was not added. As a general rule, where a negotiable instrument is executed by an agent, with no indication on the face of the instrument who the principal is, the principal will not be liable thereon, although the agent, in executing the instrument, add the word 'agent' to his signature." In the opinion the law is thus stated: "A well-recognized exception to the general rule stated springs from the law merchant. Where a negotiable instrument is executed by an agent, without sufficiently indicating on its face who the principal is, parol evidence cannot be introduced to charge the principal, although he executed the instrument as agent and added the word 'agent' to his signature. This exception to the rule is based upon the reason that 'each party who takes a negotiable instrument makes his contract with the parties who appear on its face to be bound for its payment. It is a "courier without luggage," whose countenance is its passport; and in suits upon negotiable instruments no evidence is admissible to charge any person as a principal thereto, unless his name in some way is disclosed upon the instrument itself.' 1 Clark & Skyles on Agency, 328a; 1 Daniel, Neg. Inst. § 303. But this exception in favor of negotiable instruments itself contains an exception; and that is, as between the immediate parties to a bill or note, it may be shown by parol that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and not of the agent, and that it was given and accepted as such. *Metcalf v. Williams* [104 U. S. 93, 26 L. Ed. 665]; *Mechem on Agency*, § 443." This decision is decisive of the controlling question in the case. It is averred in the petition that in making the draft Henderson was acting for his principal, the defendant railroad company, that the draft was not his individual obligation, that all parties at interest so understood it, and that the railroad company, and not Henderson, received the consideration furnished by the payee in return for the execution of the draft. These allegations bring the case squarely within the decision above cited.

[2] 2. It is claimed, however, that it does not appear that Henderson had authority to contract in behalf of the defendant corporation. The president of a corporation has not, by virtue of his office alone, power to contract in its behalf. His presumptive authority extends only to presiding and voting as a director. *Minnesota Lumber Co. v. Hobb*, 122 Ga. 20, 24, 49 S. E. 783; *Swindell v. Bainbridge Bank*, 3 Ga. App. 365, 370, 60 S. E. 13; *Great Southern Accident Co. v. Guthrie*, 79 S. E. 162. The petition alleges, however, that Henderson, as president, was by the corporation, given exclusive control over the matter of obtaining rights of way for the railroad

company, and that, by building the line through the property of plaintiff's wife, it ratified the contract of sale. It is insisted, however, that the proof does not show that authority was conferred upon Henderson to contract with plaintiff. Even if this be true, the evidence does show ratification of the contract. Ratification must of course be with knowledge of the facts; but the knowledge of the president Henderson was imputable to the company. *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92; *Diamond Power Co. v. City of West Point*, 11 Ga. App. 533, 75 S. E. 908. The company was chargeable with knowledge that it had no right to take or damage the property of the plaintiff's wife without first paying just compensation. Hence it must have known that permission to use the property had been acquired, and it was bound to inquire into the terms and conditions upon which the permission had been granted. It could not, by using the property, ratify the act of Henderson in acquiring it, and then repudiate his promise to pay for its use. The defendant did not deny that Henderson was its president, and there was enough evidence to justify the inference that he was. The deeds objected to were not an essential part of the plaintiff's case, but their admission did the defendant no harm.

[3] There was no material error committed by the city court, and the judge of the superior court did not err in refusing to sanction the petition for certiorari.

Judgment affirmed.

GRANTHAM v. LANCE. (No. 4,666.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. POSSESSORY WARRANT (§ 2*)—PROPERTY IN HANDS OF AGENT.

Where personal property has been left by the owner with an agent, to be kept by the latter until called for, and the agent refuses to deliver it on demand, a possessory warrant will lie for its recovery. *Meredith v. Knott*, 34 Ga. 222; *Sheriff v. Thompson*, 116 Ga. 436, 42 S. E. 738; *Allen v. Wheeler*, 121 Ga. 277, 48 S. E. 923. In such a case the general rule that the possession must have been acquired either violently or fraudulently does not apply.

[Ed. Note.—For other cases, see Possessory Warrant, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. POSSESSORY WARRANT (§ 3*)—LAWFUL POSSESSION BY DEFENDANT—PRESUMPTIONS.

Under the evidence it did not appear that the defendant in the possessory warrant had been in peaceable possession of the property in question, in his own right, for four years prior to the suing out of the warrant; and the dismissal of the warrant would not have been authorized upon the theory that the defendant's possession must be presumed to be lawful. It appeared without dispute, from the allegations of the petition for certiorari, that it had not been as much as two years since the plaintiff in the possessory warrant had the right to demand

the return of the deed. *New v. Le Hardy*, 46 Ga. 616; *McLeod v. Bozeman*, 26 Ga. 177.

[Ed. Note.—For other cases, see Possessory Warrant, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. ERRONEOUS RULING.

The court erred in refusing to sanction the certiorari.

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Possessory warrant by W. M. Grantham against C. W. Lance. Warrant dismissed, and plaintiff brings error. Reversed.

Thos. A. Brown and Samuel Allen, both of Blue Ridge, for plaintiff in error. Wm. Butt, of Blue Ridge, for defendant in error.

RUSSELL, J. Judgment reversed.

ALEXANDER v. PATTERSON. (No. 4,993.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

SALES (§ 472*)—CONDITIONAL SALES—OPERATION AS TO THIRD PERSONS.

A contract of conditional sale, which is in writing and duly attested, and recorded within 30 days from the date of the delivery of the property, becomes effective as against third persons from the date of the delivery of the property, even though the date of the execution of the contract does not appear therein. Civil Code 1910, §§ 3318, 3319; *Tremere v. Barfield*, 12 Ga. App. 774, 78 S. E. 729; *Bond v. Brewer*, 96 Ga. 443, 23 S. E. 421; *Rowe v. Spencer*, 140 Ga. 540, 79 S. E. 144.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*]

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action between Base Alexander and C. L. Patterson. There was a judgment for the latter, and the former brings error. Affirmed.

Glessner & Park, of Blakely, for plaintiff in error. Rambo & Wright, of Blakely, for defendant in error.

HILL, C. J. Judgment affirmed.

TYLER & TOMLINSON v. ARNETT.

(No. 5,031.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 154*)—SERVICE OF RULE NISI—DISMISSAL OF MOTION.

A rule nisi was granted on a motion for a new trial, and ordered served, and the motion set to be heard at the next regular term of the court; and when it was duly called at that time it appeared that the rule nisi had not been served, nor service waived, and no excuse for failure to serve was shown. Held, that the judge did not abuse his discretion in dismissing the motion, for want of service. *McMullen v. Citizens' Bank*, 123 Ga. 400, 51 S. E. 342; *Smedley v. Williams*, 112 Ga. 114, 37 S. E.

111; *Connor v. State*, 7 Ga. App. 482.

[Ed. Note.—For other cases, see Cent. Dig. §§ 312, 313; Dec. Dig. § 154.*]

2. NEW TRIAL (§ 156*)—MOTION FOR TRIAL—FAILURE TO SERVE RULE NISI.

Where, in the case stated, the court to continue the hearing on a motion for a new trial, in order that service of the rule nisi might be perfected, and no reason was then shown for the failure to perfect service of the rule nisi as previously ordered, and the court signed why the continuance should be granted, except for the purpose of perfecting service of the rule nisi, the trial judge did not err in refusing to grant a motion for a continuance.

[Ed. Note.—For other cases, see Cent. Dig. § 316; Dec. Dig. § 156.*]

Error from City Court of Blakely; Sheffield, Judge.

Action between Tyler & Tomlinson and J. B. Arnett. A motion for new trial was dismissed, and Tyler & Tomlinson brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. A. H. Gray, of Blakely, for defendant in error.

HILL, C. J. Judgment affirmed.

COLUMBIAN NAT. LIFE INSURANCE CO. v. MULKEY.

(No. 4,998.)

(Court of Appeals of Georgia. Affirmed. Rehearing Denied Sept. 16, 1914. Motion for Rehearing Denied Oct. 7, 1914.)

(Syllabus by the Court.)

INSURANCE (§ 349*)—FORFEITURE OF POLICY—NONPAYMENT OF PREMIUM NOTE.

"The failure to pay a premium note in payment of an insurance policy is stipulated in the note that the policy will be void if the same at maturity will avoid the policy, where the condition in the policy itself providing for the nonpayment of notes. Such a condition as to forfeiture for nonpayment of a note given for the policy is contained only in the note, the maturity of the note is not paid at maturity itself avoid the policy. Such a condition subsequent, of which the policy must avail itself by clear and unequivocal action. The decision in *Arnold v. Empire Life Co.*, 3 Ga. App. 685, 60 S. E. 477, is controlling. There is no conflict between the decision in that case and the decision of the Court in *Stephenson v. Empire Life Insurance Co.*, 139 Ga. 82, 76 S. E. 82. In the *Stephenson* case the provision relating to forfeiture for nonpayment of premium was contained in the policy itself, in the instant case it was in the premium note. The instant case the condition was not in the policy contract, but only in the note, and is therefore within the ruling in *Case*. *Joyce on Insurance*, § 121; *Insurance*, § 349e.

[Ed. Note.—For other cases, see Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. § 349.*]

Error from City Court of Atlanta; Reid, Judge.

Action by Janie Mulkey against

ational Life Insurance Company.
for plaintiff, and defendant brings
rmed.

& Latimer, of Atlanta, for plain-
tiff. Anderson & Rountree and Hor-
t Burress, all of Atlanta, for de-
fendant.

J. Judgment affirmed.

GASKINS v. GASKINS et al.

GASKINS et al. v. GASKINS.

(Nos. 4,979, 5,014.)

Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

AND CONVERSION (§ 13*)—NATURE
OF—RECOVERY OF WRITTEN INSTRU-

ment did not err in sustaining the
and dismissing the plaintiff's action.
Trover will not lie to recover pos-
session executed to a defendant, or of
the notes and certificates of deposit
of the defendant, upon the ground that
the notes were improperly taken in the
hand of the defendant, when they should have
been delivered to the plaintiff. The present ac-
tion sought to recover an apparent muni-
cipal note of the defendant, two certain
notes payable to her, and a time
deposit issued to her, and in none
of them did the name of the plaintiff
appear. Furthermore, under the allegations of
the case, the case was one in which affirma-
tive relief would have been required,
and the plaintiff's remedy, if any, lay in a pro-
cess to which all persons interest-
ed were parties.

—For other cases, see Trover and
Cent. Dig. §§ 103-106; Dec. Dig.

ALL DISMISSED.

Decision upon the main bill of excep-
tion controlling, the cross-bill is dis-

al Syllabus by Editorial Staff.)

(§ 189*)—CITY COURT OF NASH-
VILLE—EQUITABLE JURISDICTION.

Action of trover in the city court of
Nashville, in an amendment changing the action
from trover to equitable relief is not permis-
sible, such court is without equitable juris-

—For other cases, see Courts, Cent.
Dig. §§ 412, 413, 429, 458; Dec. Dig. §

from City Court of Nashville; C.
ent. Dig. § 412, 413, 429, 458; Dec. Dig. §

J. B. Gaskins against Docia Gas-
kins. Another. There was a judgment
in the action, and plaintiff brings
error, and cross-bill of exceptions

Chastain & Gaskins, of Nashville,
in error. E. K. Wilcox, of Val-
dosta, for defendants in error.

L. J. B. Gaskins brought an
action of trover against Docia Gaskins

and W. T. Rigell, Sr., to recover possession
of a deed to a certain house and lot in the
town of Ray's Mill, two notes of \$500 each,
executed by one W. D. Lee, and a certificate
of deposit for \$1,380, issued by the Bank of
Milltown. The action was dismissed upon
demurrer, and to this judgment exception is
taken in the main bill of exceptions. Prior
to the judgment of dismissal the trial judge
allowed an amendment to the petition for
bail, and the allowance of this amendment is
the subject of a cross-bill of exceptions.

[1] In the original affidavit of the plaintiff
the property sought to be recovered was de-
scribed as "one warranty deed conveying one
house and lot in the town of Ray's Mill,
* * * taken by Docia Gaskins and W. T.
Rigell, Sr., his [the plaintiff's] money having
paid for said property; also two notes for
\$500 each, signed by W. D. Lee, which notes
had been taken payable to Docia Gaskins to
defraud J. B. Gaskins out of his land and
money, the same being part of the purchase
money of 100 acres of land sold by said J. B.
Gaskins to said W. D. Lee;" and also a cer-
tificate of time deposit issued by the Bank of
Milltown for \$1,380 to Docia Gaskins, or to
W. T. Rigell, Sr., for money which belonged
to J. B. Gaskins. In the amendment the peti-
tioner set forth at length the transaction by
means of which the defendants came into
possession of \$3,000 as the purchase price
of the tract of land, which it was alleged the
plaintiff had authorized them to sell to W.
D. Lee; and it was averred that the house
and lot at Ray's Mill, which should have
been conveyed to J. B. Gaskins, represented
a portion of the \$3,000, the \$1,000 in notes
another portion, and the remainder had been
deposited as evidenced by the certificate of
deposit.

It is very apparent, if the allegations of
the amendment to the petition are true, that the
plaintiff is the victim of misplaced confidence,
and is entitled to recover the proceeds of
the sale made by his agents, which they have
converted to their own use. But the descrip-
tion of the \$2,000 in cash is insufficient to
supply that certainty of identification which
in an action of trover is essential to a sei-
zure. The money is not otherwise described
than as "\$2,000 in cash." In *McElhannon*
v. Farmers' Warehouse & Commission Co.,
95 Ga. 670, 22 S. E. 686, the money in ques-
tion was described as "\$3,500 lawful money
of the United States," and this description
was held to be too vague and indefinite.
There was some reference in the *McElhan-*
non Case to the fact that bond had been given,
as a bond has been given in the present
case, and this is adverted to by counsel for
plaintiff in error; but as was well said by
Justice Lumpkin (referring to the *McElhan-*
non Case, *supra*), in *Harper v. Jeffers*, 139
Ga. 761, 78 S. E. 174: "Now, does the fact

of the giving or not giving of a bond appear [on demurrer to the sufficiency of the allegations of the petition], unless alleged in the petition?" That there is no pertinency in the fact that bond may have been given by the defendant in trover is settled by the ruling of the Supreme Court in *Cooke v. Bryant*, 103 Ga. 727, 730, 731, 30 S. E. 435, as well as in *Harper v. Jeffers*, supra. We think the lower court could properly have held that the description of the money in the amendment was insufficient.

[2, 3] In the view we entertain of this case, however, it is not necessary to rule upon the question of the propriety of the amendment raised by the cross-bill of exceptions. Whether the amendment was correctly allowed or not, the allowance of the amendment had the effect of transforming the action to a proceeding equitable in its nature, and one which requires affirmative relief. The city court of Nashville was without jurisdiction for such a proceeding. However, the plain defect which authorized the dismissal of the action upon general demurrer, either before or after the allowance of the amendment, was the fact that the plaintiff himself shows that the title to the papers which he seeks to recover is in the defendant. Even if he could recover the deed, the notes, and the certificate of deposit, he would be in no better position than before. The deed does not convey title to him, but conveys title to Docia Gaskins. Upon it he could not recover possession of the land, and, indeed, the petition alleges that he himself is in possession of the lot at Ray's Mill. The plaintiff could not recover upon notes payable to Docia Gaskins, nor collect from the bank upon a certificate of deposit issued to Docia Gaskins and W. T. Rigell. There is no question that trover will lie to recover deeds. *Gay v. Warren*, 115 Ga. 734, 42 S. E. 86, 90 Am. St. Rep. 151. And it may be used as a proper proceeding to recover possession of promissory notes. *Rushin v. Tharpe*, 88 Ga. 779, 15 S. E. 830; *Fisher v. Jones*, 108 Ga. 490, 34 S. E. 172. It may also be used to recover a bond with interest coupons attached. *Bank v. Trustees*, 62 Ga. 271; *Hoyle v. Jones*, 35 Ga. 40, 89 Am. Dec. 273; *Nutting v. Thomasson*, 57 Ga. 418. Under these decisions we doubt not that Gaskins could by trover have recovered the notes mentioned in the present case, if they had been payable to Docia Gaskins or bearer; but according to the record they were payable to Docia Gaskins, and would not be negotiable without her indorsement. Nor could he recover the certificate of deposit. If any of the writings mentioned in the present suit should be canceled or reformed, this phase of the case would be properly cognizable only in a court of equity.

Judgment upon the main bill of exceptions affirmed. Cross-bill of exceptions dismissed.

COX v. MANNING. (No. 4,908.)

(Court of Appeals of Georgia. Sept. 23, 1913.
Rehearing Denied Oct. 3, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1138*)—HARMLESS ERROR.

The direction given to this case by the trial judge secured substantial justice, and the judgment will not be reversed in order that the same result may be more technically reached by regular procedure at a later stage in the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4456-4461; Dec. Dig. § 1138.*]

2. PARTNERSHIP (§ 320*)—TROVER AND CONVERSION (§ 17*)—RIGHT OF ACTION—ACTION FOR PARTNERSHIP ACCOUNTING—VENUE.

Under the undisputed evidence trover was not available to the plaintiff as a remedy to settle the matters in dispute between the members of a partnership composed of the plaintiff and the defendant. The testimony of the plaintiff himself showed that title to the property sought to be recovered was in the partnership, and that his interest therein could not be determined until after a full accounting had been had between the parties. *Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504. An action for the purpose of having such an accounting, being equitable in its nature, must be brought in the superior court in the county of the defendant's residence.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 741; Dec. Dig. § 320;* *Trover and Conversion*, Dec. Dig. § 17.*]

Error from City Court of Leesburg; H. L. Long, Judge.

Action by C. N. Cox against A. E. Manning. Judgment for defendant, and plaintiff brings error. Affirmed.

W. G. Martin, of Leesburg, for plaintiff in error. R. J. Bacon and R. H. Ferrell, both of Albany, for defendant in error.

RUSSELL, J. Judgment affirmed.

MONK v. NATIONAL BANK OF TIFTON. (No. 4,659.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

INSTRUCTIONS—NEW TRIAL.

The court did not err in the instruction of which complaint is made, nor in refusing the instruction requested. The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Tifton; R. Eve, Judge.

Action between S. S. Monk and the National Bank of Tifton. From an adverse judgment, Monk brings error. Affirmed.

See, also, 76 S. E. 278.

R. D. Smith, of Tifton, for plaintiff in error. Fulwood & Skeen, of Tifton, for defendant in error.

RUSSELL, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

AMERICAN MFG. CO. v. CHAMPION MFG. CO. (No. 4,939.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

SALES (§§ 370, 392*)—GOODS TO BE MANUFACTURED—BREACH OF CONTRACT—REMEDY OF SELLER.

Where goods are sold for future delivery and prior to the time for delivery the purchaser notifies the seller that he will not take and pay for the goods, the seller may treat the contract as rescinded and sue for whatever damages he has sustained up to the time of its repudiation by the vendee. If the goods bought are to be manufactured by the seller, and, upon the repudiation of the contract by the purchaser, the seller fails or refuses to manufacture the goods so as to have them ready for delivery at the time fixed in the contract, his only remedy is to bring an action against the purchaser for damages for the breach of the contract. He cannot sue upon open account either for the purchase price of the goods or for the contract price less the cost of manufacture. Before an action of this kind will lie, the seller must have put himself in a position where he could deliver and have either actually delivered the goods or have stored and retained them for the vendee. If the contract be an entire one for the manufacture of a quantity of articles, the remedy of the seller to store and retain the goods for the vendee and sue for the purchase price is not available, unless the entire quantity of articles contracted for has been manufactured.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1085, 1128-1131; Dec. Dig. §§ 370, 392.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the American Manufacturing Company against the Champion Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Miller & Jones, of Macon, for plaintiff in error. J. E. Hall and Jno. R. L. Smith, both of Macon, for defendant in error.

POTTLE, J. The American Manufacturing Company brought suit on open account against the Champion Manufacturing Company, a partnership composed of two named persons. The account was made up of 6,333 bag holders which had been delivered to and accepted by the defendants at the agreed price of 17½ cents each, of 4,360 bag holders on hand which the defendants refused to accept, and 39,307 bag holders which the defendants agreed to take but which had not been manufactured by the plaintiff. Against these items the plaintiff credited the expense of manufacturing the bag holders which had not been made up. There was also in the account several items for a number of cane strippers and an item for the cost of extra material. The total amount claimed to be due on the account was \$9,306.46, less a credit of cash paid of \$1,820.13, together with a deduction of \$409.27, the estimated expenses of completing the contract, and credit memoranda of shortage of \$1.55,

making the net balance claimed to be due on account of \$6,989.51. The items of the account for the purchase price of the bag holders was based on a written contract dated June 2, 1911, in which the plaintiff agreed to sell and the defendants to buy 50,000 bag holders, of certain dimensions, at 17½ cents each f. o. b. Chattanooga, Tenn.; deliveries to begin on July 15th and the entire number shipped out by September 15, 1911. The terms of payment were \$1,000 within five days from date of the contract and the balance to be paid for 30 days after shipment. The shipments were to be made direct to customers upon the defendants' orders, and any bag holders remaining on hand on September 15, 1911, were to be shipped to the defendants at Macon, Ga. In the event the stakes for the bag holders were lengthened, the defendants were to pay for the additional cost of the material. The defendants admitted the execution of the contract, admitted the delivery of the 6,333 bag holders, averred that the plaintiff had been paid in full for these bag holders, and denied all of the other material allegations in the petition.

From the evidence offered in behalf of the plaintiff, it appears that in August, 1911, the plaintiff had manufactured and delivered in accordance with the contract 6,333 bag holders and had on hand 4,360, for which no shipping instructions had been given by the defendants. The defendants notified the plaintiff that they would be unable to use the remainder of the bag holders contracted for and requested that some arrangements be made by which they might be relieved from the contract or have its completion postponed until a year later. No agreement was reached by correspondence, and on August 26th one of the defendants went to Chattanooga to take up the matter in person with the president of the plaintiff company. The plaintiff declined to release the defendants from the contract, but it was finally agreed that if the defendants would pay the amount then due, and pay for the 4,360 bag holders on hand, and also pay for the material on hand which had been bought for the purpose of manufacturing the bag holders contracted for, the plaintiff would extend the time for the completion of the contract for one year. The past-due account then owing by the defendants to the plaintiff amounted to \$820. Subsequently the defendants paid the plaintiff this amount but have never paid for the material on hand nor for the 4,360 bag holders. The plaintiff could have completed the contract on September 15th if it had not been notified by the defendants that they would not take and pay for the remainder of the bag holders. After the agreement between the parties on August 26th, several letters passed between them as to what was the real agreement entered into on August 26th. Proposi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions of settlement were made by the defendants but were not accepted by the plaintiff. Finally, on November 3, 1911, the plaintiff notified the defendant that it would go forward and complete the contract and hold the remainder of the bag holders, as well as the 4,360 bag holders then on hand, subject to the defendants' order. Later on the plaintiff again wrote, submitting a further proposition and stating that if it was accepted the plaintiff would defer completion of the contract until the next year. This proposition was, however, rejected by the defendants. The parties being unable to reach an adjustment, suit was brought on November 12, 1912, more than a year after the time when the contract was to have been completed, under the agreement of August 26, 1911. The trial judge granted a nonsuit, and the plaintiff excepted.

1. Where the purchaser of goods refuses to take and pay for them, the seller may pursue one of three remedies: He may retain the goods and recover the difference between the contract price and the market price at the time and place of delivery; or he may sell the goods, acting as agent for the purchaser, and recover the difference between the contract price and the price on resale; or he may store and retain the property for the vendee and sue him for the entire price. Civil Code, § 4131. The contract between the parties in the present case was an entire one. The plaintiff bought 50,000 bag holders, and the remedy of the seller to store and retain the goods and sue the purchaser for the entire price would not be available unless all of the bag holders not delivered had been manufactured. The seller could not manufacture a portion of the goods and store and retain them and sue for the purchase price of the goods so retained and decline to manufacture the remainder of the bag holders called for by the contract. When the plaintiff was notified by the defendants in August that they would not take and pay for the remainder of the bag holders under the contract, the plaintiff had a right to treat the contract as rescinded, decline to manufacture any more bag holders, and sue for whatever damages it had sustained up to the time the purchaser repudiated the contract. Or the plaintiff could have declined to agree to the rescission, proceed with the manufacture of the bag holders, and if, at the time they were to have been delivered, the defendants refused to accept and pay for them, the plaintiff could then, under the provisions of the Civil Code, § 4131, after notice to the defendants, have resold the goods at the place of delivery and recovered from the defendants the difference between the contract price and the price on resale, or the plaintiff could have stored the goods for the defendants and sued them for the entire price. *Southern Flour Co. v. St. Louis Co.*, 11 Ga. App. 401, 75 S. E. 439. By failing to manu-

facture the remainder of the bag holders bought by the defendants, the plaintiff agreed to the rescission of the contract. This is true whether the original contract providing for final delivery on September 15, 1911, was operative or whether the time for the completion of the contract was extended one year by the agreement of August 26, 1911. The undisputed evidence shows that the remainder (39,307) of the bag holders were never manufactured by the plaintiff. For this reason the plaintiff was not in a position to avail itself of the remedies provided for in the section of the Code above referred to.

Having agreed to a rescission of the contract by failing to complete it, the plaintiff's only remedy was to sue for damages for a breach of the contract. If such a suit had been brought, the plaintiff might have been entitled to recover the difference between the contract price and the market value at the time and place of delivery of the 4,360 bag holders which it had manufactured, together with such other items of damage in the way of lost profits and special expenditures on account of the contract, etc., as it might be able to prove. But the plaintiff did not adopt this remedy. It elected to sue on open account as for goods sold and delivered. This form of action is based upon the theory that there was a completed contract between the parties and that the defendants failed to pay in accordance with its terms. It is not available where goods bought have not been delivered and where there has been a breach of the contract of sale by reason of the defendants' refusal to accept goods bought, except that the indebtedness might be stated in the form of an account, if the plaintiff has stored the goods for the vendee as provided by the section of the Code above cited. *Black v. Kaplan*, 9 Ga. App. 811, 72 S. E. 303; *Linder v. Cole*, 10 Ga. App. 102, 72 S. E. 719; *Oklahoma Co. v. Carter*, 116 Ga. 141, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112; *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030. The plaintiff could not, under the evidence, recover on open account without reference to whether its cause of action was for the breach of the original agreement or upon the agreement of August 26, 1911, treated either as an extension of the original agreement or as an accord and satisfaction of it.

It was argued by counsel for the plaintiff in error that some items of the account sued on were not connected with the contract of purchase of the bag holders, and that certainly as to these items the nonsuit was erroneous. It appears, however, from the undisputed evidence, that the defendants had paid to the plaintiff \$1,820.13. This amount more than paid for the bag holders which had been delivered and for all of the other items on the account for which a recovery could be had in this form of action. The plaintiff was not entitled to recover either

for the 4,360 bag holders on hand or for the 39,307 bag holders which had not been manufactured. There was not error in awarding a nonsuit.

Judgment affirmed.

HARVEY v. ROME SCALE & MFG. CO.

(No. 4,907.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—DEFECTIVE APPLIANCES—NEGLIGENCE OF FELLOW SERVANT.

The allegations of the petition were substantially proved as laid, and it was error to grant a nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1063; Dec. Dig. § 285.*]

Error from City Court of Floyd; J. H. Reece, Judge.

Action by Nolan Harvey against the Rome Scale & Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

Eubanks & Mebane, of Rome, for plaintiff in error. Dean & Dean and J. M. Hunt, all of Rome, for defendant in error.

HILL, C. J. Nolan Harvey sued the Rome Scale & Manufacturing Company for damages for personal injuries. At the conclusion of the evidence in his behalf the trial judge awarded a nonsuit, and this is the error complained of. Plaintiff was employed as a helper by the defendant, and, while helping a blacksmith at the forge in the defendant's shop in bending iron, his eye was injured by a piece of metal flying in his eye. In his petition he alleges, as the specific cause of his injury, that the blacksmith whom he was helping struck with his hammer a piece of iron on the anvil, "and as he did so a piece of iron chipped or peeled from said hammer, said piece of steel being about the size of a shot, with rough and ragged edges, and same flew into the right eye of petitioner, going completely through the eyeball, and lodging at the base of the eye, and destroying the sight thereof." He alleged that the "hammer was defective, and not sound, nor was same fitted for said work, for the reason that said hammer was brittle, fragile, and unstable, and, when same came in contact with hard substances, would break, scale, and peel off as said hammer did * * * on said occasion; all of which was unknown to petitioner before said injury, and all of which was known to the defendant or should have been known, and of which the defendant could have known by the use of ordinary care.

The burden was on the plaintiff to establish that the injury which he complained of was caused as he alleged in the petition, and

it is distinctly alleged, as above stated, that a piece of iron chipped or peeled from the hammer when it struck the metal on the anvil, and that this piece of iron flew into the right eye of the petitioner, causing his injury. In support of this allegation, he testified as follows: "While I was holding it there [meaning a wrought iron cuff], and he [the blacksmith] was hammering, when he struck, a piece flew off of something, and hit me in the right eye, and knocked me over backwards. I could not tell at that time what it flew off from; but we looked at the hammer afterwards, and saw it was chipped off. I did not look at the piece of iron he was hammering afterwards to see if it came off of it. I saw the piece that came out of my eye, and it could not have come off of it. It came off of something in a round circle; showed where it had sloughed out of the side of something; could not have come off of the piece of iron he was striking, because the piece of iron was not in a round circle. * * * When I examined that hammer the appearance of the face of that hammer was this: Around the edges of that hammer it was chipped off, little pieces all around the edges of it, in several places, all around the edges in a kind of brittle-looking state. The piece that came out of my eye compared with the face of that hammer in this, that one side was rounding, and the other was rugged, just like if it had been chipped out of something." From this evidence the jury would have been authorized to infer that the piece of iron came from the hammer, and not from the iron or anvil, although the evidence is not clear and distinct on the point. It nevertheless makes a question for the jury, and could not have been determined as a matter of law.

The next question arising is whether the hammer was defective in the manner alleged. Several witnesses in behalf of the plaintiff testified that the hammer was defective. It is fundamental that one of the nondelegable duties of the master is to exercise reasonable care in furnishing safe instrumentalities with which his employés or servants are to do the work required of them. Under the evidence in the present case the question was issuable whether this duty had been fully performed by the master.

It is also urged by learned counsel for defendant that the nonsuit was proper because the evidence showed that the blacksmith and the plaintiff were fellow servants, and that the injury was due to the negligence of the blacksmith in striking the anvil instead of the hot iron. If the evidence conclusively showed that the injury was caused by the negligence of a fellow servant, the contention would be sound; but there are circumstances from which the jury might reasonably have inferred that the fault was in the defective condition of the hammer, or in the defective material of which the hammer

was made, and that but for these defects, one or both, the injury would not have occurred. These are matters for determination by the jury. After giving the case a careful consideration, we have come to the conclusion that the plaintiff proved prima facie the allegations of his petition, and therefore that he should not have been nonsuited. This case differs from that of Georgia R. Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308, in that the defects complained of in the present case were not latent and not in a hammer apparently sound. According to the plaintiff's allegations and evidence, the defects were such as the master could have discovered in the use of ordinary care by inspection.

Judgment reversed.

EUBANKS v. CENTRAL OF GEORGIA RY. CO. (No. 4,830.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 400*)—INJURY TO PERSON ON TRACK—REBUTTING PRESUMPTION OF NEGLIGENCE.

The jury was authorized to infer that plaintiff's minor son was killed by the running of the locomotive and cars of the defendant company, and therefore the statutory presumption of negligence as charged in the petition was raised against the company. The defendant company introduced evidence tending to rebut this presumption. The evidence was not of such probative weight and effect as clearly to rebut the presumption of negligence, and leave the question to be determined as one of law. A direction of a verdict for the defendant was therefore erroneous. Civil Code 1910, § 5926; Davis v. Kirkland, 1 Ga. App. 5, 58 S. E. 209; Ellenberg v. Sou. Ry. Co., 5 Ga. App. 389, 63 S. E. 240; Bryson v. Sou. Ry. Co., 3 Ga. App. 407, 59 S. E. 1124.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by Mollie Eubanks against the Central of Georgia Railway Company. A verdict was directed for defendant, and plaintiff brings error. Reversed.

Evans & Evans, of Sandersville, for plaintiff in error. F. H. Saffold, of Swainsboro, and J. J. Harris, of Sandersville, for defendant in error.

HILL, C. J. Judgment reversed.

GIPSON v. LOUISVILLE & N. R. CO. (No. 5,042.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

JURISDICTION—LAW OF ANOTHER STATE.

The first count of the petition in this suit, brought under the Alabama statute, is controlled by the decision of this court in Ten-

nessee Coal Co. v. George, 11 Ga. App. 221, 75 S. E. 567. Under the ruling announced in that decision, it was erroneous for the trial judge to sustain the demurrer to the first count of the petition. The second count was properly stricken.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by C. Gipson against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Gibson & Davis, of Birmingham, Ala., and Atkinson & Born, of Atlanta, for plaintiff in error. Tye, Peebles & Jordan, of Atlanta, for defendant in error.

HILL, C. J. Judgment reversed.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. GLAWSON. (No. 4,073.)

(Court of Appeals of Georgia. Oct. 8, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1195*)—SUBSEQUENT PROCEEDINGS—LAW OF THE CASE.

A judgment of the Court of Appeals affirming a judgment overruling a general demurrer to a petition is the "law of the case" throughout all subsequent stages of the trial, and is binding upon the parties, even though, after its rendition, and before final judgment in the case, the Supreme Court in another case renders a decision which conflicts with that announced by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4631-4635; Dec. Dig. § 1195.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the averments in the petition in reference to the measure of damages and the right of the plaintiff to recover, if the defendant was negligent as alleged. (Pottle, J., dissenting.)

3. TELEGRAPHS AND TELEPHONES (§§ 45, 66*)—INADEQUATE SERVICE—DAMAGES—BURDEN OF PROOF.

Telephone companies are required to exercise only ordinary care promptly to furnish a subscriber means of communication over their lines with other subscribers. Failure to exercise such care authorizes the recovery of whatever damages may proximately result from this breach of duty. Where, however, suit is brought against a telephone company for damages alleged to have resulted from the negligent failure to give a subscriber telephonic connection, the burden is on the plaintiff to prove negligence. Even if proof of a failure to give the connection raises an inference of negligence, the inference is removed when it appears that the telephone company has exercised all ordinary care and diligence, and that, notwithstanding the performance of this duty, some portion of the delicate mechanism comprising the telephone system got out of order from some unknown and unforeseen cause against which ordinary care could not guard.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 16, 20½, 61-63; Dec. Dig. §§ 45, 66.*]

Error from City Court of Americus; Z. A. Littlejohn, Judge.

Action by J. L. Glawson against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

For opinion of Supreme Court answering certified questions, see 79 S. E. 136.

Glawson brought his action against the telephone company to recover damages alleged to have resulted from the death of his wife. Plaintiff resided in the country, a distance of some seven miles from Americus, and had in his house a telephone connecting with a switchboard in Americus, through which communication could be had with other subscribers. On the night of October 2, 1909, the plaintiff's wife was threatened with a miscarriage, and about 3 o'clock in the morning of October 3, the plaintiff obtained telephone connection with his physician, who resided in Americus, and was advised by him to apply certain remedies. Plaintiff then hung up the receiver, which closed the circuit. Shortly after 3 o'clock, the condition of the plaintiff's wife becoming alarming, he again signaled the telephone operator for the purpose of obtaining communication with the doctor, to advise him to come at once. He made repeated efforts to obtain the connection, but received no response from the operator until the lapse of more than two hours, when the connection was given, and the physician urged to come immediately. The physician left at once, but reached the plaintiff's house too late to relieve his wife, and she died in consequence of a post partum hemorrhage, following a miscarriage. It is alleged that the telephone mechanism was in good order, and that the defendant was grossly negligent in that its servants in charge of the switchboard negligently, willfully, and wantonly failed and refused to respond to plaintiff's call, and that but for this negligence the physician could and would have reached the plaintiff's house in time to save the life of his wife. More particularly the petition charges the defendant with negligence (1) in failing to give plaintiff connection with the physician's telephone; (2) in failing to answer the plaintiff's signal and give the desired connection; and (3) in that the servants of the defendant, who knew or ought to have known that the plaintiff would desire to communicate with his physician, either wantonly or of their own fault failed to hear, or else willfully refused to answer the signal and give the desired connection. A general demurrer to the petition was overruled, and the trial resulted in a verdict in favor of the plaintiff for \$5,000. The defendant's motion for a new trial was denied.

H. E. W. Palmer, B. J. Clay, and McDaniel & Black, all of Atlanta, and W. P. Wallis, of Americus, for plaintiff in error. Robt. L. Berner, of Macon, and J. A. Hixon, of Americus, for defendant in error.

POTTLE, J. [1] 1. The judgment overruling the demurrer was affirmed by this

court at a previous term. *Glawson v. Southern Bell Telephone & Telegraph Co.*, 9 Ga. App. 450, 71 S. E. 747. That decision became "the law of the case," binding upon the parties throughout all subsequent stages of the trial. We cannot, therefore, upon the present writ of error, even if we were disposed to do so, review the former decision. *Southern Bell Telephone Co. v. Glawson*, 140 Ga. 507, 79 S. E. 136. It follows that, if the plaintiff proved his case substantially as laid in the petition, the evidence is sufficient to support the verdict in his favor; otherwise not.

[2] 2. The writer is of the opinion that the evidence is not sufficient to support the averment in the petition that, if the plaintiff had obtained telephone connection with his physician, he would have immediately responded, and could and would have reached the plaintiff's home in time to save the life of his wife, and that the remedies which he would have applied would have had this effect. Upon this point the writer is of opinion that the evidence is too speculative and conjectural, and that the decisions of the Supreme Court in *Seifert v. Western Union Tel. Co.*, 129 Ga. 181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210, and *Southern Bell Telephone & Telegraph Co. v. Reynolds*, 139 Ga. 385, 77 S. E. 388, are controlling. These two decisions have been recently expressly approved by the Supreme Court. *Southern Bell Telephone Co. v. Glawson*, 140 Ga. —, 79 S. E. 136. The majority of this court are, however, of the opinion that the evidence substantially supports the averments of the petition upon the question of damage, and that the law relating to this question is settled in the plaintiff's favor by the decision of this court affirming the judgment overruling the demurrer.

[3] 3. We are all agreed that the evidence did not authorize a finding that the death of the plaintiff's wife was due to any act of the defendant's, of either omission or commission, which in law amounted to negligence. It appears from the evidence that, under the rules and regulations of the defendant at the Americus office, the night operator is allowed to go to sleep in a room situated a few feet from the switchboard. In the daytime and at night, until the pressure of business is over, the operator remains at the switchboard, and subscribers signal the operator by means of a small disk or drop, which is visible to the operator as soon as the connection is made by the subscriber, either by removing the receiver from his telephone or by turning a crank, according to the system in use. At night there is on the switchboard a night bell circuit. Throughout the day this circuit is not in service, but is put on when the operator retires for the night. When the night circuit is in operation, upon a signal from a subscriber, the visual signal or drop on the switchboard comes in contact with the night circuit and causes a gong or bell to

ring loudly enough to arouse the operator. The contact touches on a very small circuit very lightly, and is considered a delicate mechanism. It frequently gets out of order, and the cause of the disturbance is rarely discovered. At about 6 o'clock on the evening before the husband sought to obtain connection with the physician, the night circuit was tested and found to be in good working order. The night signal system used by the defendant was the one in general use by telephone companies and the best known to the service. When Glawson communicated with his physician the first time, the operator had not retired, and had not put on the night circuit. After his conversation was over, the night circuit was put on, and the operator retired. She did not hear the bell ring, and did not know that Glawson had signaled again until 5:20 in the morning, when she was called by a signal on another circuit, and she then saw the drop signal at Glawson's number. She immediately called him, and connected him with the physician's telephone. When the operator retired she supposed the night circuit was in order, and knew nothing to the contrary until she saw the day signal as above stated.

Early in the morning, after it was found that the night bell would not ring, the mechanism was inspected. The condition then found is thus described by the inspector: "The night bell contacts were slightly bent, just enough to keep the night alarm from operating, a very small fractional part of an inch. The distance between that contact of the bell wouldn't be the thickness of a newspaper. The effect of that slight lack of contact with the gong would be when the phone was rung the night alarm would fail to operate; it wouldn't ring. We have a little shutter in the office connected with the subscriber's line which operates, when the subscriber rings the bell, to notify the operator that she is wanted on that line, and the night bell contacts are, you may say, an emergency arrangement for the use of the night operator during the hours when she is supposed to be asleep. She connects on a night bell, in which there is a fine spring and wire, and when the shutter falls it pushes the spring over to the wire, and closes the contact, and causes the emergency bell to ring. Now, if this spring gets bent, and fails to connect with the wire, it would cause the night bell to fail to ring. The shutter that I spoke of is a little metal arrangement about an inch square, and there is one at each line, and, when the subscriber turns his crank, that causes the little catch that holds the shutter to lift up, and the shutter drops down, disclosing a surface of a different color to the operator, and shows her that that party is calling. If she was not present, and the night gong was on, that would not disclose that fact to her. As to the operating at night on that particular line, we have a

switch on the switchboard which the night operator cuts when she retires, and which is in connection with the night bell, and which causes the night bell to operate during her absence from the switchboard. Dropping that little shutter that I spoke about when the subscriber has rung his bell by turning his crank causes the night bell to ring; the shutter falls down, and causes the little spring to come into contact with the wire, and completes the circuit, and causes the night bell to ring. On the next morning I found that spring a very small part of an inch, a fractional part, less than the thickness of a sheet of paper, from the wire, and in that condition the night bell would not operate, and the operator could not get the signal. I made the adjustment in that same spring so that it would ring the bell. The apparatus that was in use on that occasion was the standard equipment for that class of service." The inspector also testified: "There are several ways in which that spring could get bent so as to keep it from making the contact that I have just described. It doesn't take much force to bend one, if it comes from the right direction. It could be bent very easily by any slight force, and be done in such a manner that it would not make the contact. It could have been hit by some of the operators on the switchboard while the operator was at work on the switchboard, and that could be done without the operator detecting it. She wouldn't know until it was called to her attention by the night bell failing to operate while she was looking at it. It would be practically concealed from her. There is nothing to disclose it to her attention. It doesn't take much force to make the contact with that spring. It is a very fine spring, very delicate, necessarily so. That shutter might fall with about the weight of a half dollar, the force of a half dollar placed perpendicularly and allowed to drop on the flat surface, or a little bit less—about the same force as a half dollar set upon a table and allowed to turn over."

There is nothing in the evidence to justify the conclusion that the operator willfully refused to respond to the plaintiff's signal. She testified, and her testimony is undisputed, that she gave the plaintiff a connection about 2 o'clock; that about 5 o'clock she was awakened by a night signal on another "position," and then for the first time discovered that plaintiff had been calling; that she did nothing to put the night circuit out of order, and did not know when it got out of order; and that she answered her night calls as usual. The company was bound only to ordinary diligence. The only evidence of a failure to exercise this degree of care is the fact that the night circuit got out of order, and the bell failed to ring. The burden was on the plaintiff to prove his allegations of negligence. It appears from the testimony that the failure of the gong or bell to ring was due to the fact that the "night bell contacts" were

slightly bent, so slightly as not to be observed except upon a close inspection. The mechanism was inspected at 6 o'clock, and found to be in good working order. Just what force bent the night contact does not appear. According to the evidence, the mechanism was delicate, and human ingenuity has been unable to attain absolute perfection or to construct a device for night service which will never get out of order. Ordinary care did not require the defendant to keep the operator on duty all night at an exchange where there was only a small demand for service during the latter part of the night. The operator was up at 2 o'clock. The company had in use the best contrivance human experience and ingenuity had been able to discover. It was inspected and found to be working properly. It got out of order from some unknown and unforeseen cause. The mere fact that it was out of order did not of itself alone prove negligence.

Telephone subscribers take the risk of a failure to obtain connection due to any disarrangement or disturbance of the mechanism not caused by negligence on the part of the telephone company. In other words, if the company furnishes facilities equal to those in general use, and uses ordinary care to keep them in proper working order, and to furnish the subscriber the service for which he has contracted, he cannot hold the company responsible for the failure to make prompt connection in a given instance. The evidence discloses (and it is a matter of common knowledge) that frequently a subscriber cannot obtain a connection, and the cause of the trouble is not discovered until after a most minute inspection. Nor is the fact that trouble exists generally discovered until a connection is sought and not obtained. To hold these companies responsible for the consequences ensuing from a failure to make a connection, because an inspection afterwards made shows that some part of the mechanism was out of order, would be equivalent to making them insure a connection whenever called for, and render them liable for any damage which may result from the failure to furnish promptly the service called for. This would be holding them to the very highest possible degree of diligence; whereas, they are, under the law, bound only to exercise ordinary care. The time may come when the instrumentalities may be so perfected that a higher degree of care should be imposed upon those undertaking to furnish telephone service; but that time has not yet arrived.

Questions of negligence are generally for the jury; but where, as in this case, there is no evidence of negligence, a verdict finding that there was negligence is contrary to law, and should be set aside. The plaintiff contends, however, that the evidence authorized the jury to find, either that the operator saw the shutter or drop in a condition which would indicate that the plaintiff was signal-

ing, or that she was lacking in ordinary diligence in failing to see the signal or hear the noise made by the drop of the disk. The operator testifies positively that she did not see the shutter down, and did not hear the noise made by the drop of the disk, and there was not a particle of evidence to justify the inference that she was telling an untruth. The presumption is that, if she had known the plaintiff was signaling, she would have responded. There is nothing in the evidence to suggest any reason why she should not have done so. She appears to have been a faithful and competent employé, diligent, and attentive to her duties, and there is nothing to warrant the conclusion that she willfully and wantonly refused to give the plaintiff the connection which he desired. The plaintiff testified that he signaled the operator about 10 or 15 seconds after he had finished his conversation with the doctor and hung up the receiver. He said, however, that the telephone was in the hall on the facing of the door that entered his wife's room; that he hung up the receiver, walked 10 or 12 feet to the foot of his wife's bed, stopped long enough to see that she was in labor, then walked back to the telephone, and signaled the operator. The operator testified that, after the plaintiff had finished the conversation with the doctor, she disconnected them, and retired "as soon as the connection was completed, and the call taken down, and left the room as soon as I could walk from one room into the other—about a minute, I suppose." The evidence shows that the room in which the operator retired was located just west of the switchboard, about 10 or 12 feet away.

Counsel for the plaintiff contend that, as the plaintiff said the time which elapsed between the end of his conversation and the effort to signal the operator was but 10 or 15 seconds, and the operator admitted that she remained in the room a minute after the conversation ended, the jury were authorized to find either that she willfully refused to give the connection, or else that she negligently failed to see or hear the plaintiff's signal. Neither the plaintiff nor the operator made any exact computation of time. It is manifest that both were giving merely an estimate of the time which elapsed between the two occurrences to which they referred. The physical facts show that the time probably required was about the same in each instance. The plaintiff was obliged to hang up the receiver, walk 10 or 12 feet to his wife's bedside, remain long enough to see that she was in labor, return the same distance to the telephone, and take down the receiver, and signal the operator. He says positively this required not more than 10 or 15 seconds. Without using the technical terms referred to in the evidence, it is perfectly plain that all that the operator was required to do could have been done in at least as short a time and probably in less

time than was required for the plaintiff to do what he says he did. At any rate, the operator says positively and unequivocally that she immediately left the switchboard after the conversation ended, and retired to her room, some 10 or 12 feet away; that she did not see or hear the plaintiff signal; and that she did not know that he had signaled until 5:20 the next morning. She had no reason to anticipate that the plaintiff would call again. Ordinary care did not require her to remain at the switchboard. She had a right to rely upon the fact that the night gong was in good order, and that by this means she would be advised of any call made by a subscriber. There is nothing in the evidence to justify the conclusion either that the operator wantonly refused to recognize the plaintiff's signal, or that she was lacking in ordinary care in failing to observe it. For these reasons, we are clear that the verdict was not authorized by the evidence, and that a new trial should have been granted.

Judgment reversed.

BLACKBURN et al. v. MOREL. DONALDSON et al. v. SAME.

(Nos. 4,744, 4,747.)

(Court of Appeals of Georgia. Sept. 23, 1913.
On Motion for Rehearing, Oct. 3, 1913.)

(*Syllabus by the Court.*)

1. PRINCIPAL AND SURETY (§ 117*)—VIOLATION OF CONTRACT—DISCHARGE OF SURETY.

This was an action against the principal and the sureties on the bond of a building contractor, conditioned that he would faithfully perform the stipulations of a building contract. It was admitted by the plaintiff in his testimony that the principal in the bond had not complied with the contract in certain material particulars, and that the plaintiff made payments to him, from time to time, in excess of the amount authorized by the contract and prior to the times when they were due, and failed to require of him the affidavits provided for in the contract in reference to work done and material furnished for the building. *Held*, this conduct on the part of the plaintiff tended to increase the risk of the sureties on the bond, and operated to discharge them from all liability thereon. It follows that the verdict against the sureties was contrary to the evidence and should have been set aside.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 233-235; Dec. Dig. § 117.*]

2. SUFFICIENCY OF PETITION.

The petition as amended was not subject to any of the demurrers filed thereto.

3. VERDICT AGAINST PRINCIPAL OBLIGOR APPROVED.

The verdict against the principal obligor in the bond was authorized by the evidence, and no error of law was committed which would require a reversal of the judgment overruling the motion for a new trial as to him.

4. COSTS (§ 238*)—APPEAL—UNNECESSARY RECORD.

Where a suit is brought against the principal and sureties on a bond, and the plaintiff obtains verdict and judgment, and one writ of

error is prosecuted to this court by all of the defendants, and another writ of error by the sureties only, the questions involved in both records being identical so far as the sureties are concerned, and the judgment against them is reversed, the second writ of error will be dismissed, and the costs thereof assessed against the plaintiffs in error.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 908-919; Dec. Dig. § 238.*]

On Motion for Rehearing.

(*Additional Syllabus by Editorial Staff.*)

5. PRINCIPAL AND SURETY (§ 100*) — DISCHARGE OF SURETY—BUILDING CONTRACT—CONSTRUCTION.

That a building contract provided for changes in the structure to be erected did not authorize a change as to the method and amount of the payments without consent of the sureties on the contractor's bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162-165; Dec. Dig. § 100.*]

Error from City Court of Statesboro; H. B. Strange, Judge.

Two actions, both by J. J. B. Morel, one against L. R. Blackburn and others, the other against J. H. Donaldson and others. From the judgment, defendants bring error. In the former action judgment reversed in part, and in part affirmed. In the latter, writ of error dismissed. Motion for rehearing denied.

J. J. E. Anderson and R. Lee Moore, both of Statesboro, and Hitch & Denmark, of Savannah, for plaintiffs in error. White & Lovett, of Sylvania, for defendant in error.

RUSSELL, J. In case No. 4,744, judgment reversed in part and in part affirmed. In case No. 4,747, writ of error dismissed.

On Motion for Rehearing.

(a) The court did not overlook the fact that there was testimony to the effect that the amount of work done at the time of several of the payments referred to in the record may have exceeded in value the amount actually paid by the owner; but, in our opinion, the sureties were entitled, as a matter of law, to have the contract strictly construed, because the liability of a surety is stricti juris, and it is undisputed that the payments made by the owner were not made in conformity with the contract, in that it appears that payments in excess of those provided for by the contract had, in each instance, been made before the completion of specific portions of the building, as provided in the contract. In other words, while it appears from the testimony that the payments made by the owner at a particular time were less than the value of the work done and the material furnished for the building as a whole, the particular portion of the building which, under the terms of the contract, should have been completed before any payment was made at all had not been so completed. The record shows, with-

out dispute, that though at the time payment was made for the completion of the first story of the building, work had been done on a portion of the second story and up to the roof joists, still nothing had been done on the front end of the first story of the building, and, in fact, scarcely anything had been done on this portion of the building at the time the contractor abandoned the contract.

(b) For this reason, although there was an issue upon the point, it is immaterial whether the payments were in excess of the work done. There was no dispute that the payments were made in advance of the completion of the first story, according to the terms of the contract, and likewise in advance of the completion of the second story.

(c) As to the failure of the owner to require the statutory affidavit from the contractor, the mere fact that the affidavit was taken when the last payment was made was not material. As stated above, the liability of a surety is stricti juris, and cannot be extended, and a surety is relieved by any act which tends to increase his risk; and whether in fact there is an increase of his risk or not, there is a breach of the contract. Nothing ruled in *Adams v. Haigler*, 2 Ga. App. 99, 58 S. E. 330, affects this proposition.

(d) The fact that there was testimony that at the time the contractor suspended his work and abandoned the contract installments amounting to \$2,500 would have been due if the work had proceeded in regular stages as provided by the contract, and that the payments amounted to a less sum than \$2,500, does not affect the undisputed fact that the building was in a very different condition, so far as the liability of the sureties to complete it was concerned, at the time the contractor abandoned his work than it would have been if the contract had been complied with and if the work had proceeded as stipulated in the contract. The sureties, not having consented to this change of the contract, were entitled to claim a discharge, regardless of how it affected them, and even if the change had inured to their benefit.

[6] (e) The fact that the contract provided for change and alteration in the plans of the building has no bearing on the proposition to which we have referred, for there is a marked difference between a change as to the method and amount of the payments and a stipulation providing for changes in the structure to be erected. Nothing in the ruling in *Wiley v. Stanford*, 22 Ga. 385, or in *Ward v. McLamb*, 118 Ga. 811, 45 S. E. 688, which authorizes the discharge of a surety pro tanto, is in point. In fact, under the provisions of the code section, we do not see how such a judgment is possible. A surety is either liable or not, and if any act is done which increases or which tends to increase his risk he will be discharged.

The court fully considered the rulings in *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638, and in *Ætna Indemnity Co. v. Town of Comer*, 136 Ga. 24, 70 S. E. 676, and the motion for rehearing upon this point presents nothing new. Motion denied.

McDUFFIE v. LUMMUS COTTON GIN CO. (No. 5,018.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 139*)—DIRECTION OF VERDICT.

"A verdict should not be directed unless there is no issue of fact, or unless the proved facts, viewed from every possible legal point of view, can sustain no other finding than that directed." *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 363*)—ACTION FOR PRICE—QUESTION FOR JURY.

Where, in an action on a promissory note for the price of a gin outfit, under a contract obliging plaintiff to superintend putting it in place, defendant relied on failure of the machine to work satisfactorily, and the evidence showed that such failure was due to the misplacement of two pulleys, but did not show whether such misplacement was the fault of plaintiff or of defendant, it was error to direct a verdict for plaintiff.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1064; Dec. Dig. § 363.*]

Error from City Court of Abbeville; W. H. Lasseter, Judge.

Action by the Lummus Cotton Gin Company against D. McDuffie. Judgment for plaintiff, and defendant brings error. Reversed.

Max E. Land, of Cordele, for plaintiff in error. Hal Lawson, of Abbeville, for defendant in error.

RUSSELL, J. The Lummus Cotton Gin Company sued McDuffie upon a promissory note for the purchase price of a gin outfit, which he had bought under a written contract of purchase, in which the seller agreed to furnish a competent man to superintend the erection of the machinery, and the purchaser agreed to "properly put up and operate the machine according to the printed directions furnished by the manufacturers." Attached to the contract is a drawing applicable to the order, and a statement that blueprints of building plans and machinery, identified by certain letters and numbers, have been sent; but these blueprints do not appear in the record. The defendant admitted the execution of the note, and assumed the burden of proving his plea of partial failure of consideration; but at the conclusion of the testimony, upon motion of the plaintiff's counsel, the court directed a ver-

dict in favor of the plaintiff for the full amount sued for. In the bill of exceptions error is specifically assigned upon the order of the court directing the verdict, upon the ground that there was such an issue of fact presented by the evidence that the jury would have been authorized to find a verdict in favor of the defendant, under the plea of partial failure of consideration, or at least to have returned a verdict for a less amount than that which the court directed the jury to find in favor of the plaintiff.

[1, 2] We are of the opinion that the trial judge erred in directing the verdict. There is ample evidence in the record that the machinery failed to work satisfactorily. The particular in which the operation of the machinery was defective was that the fans failed to suck the cotton up and blow the seed away as fast as it should. By reason of this condition the seed fues became clogged up, and it was necessary to remove the seed by hand, and frequently the belts would be torn. According to some of the testimony, the delay in clearing the seed fues by hand greatly reduced the daily ginning capacity of the outfit, to say nothing of the expense entailed by the breakage of the belts. It appears to have been undisputed that the failure of the gin to operate properly was due to the fact that a 20-inch pulley was put where a 24-inch pulley ought to have been put, and the 24-inch pulley was fitted on where the 20-inch pulley should have been placed, for one of the witnesses transferred these pulleys, exchanging their positions, and after the change there was no recurrence of the difficulty as to the seed fues. It is perhaps upon the strength of the fact that the testimony upon this point was uncontradicted that the court adjudged that there was no issue to be submitted to the jury, for this undisputed testimony indicates that the machinery is perhaps of good quality and reasonably suited for its purpose, and thus it might superficially appear that the defendant had failed to carry the burden assumed by him of establishing a partial breach of the contract of purchase. Having admitted a *prima facie* case, it devolved upon the defendant, in order to warrant a verdict in his favor, or in order to obtain a reduction below the amount mentioned in the note, to establish that there had been a breach of the contract in some respect, and that this breach had resulted in subjecting him to pecuniary loss.

At first sight it would seem that, since the defendant was to have the machinery put up, and since the defective operation of the machinery which subjected the defendant to loss was due to the misplacement of two pulleys, and might have been avoided if, in putting up the machinery, these two pulleys had been properly placed, the defendant was the author of his own wrong, and that no matter what might have been his loss of patronage, or his expense for broken belting, he would

not be permitted to recoup either. It appears, however, that the very first stipulation in the contract under which the defendant purchased this gin is an agreement on the part of the F. H. Lummus Sons Company (now Lummus Cotton Gin Company) to furnish a competent man to superintend the erection of the gin machinery which was being purchased. The contract must be construed as a whole. The agreement of the purchaser is to properly put up and operate the machinery according to the printed directions furnished by the manufacturers. When this is construed with the undertaking of the seller to furnish a competent man to superintend the erection of the machinery, it is very evident that a proper construction of the contract compels the conclusion that the purchaser was to do nothing more than to furnish the necessary laborers to erect the machinery under the direction, control, and superintendence of a man (competent to erect such machinery) who was to be furnished by the seller. In fact, construing the undertaking of the seller as to the erection of the gin outfit in connection with the undertaking of the buyer in this case, the language of the contract as to the erection of the gin cannot be given other force than this, so far as it relates to the purchaser, and it is apparent that this stipulation and the agreement of the purchaser more especially relate to the operation of the machinery, so far as he is concerned, than to its erection.

It is not disputed that the defendant gave notice of the failure of the gin to operate properly, and that in response to his notice the plaintiff company sent a man to correct the defect. It was for the jury to say whether he was a man competent to deal with the situation, for he failed to discover the misplacement of the pulleys, and the jury might be authorized to find that neither he nor the other agent of the plaintiff company, who was sent to superintend the original erection of the ginning outfit, was competent. Under the contract it is a jury question whether the F. H. Lummus Sons Company complied with its undertaking to furnish a competent man to superintend the erection of the machinery, as it agreed to do, and whether, if the defendant suffered from the defective operation of the machinery, it was his fault, or whether it was due to the failure of the plaintiff to supply a proper superintendent. It does not appear from the record that the defendant did not erect the ginning outfit, so far as it was his duty to aid in its erection, in accordance with the blueprints, because there are no blueprints in the record.

Two facts are undisputed: That the gin did not operate properly, and that it was due to the misplacement of the two pulleys. It would certainly be for the jury to say whether, under the contract, the misplacement of these pulleys was the fault of the plaintiff or of the defendant. We do not deal with the other questions sought to be pre-

sented because, if there were any errors, they are not likely to recur upon another trial of this case, which we feel constrained to order.

Judgment reversed.

HOUSTON v. STRACHAN & CO.
(No. 4,937.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

EXCEPTIONS, BILL OF (§ 43*)—TIME FOR FILING.

In this case the bill of exceptions was certified by the trial judge on April 30, 1913, and it was filed in the office of the clerk of the lower court May 17, 1913. Not having been filed in the clerk's office within 15 days from the date of the judge's certificate, this court is without jurisdiction, and the writ of error must be dismissed. *Civil Code 1910, § 6187; Woods v. State, 11 Ga. App. 383, 75 S. E. 491; Foote & Davies v. Evans, 10 Ga. App. 194, 72 S. E. 1098.*

[Ed. Note.—For other cases, see *Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.**]

Error from City Court of Savannah; Davis Freeman, Judge.

Action between Frank Houston and Strachan & Co. Writ of error by Frank Houston dismissed.

Twiggs & Gazan and Morris H. Bernstein, all of Savannah, for plaintiff in error. Osborne & Lawrence and Edmund H. Abrahams, all of Savannah, for defendant in error.

HILL, C. J. Writ of error dismissed.

LUDDEN & BATES SOUTHERN MUSIC HOUSE v. HALE. (No. 4,904.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 208*)—CERTIORARI—REVIEW—BURDEN OF PROOF.

The plaintiff had a written contract with the defendant, authorizing him to sell pianos as its agent, and providing that the agent should receive a half of the difference between the cost of the piano, including freight, stool, and scarf, and the selling price as shown on the defendant's price list. The plaintiff's agency had terminated, and he was succeeded by another agent. The defendant employed the plaintiff to sell to a certain person a piano, upon the understanding that the plaintiff was to receive "his commission as under his old contract." Plaintiff sold the piano at the price of \$550 and upon terms approved by the defendant. Upon the trial, a price list introduced in evidence showed the selling price of the piano sold by the plaintiff to be \$700. The plaintiff testified, however, that this price list was not the price list of the defendant, but was that of Chickering & Sons, the makers of the instrument; that he did not know what was the price of the piano as shown on the price list furnished him by the defendant, but that he did not think a piano of the style sold by him was ever sold by the defendant for more than \$650. A witness for the defendant testified that \$700 was the selling price. The

certiorari record disclosed that a verdict was returned in the justice's court in favor of the plaintiff for the full amount sued for, but the summons is not in the record, and the amount sued for is nowhere disclosed therein. The defendant admitted that the plaintiff was entitled to recover some amount. The record fails to disclose the amount actually recovered. The burden was on the plaintiff in certiorari to show error, and, having failed to show what amount the plaintiff recovered, there was no error in overruling the certiorari.

[Ed. Note.—For other cases, see *Justices of the Peace, Cent. Dig. §§ 807-817; Dec. Dig. § 208.**]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Certiorari by the Ludden & Bates Southern Music House against H. H. Hale to review a judgment in favor of Hale rendered by a justice of the peace. Writ overruled, and plaintiff in certiorari brings error. Affirmed.

Arnaud & Donehoo, of Atlanta, for plaintiff in error. Etheridge & Etheridge, of Atlanta, for defendant in error.

POTTLE, J. Judgment affirmed.

RUSSELL v. STATE. (No. 4,820.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. EXECUTION (§ 129*)—"LEVY"—SUFFICIENCY—ESSENTIALS.

To constitute a valid levy upon personalty there must be an actual or constructive seizure of the property by the officer. A legal "levy" is not made by merely posting upon a mound of dirt, which the officer supposes to contain potatoes, a notice of levy on a specified quantity of potatoes; the officer not having seen the potatoes or reduced them to possession, and merely estimating the quantity of potatoes which should be in the mound, basing his estimate upon what he thinks the defendant's crops should have produced.

[Ed. Note.—For other cases, see *Execution, Cent. Dig. §§ 290-304; Dec. Dig. § 129.**

For other definitions, see *Words and Phrases*, vol. 5, pp. 4101-4106; vol. 8, p. 7705.]

2. LARCENY (§§ 3, 40*)—VARIANCE—OWNER-SHIP—ELEMENTS OF OFFENSE.

This being a prosecution for larceny, in which the title to the property alleged to have been stolen was laid in the levying officer, and it appearing, from the undisputed evidence, that no legal levy was made, no title was shown in the officer, and the conviction was unauthorized. The case, at best, was extremely weak on the question of criminal intent, even if it authorized a finding at all that the accused took and carried away the property described in the accusation with intent to steal the same. It was especially erroneous and prejudicial to charge the jury, in substance, that if they believed the defendant fraudulently violated the rights of the levying officer he would be guilty, and to fail to charge that the taking must have been with the intent to steal the same.

[Ed. Note.—For other cases, see *Larceny, Cent. Dig. §§ 3-10, 102-126, 160; Dec. Dig. §§ 3, 40.**]

Error from City Court of Louisville; W. L. Phillips, Judge.

L. O. Russell was convicted of larceny, and brings error. Reversed.

M. C. Barwick, of Augusta, for plaintiff in error. J. R. Phillips, Sol., of Louisville, for the State.

POTTLE, J. Judgment reversed.

CHITTY v. OLIVER. (No. 4,694.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 628*)—WRIT OF ERROR—DISMISSAL.

It affirmatively appears from the certificate of the clerk of the lower court that the delay in the transmission of the bill of exceptions was not due to any act of omission or commission on the part of counsel for the plaintiff in error; and the failure to transmit a transcript of the pleadings, as appears from the recitals of the bill of exceptions, was due to the fact that the case was tried upon an agreement in open court as to the contents of the originals, which had been lost or destroyed, which were not shown to have been in the possession of counsel for the plaintiff in error. For this reason the writ of error should not be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750-2764; Dec. Dig. § 628.*]

2. PRIOR DECISION FOLLOWED—NEW TRIAL.

This case is controlled by the ruling of this court in *Hodges v. Gillespie, Shields & Co.*, 13 Ga. App. —, 78 S. E. 832. The judge erred in refusing a new trial.

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

Action between L. A. E. Chitty and W. C. Oliver. From an adverse judgment, Chitty brings error. Reversed.

H. H. Elders, of Reidsville, for plaintiff in error. Williams & Giles, of Lyons, and Hines & Jordan, of Atlanta, for defendant in error.

RUSSELL, J. Judgment reversed.

WILLINGHAM v. BUCKEYE COTTON OIL CO. (No. 4,418.)

(Court of Appeals of Georgia. Aug. 25, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 380*)—BOND—QUALIFICATION OF SURETY.

The agent of a corporation is not, by reason of his agency, disqualified to become its surety upon an appeal bond. If he be solvent, his relation to his principal would not in any way diminish the right or power of the appellee to recover upon the bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2023-2028; Dec. Dig. § 380.*]

2. JUSTICES OF THE PEACE (§§ 92, 97, 171, 174*)—TRIAL DE NOVO—PLEADING—AMENDMENT.

An appeal is an investigation de novo. *Patterson v. Sama*, 2 Ga. App. 753, 59 S. E. 18; *Abrams v. Lang*, 60 Ga. 218, 221; Civil Code, § 5014. Where an action in a justice's court is not founded upon an unconditional contract in writing, the plea of the defendant need not be sworn to; and unless the answer is a dilatory plea, or a defense to an unconditional contract in writing, it need not be filed at the first term. When a case is appealed from a justice's court to a superior court, it becomes the duty of the defendant (if he relies upon any defense other than the general issue) to reduce his defense to writing before the case proceeds to trial. The performance of the duty of reducing his defense to writing may be in effect a mere amendment on the part of the defendant to the plea originally filed by him in the justice's court. But, even if this be the case, he will not thereby be precluded from the right of further amending upon the trial. Civil Code, § 4739.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 324, 325, 333, 355-357, 665-693; Dec. Dig. §§ 92, 97, 171, 174.*]

3. JUDGMENT (§ 594*)—SPLITTING CAUSE—ACTIONS ON CONTRACT.

Where the contract is entire, but one suit can be maintained for a breach thereof, and all the breaches occurring up to the commencement of the action must be included therein. *Johnson v. Klassett*, 9 Ga. App. 733, 72 S. E. 174; *Puffer Manufacturing Co. v. Rivers*, 10 Ga. App. 154, 73 S. E. 20; *Thompson v. McDonald*, 84 Ga. 5, 10 S. E. 448; Civil Code, § 4389.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1109; Dec. Dig. § 594.*]

4. JUDGMENT (§ 594*)—BREACH—RIGHT OF ACTION.

One who claims a breach of the contract under which he was hired as a clerk for a period of one year, and contends that he was wrongfully discharged $4\frac{1}{2}$ months before the expiration of the contractual relation, but who fails to institute his action to recover the amount of his monthly salary until after the expiration of the period covered by the contract, and then brings an action for only the other half of the salary for that month for which he has been paid half, is thereafter estopped to sue for the salary for the succeeding 4 months. The case is not affected by the reason of the fact that the amount claimed for the $4\frac{1}{2}$ months is too large to be within the jurisdiction of the justice's court, for the reason that the plaintiff, and not the defendant, selects the forum in which their respective rights shall be investigated and determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1109; Dec. Dig. § 594.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by B. H. Willingham against the Buckeye Cotton Oil Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. K. Miller, of Augusta, for plaintiff in error. Bryan Cumming, of Augusta, for defendant in error.

RUSSELL, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ROLL et al. v. SMITH et al.

Court of North Carolina. Oct. 8, 1913.)

SES (§§ 149, 159*)—COMPETENCY—

ACTION WITH DECEDENT.
An action by the widow and heirs of a decedent to recover land conveyed to him by his devise, where the delivery of the deed in controversy, the widow was permitted to testify that she saw her deceased husband place the deed in his trunk and the trunk, notwithstanding Revisal 31, which provides that a party or interested shall not be examined in his own interest or interest against the executor, administrator, or survivor of a deceased person, or a personal transaction or combination between the witness and the decedent, since she testified to no combination or transaction with the deceased, and no evidence against the personal reputation of the deceased or against any one under him.

—For other cases, see Witnesses, §§ 555, 556, 558, 560, 562, 563, 570, 582, 664, 666-669, 671-682; Dec. Dig. § 159.*]

(§ 273*)—DECLARATIONS AGAINST ADMISSIBILITY.

An action involving the delivery of a decedent's devise, the testimony of a party to the action or interested that the devise said he gave the deed because he was his dependent, properly admitted; this not being a declaration but one against interest, the defendants acquired their title.

—For other cases, see Evidence, §§ 1108-1120; Dec. Dig. § 273.*]

(§ 110*)—ACTIONS—INSTRUCTIONS—DELIVERY.

An action involving the delivery of an undelivered deed, where the court properly placed the burden of proof, his refusal that the grantor's possession of the presumptive evidence that it had been delivered was not error, since, while there is a presumption where nothing else is shown, this only means that the burden of proof is on the grantee to prove delivery, and it would add nothing to a charge on the court to say that there was a presumption against delivery.

—For other cases, see Ejectment, §§ 319-326; Dec. Dig. § 110.*]

AND ERROR (§ 928*) — PRESUMPTIONS—SUPPORT OF JUDGMENT.

In an action involving the delivery of a registered deed, the court refused to place its possession by the grantor raised in question that it had not been delivered, charged that this was a circumstance which the jury might consider, but the charge was not sent to the Supreme Court, would be assumed that the court charged correctly as to the burden of proof; no exception to such charge.

—For other cases, see Appeal and Error, §§ 3749-3754; Dec. Dig. § 928.*]

(§ 110*)—ACTIONS—INSTRUCTIONS—DELIVERY.

An action involving the delivery of an undelivered deed, where there was evidence that the court properly charged that the deed by the grantor was a circumstance which the jury could consider.

—For other cases, see Ejectment, §§ 319-326; Dec. Dig. § 110.*]

Appeal from Superior Court, Sampson County; Allen, Judge.

Action by Nellie Gertrude Carroll and others against Henry E. Smith and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

This is an action to recover a tract of land of 37 acres, which the plaintiffs claim Henry Carroll, from whom the defendants derive their title by devise, conveyed by deed to their ancestor, Albert Carroll, and the only issue in controversy is as to the delivery of the deed. The deed was probated but not registered, and there was evidence that it was delivered to the grantee at the time it was signed and placed by him in his trunk. After the death of Henry Carroll, the deed was found in his trunk with other papers.

Lillie Carroll, widow of Albert Carroll, testified that she saw Albert Carroll place the deed in his tin trunk and saw the deed in the trunk, and defendant excepted.

Geo. Melvin, father of Lillie Carroll, testified that he heard Henry Carroll say he had given Albert his deed because he was his dependent, and defendant excepted.

The defendant requested the court to charge the jury: "That the fact of Henry Carroll having the possession of the deed for the 37 acres of land along with his other title papers, if found by the evidence to be the fact, would be presumptive evidence that the deed had not been delivered." The court refused to so charge the jury and stated that there was no such presumption, but that it was a circumstance only, which the jury might consider. Defendant excepted.

The jury answered the issue in favor of the plaintiffs, and from the judgment rendered the defendant appealed.

Faison & Wright and G. E. Butler, all of Clinton, for appellants. Fowler & Crumpler, of Clinton, for appellees.

ALLEN, J. [1] The evidence of the widow was objected to under section 1631 of the Revisal, but she did not testify to a communication or transaction with the deceased (Johnson v. Cameron, 136 N. C. 243, 48 S. E. 640), nor was her evidence against the personal representative of the deceased or against any one claiming under the deceased. Bunn v. Todd, 107 N. C. 267, 11 S. E. 1043. She simply told what she saw and against one claiming under Henry Carroll and not under Albert Carroll.

[2] We can see no objection to the evidence of George Melvin, and none is shown in the brief. He is not a party to the action, has no pecuniary interest in the result, and was not testifying to a self-serving declaration but to one made against interest and before the defendants acquired any title.

[3,4] There is authority for the position

taken by the defendant that there is a presumption that a deed found in possession of the grantor has not been delivered; but, properly understood, this can mean no more than that the burden of proof is on the grantee to prove delivery; and we must assume that his honor charged correctly as to the burden of proof, as the charge is not sent to this court, and there is no exception that he did not do so. Delivery is essential to the validity of a deed, and in the absence of registration, if the deed is found in possession of the grantor, nothing else appearing, the law says it has not been delivered and casts the burden of proof on the grantee who alleges a delivery, and it adds no additional force to the charge on the burden of proof to say there is a presumption against delivery.

[5] There is, however, evidence in this case of a delivery to the grantee, and it was therefore proper for his honor to charge that possession of the deed by the grantor, if found to exist, was a circumstance which the jury could consider.

In *Tuttle v. Rainey*, 98 N. C. 513, 4 S. E. 475, there was a controversy as to the delivery of a deed, and the court said, while commenting upon an instruction given to the jury: "If it was intended to say that the law presumed a delivery from the possession of the deed instead of that the law authorizes the jury from that fact to infer a delivery and, in the absence of rebutting evidence, to act upon it, it would be error."

We are therefore of opinion, on the whole record there is no error.

No error.

THIRD NAT. BANK OF ST. LOUIS v. EXUM et al.

(Supreme Court of North Carolina. Oct. 8, 1913.)

1. BILLS AND NOTES (§ 537*)—SUFFICIENCY OF EVIDENCE—BONA FIDE PURCHASER.

In an action by a bank upon notes procured by fraud and indorsed to it, evidence held sufficient to take to the jury the question whether the bank was a bona fide holder for value, or merely held the notes for collection.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.*]

2. BILLS AND NOTES (§ 356*)—BONA FIDE PURCHASER—HOLDER FOR COLLECTION.

Where a bank habitually credits a depositor's accounts with negotiable instruments indorsed to it by him, but charged against the account all such instruments as were not paid, the bank was a bailee for collection, and not a bona fide holder for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 908; Dec. Dig. § 356.*]

3. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING CONTROVERTED FACTS.

Where the indorsement of a note by the payee to a bank was expressly denied, it was error for the court to state to the jury that it

was proved and not denied that the note went into the hands of the bank before it was due.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

4. BILLS AND NOTES (§ 497*)—BURDEN OF PROOF—BONA FIDE PURCHASERS.

Under Revisal 1905, § 2208, providing that, when it appears that the title of any one who negotiated an instrument was defective, the burden was upon the holder to show that he was a holder in due course, evidence that there was fraud in the execution of a note casts upon the holder the burden of proving that he was a bona fide purchaser for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.*]

Appeal from Superior Court, Lenoir County; Justice, Judge.

Action by the Third National Bank of St. Louis against W. P. Exum and others. Judgment for the plaintiff, and defendants appeal. Reversed, and new trial granted.

G. V. Cowper and T. C. Wooten, both of Kinston, for appellants. Loftin & Dawson, of Kinston, and McLean, Varser & McLean, of Lumberton, for appellee.

CLARK, C. J. This is another of the numerous actions upon notes to McLaughlin Bros. for the purchase of an "imported French coach horse," of which so many have appeared in our reports. At this term in a case of this kind (*Trust Co. v. Ellen*, 163 N. C. —, 79 S. E. 283) we quoted *Winter v. Nobs*, 19 Idaho, 28, 112 Pac. 525, Ann. Cas. 1912C, 302, where that court took judicial notice that suits of this nature in behalf of McLaughlin Bros. were numerous throughout the country.

[1] In this case the defendant tendered an issue, "Is plaintiff the bona fide owner of the note in due course?" The assignment of error on the exception for refusal to submit such issue must be sustained if there was any evidence, and we think there was, to require the issue. Besides the inherent improbability that a bank in St. Louis would buy outright, or take as collateral, the large number of notes of this nature which McLaughlin Bros. were placing with them, signed by distant and unknown parties, as in this state and elsewhere, with the knowledge the bank had of litigation over such notes, there is other evidence for consideration. Among other evidence, there is the letter of September 26, 1908, from McLaughlin Bros. to the plaintiff bank, in which they say: "The writer will be in St. Louis some time next week, and will make some sort of arrangement and will give you a special account for these due notes, or a demand note, for the amount, and then you can collect them for us." The letters of November 24, 1908, by the attorneys of McLaughlin Bros. to the plaintiff bank, and the letter of November 28th in reply, show that the litigation in regard to the collection of this note was under

the supervision and control of the lawyers for McLaughlin Bros. There is evidence that a large number of like notes for McLaughlin Bros. were taken over by the bank, amounting to about \$50,000, and that plaintiff knew nothing of the makers. It was also in evidence that under instructions from McLaughlin Bros. when any of these notes were not paid the plaintiff sent them to the attorneys of McLaughlin Bros., as was this case. There is no evidence that the bank has ever paid, or been charged with, any expenses on account of the collection of these notes. McLaughlin Bros. deposited funds in bank, and the bank charged back the amount of any of these notes which were not paid. It would seem that the understanding was that if a note was not paid the bank was to bring suit in its own name under McLaughlin Bros.' instructions, and through their attorneys, and the bank was to look finally to McLaughlin Bros. for payment of any note which was not collected. One of the McLaughlin Bros. told a witness a number of times that they would remain liable on the notes whether protested or not, and the bank was given instructions not to protest the notes, and also held a general waiver of protest. Not only this, but McLaughlin Bros. guaranteed the payment of the notes. It was in evidence that the bank had been doing business with McLaughlin Bros. for a number of years, and knew the kind of business they were in, and were aware of the abundant litigation arising on contested notes. It was not likely, therefore, that the bank purchased the notes, or took them as collateral. It is true this may have been done. But there was evidence sufficient to go to the jury to pass upon the fact whether or not the true transaction was that the bank in effect merely held the notes for collection. It was at the request of McLaughlin Bros. that this and other suits upon these notes were brought in the name of the bank under the general supervision of the attorneys for McLaughlin Bros.

[2] In *Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365, it was held: "When a bank habitually credited a depositor's account with negotiable instruments indorsed to it by such depositor, giving permission to the depositor to draw against such credits, but charged up to the depositor all such papers as were not paid on present action, or deducted them from such deposit, such a course of dealing stamps the transaction with reference to the title to instruments so indorsed as being unmistakably a bailment for collection simply, and no greater title is vested in the bank." To same effect, *Boykin v. Bank*, 118 N. C. 567, 24 S. E. 357; *Davis v. Lumber Co.*, 130 N. C. 178, 41 S. E. 95; *Cotton Mills v. Well*, 129 N. C. 452, 40 S. E. 218; *Latham v. Spragina*, 163 N. C. —, 78 S. E. 282.

[3] The indorsement of the note was ex-

pressly denied, and the court erred in stating to the jury that it was proved, and not denied, that the note went into the hands of the plaintiff before it was due. This point has been recently and fully discussed by Hoke, J., in *Park v. Exum*, 156 N. C. 230, 72 S. E. 309, upon facts almost identical with this case.

[4] When there is evidence tending to show fraud in the execution of the note, the burden is thrown upon the plaintiff to show that it was a bona fide purchaser, and not upon the defendants to show the negative of that proposition. *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738; *Park v. Exum*, 156 N. C. 231, 72 S. E. 809; *Vaughan v. Exum*, 161 N. C. 494, 77 S. E. 679; *Bank v. Walser*, 162 N. C. 53, 77 S. E. 1006; *Trust Co. v. Ellen*, 163 N. C. —, 79 S. E. 263; *Rev. § 2208*.

It is unnecessary to discuss the evidence of fraud in this case, as the above errors entitle the plaintiff to a new trial, and we only refer to the proposition because it is contended by the counsel for the plaintiff that the above rulings had been overturned by the decision in *Bank v. Brown*, 160 N. C. 23, 75 S. E. 1086. But reference to this last case will show that there was no evidence tending to show fraud, and therefore the burden was not shifted upon the defendant to show a purchase before maturity, and without notice of the defect. *Revisal 1905, § 2208*.

New trial.

GRIFFIN v. COMMANDER et al.

(Supreme Court of North Carolina. Oct. 8, 1913.)

1. WILLS (§ 600*)—CONSTRUCTION — ESTATE CREATED—DEVISE WITH POWER OF DISPOSITION.

A devise generally of real estate, with a power of disposition, passes the fee without restriction, but a devise for life with power of disposition creates only a life estate with the power annexed; the test whether the fee or merely a life estate passes is whether the testator expressly limits the devise to the first taker to a life estate by specific language.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1335-1339; *Dec. Dig. § 600.**]

2. WILLS (§ 601*)—CONSTRUCTION — ESTATE CREATED—FEE SIMPLE — GENERAL DEVISE WITH POWER OF DISPOSITION.

A devise generally of real estate, "with power to give and devise the same after her (the devisee's) death, to our beloved children and grandchildren," not expressly restricting the devisee's estate to a life estate, passes the fee without restriction, and the words quoted are to be regarded as mere surplusage, as the right to devise is incident to the fee.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1340-1350, 1608; *Dec. Dig. § 601.**]

Appeal from Superior Court, Pasquotank County; Bragaw, Judge.

Controversy submitted without action, by Elizabeth G. Griffin against C. E. Commander and another. From a judgment for defendants, plaintiff appeals. Reversed.

Ward & Thompson, of Elizabeth City, for appellant. J. C. Brooks, of Elizabeth City, for appellees.

CLARK, C. J. This is a controversy submitted without action to determine whether or not the plaintiff can make a good and valid title to the defendants for certain real estate in Elizabeth City which she has contracted to convey to them. W. W. Griffin died October 1, 1897, owning said realty in fee and leaving his widow, who is the plaintiff, two children, M. R. Griffin and Blanche Temple, each of whom had living children, and seven grandchildren, who were the children of his deceased son, Wm. J. Griffin. In March, 1901, said widow and her son, M. R. Griffin, instituted a special proceeding against Blanche Temple and the seven children of W. J. Griffin, deceased, for sale of the premises for partition. Such sale was made and confirmed, and a deed was made to the plaintiff as purchaser. In that proceeding the children of M. R. Griffin and Blanche Temple were not made parties, and this is now urged as a defect.

[1] The effect of such partition proceedings need not be discussed, for we are of opinion that under the will of W. W. Griffin the plaintiff took a fee simple in the locus in quo, and has a right to convey a good and indefeasible title to the defendants, to whom she has contracted to sell the same.

W. W. Griffin by his will devised and bequeathed to his widow, the plaintiff, "Elizabeth G. Griffin, all the remainder of my estate, real and personal, with power to give and devise the same after her death, to our beloved children and grandchildren, that inasmuch as they are and should be our lawful heirs and that they are equally our own and well beloved by each of us, as their joint parents, she has the same right of distribution of our estate, as I have, knowing no partiality nor discrimination in the same."

The rule governing this case is clearly stated in *Borden v. Downey*, 35 N. J. Law, 77: "Where an estate for life is expressly given, and a power of disposition is annexed to it, in such case the fee does not pass under such devise, but the naked power to dispose of the fee. It is otherwise in case there is a gift generally of the estate, with a power of disposition annexed. *In this latter case the property itself is transferred.*"

[2] In the will of W. W. Griffin there is no limitation for life, and the words annexed do not restrict it to a life estate, but are merely an expression of the opinion of the testator that his wife, after his death, should have complete right of distribution of said estate as fully as he had himself, and would exercise it impartially.

In *McKrow v. Painter*, 89 N. C. 437, the testator gave the property to his wife "if she remains a widow; and if she marries she is only to have a child's part * * * and I

do authorize my wife, * * * at her death, to divide this property among our children as she sees proper." The court held that under the act of 1784, now Revisal 3138, this language vested the absolute title in the wife of the testator, distinguishing *Alexander v. Cunningham*, 27 N. C. 430.

In *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649, it is held, citing 2 Underhill on Wills, § 686, that "a devise to a person for life only, with power of disposition, gives the devisee an estate for life, with power to appoint in fee simple."

In *Jackson v. Robins*, 16 Johns. (N. Y.) 588, it is held to be settled law that: "Where an estate is given to a person generally, or indefinitely, with power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee * * * will not take the estate in fee." This case is cited and approved in *Bass v. Bass*, 78 N. C. 374, where it was held that a devise to the testator's wife of his property "to be disposed of by will, or in any manner she may deem best," did not impose a limitation upon the gift, and that the words of appointment cannot be held to have such effect, and, further, that where an estate is given to a person generally, with the power of disposal, it is in fee unless the testator gives to the first taker an estate for life only, and annexes thereto a power to dispose of the reversion, citing 2 Jarman, Wills, 171, note 2; 4 Kent, Comm. 349; Sugden on Powers, 96.

Jackson v. Robins, supra, is also cited with approval in *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684, where it is laid down: "It has been settled upon unquestionable authority that, if an estate be given * * * to a person generally, with the power of disposition or appointment, it carries the fee; but if it be given to one for life only and there is annexed to it such a power, it does not enlarge the estate, but gives him only an estate for life." *Bass v. Bass* and *Patrick v. Morehead*, both supra, are cited with approval in *Long v. Waldraven*, 113 N. C. 337, 18 S. E. 251.

The test in cases of this kind is whether the testator expressly limits the devise of the first taker to a life estate by specific language. No such specific language is used in this case. The plaintiff took a fee simple absolute, and the phrase, "with the power to devise after her death to our children and grandchildren," does not limit the prior fee-simple estate devised to her. Such words were mere surplusage, because the right to devise is incident to her fee simple. Indeed the words, "she has the same right of distribution of our savings as I have," intimate a clear intention to devise the fee simple to her. In effect he said that, the property

acquired by the toll of both of intended that his wife after his death should have the same power of disposing of such property as full control of himself.

gment of the court below to the effect of this opinion is reversed.

WHITFORD v. NORTH STATE LIFE INS. CO.

Court of North Carolina. Oct. 8, 1913.)

§ 190*)—CONSTRUCTION.

of a statute are to be construed in the ordinarily understood, and where the language is plain and admits of but one meaning there is no room for construction; only when the terms of the statute are ambiguous or the grammatical construction is doubtful that courts can exercise power of controlling the language in order to give effect to the supposed real intention of the Legislature.

e.—For other cases, see Statutes, §§ 266, 269; Dec. Dig. § 190.*]

§ 191*)—COMPETENCY—HUSBAND WIFE—"COMMUNICATE"—"COMMUNICATION."

§ 1908, § 1636, declares that no husband shall be compellable to disclose confidential communication made by one to the other during marriage. *Held*, that the word "communicate" means to bestow, convey, impart, recount, to impart, as to communication to any one, the word "communication" meaning the act of communicating; hence, a paper written by a husband to his wife, just prior to his suicide, giving her directions as to what she should do with reference to various matters after he was dead, and which he intended she should see until after his death, was not a communication during marriage and was therefore admissible in an action to prove suicide.

e.—For other cases, see Witnesses, §§ 738; Dec. Dig. § 191.*

r definitions, see Words and Phrases, p. 1341, 1342; vol. 8, p. 7608.]

§ 272*)—DECLARATIONS AGAINST

ing by deceased, addressed to his estate, not intended to come into her hands after the writer's death, directing his estate to take certain business matters, *held* admissible in an action on a policy to show declarations against interest.

e.—For other cases, see Evidence, §§ 1105-1107; Dec. Dig. § 272.*]

from Superior Court, Craven County. Judge.

by G. A. Whitford against the North State Life Insurance Company. Judgment for defendant, and plaintiff appeals.

an action to recover upon a policy issued by the defendant on the 10th day of December, 1910. The insured died on the 13th day of May, 1911. The defendant denied liability, and set up as a defense that W. B. Burgess, the insured, in his application therefor, committed suicide, and the further defense that the policy was void for the reason that the applicant, W. B. Burgess, had made material false representations in his application for the insurance.

The defendant introduced in evidence on the issue of suicide, the following papers:

"To My Wife:

"Telegraph Joe Latham to come to you at once.

"Look out for my Royal Arcanum and Heptasophs.

"My Union Central policy is in the hands of the company as collateral for \$180, there is a thousand available on it.

"Look into one of the little drawers and you will find a policy in the North State Mutual for \$1,500, they hold my note for the premium but the interest is paid on it up to May 30th, see if you can collect on it.

"Tell Joe to write Carey J. Hunter for instruction in regard to the Union Central.

"I owe Sam King \$20.

"I owe Gus Pritchard, (colored) \$50. Allan Jenkins, colored, \$20.

(over)

"Sell the place for what you can get, pay Mr. Cannaday and take the rest and do the best you can.

"God bless you and the children. Goodbye.

"Bat.

"Sam can tell you of the other colored people."

This note was in an envelope and on the back of the envelope the following was written:

"To Mam Important.

"Mrs. W. B. Burgess.

"See Eugene Wood and get him to bury me and wait until you get insurance."

Plaintiff excepted.

Notice was duly served on the plaintiff to produce said papers on the trial. The papers were written by the husband, but were not delivered by the insured to his wife, nor did she know of the existence of either until after the death of her husband, when they were brought to her from the private desk of the husband by one of her children. She then gave them to G. A. Whitford before his qualification as administrator, and he retained them until a few days before the trial, and after notice had been served on him, when he returned them to the wife. The indorsement on the envelope was shown to Eugene Wood, who was undertaker and coroner, and upon request the papers were delivered to the coroner's jury at the inquest, but it does not appear that the paper inclosed in the evidence was read.

The jury returned the following verdict:

"(1) Did the defendant insure the life of W. B. Burgess in the sum of fifteen hundred dollars (\$1,500.00) as alleged in the complaint? Answer: Yes.

"(2) Did the insured, W. B. Burgess, die

by his own hand, with intent to commit suicide? Answer: Yes.

"(3) Did the assured, W. B. Burgess, represent that he had had no serious illness or disease other than that stated in the application? Answer: Yes.

"(4) Was said representation untrue? Answer: Yes.

"(5) Was such representation material? Answer: Yes.

"(6) What sum, if any, is the plaintiff entitled to recover? Answer: ———"

Judgment was entered in accordance with the verdict, and the plaintiff excepted and appealed.

Guion & Guion, of New Bern, for appellant.
Rouse & Land, of Kinston, for appellee.

ALLEN, J. The statute of this state as to communications between husband and wife provides that "no husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage," and it is by this statute, construed in connection with the rules of the common law as to what communications are confidential, that the admissibility of the papers introduced in evidence is to be tested. The inquiry naturally resolves itself into two propositions: (1) Are the papers communications from the husband to the wife during marriage? (2) If so, are they confidential?

We will consider the two propositions together. The reasons for the rule preventing the disclosure of confidential communications between husband and wife, as enforced at common law, are well stated by Taylor, C. J., in *Mercer v. State*, 40 Fla. 216, 24 South. 154, 74 Am. St. Rep. 135: "Society has a deeply rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore the law places the ban of its prohibition upon any breach of the confidence between husband and wife, by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses. * * * The reason of the rule for excluding the confidences between husband and wife as incompetent matter to be deposed by either of them, though they may be competent witnesses to testify to other facts, is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society"—and Judge Daniel admonishes us in *Hester v. Hester*, 15 N. C. 228, that "the rule should not be extended, to the exclusion of truth, beyond the limits within which the reason of the law calls for it."

[1] Words in a statute are to be construed as they are ordinarily understood, and where "the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. It is therefore only in the construction of statutes whose terms give rise to some ambiguity, or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the lawmakers. Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be. It has therefore been distinctly stated, from early times down to the present day, that judges are not to mold the language of the statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship, or of what in their view is right and reasonable, or is prejudicial to society; are not to alter clear words, though the Legislature may not have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which is 'supposed to be more consonant with justice' than their ordinary meaning." *Endlich, Inter. Stat. § 4*. "The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced. This meaning and intention must be sought first of all in the language of the statute itself. For it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose, and do express that will correctly. If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey." *Black on Inter. Statutes*, pp. 35 and 36.

[2] The words of the statute under consideration are "communications made by one to the other during marriage." "Communicate," as defined by Webster, is to bestow, to convey, to make known, to recount, to impart, as to communicate information to any one, and "communication" is the act of communicating, and it would seem that a paper, although directed to the wife, of which she had no knowledge, and which it was not expected she would see until after the death of the husband, is not a communication during marriage. The language indicates either that the information should be actually imparted, or, at least, that there should be an expectation of doing so, during marriage. If, however, the papers introduced in evidence are communications from the husband to the wife, the statute does not render them incompetent unless they are confiden-

usal of the papers discloses that statements made are in regard to matters, that the directions given be performed without disclosing of the papers, and that the husband this would be done, and in the papers are testamentary in

c. 2355, the author says: "Com- between husband and wife in purely business matters are not and the text is supported by cases. Spitz's Appeal, 56 Conn. 776, 7 Am. St. Rep. 303; Parkardell, 110 N. Y. 386, 18 N. E. 123, Rep. 384; Hanks v. Van Gardner, 81, 18 N. W. 103; Sedgwick v. Ind. 281.

also not without authority upon the our own state. In the Hester referred to, Judge Daniel says: upon the subject of confidential communications is not denied; the sanctity of communications will be protected. Perpetrated by the marriage tie have, as the bar, the right to think aloud in presence of each other. But the questions, What communications are to be confidential? Not those, we think, made to the wife, to be by her communicated to others; nor those which she makes to the wife as to a matter of which a thing is to operate after when it must be the wish of the husband that the operation should be according to the fact, as established by evidence. Suppose a husband were to tell his wife, that he has given to one of his children a horse, can she not afterwards prove that as against the executor? So, that the declaration to which she has called had been made to her husband; there is no reason why she, if she may not testify to it, as well as the husband? Because it is then apparent that the communication is not confidential between the husband and wife in the sense of the rule. The rule equally applies when from the conversation it is obvious he has concealed, but on the contrary he has desired to make it known, to her, if he found no other means of doing so." Note that the learned and able judge says, among other things, that the rule does not apply to those communications in which the husband makes to the wife a statement of fact upon which a thing is to operate after his death, and it will be seen that each statement in the papers of the husband fits this case was approved in Gasconade, 34 N. C. 213, in which the widow was permitted to testify that her husband had made a deed in question to her, and told her to take care of it for Anson, and have it recorded for him, whenever she should see him, that she then took it, and put it

in her trunk, separate from her husband's papers, and he never saw it afterwards to her knowledge, and that he died in 1836, and shortly afterwards she had the deed proved and registered.

[3] We are therefore of opinion, having in view the reason for the rule—the language employed in the statute, the fact that the wife had no knowledge of the papers until after the death of her husband, that it appears from the papers and the attendant circumstances that she was not expected to do so, and the subject-matter of the papers—that they are not confidential communications made by the husband to the wife during marriage, within the meaning of the statute, and were properly admitted in evidence as declarations against interest.

We at first thought the case of State v. Wallace, 162 N. C. —, 78 S. E. 1, at the last term, was decisive of this in favor of the defendant, but the two cases rest upon different principles, and the distinction between the two is that in the Wallace Case the letter reached the wife during the life of the husband, and came into the hands of a third person without the connivance or consent of the wife, while in this the wife knew nothing of the papers until after the death of her husband, and she gave them to another person.

This disposes of the only material exception upon the second issue; and, as the finding on that issue precludes a recovery by the plaintiff, it is not necessary to discuss the exceptions arising on the other issues.

No error.

JONES et al. v. WHICHARD et al.

(Supreme Court of North Carolina. Oct. 1, 1913.)

1. ESTATES (§ 8*)—RULE IN SHELLEY'S CASE.

Under the rule in Shelley's Case, when a person takes an estate of freehold, legal or equitable, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.

[Ed. Note.—For other cases, see Estates, Dec. Dig. § 8.*]

2. ESTATES (§ 8*)—RULE IN SHELLEY'S CASE.

In order to make the rule in Shelley's Case apply, the word "heirs" or "heirs of the body" in the limitation to the heirs must be used in a technical sense, carrying the estate to such heirs as an entire class, to take in succession from generation to generation; and, where the words are simply intended as a descriptio personarum, or if the estate is conveyed in any other manner than it would descend, the rule does not apply.

[Ed. Note.—For other cases, see Estates, Dec. Dig. § 8.*]

3. DEEDS (§ 128*)—CONSTRUCTION — ESTATE CREATED—RULE IN SHELLEY'S CASE.

Land was deeded to J. and wife for life, "then to their legal bodily heirs provided they leave any, and if not, to be equally divided among my nearest of kin." Held, that the word "heirs" was not used in its technical sense, but meant children and grandchildren, and the fee did not pass to J. and wife under the rule in Shelley's Case.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.*]

4. DEEDS (§ 133*)—CONSTRUCTION — ESTATE CREATED—REMAINDERS — VESTED OR CONTINGENT.

The remainder to the heirs was contingent on their being alive when the life estate terminated, and the husband of one of the heirs, whose wife and their only child died before the life tenants, could claim no interest in the remainder.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368-371; Dec. Dig. § 133.*]

5. CURTESY (§ 9*)—REQUISITES — SEISIN OF WIFE.

A husband could not claim as tenant by curtesy because his wife never had the seisin requisite to the validity of such a claim.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. §§ 20-30; Dec. Dig. § 9.*]

6. DEEDS (§ 97*)—CONSTRUCTION — CONFLICT BETWEEN THE PREMISES AND HABENDUM.

It is the usual province of the habendum of a deed to define the quantity of the estate, or to explain or qualify the premises, but it cannot be allowed to create an estate entirely repugnant to the interest conveyed in the premises.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.*]

7. DEEDS (§ 97*)—CONSTRUCTION — CONFLICT BETWEEN THE PREMISES AND HABENDUM.

Where the premises of a deed standing alone conveyed the fee, but the habendum limited the estate to a life estate, they are not to be construed as entirely repugnant, but each is to be used in explanation of the other; and, it being clear that it was only intended to create a life estate, it will be construed accordingly.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Agreed case by R. E. Jones and others against Jarvis Whichard, C. F. Page, and another. From a judgment for the plaintiffs and a codefendant, the defendant Page appeals. Affirmed.

On the hearing it was made to appear: That in August, 1866, Major Jones made a deed to his son, R. M. Jones, etc., for 40 acres of land, in terms as follows: "This indenture made this the 11th day of August, A. D. 1866, between Major Jones of the first part and Robert M. Jones of the second part both of the county of Pitt and state of North Carolina: Witnesseth, that the said Major Jones, for and in consideration of natural love and affection which he has unto the said Robert M. Jones, his son, has given, granted, aliened, released and confirmed, and by these presents do give, grant, alien, release and confirm unto the said Robert M. Jones, his heirs and assigns, a certain tract or

parcel of land situate as follows: * * *

To have and to hold the said tract or parcel of land and all the appurtenances thereof to him, the said Robert M. Jones and Martha F. Jones, his wife, during their natural life, and then to their legal bodily heirs, provided they leave any, and if not, to be equally divided among my nearest of kin." etc. That on November 27, 1900, said R. M. Jones made a deed for the land to his wife for life, remainder to seven of his nine children, and not including a son, S. L. Jones, or a daughter, Huldah, intermarried with C. F. Page. That Huldah Page had issue born alive, a son, and she and son died before R. M. Jones and wife, and these last having also died, present suit was instituted for sale of land for division. Plaintiffs are the seven children of R. M. Jones and wife, who were grantees in the deed of R. M. Jones to his wife, etc. Defendants are S. L. Jones, another son, and C. F. Page, surviving husband of Huldah. On these facts it was contended for plaintiffs that, under the rule in Shelley's Case, the deed from Major Jones conveyed a fee simple, and that when R. M. Jones conveyed the property to his wife for life and remainder to seven of their children, plaintiffs, the deed passed the entire interest, and defendants were thereby excluded. Defendant S. L. Jones, contended that the deed of Major Jones conveyed only a life estate, remainder to his children or issue in the sense of children or grandchildren, and that he, as one of them, was entitled to a child's interest. It was insisted for C. F. Page that the deed from Major Jones conveyed a life estate to R. M. Jones and wife, remainder to their issue, in the sense of children and grandchildren, and that this remainder was vested in such children, and that on the death of his wife, Huldah, leaving an infant son, her interest descended to such son, and on his death without issue and without brother or sister the share passed to C. F. Page, the father, under 6 Canon Descent, Revisal, c. 30. The court below, being of opinion that the deed of Major Jones conveyed a life estate, remainder to the children and grandchildren, contingent on their surviving their parents, entered judgment that defendant S. L. Jones was entitled to a share in the fund and that C. F. Page was excluded; his son having died before R. M. Jones and wife. From this judgment said C. F. Page, having duly excepted, appealed.

Julius Brown, of Greenville, for appellant. Harding & Pierce, of Greenville, and Ward & Grimes, of Washington, N. C., for appellees.

HOKE, J. (after stating the facts as above). [1, 2] A very full and satisfactory statement of the rule in Shelley's Case is given in Preston on Estates as follows: "When a person takes an estate of freehold, legally or equita-

bly, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." In approval and illustration of the rule, as stated, there are many decisions here and elsewhere to the effect that, in order to its proper application, the words "heirs" or "heirs of the body" (these last by reason of our statute, Revisal, § 1578) must be used in their technical sense, carrying the estate to such heirs as an entire class, to take in succession from generation to generation, and they must have the effect to convey "the same estate to the same persons, whether they take by descent or purchase," and, whenever it appears from the context or from a perusal of the entire instrument that the words were not intended in their ordinary acceptance as words of inheritance, but simply as a descriptio personarum designating certain individuals of the class, or that the estate is thereby conveyed to "any other person in any other manner or in any other quality than the canons of descent provide," the rule in question does not apply, and interest of the first taken will be as it is expressly described an estate for life. *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15; *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172; *Wool v. Fleetwood*, 136 N. C. 460-470, 48 S. E. 785, 67 L. R. A. 444; *May v. Lewis*, 132 N. C. 115, 43 S. E. 550; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295; *Mills v. Thorne*, 95 N. C. 362; *Ward v. Jones*, 40 N. C. 404.

[3] In the recent and well-considered case of *Puckett v. Morgan*, supra, the language of the instrument was: "To M. * * * during her life, then to her bodily heirs, if any; but, if she have none, back to her brothers and sisters"—well-nigh in the exact terms of the present deed and it was held that, by reason of the context, the words "bodily heirs" were so qualified as to indicate that they were used merely as a descriptio personarum, and that M. took only a life estate. The authority is, in our opinion, controlling, and fully supports the judgment of his honor in denying the application of the rule. The cases of *Morrisett v. Stevens*, 136 N. C. 160, 48 S. E. 661, and *Whitfield v. Garriss*, 134 N. C. 24, 45 S. E. 904, and others cited by counsel, when properly understood, do not militate against this construction. In *Whitfield's Case* and in *Morrisett's Case* the ulterior disposition of the property was not, and was not intended as, a limitation on the estate conveyed to the first taker, but was a provision whereby one stock of inheritance on certain contingencies was substituted for another, the second to hold as purchasers direct from the grantor and orig-

inal owner. *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687. The case of *Puckett v. Morgan* is also authority for the position that this deed of Major Jones conveys an estate for life to R. M. Jones and wife, remainder to their issue in the sense of children and grandchildren. This meaning has not infrequently prevailed when it appeared to be the clear intent of the instrument. *Smith v. Lumber Co.*, 155 N. C. 389-393, 71 S. E. 445; *Sain v. Baker*, 128 N. C. 256, 38 S. E. 858; *Rollins v. Keel*, 115 N. C. 68, 20 S. E. 209, etc., and we concur also in the view of his honor that this remainder is contingent on these devisees being alive to fill the description at the time of the falling in of the particular estate. This construction is also sustained by *Puckett v. Morgan*, and the well-reasoned cases of *Latham v. Lumber Co.*, 139 N. C. 9, 51 S. E. 780, 111 Am. St. Rep. 764, and *Bowen v. Hackney*, 136 N. C. 187, 48 S. E. 633, 67 L. R. A. 440, are to like effect.

[4] It was contended for defendant that this was a vested remainder, relying on certain expressions in *Ex parte Dodd*, 62 N. C. 97, quoted by the court in *Springs v. Scott*, 132 N. C. 552, 44 S. E. 116, but the position is not well taken. In *Springs v. Scott*, the court was dealing with the power to sell contingent remainders, and, in using the expression that "such power existed whensoever one was born in whom the estate *can vest*," the judge delivering the opinion did not intend that the remainder thereby became vested, but that the power in question arose whenever one of the class was born in whom the estate would vest on the happening of the contingency. Those cases, in the aspect suggested, have no bearing on the question presented. The remainder in our case was contingent and, applying the doctrine as above stated, it was properly held that defendant S. L. Jones was entitled to a child's portion of the estate, he being alive to claim it when the life estate terminated; thus filling the description as devisee, and that *Huldah Page* and her son, both having died before the life tenants, did not fill such description, and had no interest or estate which the father, C. F. Page, could inherit.

[5] The suggestion that C. F. Page could claim as tenant by curtesy is without merit; the existence of the life estate in R. M. Jones and wife would, in any case, prevent the seisin required for the validity of such a claim. In *re Robert Dixon*, 156 N. C. 26, 72 S. E. 71; *Redding v. Vogt*, 140 N. C. 562, 53 S. E. 337, 6 Ann. Cas. 312.

[6] We are not inadvertent to the fact that the deed of Major Jones in the premises, if it stood alone, would convey a fee simple, nor to the legal position that at common law, while it was the usual province of the habendum to define and determine the quantity of the estate, or to explain or qualify the promises, it was not allowed to create an estate entirely repugnant to the interest con-

vayed in the premises, an instance of this appearing in *Hafner v. Irwin*, 20 N. C. 570, 34 Am. Dec. 390, where the premises conveyed an estate to A. and his heirs, habendum to B. and his heirs. Such a position is still recognized here in proper cases, as appears in *Wilkins v. Norman*, 139 N. C. 41, 51 S. E. 797, 111 Am. St. Rep. 787, and other cases of like kind.

[7] But in the case of *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514, this court, in a well sustained opinion by Associate Justice Brown, announced the decision that, although a deed in its premises professed to convey an estate to the grantee and his heirs, it would not have the effect to convey a fee simple when it clearly appeared from the habendum or other portions of the instrument that it was the intent to convey only a life estate; that in such case it was not proper to construe the clauses as entirely repugnant, but that the one was in explanation of the other, adopting on that question the rule as given in 1 *Devlin on Deeds*, § 215, as follows: "It may be formulated as a rule that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the habendum to control, the granting words will govern, but if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the habendum the latter must control."

There is no error, and the judgment of the lower court must be affirmed.

Affirmed.

CABLE PIANO CO. v. STRICKLAND.

(Supreme Court of North Carolina. Oct. 8, 1913.)

PRINCIPAL AND AGENT (§ 119*) — SELLING AGENT—MODIFICATION OF CONTRACT—AUTHORITY.

Where, in an action to recover a balance due on a piano, defendant relied on a parol agreement of plaintiff's selling agent that defendant was to have a credit of \$50 for a recommendation in case he found the piano satisfactory, and the contract of sale in bold type provided that it was agreed that plaintiff was not to be bound by any provisions other than those printed in the contract, unless approved by plaintiff, and that no salesman or agent was authorized to make alterations therein, etc., the salesman not being a general agent, the burden was on defendant to prove that such agent had authority to waive the provisions of the written contract and to make the oral agreement.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 391-401; Dec. Dig. § 119.*]

Appeal from Superior Court, Sampson County; Lyon, Judge.

Action by the Cable Piano Company against Archie H. Strickland. Judgment for defendant, and plaintiff appeals. Reversed.

This is an action to recover possession of a piano. Defendant admitted his signature to the contract of sale, which retained title to the piano until the purchase price was paid in full, but averred that plaintiff's selling agent, S. A. Kell, agreed with him at the time of the sale that if the piano came up to Kell's representations and Strickland gave him a letter of recommendation, he would credit the note with \$50 when it became due. Defendant paid the balance, except \$50 due at the time of the payment, and tendered the recommendation. The written contract contains the following clause in bold type: "*It is expressly agreed that the Cable Piano Company is not to be bound by any provisions other than those printed in the contract, unless the same shall be approved by the Cable Piano Company at* ———.

This contract subject to the approval of the Cable Piano Company"—and the following indorsed thereon: "Notice.—This conditional contract is subject to the approval of the Cable Piano Co., at Richmond, Va., and contains all the agreements pertaining thereto. No agent or salesman is authorized to make any alterations herein, to vary in any way the interest clause nor to give copies thereof not bearing the approval of the Cable Piano Company at Richmond, Va. Factory warranties do not include tuning." The officers of the plaintiff testified that Kell had no instructions to make any such contract, nor any such authority; that they did not know, nor had there been reported to the company any such contract as claimed by the defendant. That the contract approved by the company was the written one without change. There was no evidence on the part of the defendant tending to prove authority in Kell to make the agreement alleged by the defendant. The plaintiff excepted to the introduction of all evidence offered to prove the agreement with Kell. The defendant alleged in his answer, among other things: "That at the end of the period agreed upon, to wit, on the 26th day of September, 1909, the defendant, finding that said piano came up to the recommendations of said Kell, and was in fact a very desirable instrument, came to Clinton, paid to said Kell the sum of \$114.80, the same being the balance due on said contract, less the sum of \$50, and delivered to said agent a written testimonial in full accordance with the agreement hereinbefore stated, and demanded his contract and receipt in full for said payments. That said Kell accepted said payment and said testimonial, but refused to deliver to the defendant the contract signed by him, claiming that the same was at Richmond, Va., the home office of the plaintiff." His honor charged the jury: "If you find from the evidence that at the time of signing the written contract, or before that time, that plaintiff's agent, S.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A. Kell, acting in the scope of his authority, promised defendant to deduct the sum of \$50 from the price of the piano, and to credit that sum on the contract, provided that defendant would make the recommendation that the piano bought was a good one and up to the representations, then you will answer the first issue, 'No,' the second, 'Yes,' issue 1½, 'Yes.'" The plaintiff excepted. The second issue and the answer thereto was as follows: "(2) Did the plaintiff's agent, S. A. Kell, while acting within the scope of his authority, promise and agree to deduct the sum of \$50 from the price of the piano, provided the defendant would make the recommendation referred to in the answer? Answer: Yes." The plaintiff requested his honor to instruct the jury, if they believed the evidence, to answer the second issue "No," which was refused, and the plaintiff excepted. There was a verdict in favor of the defendant and the plaintiff appealed from the judgment rendered thereon.

Faison & Wright, of Clinton, for appellant.
H. A. Grady, of Clinton, for appellee.

ALLEN, J. The agent from whom the defendant bought the piano was not a general agent of the plaintiff, and the burden was therefore on the defendant to prove that he had authority to waive the provisions of the written contract. It was so held in *Machine Co. v. Hill*, 136 N. C. 128, 48 S. E. 575, and in *Medicine Co. v. Mizell*, 148 N. C. 387, 62 S. E. 511. In the first of these cases, the plaintiff was suing upon a contract for the sale of sewing machines, which contained the provision: "It is understood that no claim or any understanding or agreement of any nature whatsoever between this company and its dealers will be recognized, except such as is embraced in written orders or is in writing and accepted by said company at its office"—and the defense was that the agent who made the sale made a verbal agreement with them to have the sole agency for sale of the plaintiff's machines in Franklin county, and that they incurred considerable expense, employing an experienced salesman to handle the machines and purchased a horse and wagon for him, but that in violation of such contract, the plaintiff shipped machines to said county to rivals in business of the defendants, who undersold the defendants, causing them to sell the machines bought of the plaintiff at a loss, besides causing the loss of salary paid their salesman and the cost of equipping themselves for the handling of the machines under their contract for an exclusive agency, and the court said: "It is true on one hand that the plaintiff had the right to restrict the powers of its agents by the notice quoted above, and printed on the orders signed by the defendants, and on the other that this restriction could be waived. But the bur-

den to prove that such waiver was within the scope of the agent's authority was upon the defendants. It could not be proved by the agent's own declaration. It must be proved aliunde. *Taylor v. Hunt*, 118 N. C. 173 [24 S. E. 359], and cases there cited; *Summerrow v. Baruch*, 128 N. C. 204 [38 S. E. 861]." In the second case the action was brought to recover the price of goods sold and delivered to the defendant under a written contract containing the following stipulation: "This order is not subject to countermand, and we will receive said goods promptly on arrival at the station named above. There is no agreement, verbal or otherwise, affecting the terms of this order than is specified herein." The court, over the plaintiff's objection, permitted the defendant to testify that at the time he signed the written contract or order, the agent who sold the goods said he would ship them, and the defendant could keep them for 90 days, and if at the expiration of that time they were unsold, he could ship them back to the plaintiff. This court held the evidence incompetent, and said: "If the agent had the authority to make the oral agreement, the burden was upon the defendant to show it, even if evidence of such agreement was otherwise competent. *Machine Co. v. Hill*, 136 N. C. 128 [48 S. E. 575]." The last case of *Medicine Co. v. Mizell*, has been approved in *Woodson v. Beck*, 151 N. C. 146, 65 S. E. 751, 31 L. R. A. (N. S.) 235, *Briggs v. Ins. Co.*, 155 N. C. 78, 70 S. E. 1068, *Bowser v. Tarry*, 156 N. C. 38, 72 S. E. 74, and *Simpson v. Green*, 160 N. C. 301, 78 S. E. 237.

It follows, therefore, as there was no evidence of authority upon the part of the agent to waive the provisions of the written contract and to make the oral agreement, that his honor was in error in refusing the instruction prayed for, and in assuming in his charge that there was evidence of authority by the agent.

A new trial is ordered.

New trial.

In re PIERCE.

(Supreme Court of North Carolina. Oct. 8, 1913.)

1. WITNESSES (§ 22*)—DAMAGES FOR FAILURE TO OBEY SUBPENA.

Under Revisal 1905, § 1643, providing that a witness summoned to appear in any court shall appear and continue to attend until discharged, and that in default thereof he shall forfeit to the party at whose instance the subpoena issued \$40 and full damages sustained by such party for the want of his testimony, the statute does not require that the failure to attend should be willful.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 42, 43; Dec. Dig. § 22.*]

2. WITNESSES (§ 22*)—DAMAGES FOR FAILURE TO OBEY SUBPENA—"WILLFUL."

If under Revisal 1905, § 1643, prescribing the penalty for the failure of a witness duly

summoned to attend court as a witness, the failure must be willful, an intentional failure, although under the belief that he had a right to absent himself for the protection of his client's interests in other pending cases, was "willful," since "willful" means "intentional," and is used in contradistinction to "accidental," or "unavoidable" (8 Words and Phrases, 7473).

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 42, 43; Dec. Dig. § 22.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7468-7481; vol. 8, pp. 7835, 7836.]

3. WITNESSES (§ 5*)—DAMAGES FOR FAILURE TO OBEY SUBPENA.

Under Revisal 1905, § 1643, providing that a witness duly summoned shall appear and continue to attend court until discharged, and that in default thereof he shall forfeit \$40 to the party at whose instance the subpoena issued, and the damages sustained by such party, a practicing attorney was not excused from obeying a subpoena because cases in which he appeared were ready for trial in another court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 8; Dec. Dig. § 5.*]

Appeal from Superior Court, Duplin County; Allen, Judge.

On notice to show cause judgment was entered against W. W. Pierce as a defaulting witness, and he appeals. Affirmed.

H. L. Stevens, of Warsaw, for appellant.

CLARK, C. J. Judgment nisi for \$40 having been entered against W. W. Pierce as defaulting witness under Revisal, § 1643, on notice to show cause, the judgment was made absolute. The court found the facts: "W. W. Pierce was duly subpoenaed as a witness for the defendant in the case of I. F. Hill et al. v. W. M. Faison et al. to attend the term of the Superior court of Duplin which began November 25, 1912. He was notified that he need not attend till Friday, November 29th, on which day he attended. He was a practicing lawyer and appeared in cases which were ready for trial in Wayne superior court which was then in session, and at his request the judge of that court postponed the trial of his causes till Saturday, November 30th. The case in Duplin superior court in which he was subpoenaed as a witness was not reached on Friday, and he applied to the judge of that court for a discharge. His honor referred him to counsel for the defendant, who declined to excuse him but paid him his per diem and mileage as required by Revisal, § 1298. The witness thereupon, without being excused either by the judge or the counsel for the defendant, returned to Goldsboro, and on the following day, being called as a witness and failing to appear, judgment nisi was rendered, and upon this motion the court, finding that he did not show sufficient cause of incapacity to attend on said Saturday, November 30th, of Duplin superior court, rendered judgment absolute for said penalty, and that Winifred Faison, for whom he had been duly subpoenaed, should recover of the respondent W. W.

Pierce the sum of \$40, together with the costs of the motion."

[1, 2] This judgment was correct. It is true that the judge also found that the witness believed that he had a right to return to Wayne superior court to represent his clients, and therefore that his failure to attend the trial in Duplin superior court was not willful. Revisal, § 1643, does not require that the failure to attend should be "willful." Besides, if it did, his honor's finding of law to that effect was incorrect and could not be sustained. Willful means intentionally, and of that there was no question in this case. Willful is used in contradistinction to accidental or unavoidably. See numerous cases cited 8 Words and Phrases, 7473. Indeed, the only definition given of "willfully" in Bouvier's Law Dictionary is "intentional." It has some additional meaning in certain circumstances, but not under this statute, which besides does not use the word.

The defense that the appellant had a right to look after his practice as a lawyer in preference to obeying the subpoena of the court cannot be sustained. "Ignorance of law is no excuse." Least of all could it be tolerated in an attorney who has a license which certifies that he is "learned in the law."

[3] "Equality before the law" is a fundamental principle of our system of government. The law is no respecter of persons. While in one sense a lawyer is an officer of the court, that means simply that in the discharge of his duties he is subject to its control and discipline. But this does not excuse him from obedience to legal precepts to which he owes exactly the same respect and obedience as any other citizen. If a lawyer can be excused from obeying a subpoena because he prefers to attend to his business as a lawyer, then a doctor would be equally excused for attending the bedside of his patients, or a locomotive engineer would take his seat in his cab, and a farmer would be equally entitled to pull fodder or pick cotton when those duties are pressing. A banker or a business man might well prefer attending some important meeting which would serve his pecuniary interests to a far greater extent than this witness would have been benefited by being present at the trial of his causes. The public authority has preference over private interest.

When the witness found that he was not discharged on Friday afternoon and was required to attend as witness again on the next day, he should either have gone to Goldsboro that night to have seen the judge to procure a continuance of his causes or have procured a brother attorney to represent him, and he could have returned next morning in time for court, or he could have discharged this matter probably equally as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

one or wire. Certainly he could this subpoena from any supposed his personal duty to his client in on of a fee received, or expected, ect of his duty to the public. The uses cannot be conducted without of the court to compel the attend- witnesses, for this duty is rarely r desired by the witnesses them- whom it means also often a pecuni- s well as an inconvenience. So is requirement that a defaulting not only liable for a fine of \$40 but he is "further liable for the ges which may be sustained for of such witness' testimony." Re- 13.

§ 1645, authorizes the reading of n in certain cases, as where the he President of the United States, or of the state, or judge of the ing a session of his court at the trial, and other officials named in n whose public duties are deemed nt as presence at a trial. But the es not enumerate lawyers in this and it is apprehended that no statu- passed to give them such exemp- nt including every other class of nity to whom their personal inter- is important as the functions of a ndeed, the latter can often more cure a continuance of his cause lices of a substitute than a doctor, a merchant, a locomotive engineer, ther callings and professions. ment absolute is affirmed.

EWELL v. EWELL et al.

Court of North Carolina. Oct. 8, 1913.)

§ 3*)—LEGITIMACY—PRESUMP-
EVIDENCE IN REBUTTAL.

a child is born in wedlock, the law t to be legitimate, and, unless born circumstances as to show that the uld not have begotten it, the pre- s conclusive, but such presumption butted by facts and circumstances y that the husband could not have father, as that he was impotent or ave had access.

e.—For other cases, see Bastards, § 4, 5; Dec. Dig. § 3.*]

§ 3*)—LEGITIMACY—PRESUMP-

issue as to the legitimacy of a child dlock, access between husband and sumed until otherwise plainly prov- g being allowed to impugn the legiti- e child short of proof by facts show- impossible for the husband to have tther.

e.—For other cases, see Bastards, § 4, 5; Dec. Dig. § 3.*]

§ 287*)—HEARSAY—PEDIGREE—
RECORD.

age and time and place of birth and ot in themselves questions of pedi-

gree or genealogy, are connected therewith in such a way as to render declarations concern- ing them admissible, entry in the family Bible, made by a person since deceased, showing his own birth and its date, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1145, 1146; Dec. Dig. § 287.*]

4. EVIDENCE (§ 355*)—BEST AND SECONDARY
EVIDENCE—COPY OF PEDIGREE RECORD.

Where an original entry of the birth of a person and its date in the family Bible is proved to have been lost or destroyed, an authentic copy thereof is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. § 355.*]

5. EVIDENCE (§ 222*) — ADMISSIONS — PAROL
PARTITION.

On an issue whether plaintiff's father, since deceased, was the legitimate heir of E. and the brother of defendant, evidence that there had been a parol partition of the land in controversy, which had previously belonged to E., between defendant and plaintiff's father in his lifetime was admissible, in a subsequent suit for partition, to show that defendant had recognized deceased as the legitimate heir of E.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 786-800, 803-808; Dec. Dig. § 222.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Suit by Parmella Ewell against M. M. Ewell and others for partition. Verdict for plaintiff, and defendant M. M. Ewell appeals. Affirmed.

This is an action for partition. J. J. Ewell died selsed of the tract of land in question, and plaintiff alleges that he and his brother, Walter Ewell, are his sons and consequently were tenants in common of the land as his sole heirs. Defendant denies this allegation and avers that Charles Ewell was not the legitimate child of J. J. Ewell, although the two, Walter and Charles, were of the same mother, the wife of said Ewell. That J. J. Ewell and his wife had separated before Charles Ewell was begotten and continued to live apart until his birth, and, during the entire period of the separation, the wife lived in adultery with one Dr. Best, who is the father of Charles Ewell; he having taken the name of his mother. The following is the substance of the testimony: The defendant's testimony tended to show these facts: J. J. Ewell lived separate and apart from his wife; he spent his time in Martin county; his wife was unfaithful to him; she was intimate with other men and she had been heard to say that Charles Ewell was not the son of her husband; another man recognized Charles as his son, made presents to him, called him son, and Charles called the other man "daddy." The plaintiff's testimony tended to show these facts: J. J. Ewell did not live separate and apart from his wife; while it was true he spent much of his time in Martin county, he left his neighborhood in Pitt county because he was charged with committing some criminal of-

fense for which he feared he might be arrested; he had opportunity of access to his wife; he spent some of his time in the neighborhood in which she lived; he had been seen at the house in which she lived about the time that Charles must have been begotten; he made shingles in a swamp within a mile of his wife; he sent to her provisions for her support; he employed a midwife for his wife when Charles was born and paid the fees. The plaintiff also introduced testimony tending to show that Charles was born about the time fixed in the family record, and defendant's testimony tended to show that he was born at a different time.

Upon the issue of paternity it appears, therefore, that there was conflicting evidence, and it was submitted to the jury to find the fact as to the legitimacy of Charles Ewell; the court instructing the jury that there is a presumption of legitimacy, Charles having been born during the marriage of the Ewells, and placing the burden upon the defendant to rebut it by showing impotency or nonaccess. The plaintiff Parmelia Ewell is the child of Charles Ewell, who is dead, and claims his interest from him as his heir. The defendant M. M. Ewell claims under Walter Ewell. The jury returned a verdict in favor of the plaintiff, and defendant M. M. Ewell appealed.

F. C. Harding and Harry Skinner, both of Greenville, for appellant. Jarvis & Wooten and F. G. James & Son, of Greenville, for appellee.

WALKER, J. [1] The case turns upon the legitimacy of Charles Ewell. According to the established rule, when a child is born in wedlock, it is presumed in law to be legitimate, and by the ancient common law this presumption could not be rebutted if the husband was capable of procreation and was within the four seas during the period of gestation, but this doctrine was exploded in the case of *Pendrell v. Pendrell*, 2 Str. 925, and gave way to the modern doctrine that the presumption may be rebutted by any competent and relevant evidence tending to satisfy the jury that sexual intercourse did not take place at any time when by the laws of nature the husband could have been the father of the child. *Boykin v. Boykin*, 70 N. C. 262, 16 Am. Rep. 776; *State v. McDowell*, 101 N. C. 734, 7 S. E. 785; 2 Greenleaf on Evidence, 130, 131; *State v. Pettaway*, 10 N. C. 623; *Rhyne v. Hoffman*, 59 N. C. 335; *Woodward v. Blue*, 107 N. C. 407, 12 S. E. 453, 10 L. R. A. 662, 22 Am. St. Rep. 897; *State v. Liles*, 134 N. C. 735, 47 S. E. 750; *Banbury Peerage Case* (H. of Lords) 1, Simm & Stuart, 153; 5 Cyc. 626. Our cases have stated the present rule in somewhat different language but they substantially agree as to its terms and scope, as will be seen from the following extracts:

"When a child is born in wedlock the law

presumes it to be legitimate, and, unless born under such circumstances as to show that the husband could not have begotten it, this presumption is conclusive; but the presumption may be rebutted by the facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access." *State v. McDowell*, supra (opinion by Davis, J.).

In another case the court said: "The child was begotten while the parties were man and wife but was not born until six months after the husband had obtained a divorce a vinculo matrimonii on account of adultery. During the time, when the child was begotten, the husband and wife lived separately, but in the same neighborhood, near enough for the husband to visit her, and it is proved that occasionally he did go to the house where she was staying. There was then an opportunity for sexual intercourse between the parties, and from that the law presumes that, in fact, there was sexual intercourse between them. This plaintiff must therefore be taken to be legitimate, unless it be proven, by irresistible evidence, that the husband was impotent or did not have any sexual intercourse with his wife; but the former is not pretended, and the latter is a fact which neither the wife, nor the declarations of the wife, is admissible to prove. *Rex v. Luffe*, 8 East, 193. Here, independent of the declarations of the wife, which must be rejected as incompetent, there is no testimony sufficient to rebut the presumption of access. Such being the case, the proof that the plaintiff's mother lived in adultery with a man, who testified that he was the father of her children, makes no difference. As was said in the case of *Morris v. Davies*, 14 Eng. C. L. Rep. 275, 'it matters not that the general camp, pioneers and all, had tasted her sweet body,' because the law fixes the child to be the child of the husband." *Rhyne v. Hoffman*, supra (opinion by Battle, J.).

More recently this court said: "Formerly a child born of a married woman was conclusively presumed to be legitimate, but now legitimacy or illegitimacy is an issue of fact resting upon proof of the impotency or nonaccess of the husband. * * * This is true even when the child is begotten as well as born in wedlock. For a stronger reason this is true when, as in this case, the child was begotten four or five months before the marriage and the jury believed the evidence that the husband had no intercourse with the prosecutrix prior to the marriage." *State v. Liles*, supra (opinion by Clark, C. J.).

"The question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting on decided proof as to the nonaccess of the husband, and the facts must generally be left to the jury for determination." 2 Kent's Com. 210. See, also, *Schouler*, Dom. Rel. § 225; *Hargrave v. Hargrave*, 9 Beavan, 552.

[2] The rule as to the presumption of legitimacy in respect to a child born in lawful wedlock was strongly stated by the Supreme Court of the United States in two of the celebrated Gaines Cases in which the question was often considered and discussed. The court held that access between man and wife is always presumed until otherwise plainly proved, and nothing is allowed to impugn the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been its father. *Gaines v. Hennen*, 65 U. S. (24 How.) 553, 16 L. Ed. 770; *Patterson v. Gaines*, 47 U. S. (6 How.) 550, 12 L. Ed. 553. Those cases were described by Mr. Justice Wayne, in concluding the opinion in the last case of this long-protracted litigation, as the most remarkable in the records of the court. What is therein said, therefore, is entitled to great respect and should have great weight, and it does not materially differ from the rule as formerly settled by this court.

We conclude that the judge was right in leaving the matter to the jury, as an open question of fact, with a correct instruction as to the presumptions of the law and a proper caution as to how to deal with the evidence.

[3] There are two questions of evidence which require our notice. The plaintiff offered to introduce a copy of the entry in the family Bible of the Ewells showing the birth of Charles Ewell and its date. If age, time and place of birth and death, are not in themselves questions of pedigree or genealogy, they may be connected therewith in such way as to render declarations concerning them admissible. They may be material circumstances from which an inference may fairly be drawn as to a person's paternity, as, for example, whether A. is the son of B., and any one of them alone may have this force as proof. *McKelvey on Evidence*, p. 219. In such case declarations of deceased members of the family are competent to show the fact in issue. 1 *Greenleaf on Evidence* (16th Ed.) § 114b; *McKelvey on Evidence*, supra. The declarations may be oral or written, such as entries in the family Bible or other family register or record. *Clements v. Hunt*, 46 N. C. 400; 16 Cyc. p. 1234, and cases in notes 89 and 90; *Lewis v. Marshall*, 5 Pet. 470, 8 L. Ed. 195. "The date of a birth and death of an individual, being matter of pedigree, may be proved by hearsay evidence and general reputation in his family, and an entry of a deceased parent, made in a Bible, is regarded as a declaration of the parent making the entry and therefore admissible. 1 *Greenleaf on Ev.* § 104; *Phil. Ev.* (Cow. & Hill's and Edw. notes) 249-252, and notes." *Greenleaf v. D. & S. C. R. R. Co.*, 30 Iowa, 303. But entries in family Bibles or other family records are not the only source from which we may legally obtain this kind of proof. Hearsay, or, as it is generally termed, reputation, is admissible in all questions of

pedigree. And the phrase "pedigree" embraces not only descent and relationship but also the facts of birth, marriage, and death and the times when these events happened. The entry of a deceased parent or other relative, made in a Bible, family missal, or any other book, or document, or paper, stating the fact and date of the birth, marriage, or death, of a child or relative, is regarded as the declaration of such parent or relative in a matter of pedigree. Correspondence of deceased members of the family, recitals in family deeds, descriptions in wills, and other solemn acts are original evidence where the oral declarations of the parties are admissible. Inscriptions on tombstones and other funeral monuments, engravings on rings, inscriptions on family portraits, charts of pedigree, and the like are also admissible, as original evidence of the same facts. 1 *Greenleaf on Evidence* (16th Ed.) § 114d; *Kelley's Heirs v. McGuire*, 15 Ark. at pages 604 and 605; *Jones on Evidence* (2d Ed.) § 316; *Berkley Peerage Case*, 4 Campbell, 401, 418; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128, 131.

The following cases sustain and illustrate the rule and the variety of forms which the proof may take: *Eastman v. Martin*, 19 N. H. 152; *Collins v. Grantham*, 12 Ind. 440; *Whitcher v. McLaughlin*, 115 Mass. 167; *Inhabitants of North Brookfield v. Inhabitants of Warren*, 16 Gray (Mass.) 171; *S. L. Ins. Co. v. Wilkinson*, 53 Ga. 535; *Jones v. Jones*, 45 Md. 144; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894 (which is like our case in respect to the fact offered to be proven and the mode of proof).

[4] The original entry being competent, an authentic copy of it, when the original has been lost or destroyed, must also be. We presume that the judge found as a fact that the original was lost; the copy therefore was admissible as secondary evidence, for the general rule applies. 1 *Greenleaf, Ev.* (16th Ed.) § 563q; *Whitcher v. McLaughlin*, 115 Mass. 167. The entry must have been made by a deceased person or recognized by the family and the record brought from the proper custody. *Jones on Ev.* (2d Ed.) §§ 312, 315. These requirements seem to have been observed in this case. The testimony of Emily Ewell as to the manner in which Charles Ewell, her husband, made the copy, which was offered in evidence, from the family Bible is not very satisfactory. She does not say that the copy is a perfect or even a true one, but we cannot say there is not sufficient evidence to sustain the finding that the copy is a correct transcript of the original. The court gave the defendant another chance as to this matter by submitting it to the jury and instructing them that they must find that the paper contained a true copy of the entry before using it as evidence upon the question of the legitimacy of Charles Ewell. There can be no doubt of the relevancy of the evidence to prove this fact.

The copy, therefore, was properly admissible.

[5] The plaintiff also proposed to prove that there had been a parol partition of the land between the defendants M. M. Ewell and Charles Ewell for the purpose of showing that Charles Ewell had been recognized as the legitimate heir of J. J. Ewell, and we do not see why it was not competent for this purpose as an admission or recognition by defendant of this fact of conduct on his part from which the jury might infer the legitimacy at least in connection with the other facts and circumstances. Jones on Ev. (2d Ed.) § 315, p. 397. The plaintiff did not rely on the partition as valid and proof of her title to one-half of the land but solely for the purpose first stated. The evidence was properly admitted. We find no error in the case after careful examination.

No error.

WILLIAMS v. CHAS. F. DUNN & SONS CO. (Supreme Court of North Carolina. Oct. 8, 1913.)

1. EXECUTION (§ 253*)—SALE—MOTIONS TO VACATE—NATURE.

A motion to set aside an execution sale is not a new proceeding, but a motion in the original cause, and the title of the original action should be retained instead of entitling it as though the moving party was plaintiff and the purchaser a defendant.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 698, 717-721; Dec. Dig. § 253.*]

2. EXECUTION (§ 258*)—SALE—OPENING OR VACATING IRREGULARITIES.

A sale of real property under execution, without advertising it and serving a copy of the advertisement on the judgment debtor, as required by Revisal 1905, §§ 641, 642, does not render the sale void as against a stranger without notice of the irregularity, nor open to collateral attack, but the debtor may, on motion or by direct proceeding, have the sale vacated.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 736-739, 789; Dec. Dig. § 258.*]

3. EXECUTION (§§ 219, 221*)—SALE—POWERS OF OFFICER MAKING SALE.

The sheriff in selling property under execution acts as the agent of both parties, charged with the duty on one hand of producing a satisfaction of the writ, and on the other, of causing no needless injury or sacrifice, and is therefore given a discretion with respect to the time and mode of sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 621, 626-628; Dec. Dig. §§ 219, 221.*]

4. EXECUTION (§ 251*)—SALE—OPENING OR VACATING IRREGULARITIES.

Where property is sold under execution en masse or in bulk, when it could reasonably be sold in parcels without prejudice to the parties, and there is any fraud or oppression or even unfairness whereby it is sold at a disadvantage to the debtor, the sale may be avoided by him in a direct proceeding.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 708-716; Dec. Dig. § 251.*]

5. EXECUTION (§ 249*)—SALE—OPENING OR VACATING IRREGULARITIES.

An assignee of a judgment deceived and misled the judgment debtor's attorney as to the

real value of land levied on at a time when investigation by the attorney could not well be made before the sale, as a result whereof and of the failure to advertise the sale there was no competition at the sale, and he bought for \$125 three separate lots, sold as a whole, worth nearly \$1,000. The debtor tendered to the assignee the amount bid, which he had applied on the judgment, and another judgment against the debtor, which the assignee refused to accept. The assignee's attention had been called, prior to the sale, to irregularities in the execution, the levy, and the advertisement. *Held*, that the sale of the three lots en masse, with the attendant circumstances of fraud and irregularity, rendered the sale void, and it was properly set aside on motion.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 697-702; Dec. Dig. § 249.*]

Appeal from Superior Court, Lenoir County; Justice, Judge.

Action by Jesse E. Williams against J. W. Williams, in which the defendant moved to set aside a sale under execution to Chas. F. Dunn & Sons Co. From a judgment in favor of the moving party, the purchaser appeals. Affirmed.

This was a motion before the clerk, in the case of Williams v. Williams, to set aside a sale of land made under an execution. The motion was based upon affidavits filed, and the sale was set aside by him. Plaintiff appealed to the superior court, where the action was dismissed, this court reversing the decision. At the August term, 1912, of that court, the judgment of the clerk was affirmed, and an order of reference was made for an accounting between the parties. The report of the referee was confirmed at the June term, 1913, all of which will appear more fully hereafter.

The case was before us at Spring term, 1912, upon a question of jurisdiction, and is reported in 158 N. C. 399, 74 S. E. 99. We then reversed the judgment below dismissing the proceeding, and remanded it for further hearing. Jesse E. Williams filed a lengthy affidavit, upon which he based his motion in the cause to set aside the sale under the execution issued therein. The material allegations of this affidavit, which describes in detail the transaction from its inception to the time of the motion, was denied by defendant, but Judge Carter affirmed the judgment of the clerk of the superior court, before whom the motion to set aside the execution was originally made, and in that judgment, the clerk finds the facts to be as set forth in the affidavit of the plaintiff, John W. Williams, and those facts are substantially as follows: On February 10, 1909, Jesse E. Williams, one of the defendants, recovered a judgment against John Williams before a justice of the peace, which was docketed in the superior court of Lenoir county. On the 21st day of October, 1910, Jesse E. Williams transferred and assigned this judgment to Chas. F. Dunn, cashier of Chas. F. Dunn & Son Company. Chas. F. Dunn & Son Company is a banking concern and a partnership.

On the 8th day of February, 1911, the clerk of the superior court issued an execution on the judgment returnable to the March term of the superior court of Lenoir county, which convened on the 13th day of March; the return day of said execution being less than 40 days from the date of its issue. On the 14th day of March, the sheriff proceeded to sell the land upon which he had levied, and Chas. F. Dunn, representing himself as cashier of Dunn, Son & Company, purchased the property for the sum of \$125. The property consisted of three separate lots, each of which, with its improvements, was worth more than \$300 each. The sheriff sold all three of the lots together. Prior to the sale, the plaintiff, through his attorneys, protested against the sale, same being made upon the ground that the execution was irregular, and upon the further ground that the sale thereunder was irregular. The plaintiff at the time had sufficient personal property out of which the execution could have been satisfied. The plaintiff was a resident of Philadelphia and was not present at the sale, and the defendant, taking advantage of his absence, represented to the plaintiff's attorney, who was unfamiliar with the property or its value, and just before the sale, that it was not worth more than \$150. Chas. F. Dunn, acting for defendants as their duly authorized agent, made his statement to the attorney of plaintiff for the purpose of misleading him, and with the intent to prevent fair competition at the sale under the execution, so that the property could be bought by him at an undervalue, "or at a figure greatly less than its value," he well knowing that the attorney was acting in ignorance of the real value of the property, and had not time for investigation, and this was done with the purpose of defrauding the debtor by preventing a fair sale of the property. The sale of the land was not advertised according to law. Jesse E. Williams and Chas. F. Dunn, as assignee of the Williams judgment, had agreed that no execution should issue on the judgment, and this agreement was a part of the consideration for the assignment by Jesse E. Williams to Chas. F. Dunn, who was in fact the assignee of the judgment in his individual capacity, and not as cashier of the alleged bank. Chas. F. Dunn, who was the only bidder, bought the property for the sum of \$125. The purchase price was applied to the Williams judgment (and another judgment against the plaintiff, which had been assigned to Chas. F. Dunn) and the cost of the execution sale, and the balance was paid into court. There were no other bidders present at the sale except the defendant Dunn. Execution under which the sheriff attempted to sell was for the sum of \$35.12, with interest from the 10th day of February, 1909, and \$1.45 cost. The sheriff levied upon and sold all three of the lots at one time; they being worth about \$1,000. On the 2d day of Sep-

tember, 1911, the plaintiff, after due notice, moved to set aside the sale upon the grounds set forth in the affidavit filed. Prior to the making of the motion, the plaintiff tendered to the defendant the amount bid at the sale and interest, which was more than sufficient to satisfy the judgment, with interest and costs, which had been assigned to the defendant. The clerk found the facts set forth in the affidavit of the plaintiff to be true, and adopted them as his findings and set aside the execution sale. The judgment of the clerk was affirmed by Judge Carter at the August term, 1912, and a reference ordered to take an account between the parties. The defendant Dunn was in possession of the property from the 15th day of April, 1911, to the 1st day of September, 1912. The rental value of the lots, as alleged by the plaintiff and admitted by the defendant, was \$3 per week.

The referee, Mr. J. G. Dawson, after allowing the defendant the amount due under the two judgments of Jesse Williams against John W. Williams, and the other judgment against him, which had been assigned to the defendant Dunn, with interest and cost, the balance of the purchase money paid by him and the taxes, found that there was due to plaintiff from the defendant the sum of \$121.03, with interest from the 21st day of September, 1912, and that the plaintiff was entitled to have all of said judgments canceled. The findings of the referee, both as to law and facts, were approved by Judge Justice at the June term, 1913, and final judgment entered, from which this appeal was taken by the defendant.

Chas. F. Dunn, of Kinston, in pro. per. Rouse & Land, of Kinston, for appellee Williams.

WALKER, J. [1] This is a motion to set aside an execution sale, and the title of the original action should have been retained, instead of making the motioner plaintiff and the purchaser at the sale a defendant. It is not a new proceeding, but a motion *in the cause*, as at first constituted, for the desired relief. The title on the docket here and below should be Williams v. Williams, motion by defendant, and not Williams v. Dunn. We hope that the clerks and attorneys will hereafter take notice of the procedure in such cases, and be governed accordingly, as a compliance with the rule will prevent uncertainty and confusion, which is sure to follow its disregard, and will conduce to order and regularity in judicial proceedings—something much to be desired. The mistake in this case at first produced some little perplexity, which could easily have been avoided by proper attention to orderly arrangement. We believe, though, that we have, at last, succeeded in extracting from the record and stating correctly the relations of the parties and the facts of the case, and have thus removed its

seeming complication and difficulty, and simplified the questions involved.

The defendant in the judgment and execution, John W. Williams, alleges that the sale by the sheriff is voidable by him because there was no legal advertisement or notice of the sale; that the execution was issued within 40 days of the court to which it was returnable (Revisal, § 624); that the land, consisting of three lots, was sold en masse, and not in separate parcels; and that Chas. F. Dunn, the real plaintiff, as assignee of the original plaintiff, did by fraudulent representations and conduct obtain the land, as purchaser, at an undervalue, the price he paid being grossly inadequate.

[2] The law requires a sheriff to advertise a sale under execution, and to serve a copy of the advertisement upon the defendant 10 days before the sale. Revisal, §§ 641, 642. A failure to comply with this provision of the statute, which is directory will not render the sale void as against a stranger without notice of the irregularity, nor can it be assailed collaterally, but in such a case the defendant may, on motion, or by direct proceeding, have the sale vacated.

In *Burton v. Spiers and Clark*, 92 N. C. 503, Justice Ashe said for the court: "It is well settled as a general rule that a purchaser at execution sale is not bound to look further than to see that he is an officer who sells, and that he is empowered to do so by an execution issued from a court of competent jurisdiction, and he is not affected by any irregularities in the conduct of the sheriff. *Mordecai v. Speight*, 14 N. C. 428 [24 Am. Dec. 266]; *McEntire v. Durham*, 29 N. C. 151 [45 Am. Dec. 512]. It follows from this that a purchaser may get a good title at a sheriff's sale when there has been no advertisement of the sale, but this is subject to qualifications. As where the purchaser is a stranger, he will get a good title, notwithstanding any irregularities there may have been in the management of the sheriff. *Oxley v. Mizle*, 7 N. C. 250. But when the purchaser is the plaintiff in the execution, or his attorney, or any other person affected with notice of the irregularities, the sale may be set aside at the instance of the defendant in the execution by a direct proceeding. If not so corrected, they cannot be made available by a collateral attack on the purchaser's title. Hence an execution sale cannot be collaterally avoided, because real estate was sold without first levying upon personalty, nor because of irregularities or deficiencies in the advertisements, nor for defects in the levy. *Herman on Executions*, § 39; *Oxley v. Mizle*, supra; and it was held by Chief Justice Ruffin in the case of *Harry v. Graham*, 18 N. C. 76 [27 Am. Dec. 226], "that an allegation of fraud against a purchaser at execution sale will not be heard from a stranger to the execution." *Dula v. Seagle*, 98 N. C. 458, 4 S. E.

549; *Sanders v. Earp*, 118 N. C. 275, 24 S. E. 8.

In the *Dula Case*, Chief Justice Smith said: "The sheriff acts under the law that prescribes his duties, with a proper responsibility to those affected by what he does. If he sells under execution, without advertising, as required by law, and the purchaser has no notice of this dereliction of duty, he acquires title; but it would be otherwise if the sale was at a time or place not warranted by law, because the purchaser is charged with knowledge of this legal requirement, and does not buy in good faith. *State v. Rives*, 27 N. C. 297; *Mayers v. Carter*, 87 N. C. 146." Our case is a good illustration of the justness of the rule. For some reason, and none other than the omission to duly advertise the sale can be fairly assigned, there were no bidders present, and there was consequently no competition. In this way the purchaser bid in the land at about one-eighth of its real value, and land worth \$800 to \$1,000 was sold to pay a debt of less than \$45. "This is calculated to cause surprise and to make one exclaim: 'Why, he got it for nothing! There must have been some fraud or connivance about it.'" *Worthy v. Caddell*, 76 N. C. 82. Such an apparently unfair sale should not be permitted to stand unless the strict right of the purchaser, under the law requires us to sustain it, and this we do not think is the case. Apart from the irregularities in respect to the execution and sale, of which the purchaser, who had by assignment from Jesse E. Williams become the real plaintiff, had notice, it appears by the finding of the clerk that the sheriff sold three distinct lots en masse, when if sold separately, any one of them would have brought a price far more than sufficient to pay the total of debt, interest, and costs, and five times as much as required for that purpose if the lot thus sold had brought anything like its market value. The counsel of John W. Williams, the debtor, contends that the fact of selling the three lots as one entire parcel is of itself sufficient to vitiate the sale, and there is strong authority to be found in the decisions of other jurisdictions to sustain this position. *Rorer on Judicial Sales*, § 730, and cases cited; *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 415. But our decisions have not, up to this time, gone quite so far, as we will presently see. It is generally agreed that it is the duty of the officer to sell in the exercise of a fair discretion, and to the best advantage, so as to make the debt and costs to be levied by the execution without unnecessary sacrifice of the debtor's property.

"The proposition is not to be disputed," said Chancellor Kent in *Tiernan v. Wilson*, supra, "that a sheriff ought not to sell, at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand" of the writ,

"provided the part selected can be conveniently and reasonably detached from the residue of the property, and sold separately. The justice of this rule is self-evident. As long ago as the case of *Wordye v. Bailly* (Noy. 59) Gawdy, J., said, and the rest of the court agreed with him, that if the sheriff, upon a *fi. fa.* for 40 shillings, takes five oxen, each of the value of five pounds, and sells them all, the defendant may have an action of trespass against him. In addition to what has been repeatedly said in our own courts (*Hewson v. Deygert*), 8 Johns. [N. Y.] 333; [*Jackson v. Newton*], 18 Johns. [N. Y.] 362; [*Woods v. Monell*], 1 Johns. Ch. [N. Y.] 502), I would refer to the case of *Executors of Stead v. Course*, 4 Cranch, 403 [2 L. Ed. 660], in which the Supreme Court of the United States held that if the collector sell a whole tract of land, when a small parcel of it would be sufficient, for taxes, he exceeds his authority, and a plea by the purchaser to a bill to set aside the sale was not to be sustained. It was the case of a sale in Georgia, under a law directing the collector to sell only so much land as was necessary to pay the taxes in arrear. The rule must be the same, without any positive law for the purpose. It rests on principles of obvious policy and universal justice." The learned Chancellor again says: "Any 10 acres, taken from any corner of either of these lots, would probably have raised the amount of the execution. The very circumstance of advertising and selling the whole supposed interest of the plaintiff, in both lots together, and for so small a demand, was calculated to excite distrust as to the title, and to destroy the value of the sale. It was a perversion of the spirit and policy of the power with which the sheriff was intrusted. It is difficult to define precisely the extent of property that a sheriff may sell together, in mass. There must be a sound discretion exercised by the officer, and each case will furnish a rule applicable to it, under all its circumstances. It is sufficient to say that here is a case in which the abuse of discretion is too flagrant to be endured, and that the law will adjudge such a sale, in such a case, fraudulent. No person can hesitate for a moment to say that the sheriff ought not to have sold more than the interest of the plaintiff in one lot, at one time, and in one parcel; and I believe every one will be ready to conclude that the sale of one lot would have raised the \$10, with equal facility as the sale together of both lots. * * * I shall, accordingly, set aside the sale as fraudulent and void in law." We have referred to this case at some length, as its facts so clearly resemble those to be found in this record, and yet our case more strongly appeals to the conscience of the court for equitable relief to the debtor, who has so greatly suffered by the manner in which this sale was conducted at the in-

stance of the plaintiff, who was the purchaser. The difference between the cases which makes in favor of this debtor is that here there were three separate and distinct tracts, each having its own valuable improvements, while in the *Tiernan* Case the tract was an entire one, and the court held that a reasonably sufficient portion should have been cut off and sold, if the land was susceptible of such a division and the whole was not required to satisfy the writ. See, also, *Kinney v. Knoebel*, 51 Ill. 112, 121; *Berry v. Griffith*, 2 Har. & G. 337, 18 Am. Dec. 309; *Hewson v. Deygert*, 8 Johns. (N. Y.) 333; *Winters v. Burford*, 6 Cold. (Tenn.) 328; *Kiser v. Ruddick*, 8 Blackf. (Ind.) 382, 383; *McLean Bank v. Flagg*, 31 Ill. 290, 83 Am. Dec. 224; *Phelps v. Conover*, 25 Ill. 309; *Freeman on Executions* (3d Ed.) § 295, and especially 296.

[3] Perhaps by no means can we procure a more correct and just view of the duties of the sheriff or other officer in the proceedings which he is authorized to take, after levying upon property, for the purpose of producing a satisfaction of the plaintiff's demand, than by conceding that such officer is the agent of both parties, and as such is charged with duties which are not wholly compatible, and which must nevertheless be reconciled. It is true that the officer owes to the plaintiff the duty of making the money at or before the return day of the writ, and may be considered as the agent of the plaintiff, charged with the duty of producing a satisfaction of the writ. On the other hand, he is equally the agent of the defendant, charged with the duty of so disposing of his property that the writ against him shall be satisfied with no needless injury or sacrifice. Hence, as the duty of selling the property is modified by the duty of not needlessly sacrificing it, the officer has a discretion with respect to the time and mode of sale. A reasonable discretion, however, is allowed to be exercised in order that the object of the writ may be accomplished, not frustrated, and that the property of the debtor be not causelessly sacrificed. There is no iron rule in regard to this matter, but it may be said that the officer should exercise a sound discretion, honestly and impartially, as between the parties, remembering that he is the sworn minister of the law, and not the servant or emissary of either, commissioned to advance, in a covetous manner, the interests of his employer. As is the duty of the just and impartial judge, he should hold the scales evenly balanced. Judge Freeman, speaking to this very question, said: "Where several distinct parcels of real estate, or several articles of personal property, are to be sold, what is called a 'lumping sale' can rarely be justified. Such a sale, when objected to in due time, will not be upheld, unless special circumstances can be shown from which it must be inferred

that such sale was either necessary or advantageous. It is sometimes said that such a sale will not be vacated until it is shown to have injured some one. The command of the law that distinct parcels of land shall be offered for sale separately is founded on the assumption that, by so offering them, the best price will probably be secured and the sale not result in the taking from the defendant of any more property than is necessary to satisfy the writ." Freeman on Executions, § 296, p. 1703. Some of the courts have expressed themselves strongly in emphatic condemnation with regard to sales in mass of property divided into separate parts or lots, going to the length of saying that "sales in a lump of real estate held in parcels, are not to be countenanced or tolerated." Rorer, Jud. Sales (2d Ed.) § 730, and the numerous cases in note 6. But we have not referred to the authorities above for the purpose of approving all that is therein said, as this court has formulated a rule of its own upon the subject, which we will follow in this case, as it fully sustains the judgment below, and it is not necessary that we should go beyond it, as the facts are now presented to us.

In *Wilson v. Twitty*, 10 N. C. 44, 14 Am. Dec. 569, Judge Hall opens his opinion by saying: "It is much to be regretted that a more particular rule of conduct has not, by the law, been prescribed to sheriffs, in sales of landed property under execution." He then states that, while he believes it is not usual to sell separate parcels at once and as a whole, it is not forbidden in express terms, and then adds: "But it is surely the sheriff's duty to sell in the way that will likely be most beneficial for both parties. I mean in the way that will produce the most money." He then strongly intimates that circumstances of fraud or oppression prejudicial to the debtor should avoid the sale, each case to be judged by its own facts. At the same term, it was held in *Thompson v. Hodges*, 10 N. C. 51, that "a sale by a sheriff, en masse, of tracts of land adjoining each other, will be supported." But in both of these cases the jury had found, under the evidence and charge of the court below (Nash, J., presiding in one and Norwood, J., in the other), that there was no element of fraud or oppression. In the *Wilson Case* Judge Nash had charged the jury that the duty of the sheriff was to levy on the entire tract and to sell the parcels separately, but he directed them to find whether the debtor had authorized the sale as made by the officer, and had furnished a description of the land to him. In the *Thompson Case* Judge Norwood charged the jury "that a sheriff is bound to use such means in the sale of property, under execution, as any ordinary and prudent man would do in the sale of his own property, in order to make it bring the best possible price." The verdict of the jury was

for the lessor of the plaintiff, and the court discharged the rule for a new trial. Both cases were affirmed in this court. So the exact duty of the sheriff was not defined by this court in them, nor consequently was it decided what effect failure to perform it would have upon the validity of the sale.

In *Jones v. Lewis*, 80 N. C. 70, 47 Am. Dec. 338, which soon followed the other two cases and cited them, it appeared that executions issued, and were, by the sheriff, levied on the undivided interests of John C. and Atlas Jones in the premises, which consisted of several tracts. The land was sold by the officer, and at the sale each tract was set up separately, and the interest of the defendant in it sold at one bid. Jesse Person was the purchaser, and to him the sheriff executed the deed. The sale was attacked collaterally in an action of ejectment. No fraud or other equitable element was shown, if it could have availed anything in such an action, where there was no direct attack. Judge Nash said for the court: "The second objection is that the interests of John C. and Atlas Jones in the land were sold at one bid, instead of being sold separately. There is no allegation of fraud in the transaction, nor is there any complaint on the part of the owners of the land that their interests have been injured by the mode pursued. We admit that it is unusual; but we do not see that it is therefore contrary to law. The law points out no specific mode in which a sheriff shall conduct the sale, but he is bound, by general principles, to sell the property levied on in such way as will probably raise the most money. The office of sheriff is a highly responsible one, and much discretion must, in many cases, be allowed him. In this case, John C. and Atlas Jones were owners of two undivided fifths of the land sold; it might have been beneficial to them to have their respective interests sold by the same bid; the land thereby might have produced more. But this was a question of fact, which, if pertinent to the case, ought to have been submitted to the jury, and we cannot say, as a matter of law, that the sale for that case is absolutely void."

That case was followed by *Huggins v. Ketchum*, 20 N. C. 550, in which Judge Daniel thus refers to the method of sale by the sheriff: "If the lands embraced in that description comprehended more tracts or parcels of land than one, a sale en masse by the sheriff will still be supported, because it is warranted by his execution, and no fraud is shown either in the sheriff or the purchaser. *Wilson v. Twitty*, 10 N. C. 44 [14 Am. Dec. 569]; *Thompson v. Hodges*, 10 N. C. 51." And he enlarged upon this view in the subsequent case of *Davis v. Abbott*, 25 N. C. 137, as follows: "Under the execution, issued to satisfy the first judgment mentioned in the case, the sheriff sold *by the acre* as much of the land that had been levied on as made the debt and costs. This mode of sale is not

usual, we admit, but we cannot conceive that there is anything illegal in it, and in this case there is no pretense of fraud in the sheriff, or loss by the debtor. If chattels are levied on, the sheriff sells the same in parcels, so as to make the debt by as few of them as he can conveniently. If he can save to the defendant a part of his land levied on, and satisfy the execution out of the remainder, the defendant must generally be benefited by it. The sheriff is a high and responsible officer, and a reasonable discretion, exercised by him in making sales, either by exposing the whole tract or selling by the acre, we think is allowable; both the plaintiff and the defendant may, in many cases, be benefited by it."

The question arose in *McCanless v. Flinchum*, 98 N. C. 358, 4 S. E. 359, and Chief Justice Davis said: "The defendants say that the sale was made by the sheriff in bulk, and they insist that his deed to the plaintiff was void for that reason. It is undoubtedly the duty of the sheriff to sell in such way as to realize, so far as he may be able to do so, a fair price for the property sold under execution, and if he fails to do so, the sale is voidable, and, upon objection, may be set aside; but this is a question of fact which ought to be submitted to a jury. *Jones v. Lewis*, 30 N. C. 70 [47 Am. Dec. 338]." In *McLeod v. Pearce*, 9 N. C. 110, 11 Am. Dec. 742, the court held that chattels, consisting of various specific articles, taken in execution cannot be sold en masse; the sheriff should conform, as nearly as possible, to such rules as a prudent man would probably observe in selling his own property for the sake of procuring a fair price. Judge Henderson, in the course of the opinion, said: "The sale is void, on the ground that the whole of defendant's interest in the property held by his mother for life, was put up by the sheriff and sold at one time; and, even without pointing out what the property consisted of, such sale was unfair as tending to lessen the price, to give one bidder who might have a knowledge of the property an advantage over the rest, and to encourage speculation. The law which constitutes the sheriff the agent of the parties, without their consent, will see that he acts fairly; and it is upon this principle that it is necessary for the sheriff to seize the property and have it ready to deliver to the purchaser when from its nature it is capable of seizure. The court would not be understood to say, that where property consisted of a variety of small articles, each article should be sold separately, or to sell separately where it is usual for the owners to sell in the gross; for instance, hogs in parcels, a flock of geese, or sheep, or other things, where it is customary for the owners of them to sell in such manner. Nor would a sale be invalidated where there might be difference of opinion as to the common or proper mode; it must appear

palpably wrong; no man would adventure here unless he had a knowledge which it was not to be supposed others possessed, or was a mere speculator."

In *Bevan v. Byrd*, 48 N. C. 397, it appeared that a quantity of unshucked corn belonging to the plaintiff had been levied upon by a constable, who was sued in case for selling en masse, and in the absence of the plaintiff, thereby causing the corn to be purchased at an undervalue, to the plaintiff's damage, and this court held that it was no violation of the officer's duty to divide the corn into small piles and sell it by the pile. *Nash, C. J.*, saying: "When an officer levies an execution upon property, it is his duty so to conduct the sale as will be most beneficial to all parties. The law points out no particular mode in which an officer shall conduct his sales; but he is bound by general principles to sell the property in that way which will probably bring the most money. He is the agent of both parties, appointed by the law to conduct the sale, and must act in good faith to both, and both are interested that the articles shall bring the greatest amount of money; particularly is it important to the defendant. When various articles are levied upon, they cannot be sold en masse; the officer must conform as nearly as possible to such rules as a prudent man would pursue in selling his own property (citing *Jones v. Lewis*, *supra*, and *McLeod v. Pearce*, *supra*)." It was also held that whether the corn had been properly sold was a question of fact for the jury, to be decided by them under proper instructions from the court as to the law, the judge adding: "The practiced eye of the experienced farmer can pretty well inform him of the quantity of corn, both in the field and in the pile. * * * The purchaser's eye is his chapman."

We have reviewed a few of the cases somewhat at length, on account of the great importance of the question, and for the further reason that very little has been said about it by this court in recent years. It may serve to stimulate officers to a just performance of their important and delicate duty, and to advise them in some manner as to how it should be performed.

[4, 5] One clear result to be deduced from the foregoing authorities is that if property is sold en masse, or in bulk, when it could reasonably be sold in parcels, without prejudice to the parties—creditor or debtor—and there is any fraud or oppression, or even unfairness, whereby it is sold at a disadvantage to the debtor, the sale will be avoidable by him, in a direct proceeding to set it aside. The facts in this case are so plainly against the fairness of the purchaser's conduct, he being also the plaintiff in the writ, that as said by Justice Reade in a somewhat similar case (*Andrews v. Pritchett*, 72 N. C. 135), it requires no very nice application of them "to stamp this transaction with fraud."

Let us assemble a few of the most salient facts. The land brought a grossly inadequate price, which is a badge of fraud. Chas. F. Dunn knew the land, and took advantage of his superior knowledge to deceive and mislead the debtor's attorney as to its real value, and at a time when investigation by the latter could not well be made before the sale. This was fraudulent conduct, as it accomplished its purpose. *Machine Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634. There was no competition at the sale, by reason of the purchaser's conduct and the failure to advertise the sale properly, and he, therefore, bought at his own price—\$125 for land worth nearly, if not quite, \$1,000, and, finally, the land was sold when there was personal property sufficient to pay the amount due and the costs. The debtor, after the sale, tendered to Dunn, not only the amount of the debt, interest, and costs, which was all the law required him to do, but the full amount bid by him for the land, and he refused to accept it. The land was sold, notwithstanding Dunn's attention had been called to the irregularities in his execution, the levy, and the advertisement. The land, consisting of three separate lots, was sold as a whole, when if any one of the lots had been sold, the proceeds would have been far more than sufficient to pay the debt and costs. This is not all, but it is surely enough for the purpose of deciding this case. These facts show palpably that the plaintiff in the execution was coveting the land, and not merely seeking, in a fair and legitimate way, the recovery of his debt. The process of the law should not be perverted to such an avaricious and fraudulent object. It will compel the debtor to pay, but will not tolerate unfairness and oppression.

The facts clearly bring this sale within the condemnation of the law, without deciding whether, under our decisions, a much weaker showing would be sufficient to avoid it. The sale en masse, with the attendant circumstances of fraud and irregularity, render the sale void as to the debtor. This affirms the judgment.

It is just to the sheriff to say that no wrong can fairly be imputed to him. It was all due to the fault of the purchaser, who, under cover and the supposed protection of the court's process and with special and peculiar knowledge of the facts, sought to use it for the evident purpose of deriving an unfair advantage, and thereby bought the property at a grossly inadequate price, to the great sacrifice and damage of his debtor. We have no idea that the sheriff was cognizant of any such inequitable conduct on the part of the purchaser; the debtor makes no charge against him of complicity, and we, therefore, fully acquit him of all blame. The acts of the creditor are alone sufficient to annul the sale.

No error.

RIGBY v. GAYMON.

(Supreme Court of South Carolina. Oct. 6, 1913.)

FRAUDS, STATUTE OF (§ 111*)—SUFFICIENCY OF WRITING—CHATTEL MORTGAGE.

Where a farmer gave a dealer a combined crop lien and chattel mortgage to secure future advances of supplies and money, and thereafter orally ordered from the dealer fertilizer of the value of more than \$50, which he refused to accept when shipped to him, the lien and mortgage was not a sufficient writing to satisfy the requirement of the statute of frauds as to the sale of fertilizer, since it did not specify the kind, quantity, or price of the supplies to be furnished.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 237; Dec. Dig. § 111.*]

Appeal from Common Pleas Circuit Court of Clarendon County; Ernest Gary, Judge.

"To be officially reported."

Action by J. H. Rigby against David Gaymon. Judgment for the plaintiff, and defendant appeals. Reversed.

A. Levi and Charlton Du Rant, both of Manning, for appellant. Davis & Weinberg, of Manning, for respondent.

HYDRICK, J. This was an action of claim and delivery to recover the possession of certain chattels, which plaintiff claimed under a chattel mortgage given him by defendant on January 19, 1911. The contract under which plaintiff claimed the right to recover was a combined agricultural lien and chattel mortgage. It was under seal, and was duly executed by both parties. It recited that Gaymon desired Rigby to make advances during the year to enable him to make a crop; that such advances were to be made from time to time during the year, and the amount and kind thereof, whether in money or supplies, or both, were to be entirely at the option of Rigby; that they should not exceed \$164.50; that the amount should become due on October 1, 1911; and that Gaymon should use them to make the crop. The instrument expressed that it was given "to secure the payment of all such sums of money" as Gaymon "may owe" Rigby "for advances made during the year under the terms set forth."

At the time the paper was executed Gaymon owed Rigby nothing. On the day that it was executed, and after it was executed, Gaymon told Rigby he wanted three tons of guano and eight sacks of soda, of the value of \$149.50, and \$15 worth of other supplies. Rigby put this down on his books; but the entry was not signed by Gaymon. About the 1st of March Rigby ordered the fertilizer shipped from Charleston to Silver, Gaymon's nearest station, in a car consigned to Rigby. For alleged reasons which need not be mentioned, Gaymon refused to accept or receive the fertilizer, or any part thereof, and never got any supplies from Rigby at all. Under the instructions of the

court plaintiff had a verdict and judgment for the property.

The sole question presented by the appeal is whether plaintiff's account for the fertilizer was within the statute of frauds, which was set up as a defense. We think it was. Leaving out of consideration, for the moment, the written agreement, the contract for the sale of the fertilizer was clearly within the statute. The question for secondary consideration, then, is whether the written agreement was sufficient to take the sale out of the statute, for that is the only ground upon which it is contended that the sale is not within the statute. We do not see how the agreement can be allowed to have that effect, because the rule is well settled that a writing is not sufficient to take a sale out of the statute, unless it contains all the essential elements of the contract. *Louisville Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212. Here the writing does not specify the kind, or quality, or quantity, or the price of the advances to be made. Therefore it was incumbent on plaintiff to prove each sale made to the defendant under the contract. If he had advanced supplies in items under \$50 in value, he would have had to prove each item of the account according to the rules of evidence, just as if the written contract had not been made. So, when he undertook to prove the item in question, it was incumbent upon him to do so according to law and the rules of evidence; but he was met in the attempt by the statute, which says that as to this item the contract was not good, because no note or memorandum in writing of the bargain was made and signed by the party to be charged by the contract. *Smith v. Evans*, 36 S. C. 69, 15 S. E. 344.

Respondent relies upon certain remarks of the court in *McNeill v. Conyers*, 80 S. C. 571, 61 S. E. 1068, in which plaintiff was allowed to recover property sued for under a similar contract. In that case, however, the whole amount advanced was only \$26.25, and there was no dispute as to the account, the items of which had been accepted and received by the defendant. Therefore the application of the statute of frauds was not an issue in that case.

Reversed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

SILVERTHORNE v. BARNWELL LUMBER CO. et al.

(Supreme Court of South Carolina. Oct. 16, 1913.)

1. CORPORATIONS (§ 284*)—PROPERTY—POSSESSION—MANAGEMENT.

Since in general a corporation is entitled to possession and management of its property and business, where plaintiff claimed to be en-

titled to the position of superintendent and general manager of defendant corporation, and that he had been unlawfully deprived of his position by the officers of the company, the burden was on him to show it.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1195, 1196, 1198-1205, 1207-1235; Dec. Dig. § 284.*]

2. APPEAL AND ERROR (§ 456*)—INJUNCTION PENDING APPEAL—RIGHT TO ISSUE.

A justice of the Supreme Court has jurisdiction to grant an injunction to award appellant temporary relief pending appeal; but the power will not be exercised unless the appellant's right is beyond reasonable question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2215; Dec. Dig. § 456.*]

3. APPEAL AND ERROR (§ 456*)—EFFECT OF APPEAL—TEMPORARY INJUNCTION PENDING APPEAL.

Comparative injury should be considered in determining an application to a single justice of the Supreme Court for a temporary injunction restraining a corporation from removing appellant from his office as general manager pending appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2215; Dec. Dig. § 456.*]

Action by Albert E. Silverthorne against the Barnwell Lumber Company and others. On motion before a judge of the Supreme Court for a temporary injunction pending appeal. Denied.

J. E. Davis and R. A. Ellis, both of Barnwell, and Hendersons, of Aiken, for appellant. J. O. Patterson, Jr., and John G. Hay, both of Barnwell, and W. A. Holman, of Charleston, for respondents.

FRASER, J. This is an action for injunction. Judge Bowman issued a rule to show cause why a temporary injunction should not issue, and made the rule returnable before Judge Gage. Judge Gage refused the injunction. Plaintiff appealed, and moved before me for a temporary injunction pending the appeal.

Plaintiff claims to be entitled to the position of superintendent and general manager of the defendant the Barnwell Lumber Company, respondent, and that he has been unlawfully deprived of his position by the officers of the company.

[1] As a general proposition, a person or corporation is entitled to the possession and management of its property and business, and, if the appellant is entitled to the possession and management, the burden is on him to show it.

[2] A justice of this court has the power to make the order of injunction; but it ought not to be exercised unless the right of the appellant is very clear and beyond reasonable question. I cannot say that the appellant's right is clear and beyond reasonable question. It is true the appellant appears to have an interest in certain stock of the company, but what that interest is does not appear; but, even if the appellant was the sole owner of the stock, this proceeding is not based upon his right as a

stockholder, but upon his rights as an individual under the contracts set up in his complaint. The respondent denies the appellant's rights under these contracts. The questions of right under these contracts are not so clear as to warrant a single justice of this court in practically reversing the judgment of the circuit judge.

[3] Comparative injury should be considered in a case of this sort. If this court should hold that Judge Gage is in error, the appellant's individual loss may be comparatively small. If this court should hold that Judge Gage is not in error, then, under the great powers claimed by the appellant, the respondent's loss may be very great.

It is therefore ordered that the motion for temporary injunction be and the same is refused.

STRICKLAND v. STRICKLAND et al.
(Supreme Court of South Carolina. Oct. 6, 1913.)

1. APPEAL AND ERROR (§ 425*)—NOTICE OF APPEAL—TIME FOR SERVICE.

Where a judgment was filed after adjournment for the term, and no notice thereof was given to the unsuccessful party, a notice of appeal served by his attorney 11 days after the filing of the judgment was in time under Code Civ. Proc. 1912, § 384, giving parties 10 days after the service upon them of notice of judgment entered in vacation in which to serve notice of intention to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2155-2161; Dec. Dig. § 425.*]

2. PARTNERSHIP (§ 279*)—RETIREMENT OF PARTNER—ASSUMPTION OF OBLIGATIONS BY OTHER PARTNERS—EFFECT UPON CREDITORS—ACTION—VENUE.

Where a partnership composed of three individuals, which had contracted a debt, was dissolved prior to the institution of suit upon the debt, and it was agreed that two of the partners should assume the debts of the partnership, that agreement did not affect the rights of the creditor to hold the retiring partner; and therefore a justice in the county where the retiring partner resided had jurisdiction of an action against all three for the amount of the debt.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 636, 637; Dec. Dig. § 279.*]

Appeal from Common Pleas Circuit Court of Colleton County; R. W. Memminger, Judge.

Action by J. F. Strickland against W. W. Strickland and others, formerly copartners doing business as the Fairfax Furniture Company. Judgment for the defendants, and plaintiff appeals. Reversed.

Padgett, Lemacks & Moorers, of Walterboro, for appellant. J. M. Patterson, of Allendale, for respondents.

HYDRICK, J. [1, 2] The respondents moved to dismiss this appeal on the ground that the notice of appeal was not served within the time required by law. From the affida-

vits we gather these facts: The cause was heard in term time, but the court reserved its decision, and it was filed after the court had adjourned for the term, on July 12, 1912. On July 23, 1912, notice of appeal was served on respondents' attorney by J. Henry Johnson, Esq., who makes affidavit that he delivered to him and left with him a copy thereof. As the parties have 10 days after the service upon them of written notice of the filing of orders, decrees, or judgments granted or rendered at chambers or filed in vacation (see Code of Procedure 1912, § 384, and cases cited in the note, and O'Rourke v. Paint Co., 91 S. C. 403, 74 S. E. 930), and as no such notice had been given to appellant's attorneys at that time, the service of notice of intention to appeal on July 23d was in time, although it was more than 10 days from the filing of the judgment. This makes it unnecessary to pass upon the validity of the service made by the sheriff, upon which appellant also relies. The motion to dismiss the appeal is therefore refused. Plaintiff brought this action in the court of a magistrate for Colleton county against the defendants named in the caption, as partners doing business under the name of the Fairfax Furniture Company. At the time of the commencement of the action, the defendant W. W. Strickland was a resident of Colleton county. The other defendants resided in Barnwell county. In January, 1911, when the contract sued on was made, the defendants were all members of the firm. Thereafter, in August, 1911, and before the commencement of the action, the defendant Strickland sold his interest in the partnership to the other defendants, who assumed the debts of the concern. On the call of the case for trial in the magistrate's court, the Thomas defendants interposed an objection to the jurisdiction of the court, supported by an affidavit, on the ground that, at the time the action was commenced, both members of the firm were residents of Barnwell county. The magistrate overruled the objection, and allowed plaintiff to amend his summons and complaint by charging the defendants as "formerly partners," etc. The Thomas defendants then moved to strike the name of W. W. Strickland from the record as a party defendant, on the ground that he was not a member of the firm. That motion was refused. The plaintiff proved the facts above stated. The magistrate rendered judgment against the Thomas defendants only, holding that the testimony showed that, as between them and the defendant Strickland, they had assumed the debts of the firm. The Thomas defendants alone appealed.

The circuit court reversed the judgment on the ground that the magistrate in Colleton county had no jurisdiction of the defendants against whom the judgment was rendered, because they were residents of Barnwell

county. The court held that, as there were several defendants, the magistrate would have had jurisdiction if one of the real defendants in interest had been a resident of Colleton county; but that, as the defendant Strickland was not a real party in interest, because the other defendants had assumed the firm debts, the court could not acquire jurisdiction of the others by making him a party defendant. In this the court erred. The assumption of the firm debts by the Thomases was an agreement only between them and the defendant W. W. Strickland. There was no testimony that the plaintiff was a party to it, or that he acquiesced in it. Therefore it could not have affected the liability of the defendant Strickland to the plaintiff. His liability to the plaintiff was fixed when the contract was made, and nothing which the members of the firm did among themselves after that time could have affected it without his consent. Therefore he was properly made a party defendant, and, as one of the proper parties defendant was a resident of Colleton county, the magistrate of that county had jurisdiction of all the defendants, under the authority of section 17 of the Code of Procedure of 1912, which provides that, if there is more than one defendant, the action may be tried in any county in which one or more of the defendants reside, at the time of the commencement thereof. In such cases, when the court has properly acquired jurisdiction of the parties, the rendition of a judgment in favor of the party whose residence in the county of trial gave the court jurisdiction of the other defendants could not have the effect of ousting the jurisdiction.

Reversed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

WYNNE v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Oct. 6, 1913.)

1. CONSTITUTIONAL LAW (§ 126*)—WAGES—PAYMENT TO DISCHARGED EMPLOYEE—STATUTES—VALIDITY.

Under Const. 1868, art. 12, § 1, and Const. 1895, art. 9, § 2, conferring on the Legislature the right to alter or repeal all charters of incorporation, and article 9, § 8, forbidding foreign corporations to construct, operate, or lease railroads within the state, Civ. Code 1912, § 3812, providing that, when a corporation shall discharge a laborer whose wages are paid monthly or weekly on a fixed day beyond the end of the month or week in which the labor is performed, the wages earned up to the time of discharge shall become immediately due and payable, and, if not paid within 24 hours after demand, the corporation shall be subject to penalty of \$5 a day, was sustainable as an amendment of the corporate charter of defendant railroad company.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325, 366-369; Dec. Dig. § 126.*]

2. CONSTITUTIONAL LAW (§§ 238, 275, 276*)—MASTER AND SERVANT (§ 69*)—PAYMENT OF WAGES—EMPLOYEE—TIME—POLICE POWER—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—WRITTEN CONTRACT.

Civ. Code 1912, § 3812, was also sustainable as a proper exercise of police power, and was not therefore unconstitutional as depriving the corporations of their property without due process of law, or denying to them the equal protection of the laws and liberty of contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-690, 695, 706-708, 830, 835, 843-846; Dec. Dig. §§ 238, 275, 276; * Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. § 69.*]

3. MASTER AND SERVANT (§ 83*)—DISCHARGED EMPLOYEE—WAGES—PAYMENT—TIME—STATUTES—CONSTRUCTION.

Civ. Code 1912, § 3812, requiring corporations to pay wages earned by discharged employees within 24 hours after demand on pain of a penalty, does not apply to a failure to pay because the demand is not a just debt, or when the discharged laborer after demanding payment prevents compliance by his own conduct, nor does it deny or preclude the right of the corporation to interpose any valid counterclaim or defense to the claim of such laborer, under coercion of the penalty so imposed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. § 83.*]

Appeal from Common Pleas Circuit Court of Richland County; T. S. Sease, Judge.

"To be officially reported."

Action by A. W. Wynne against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lyles & Lyles, of Columbia, for appellant. Rembert & Monteith, of Columbia, for respondent.

HYDRICK, J. Plaintiff recovered judgment against defendant in the court of a magistrate for \$1.93 wages due him by defendant at the time he was discharged from the service of defendant, and \$95 the accumulated daily penalty of \$5 per day for every day's delay in payment of his said wages, after demand therefor, as allowed by section 3812 of the Civil Code of 1912, which reads as follows: "When any corporation carrying on any business in this state in which laborers are employed, whose wages, under the business rule or custom of such corporation, are paid monthly or weekly on a fixed day beyond the end of the month or week in which the labor is performed, shall discharge any such laborer, the wages which have been earned by such discharged laborer shall become immediately due and payable. And if not so paid, then such laborer shall recover in addition thereto, a penalty of five dollars per day for every day after twenty-four hours until such wages are paid, to be recovered in any court of competent jurisdiction, in the same action with the wages, or in a separate action: Provided, such demand has been made upon the paymaster or other paying officer." From the judgment of the circuit court, affirming the

magistrate's judgment, the defendant appealed to this court, on the ground that the statute above quoted is unconstitutional and void, because it deprives defendant of its property without due process of law, and denies to it the equal protection of the laws and the liberty of contract.

These constitutional guarantees have been so frequently and so fully considered and discussed in this court and in the Supreme Court of the United States that we shall content ourselves in the present case with the citation of only a few of the cases upon the authority of which the validity of the statute must be affirmed.

[1] In the case of *St. Louis, etc., Ry. Co. v. Paul*, 173 U. S. 402, 19 Sup. Ct. 419, 43 L. Ed. 746, the decision of the Supreme Court of the state of Arkansas, sustaining a similar statute against the same grounds of attack as here invoked, was affirmed. Except in unimportant details, that case cannot be distinguished from this. The Supreme Court of Arkansas rested its decision principally upon the ground that the statute as applied to corporations was a valid exercise of the right "to alter, revoke, or annul any charter of incorporation," which had been reserved by the state Constitution. The validity of section 3812, *supra*, may be affirmed upon the same ground, because both in the Constitution of 1868 (article 12, § 1) and in that of 1895 (article 9, § 2) the right to alter or repeal all charters of incorporation was expressly reserved, and by section 8 of article 9 foreign corporations are not allowed to build, operate, or lease any railroad in this state. So that defendant's charter must be subject to the power reserved to alter or repeal it.

[2] There can be no doubt that such legislation may also be sustained under the power of the state to legislate for the common good—commonly called the police power. *Chicago, etc., R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; *Johnson v. Spartan Mills*, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409.

We determine the validity of the statute as applied to the facts of the case presented by the record, which is that of a corporation having discharged one of its laborers to whom it was indebted in the sum of \$1.93 for wages which he had earned, and having refused, after demand, to pay his wages, without any reason or excuse, except that which appears only in the argument of its counsel, to wit, that by custom or contract, express or implied, his wages were not due until defendant's next regular pay day. Therefore we are not concerned in this case with possible combinations of circumstances in which the statute might work inconvenience or even hardship.

[3] We say, however, that, giving the statute a reasonable construction, the intention is not to be gathered from it that the cor-

poration employer shall be penalized for the failure to pay what is not a just debt nor for the failure to pay, when the discharged laborer, after demanding payment, prevents compliance with the demand by his own conduct, nor to deny or preclude the right of the corporation to interpose any valid counterclaim or defense to the claim of such laborer, under coercion of the penalty thereby imposed.

The purpose of the statute is to prevent the postponement, until the corporation's next regular pay day, of payment of the wages which a discharged laborer has earned at the time of his discharge, and which he would be entitled to sue for and collect immediately, but for the rule or custom of the corporation not to pay except on its regular pay days, and the express or implied agreement of the laborer to abide that rule or custom. The Legislature probably considered that the hardship which befalls the needy laborer by withholding for a week, or two weeks, or a month the wages which he has earned is far greater than the inconvenience to the corporation which is caused by requiring a reasonably prompt settlement with him, so that he can use the money which he has earned in an effort to get other employment, or to live upon until he can get other employment, and thereby possibly prevent him and his family from becoming a burden upon the state. Besides this, the statute tends to prevent dissatisfaction among laborers, and hence, also, tends to prevent agitation and strikes among them, which is a matter of grave public interest.

Affirmed.

GARY, C. J., and WATTS, and FRASER, JJ., concur.

STATE ex rel. BATES et al. v. PATTERSEN, County Sup'r, et al.

(Supreme Court of South Carolina. Oct. 13, 1913.)

1. INJUNCTION (§ 157*)—TEMPORARY INJUNCTION—ORDER—AMENDMENT.

A judge, after making an order for temporary injunction, may on motion amend it to require relators to give a bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 340, 342; Dec. Dig. § 157.*]

2. INJUNCTION (§ 148*)—TEMPORARY INJUNCTION—BOND.

A bond is required, under the statute, of relators to whom a temporary injunction is granted by a judge of the Supreme Court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 323-334; Dec. Dig. § 148.*]

On motion to amend order. Granted.

For former opinion, see 79 S. E. 309.

De Bruhl & McLaughlin, of Columbia, for petitioners. Melton & Belser, of Columbia, for respondents.

FRASER, J. [1, 2] This is a motion to amend an order of temporary injunction issued by me in this case. The motion was made to require the relators to give bond. The motion was made on the morning of October 4th. At the hearing of the motion for injunction, my recollection is that nothing was said about the bond; and, inasmuch as the state was practically a party, it did not occur to me that a bond would be necessary. On the hearing on this motion, I declined to hear from Messrs. Melton & Belser and stated that, as then advised, a bond was necessary, but gave Messrs. DeBruhl & McLaughlin three or four days in which to furnish me with authorities to the contrary. It appears that later in the day of the 4th the notice of appeal and exceptions were served. The authorities furnished me have not convinced me that the relators are not required to give bond, and I am satisfied that, under the case of Lorick & Lowrance v. Motley, 69 S. C. 570, 48 S. E. 614, I have authority to amend the order heretofore made by me. It seems to me that a bond is required under the statute.

It is therefore ordered that the petitioners in this action do, within ten days from the date of this order, enter into the undertaking required by law, with sufficient surety to be approved by the clerk of this court, in the sum of \$2,000 for the payment of such damages as the respondents may sustain, not exceeding said sum, by reason of the temporary injunction heretofore granted in this cause, should the court finally determine that the petitioners are not entitled to injunction.

WARDLAW v. FREDERICK. (No. 5,027.)
(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 204*)—DEMURRER—PLEADING GOOD IN PART—ANSWER.

Where an answer is demurred to on the general ground that the allegations thereof are irrelevant and insufficient, and do not set up any matter of defense, and the demurrer fails specifically to point out in what particular they are irrelevant and insufficient, and it appears that some of the paragraphs demurred to do set up matters which are relevant and material, in testing the relevancy and sufficiency of matters of defense thus set up, the facts alleged in all the paragraphs will be considered together; and, if, in light of the allegations embraced in all the paragraphs, there is a sufficient defense, there would be no error in a judgment overruling the demurrer. *Antognoli v. Miller*, 116 Ga. 621, 42 S. E. 1006.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

2. PLEADING (§ 208*)—DEMURRER—PLEADING GOOD IN PART—ANSWER.

Where a paragraph in an answer contains both relevant and irrelevant matter, it will be purged of the irrelevant matter on special demurrer pointing out such irrelevancy; but if the demurrer goes to the paragraph as a whole, without specifying the irrelevant matter, the

demurrant cannot complain that the entire paragraph of the answer is not stricken. *Southern Ry. Co. v. Phillips*, 136 Ga. 282, 71 S. E. 414.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513-519; Dec. Dig. § 208.*]

3. EXECUTORS AND ADMINISTRATORS (§ 221*)—ALLOWANCE OF CLAIMS—DISPUTED CLAIMS—ADMISSIBILITY OF EVIDENCE.

It was erroneous to admit in evidence the deed from the defendant's testator to the plaintiff. The plaintiff offered evidence in support of her contention that at the date of the death of her brother, the testator, he was indebted to her in the amount sued for. The defendant pleaded that this indebtedness, if it ever existed, had been settled by a conveyance of real estate from the decedent to the plaintiff. The deed introduced in evidence recited that it was based upon a consideration of love and affection and \$10. There was no evidence to authorize a finding that this deed was intended by the grantor and accepted by the grantee as a settlement and satisfaction of the debt for which the plaintiff sued. In the absence of some evidence of this character, the deed was wholly irrelevant to any issue on trial in the case. For the same reason, it was erroneous to admit the prior conveyances showing title in the decedent to the same property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.*]

4. EXECUTORS AND ADMINISTRATORS (§ 221*)—ALLOWANCE OF CLAIMS—DISPUTED CLAIMS—ADMISSIBILITY OF EVIDENCE.

It was erroneous to admit in evidence a written agreement between the plaintiff and the defendant in reference to certain other matters pending between them, in which it was recited that the plaintiff claimed an indebtedness of \$1,750 without interest, and that nothing in the agreement was intended to prejudice this claim. The agreement was irrelevant to any issue on trial, and the mere recital therein that the plaintiff claimed an indebtedness of \$1,750, "without interest," did not amount to an agreement not to demand interest, and did not operate as an estoppel upon the plaintiff to claim interest on the indebtedness.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.*]

5. NEW TRIAL (§ 68*)—GROUNDS—VERDICT CONTRARY TO EVIDENCE.

Plaintiff having proved her case as laid, and there being no evidence whatever introduced by the defendant to sustain the defense relied upon, a verdict for the plaintiff was demanded, and the court erred in not setting aside the verdict for the defendant and granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 135-140; Dec. Dig. § 68.*]

Error from City Court of Columbus; G. U. Tigner, Judge.

Action by C. A. Wardlaw against N. C. Frederick, as executrix. Judgment for defendant, and plaintiff brings error. Reversed.

Hatcher & Hatcher, of Columbus, for plaintiff in error. Henry R. Goetchius and Wm. De L. Worsley, both of Columbus, for defendant in error.

HILL, C. J. Judgment reversed.

JOHNSON v. STATE. (No. 4,981.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 67*)—SERVANT'S BREACH OF CONTRACT—ELEMENTS OF OFFENSE—BURDEN OF PROOF—PRESUMPTIVE EVIDENCE.**

An intent to defraud, coexistent with the making of the contract, is an ever-essential element of the offense of cheating and swindling, as denounced in section 715 of the Penal Code of 1910. Under the provisions of section 716 of the Penal Code, failure to perform services contracted for and failure to return money advanced upon a contract of service, without good and sufficient cause, may afford presumptive evidence that the fraudulent intent existed at the time the contract was made, but either the performance of the services or the repayment of the advancement is a complete defense, and upon the trial of one charged with a violation of section 715, it is incumbent upon the prosecution to prove, not only that the services as contracted for were not performed, but also to establish the fact that the advances, with interest thereon, had not been repaid at or before the time fixed for the commencement of the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

2. MASTER AND SERVANT (§ 67*)—CRIMINAL LAW (§ 308*)—CHEATING AND SWINDLING—BURDEN OF PROOF—PRESUMPTION OF INNOCENCE.

Where one is charged with cheating and swindling in violation of section 715 of the Penal Code of 1910 the burden of showing that the accused had no good cause or excuse for his failure to perform his contract, or to repay the advancement, is not upon the defendant as matter of defense, but the burden rests upon the prosecution in the establishment of an essential element of the state's case (to wit, the existence of fraudulent intent) to prove those facts which are by the statute declared to be necessary to raise the presumption of an intent to defraud, which is so essential an ingredient of the offense that a conviction cannot be supported where such an intent is not proved beyond a reasonable doubt. Proof that one accused of this offense failed to perform the services contracted for, or to repay the advances which supplied the consideration of the contract, would be rebutted by the general presumption of the defendant's innocence, because the existence of a fraudulent intent at the time the advances were made and the contract was entered into must be proved, and yet the question as to what was the real intention of the defendant at the time of making the contract, to say the least of it, would be an open one. Indeed, under the well-established rule that where an act is equally subject to two constructions, the one indicative of the guilt of the actor and the other consistent with his innocence, the latter must be adopted would prevail.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67*; Criminal Law, Cent. Dig. § 731; Dec. Dig. § 308.*]

3. MASTER AND SERVANT (§ 67*)—BREACH OF CONTRACT—CHEATING AND SWINDLING—SUFFICIENCY OF PROOF.

In the present case it is uncontradicted that the failure of the accused to comply with his contract and to labor for the prosecutor was due to the fact that he was already under contract of service with another employer, and the testimony that the defendant immediately endeavored to get his employer to repay the

money advanced by the prosecutor, and that payment was promised, but postponed by this employer, is undisputed. The state failed to show that the accused had no good cause or excuse for not repaying the advancement, and even if the testimony in behalf of the defendant upon this point should have been discredited by the lower court, the conviction of the defendant was not authorized. The fact that the defendant made an affidavit which was alleged was attached to the contract, to the effect that he was not under any other contract of service at the time of the advancement made for him by the prosecutor, might subject him to prosecution for false swearing, or to a prosecution for cheating and swindling by artful means and deceitful practices, under the provisions of section 719 of the Penal Code of 1910, but proof of making this affidavit, and in the absence of proof that the defendant had no reason for not performing his contract or repaying the money, is not a sufficient substitute for proof that the subsequent failure to perform the contract, or repay the advancement, was without the good cause required by law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

*(Additional Syllabus by Editorial Staff.)***4. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION.**

In a prosecution for cheating and swindling in violation of Pen. Code 1910, § 715, a witness' testimony merely that defendant "took an affidavit" should have been excluded as opinionative, where he testified to no facts from which the court could determine who administered the oath, whether it was lawful, or whether defendant was conscious that the oath was being administered and was apprised of the contents of the affidavit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.*]

Error from City Court of Dublin; Jas. B. Hicks, Judge.

Dave Johnson was convicted of cheating and swindling, and brings error. Reversed.

Burch & Burch and J. G. Howard, all of Dublin, for plaintiff in error. Geo. B. Davis, Sol., of Dublin, for the State.

RUSSELL, J. The defendant was convicted of a violation of section 715 of the Penal Code. His motion for a new trial was overruled. It appears from the record that he was in the employ of one Burch, as a cropper or farm laborer upon Burch's farm. He was indebted to a mercantile establishment in the city of Dublin, known as the "Four Seasons," of which a Mr. Arnau was manager. To secure the payment of this indebtedness he executed a mortgage on a certain cow and on his crop then growing. Upon his failure to pay this debt and the failure of the levying officer to find property upon which to levy, the defendant was arrested and placed in jail. At the jail he was visited by Mr. Carter, the prosecutor in the present case, and Mr. Carter's son, and after some conversation he was taken, at the instance of Mr. Arnau, to the office of the solicitor of the city court (who was also Mr. Carter's personal attorney). There the

young Mr. Carter, as agent for his father, negotiated with the defendant and agreed to pay the defendant's indebtedness to the Four Seasons, upon the payment of which the defendant would be discharged from jail, and thereupon Mr. Davis, the attorney, prepared a contract by the terms of which the defendant agreed to work for six months for Mr. Carter, in consideration of the advance of \$31. The record does not show whether the warrant sworn out upon the mortgage of the Four Seasons was dismissed or not, but the defendant was discharged from jail upon his promise to return in a day or two and enter upon his service of employment with Mr. Carter. Mr Davis testified: "This negro asked Mr. Carter to let him go down to Cadwell and get him some clothing, and said he would meet him back here Monday morning. I added an oath to the contract, where he swore he was not under contract with any one else." When the defendant reached Mr. Burch's, to get his clothes, according to the undisputed testimony of Mr. Burch, he told Mr. Burch that he owed Mr. Carter. Mr Burch testified: "I told him that I would pay it whenever he worked enough." The defendant had traded with Mr. Burch to make a crop, and the payment was made by Mr. Carter before the expiration of the defendant's contract with Mr. Burch. The state proved the contract substantially as set forth in the accusation, and that loss and damage had accrued to the prosecutor as alleged; that no service had been performed under the contract, nor had the money advanced been tendered to be repaid. There was no evidence whatever which tended to show why the defendant did not perform his contract other than offered by himself in the testimony of Mr. Burch, nor did the state establish that the failure of the accused to repay the advance was without cause. The evidence of Mr. Burch, to the effect that at the time Mr. Carter advanced the \$31 the defendant was bound by a subsisting contract of employment to himself, was undisputed, as is the fact that as soon as the negro could get to Mr. Burch's after his release from jail, he endeavored to induce Mr. Burch to repay Mr. Carter the advancement made by the latter, and that his failure to comply with his contract was due to the fact that Mr. Burch would not consent for him to leave. Furthermore Mr. Burch had promised the defendant that he would repay the advancement when he made his crop.

[3, 4] The single question in the case is whether the proof of fraudulent intent upon the part of the defendant at the time that he procured the advance is sufficient to comply with the requirements of section 715 of the Penal Code, under which the defendant stood charged. It is not necessary to refer to those portions of the record in which the testimony is in conflict. We consider the

judgment of the lower court as based upon the superior credibility of the testimony in behalf of the state, which he was authorized, in his discretion, to attribute to it. We disregard the contention of the plaintiff in error that the contract was induced by duress, and the further insistence that the payment to the Four Seasons was the act of Mr. Carter, and not the free and voluntary act of the defendant; in other words, that the advancement was suggested by the prosecutor instead of being solicited and requested by the accused. We consider the case upon the theory, very evidently adopted by the trial judge, that the defendant, being desirous of being released from jail, promised the would-be employer that if he would advance for him a certain sum of money, in which the prospective employer had no interest, he would perform certain definite services for him for a fixed and definite time, and that thereafter he failed to perform these services or to refund the money thus advanced. For reasons which will be hereafter stated, the fact that the defendant took an oath at the time of making the contract that he was not under contract with any one else is, in our opinion, insufficient of itself to evidence the existence of a fraudulent intent, as defined in section 715 of the Penal Code. But even if we are mistaken as to this, the testimony as to the affidavit should not have been considered by the trial court, because it was purely opinionative, and no sufficient facts were presented to the court upon which it could be adjudged that the defendant was actually sworn, or made a statement upon oath, conscious that he was bound by its obligations. To say that one "took an affidavit" assumes, without giving the court an opportunity of passing upon the question, that the alleged affiant was fully apprised of the contents of the purported affidavit, and that he consciously and voluntarily assumed the obligation of a lawful oath, administered by one lawfully authorized to administer oaths. The trial court did not have before him any information, so far as appears from the record, which would enable him to say who administered the oath, whether the oath was a lawful oath, or whether the affiant was conscious that an oath was being administered, or was apprised of the contents of the affidavit to which he was being sworn; so that, clearly, there is nothing more in the record upon the subject of the affidavit than the mere conclusion of the witness who testified upon that point. Especially is this true since Mr. Carter testified, upon cross-examination, as to the contract to which the oath was attached, that although he had searched for it, he would not swear that it was lost.

[1, 2] Omitting the consideration of the affidavit for the present, therefore, the question arises as to whether, in any case, as to

one charged with a violation of the labor contract law of 1903 (now embodied in sections 715, 716 of the Penal Code), who has contracted to perform services in consideration of an advance, mere proof that such a one failed to comply with his contract, or to repay the money, is presumptive evidence of the co-existent fraudulent intent essential to authorize conviction in such a case, and at the same time preserve the act as a constitutional enactment and prevent it from being nothing more or less than imprisonment for debt.

Of course the labor-contract law of 1903, like all other criminal statutes, must be strictly construed. Hence it was held in *Glenn v. State*, 128 Ga. 587† (and this ruling has been uniformly followed since by the Supreme Court and by this court), that there must be a distinct and definite contract of service, and that the person contracting to perform this service refused, without good and sufficient cause, to carry out his contract by performing the service. In *Patterson v. State*, 1 Ga. App. 782, 58 S. E. 284, we held that "the paramount, controlling, ever-essential element of the offense, which must be proved to have been coexistent with the debt or contract, is the intent to defraud." All of the decisions of the Supreme Court bearing upon this question place the burden of proof, as to whether the defendant had good cause for failing or refusing to carry out his contract, upon the state; necessarily so because the statute itself declares that "satisfactory proof of the contract, the procuring thereon of money or other thing of value, failure to perform the services so contracted for, or failure to return the money so advanced, with interest thereon, at the time said labor was to be performed, *without good and sufficient cause*," etc., shall be deemed presumptive evidence of the fraudulent intent referred to in the preceding section. Where it appears that failure to perform the contract was the result of sufficient cause, an acquittal necessarily results; but this is not all; proof of absence of sufficient cause is essential to support a conviction, because without this proof the existence of the antecedent or coexistent intent to defraud is not established. The labor-contract act of 1903 can only be maintained as a constitutional enactment, and its provisions be enforced by giving to it such a construction as will prevent it from being, or even appearing to be, a criminal process to be used for the collection of debts.

From the testimony in the record it is plain that the state did not establish that this defendant had no good cause for failing to comply with his contract. According to the defendant's evidence, he could only comply with this contract by violating a pre-existing contract of the same nature. The state's testimony did not offer any reason why the defendant violated his contract. Upon the

trial of one accused of a violation of section 715 of the Penal Code the state must show that the accused did not have any good reason for failing to comply with his contract, or for failing to repay the money. In other words, if it appears from the evidence that the accused had a good reason for not complying with his contract, or for failing to repay the money, he cannot be convicted.

Judgment reversed.

BLAKELY ARTESIAN ICE CO. v. CLARKE (No. 4,929.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION (§ 32*) — PETITION—SUFFICIENCY OF DESCRIPTION.

The following description of property in a petition in an action of trover was sufficiently definite: "All the iron machinery such as boilers, cans, piping, ammonia apparatus, etc., situated in the town of Blakely, along the line of the Central of Georgia right of way, and heretofore used by the defendant in the manufacture of ice, said machinery being the same machinery which was sold by the Huson Ice & Coal Company to the Union Point Ice Company, and described in a written retainer-title note for the sum of \$900, dated July 27, 1910, and payable January 1, 1911, to the Huson Ice & Coal Company, and signed by the Union Point Ice Company, by its president, and recorded in the office of the superior court of Greene county, on August 5, 1910, in Book 8, page 447."

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 181-202; Dec. Dig. § 32.*]

2. CORPORATIONS (§ 432*) — CONTRACTS UNDER SEAL—AUTHORITY TO EXECUTE—PRESUMPTION.

An instrument executed in the name of a corporation by its president and under the seal of the corporation is presumed to have been executed by its authority, but this presumption is rebuttable.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

3. ASSIGNMENTS (§ 76*) — NOTE RETAINING TITLE — TRANSFER BY INDORSEMENT — REPLEVIN.

A transfer in the following language on the back of a note, containing a reservation of title to property therein described, was adequate to pass title both to the note and to the property, and was sufficient to support an action of trover for the latter's recovery: "For value received, we hereby transfer and assign all the right, title, and interest we have in the within note, together with the security mentioned in said note, to C. A. Clarke. December 16, 1910. Huson Ice & Coal Company, by H. T. Huson, Secretary and Treasurer."

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 143; Dec. Dig. § 76.*]

4. RECORDS (§ 10*) — DEFECTIVE REGISTRATION—EFFECT.

An instrument executed in behalf of a corporation and under the corporate seal, if capable of being admitted to record under the registry statutes, operates as notice to third persons of the presumptive power of the agent of the corporation to execute it, from the date of the filing of the paper for record, although it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

† 51 S. E. 605.

was so defectively recorded as to indicate that it was not an instrument under seal.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 8-12; Dec. Dig. § 10.*]

5. CORPORATIONS (§§ 399, 404*)—OFFICERS—POWERS.

The president of a corporation has no power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management. The evidence in the present case demanded a finding that the contract upon which the plaintiff relied was executed without the authority of the corporation whose name was signed thereto. Power conferred by the governing authorities of a corporation upon an agent, to renew a note payable to a named person, does not embrace the authority to convey property of the corporation as security for the payment of the note, unless it appears that in the original evidence of indebtedness the property had been conveyed as security.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602-1610, 1626-1628, 1633-1639; Dec. Dig. §§ 399, 404.*]

6. CORPORATIONS (§ 432*)—AGENCY—ESTOPPEL—SUFFICIENCY OF EVIDENCE.

There was no evidence in the present case to authorize a finding that the corporation had held out as its agent the person who executed the contract, in such a way as to estop it or its privies from pleading the want of the agent's authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

7. DENIAL OF NEW TRIAL—ERROR.

The foregoing rulings deal with all of the material questions which will likely arise upon another trial. A new trial should have been granted because of erroneous instructions of the trial judge, and because the evidence demanded a finding that the instrument upon which the plaintiff relied in proof of his title was executed without any authority from the corporation in whose behalf it was made.

(Additional Syllabus by Editorial Staff.)

8. CORPORATIONS (§ 399*) — INFERENCE OF GENERAL AGENCY.

That the agent of a corporation was specially authorized in some instances to execute a mortgage and a security deed, and in others to borrow money from named persons on specified terms, did not authorize the inference that he had general authority to contract on behalf of the corporation to borrow money, or for any other purpose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602-1610; Dec. Dig. § 399.*]

Russell, J., dissenting.

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by C. A. Clarke against the Blakely Artesian Ice Company. Judgment for plaintiff, and defendant brings error. Reversed.

Glessner & Park, of Blakely, and Saml. H. Sibley, of Union Point, for plaintiff in error. Rambo & Wright, of Blakely, for defendant in error.

POTTLE, J. Clarke sued the Blakely Artesian Ice Company in trover, alleging that the defendant was in possession of certain machinery used in connection with an ice plant

sold by the Huson Ice & Coal Company to the Union Point Ice Company to which the seller had reserved title, and that an obligation for a part of the purchase money, containing a reservation of title to the property sued for, had been duly transferred from the Huson Ice & Coal Company to the plaintiff. The property was described in the petition as being "all the iron machinery, such as boilers, cans, piping, ammonia apparatus, etc., situated in the town of Blakely, along the line of the Central of Georgia right of way, and heretofore used by the defendant in the manufacture of ice; said machinery being the same machinery which was sold by the Huson Ice & Coal Company to the Union Point Ice Company, and described in a written retainer-title note for the sum of \$900, dated July 27, 1910, and payable January 1, 1911, to the Huson Ice & Coal Company, and signed by the Union Point Ice Company, by its president, and recorded in the office of the superior court of Greene county, on August 5, 1910, in Book 8, page 447." The petition was demurred to on the ground that the property sued for was not sufficiently described, and that no copy of the instrument upon which the plaintiff relied in support of his title was attached to his petition. By amendment the plaintiff attached a document, dated July 22, 1910, reciting a promise to pay the Huson Ice & Coal Company the sum of \$900 principal, together with interest, and attorney's fees in case of collection by suit. The instrument further recited: "And to secure the payment of this note, I hereby mortgage and convey unto said payee, its successors and assigns, the following described property, to wit: For purchase money on all the iron ice machinery, as boiler, cases, piping, ammonia apparatus, in pay for plant at Union Point, Ga.; this note being given for purchase money of said machinery, and title to same to remain in payee until this note is paid in full." The instrument was signed as follows: "Witness my hand and seal the day and year above written. Union Point Ice Company (L. S.), by J. E. Carlton, President. In presence of L. D. Carlton, Notary." On the back of this document was the following transfer: "For value received, we hereby transfer and assign all the right, title, and interest we have in the within note, together with the security mentioned in said note, to C. A. Clarke. December 15, 1910. Huson Ice & Coal Company, by H. T. Huson, Secretary and Treasurer." To the petition as amended the defendant demurred on the following additional grounds: (1) No authority is alleged or shown in J. E. Carlton, president of the Union Point Ice Company, to execute the paper under which the plaintiff claims title; and (2) no authority appears in Huson, the secretary and treasurer, to convey the property in dispute to the plaintiff for the Huson Ice & Coal

Company. The demurrers were overruled, and the defendant excepted pendente lite. The trial resulted in a verdict for the plaintiff for the principal sum of \$900, \$184.50 interest, and \$90 as attorney's fees. The attorney's fees being stricken, the verdict was left to stand with the principal and interest as stated. The defendant's motion for a new trial was overruled, and it excepted.

From the evidence it appears that the Huson Ice & Coal Company was formerly the owner of the property sued for, and that it opened negotiations with the Union Point Ice Company for the sale of the property, and the following terms of sale were agreed upon: \$10,000, one half of which was paid in capital stock of the Union Point Ice Co., the other half to be paid either in cash or in notes given for stock in that company. According to the testimony in behalf of the plaintiff, \$4,100 was paid in this way, leaving a balance of \$900 still due. Huson, one of the witnesses for the plaintiff, testified, that the Huson Ice & Coal Company was given a note for \$900, which he thought was for the balance of the purchase price due on the machinery; that this note was turned over to Carlton, the president of the Union Point Ice Company, and that the paper under which the plaintiff claimed title was given in renewal of this note. Clarke testified that he bought this renewal paper for value from Huson Ice & Coal Company, before maturity, without notice of any defense of the Union Point Ice Company. There was introduced in evidence an extract from the minutes of the board of directors of the Union Point Ice Company, of July 26, 1910, from which the following appears: "Mr. J. E. Carlton was authorized to renew a note for nine unsold shares in the plant to Huson Ice & Coal Company." These minutes do not appear ever to have been read and approved by the directors, but Huson testified that the directors, including Carlton, the president, were present and assented to the resolution. All the other directors testified that they knew nothing about such minutes; that no authority was given anybody to execute a paper to the Huson Ice & Coal Company, and that as a matter of fact the Union Point Ice Company was not indebted to the Huson Ice & Coal Company, in any sum. Carlton was president, and Huson vice president of the Union Point Ice Company. The document relied on as the basis of the plaintiff's claim of title was filed for record within 30 days after its execution, and when recorded the clerk omitted to record the words: "Witness my hand and seal the day and year above written;" so that, as it appeared upon the record, the paper was not a sealed instrument, though it was actually executed as such. Subsequently to the execution and recording of this paper, the Union Point Ice Company, executed a conveyance to a third person to secure an indebtedness. Under this conveyance the property was brought to sale

and by an arrangement made between the Union Point Ice Company and W. A. Hall and others (who afterwards formed the Blakely Artesian Ice Company), the property was bought in by Hall and his associates. Hall testified that at the time of the purchase, he had actual knowledge of the existence of the paper under which Clarke claims title. Although at the time of this sale Clarke's paper was past due, he made no effort to enforce collection, but waited some time after the plant had been set up in Blakely and brought trover.

[1] 1. The description of the property sued for was sufficiently definite. *Pepper v. James*, 7 Ga. App. 518, 67 S. E. 218.

[2] 2. It was not essential that the petition should affirmatively set forth the authority of Carlton as president to execute the paper upon which the plaintiff relied. The paper was under seal. The corporation had authority to adopt any device it saw proper as a seal for the particular occasion. Being regularly executed under seal, the presumption was that the president had authority to execute the instrument, although this presumption was rebuttable. *Nelson v. Spence*, 129 Ga. 35 (6), 58 S. E. 697; *New York Life Ins. Co. v. Rhodes*, 4 Ga. App. 25 (5), 29, 60 S. E. 828; *American Investment Co. v. Cable*, 4 Ga. App. 106 (3, 4), 110, 60 S. E. 1037; *Cannon v. Gorham*, 136 Ga. 167 (3), 71 S. E. 142, Ann. Cas. 1912C, 39; 3 *Cook, Corporations* (6th Ed.) § 722.

[3] 3. The transfer on the back of the instrument to the plaintiff was adequate to transfer, not only the indebtedness, but also the title, and was sufficient to enable the plaintiff to maintain trover for the recovery of the property. *Dawson v. English*, 8 Ga. App. 585, 69 S. E. 1133; *West Yellow Pine Co. v. Kendrick*, 9 Ga. App. 350, 71 S. E. 504; *Townsend v. Southern Product Co.*, 127 Ga. 342, 56 S. E. 436, 119 Am. St. Rep. 340. This transfer, together with the possession of the paper, was sufficient evidence of the plaintiff's title, and the petition was not demurrable on the ground that it did not appear therefrom that Huson had authority to transfer the paper in behalf of the corporation. See *Sheffield v. Johnston County Savings Bank*, 2 Ga. App. 221, 58 S. E. 386.

[4] 4. It is further suggested that, inasmuch as the instrument executed by Carlton was defectively recorded, its record could not operate as constructive notice to those under whom the defendant claims title, and who hold a conveyance junior in date to the paper under which the plaintiff claims title. This paper took effect as against third persons without notice from the time it was filed for record; and, to operate as notice, it was not essential that the clerk should have recorded it at all, nor does the fact that it was defectively recorded prevent it from being notice to third persons. *Durrence v. Northern National Bank*, 117 Ga. 385, 43 S. E. 726; *Wadley Lumber Co. v. Lott*, 130

Ga. 135, 141, 60 S. E. 836. This being so, the defendant cannot stand on the proposition that Hall and his associates were purchasers with notice from persons without notice.

[5] 5. While the paper transferred to Clarke bore on its face presumptive evidence of the authority of the corporation for its execution, this was a rebuttable presumption, and the defendant was not precluded from showing that the president of the corporation had no authority to execute the instrument in its behalf. "The mere fact that a deed had a corporate seal attached does not make it the act of the corporation, unless the seal was placed to it by some one authorized." 1 Clark & Marshall on Private Corporations, 510. The presumption of authority to execute an instrument, arising from the fact that the corporate seal was attached thereto, may be overthrown by proof that the seal was affixed without proper authority from the board of directors, or some other duly authorized corporate agent. 3 Cook on Corporations (6th Ed.) § 722. "The president of a corporation has not power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management. His duty is merely to preside at meetings of the board of directors, and to perform only such other duties as the by-laws or resolutions of the board of directors may expressly authorize." Id. § 716; Brown v. Bass, 132 Ga. 41, 43, 63 S. E. 788; Minn. Lumber Co. v. Hobbs & Livingston, 122 Ga. 20, 24, 49 S. E. 783; Ocella Southern R. Co. v. Morton, 13 Ga. App. —, 79 S. E. 480. It follows that the mere fact that one may be designated by the stockholders as the president of the corporation does not confer upon him either actual or presumptive authority to execute a contract in behalf of the corporation. His actual authority is only such as is conferred either by the by-laws adopted by the stockholders or by resolutions of the board of directors duly passed. The only authority conferred upon the president by the by-laws of the Union Point Ice Company to the president was to preside over the stockholders' and directors' meetings. The general manager was given the authority to manage the ice plant, and the secretary and treasurer was directed to sign all vouchers, agreements, and other important papers, and make purchases and sales for the corporation.

The minutes of the board of directors must therefore be looked to, to determine what actual authority Carlton had to execute the contract upon which the plaintiff relied. It is conceded that no such actual authority was conferred by the directors, unless it be embraced in the minutes of July 26th referred to in the statement of facts. Carlton himself, and all the directors, testified that he had no authority from the directors to execute the paper; and Huson, the chief witness for the plaintiff on this question, did not

claim Carlton had any actual authority, unless it was conferred by the directors at the meeting above mentioned. The question of the president's authority to execute this paper must therefore depend upon the construction of this resolution of the board of directors. By it Carlton was "authorized to renew a note for nine unsold shares in the plant to Huson Coal & Ice Company." Nothing is said about the execution of any title to the property as security for the debt; nor does this resolution confer express authority upon Carlton to pledge any of the corporation's property as security for the payment of this debt. It is true he was authorized to renew a note. On its face he had authority to execute only an ordinary promise to pay without security; and if nothing more had appeared, it would be clear that no authority had been conferred upon the president to execute any paper in which the Huson Coal & Ice Company should have title to any of the corporation's property. If it had appeared that the note previously executed to the Huson Coal & Ice Company for \$900 was one in which that company retained title to the property sold to the Union Point Ice Company, then it would be clear that the authority had been conferred upon Carlton to execute a new paper, in which title would be retained in the payee of the note. But nothing of this sort appeared from the evidence. All that appeared on this subject is from the following testimony of Huson: "I was at this meeting July 26th also September 19th. I was there when Mr. Cunningham made the motion to raise \$3,500 and when the motion was made to pay me the \$900. I remember the motion very clearly. Mr. Cunningham made a motion to authorize Mr. Carlton to borrow \$3,500, and another to renew a note for \$900 that I had. It was a note for \$900 that the Union Point Ice Company gave Huson Ice & Coal Company, which I think I turned over to Mr. Carlton. I think it was given for the purchase of this machinery. I haven't got it now." To meet the apparent want of authority in Carlton as evidenced by the resolution of the board of directors, it was incumbent upon the defendant to show there had been an original note containing a retention of title, which Carlton was authorized to renew. All except Huson testified affirmatively that no such note was executed. And Huson testified merely that he had had a note for \$900, but did not testify that this note contained a retention of title to the property in the payee. This being so, the evidence demanded a finding that Carlton had no actual authority to execute the paper upon which the plaintiff relied. When a corporation authorizes its president to borrow money, the president, when acting as agent of the corporation to carry out such authority, should be held strictly to its terms. Monroe v. Arnold, 108 Ga. 449 (4), 34 S. E. 176.

The defendant relies on the doctrine stated in 10 Cyc. 766, 1182, to the effect that "the power to borrow money carries with it, by necessary implication, the power to give the usual security for the loan." The author was, however, discussing the power of the corporation as contained in its charter, and simply stated the rule that, where a corporation has in its charter the power to borrow money, it has the incidental power, by necessary implication, to do any act necessary to enable it to borrow the money, such as give security therefor. The subject there under discussion was the ultra vires power of corporations, and not intra vires, as in this case, and is quite a different thing from mere authority conferred by the corporation on an agent to execute a note for the payment of an indebtedness of the corporation. The authority to pledge the property of the corporation as security for a note will not be implied from the mere authority to one of its officers to execute the note.

[6] 6. The defendant invokes the well-settled rule that, where a corporation holds out a person as its officer, it is bound by any act apparently within the scope of his authority, notwithstanding a limitation upon the power of the officer by a by-law or otherwise, not known to a party dealing with him as such. *Johnson v. Waxelbaum Co.*, 1 Ga. App. 511, 58 S. E. 56. It relies also upon the well-settled rule that a person who has held out another as his agent, and thus induced third persons to deal with him as such, is estopped as to third persons from denying the agency. *Fitzgerald Cotton Co. v. Farmers' Supply Co.*, 3 Ga. App. 212, 59 S. E. 713. We have already seen that the power to execute contracts is not within the apparent scope of the authority of the president of a corporation; nor is there anything in the evidence to authorize the application of the principle of estoppel by reason of the fact that the Union Point Ice Company held Carlton out as its general agent, having power to execute contracts in its behalf.

[8] It does appear, from extracts from the minutes of the directors at various times, that Carlton was authorized from time to time to borrow money. In some instances he was authorized specifically to execute a mortgage or a security deed, and in others the authority was conferred upon him simply to borrow money. But in every case the person from whom the loan was to be obtained was mentioned, and the terms of the loan were stated. The mere fact that a corporation may, on several occasions, have conferred specific authority upon an agent to execute a particular contract or make a particular loan upon stated terms does not authorize the inference that he had general authority to contract in behalf of the corporation, either for the purpose of borrowing money or for any other purpose, but,

on the contrary, the inference of a lack of general authority would arise. The appointment by a corporation of a special agent for a special purpose, no matter how often made, does not authorize other persons to deal with him upon the theory that he is a general agent of the corporation, with power to contract in its behalf, or estop the corporation or its privies from challenging the power of the agent to execute a contract which the directors had given him no authority to make. There was no evidence authorizing a charge to the jury on the subject of estoppel by reason of the fact that the corporation had held out Carlton as its general agent having apparent authority to execute the contract, and the instructions of the trial judge upon this subject were erroneous.

[7] 7. The foregoing deals with the material questions which will likely arise upon another trial. Some of the instructions of the trial judge were not in accordance with the rulings here announced, and those requests to charge which set out principles of law in harmony with these rulings should have been given. The main ground, however, upon which the judgment of reversal is based is that there was no evidence to authorize the finding that Carlton had authority to bind the corporation by the conveyance of title upon which the plaintiff relied. We do not mean, of course, to hold that the plaintiff could not recover against the Union Point Ice Company, upon the note as an evidence of indebtedness. This question he must test in a different forum.

Judgment reversed.

RUSSELL, J., dissents.

HUMPHREY et al. v. JOHNSON et al.

JOHNSON et al. v. HUMPHREY.

(Nos. 4,734, 4,735.)

(Court of Appeals of Georgia. Oct. 7, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§§ 141, 196*)—APPEAL—JURISDICTION—CERTIORARI.

An appeal to the superior court will not lie from a judgment of a justice's court establishing copies of lost office papers, notwithstanding the papers compose a part of a record in a suit involving a claim above \$50; but certiorari is the remedy.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 467-476, 762-767; Dec. Dig. §§ 141, 196.*]

(Additional Syllabus by Editorial Staff.)

2. JUSTICES OF THE PEACE (§ 141*)—APPEAL—JURISDICTIONAL AMOUNT.

The question whether the amount is involved sufficient to give jurisdiction on appeal from a justice's judgment must be determined by the summons and the cause of action thereto attached.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 467-476; Dec. Dig. § 141.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Motion before a justice of the peace by Charlie Johnson and others against E. J. Humphrey, administratrix, to establish copies of lost papers. Judgment for movant, and respondents appealed to the superior court, and, from a refusal of the superior court to dismiss the appeal, the movant by cross-bill of exceptions brings the question to the Court of Appeals. Judgment on cross-bill of exceptions reversed, and main bill dismissed.

Lavender R. Ray, of Atlanta, for plaintiff error. Simmons & Simmons and O. L. Pettigrew, all of Atlanta, for defendants in error.

HILL, C. J. A motion was made in writing by Charlie Johnson before A. A. Jones, a justice of the peace in and for the 722d district G. M., Fulton county, Ga., at the August term, 1911, of the justice's court, to establish alleged lost papers, to wit: A promissory note, payable to one W. A. Smith, for the principal sum of \$100, with a credit of \$55 thereon, signed by W. P. Humphrey; an original summons, and entry of service thereon, directed to E. J. Humphrey, as administratrix of the estate of W. P. Humphrey, deceased; affidavit in forma pauperis, filed on appeal by the defendant from the judgment of the justice of the peace; verdict of the jury on appeal, and judgment of the justice entered upon said verdict—which were claimed by the movant to be parts of the record in a prior case disposed of by a former justice in and for the same district in the year 1897. It was prayed that the copy judgment when established be amended nunc pro tunc, so that the judgment should be against E. J. Humphrey, as administratrix of the estate of W. P. Humphrey, and not against her individually. The right to file the motion to have the papers established was based by the movant upon the ground that they pertained to the muniments of title to a certain lot of land, which title he was defending in a suit in the superior court of Fulton county, filed by the heirs at law of the maker of the note. Copies of the movant's petition, attached to a summons of the justice of the peace, were served upon the administratrix of W. P. Humphrey, deceased, and the heirs at law of W. P. Humphrey, calling upon them to show cause why the prayers of the petitioner should not be granted and the papers established and the corrections nunc pro tunc made. The administratrix and the heirs at law responded to the rule and resisted the establishment of the papers upon the ground, among others, that there never were such original papers, and resisted the amendment nunc pro tunc upon the ground that, if there ever were such original papers, the proceedings were against the administratrix individually, as the docket

of the justice of the peace showed, and not against her as administratrix of the estate of W. P. Humphrey, deceased. Upon the trial of the issue thus raised, the justice of the peace found for the movant, establishing the papers, and entered nunc pro tunc corrections on the judgment, making it a judgment against E. J. Humphrey as administratrix of the estate of W. P. Humphrey instead of against her individually. The respondents appealed to a jury in the superior court, and in that court the movant made a motion to dismiss the appeal upon the ground that the superior court was without jurisdiction on appeal but that certiorari was the proper method of bringing the proceeding before the superior court for review. The court overruled the motion to dismiss, and the movant excepted pendente lite and by cross-bill of exceptions brings the question to the Court of Appeals for adjudication. The decision that we have reached in the consideration of the question raised in the cross-bill of exceptions leaves nothing remaining to be considered by this court; hence the brief statement of the facts as set forth in the opinion is all that is necessary to an understanding of the case as decided by this court.

[1] The right of appeal in any case is founded upon express legislative enactment. 2 Cyc. 507; Hendrix v. Mason, 70 Ga. 523; Cunningham v. U. S. Loan Co., 109 Ga. 616, 619, 34 S. E. 1024; Pontano v. Moxley, 121 Ga. 46, 48, 48 S. E. 707; De Lamar v. Dollar, 128 Ga. 57, 66, 57 S. E. 85; Alabama Ry. Co. v. Ventress, 149 Ala. 658, 659, 42 South. 1017. The constitutional provision allowing an appeal to a jury in the superior court, under such regulations as should be prescribed by law, did not become operative until legislative action prescribing regulations. "The appellate jurisdiction of the superior court must be exercised, and can only be exercised, in such cases as are provided by law." De Lamar v. Dollar, supra. Hence, unless provision for appeal to a jury in the superior court is contained in the Code in the class of cases under consideration, no appeal can lie, but some other remedy must be invoked, to review the judgment of the lower court. True, the Constitution provides as to cases in justice's courts that "in all cases there may be an appeal to a jury in said court or an appeal to the superior court under such regulations as may be prescribed by law" (Civil Code, § 6524); yet, as we have seen in the Case of Hendrix v. Mason, supra, this provision of the Constitution is not self-executing, and, until these regulations are prescribed by the Legislature, no appeal will lie, and, of course, then will lie only when the regulating statute has been complied with.

Section 4742 of the Civil Code provides that: "Where the sum claimed exceeds fifty dollars, the law of appeals from the justice court to the superior court shall be the same

as contained in this Code." Section 4738 provides: "Either party being dissatisfied with the judgment of the justice of the peace or notary public, and upon all confessions of judgment, provided the amount claimed in said suit is over fifty dollars, may, as a matter of right, enter an appeal from said judgment, within four days (exclusive of Sundays) after the rendition of such judgment, under the same rules, regulations, restrictions, and liabilities as are provided on the subject of appeals." Section 4998 says: "In all civil cases tried and determined by a county judge, or a justice of the peace, or a notary public who is ex officio a justice of the peace, and on all confessions of judgments before either of said officers, where the sum or property claimed is more than fifty dollars, either party may, as a matter of right, enter an appeal to the superior court."

From a reading of the foregoing sections it will be seen that, to authorize an appeal from the judgment of a justice of the peace to the superior court, an essential requisite is that the sum or property claimed in the case shall be for an amount above \$50. See, also, *Toole v. Edmondson*, 104 Ga. 776, 783, 31 S. E. 25, where Justice Cobb laid down rules regulating the right of appeal and certiorari.

[2] In a justice's court this question of the amount involved in a suit, and the nature and character of a suit, must be determined by the summons and the cause of action thereto attached. *Singer Mfg. Co. v. Martin*, 75 Ga. 570; *Bell v. Davis*, 93 Ga. 233, 18 S. E. 647, and cases cited. Hence, if no amount is claimed (as appears from the summons and the petition thereto attached in the present case), or, if claimed, is under \$50, no appeal will lie to the superior court. The summons in the present case directs that the defendants "show cause, if any they have, why the prayers of the foregoing and attached petition should not be granted." The prayers of the petition (as set forth in the statement of facts in this opinion) are for the establishment of copies of certain named papers and for the amendment nunc pro tunc of one of them.

It is contended, however, that as the copy of the judgment which the petition seeks to establish shows that the judgment is for \$45 principal, \$9.36 interest, and \$4.50 attorney's fees, aggregating \$58.86, the present proceeding is a claim involving an amount above \$50, and therefore an appeal to the superior court will lie. This was a proceeding under section 5312 of the Civil Code (*Eagle Mfg. Co. v. Bradford*, 57 Ga. 249; *Bell v. Bowdoin*, 109 Ga. 209, 34 S. E. 339), except that notice was given to the adverse parties to the suit pending in the superior court—a method of procedure approved by the Supreme Court in the case of *Cleghorn v. Johnson*, 69 Ga. 369, 372. See, also, *Wimberly v.*

Mansfield, 70 Ga. 783, 785, *Cosnahan v. Rowland*, 99 Ga. 285, 25 S. E. 647, *Selph v. Selph*, 136 Ga. 740, 72 S. E. 31, where the copies which the movants sought to establish were to be used in separate actions then pending. The purpose of this proceeding was to establish copies of office papers in a former suit (Civil Code, § 5313) to be used by the movant in a case pending in the superior court. Only in cases of this character, or where it is sought to establish the copies sought for the purpose of completing the records on file, will a court establish copies of papers belonging to a case which has been disposed of. If it were not for the pending suit filed in the superior court by the heirs at law of W. P. Humphrey against the movant, this proceeding to establish copies would not have been instituted. The mere fact that the face of the judgment, a copy of which it is sought to establish, sets forth items aggregating an amount above \$50 does not alter the nature and character of the proceeding. These are allegations of description and not of jurisdiction. The several items appearing on the face of a judgment are marks of identity of the judgment, without which a description would be difficult and merely general, for aside from the amounts recovered in a judgment especially where the terms "defendant" and "plaintiff" are used, there remains no mark of identity differentiating it from other documents of like character; the formalities of judgments being common to all. The payment of \$58.86 to the parties to whom the summons was directed would not answer the demand of the summons; nor would the payment of any other sum do so. The loss of the papers is the complaint, and the establishment of copies of the same, as prayed for in the petition and referred to in the summons, is the only remedy that will meet this demand. The proceeding being such as does not involve a claim for a sum or property above \$50, an appeal to the superior court from the judgment of the justice of the peace is not allowable. Therefore the motion to dismiss the appeal should have been sustained. There is, however, provided in the Code a method of review in the superior court of judgments of justices of the peace and other inferior judicatories; and that is by certiorari. See sections 6514, 4748, 4849 (4), 5180.

Judgment on cross-bill of exceptions reversed; main bill dismissed.

C. L. HARDWICK & CO. v. CASH et al.
(Supreme Court of Georgia. Sept. 26, 1913.)

(Syllabus by the Court.)

1. EXECUTION (§ 2*) — ASSIGNMENT BY SHERIFF—VALIDITY.

A sheriff, who has in his hands, for the purpose of making money thereon, an execution issued upon a judgment rendered by a court, has

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

no authority, upon receiving the amount of the execution from a third person, to transfer the execution to him, so as to enable him to claim thereunder the proceeds of the sale of the property of the defendant in execution, made under the levy of an execution issued upon a prior judgment obtained against him. See Civ. Code 1910, § 5969.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. EXECUTION (§ 2*)—ASSIGNMENT BY SHERIFF—VALIDITY.

Accordingly, where a sheriff had in his hands money arising from the sale of personal property sold by virtue of an attachment levied thereon, and a rule was brought against him by a third person, claiming the money as the transferee under an execution older than the attachment, and on the trial it appeared that the third person, claiming the money as transferee, paid to the sheriff the amount due on the prior execution, and had the sheriff transfer it to him, without the authority of the plaintiff in execution, or of any one authorized by such plaintiff, and the transfer was not ratified by the plaintiff in execution, this amounted to a settlement of the execution, and did not transfer it to the third person.

(a) Without express authority, a sheriff cannot transfer a *fi. fa.* in his hands for collection.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The undisputed evidence in the case, and the application of the legal principles above announced, demanded a verdict in behalf of the plaintiffs in attachment, and the court erred in refusing a new trial.

4. MOTION FOR NEW TRIAL.

It is unnecessary to decide the other questions made in the motion for a new trial.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

On a rule against the sheriff to distribute money arising from sale of personal property of Mrs. Mary Evans under an attachment in favor of C. L. Hardwick & Co., J. M. Cash claimed as transferee of an execution in favor of the William Barr Dry Goods Company against a portion of the money. Judgment for Cash, and Hardwick & Co. bring error. Reversed.

A rule was brought against the sheriff to distribute money in his hands arising from the sale of certain personal property of Mrs. Mary Evans under an attachment in favor of Hardwick & Co., J. M. Cash claiming to be the transferee of an execution in favor of William Barr Dry Goods Company against a portion of the money in the hands of the sheriff. Hardwick's attachment issued on June 9, 1908, and was levied on June 10, 1908. The judgment in favor of William Barr Dry Goods Company was obtained on November 21, 1907, and execution issued on December 2, 1907. There is no evidence in the record that the execution was ever entered upon the general execution docket, except the statement by the attorney for Hardwick that the docket showed it had been entered, but no date is given of this entry. The following receipts appeared upon the execution:

"\$105.00. Received of J. H. Gilbert, sheriff, one hundred and five dollars, full balance, principal and interest, due on the within *fi. fa.*, this Feb. 5, 1909. J. M. Rudolph, Plaintiff's Attorney."

"Georgia, Whitfield County. Received from J. M. Cash the sum of \$153.31, being the remainder due and payment in full of all principal, interest, costs, inclusive of \$35.00 paid to F. K. McCutchen for storage; and the within *fi. fa.* transferred to said J. M. Cash so far as the office of sheriff authorizes me to transfer same, together with all rights thereunder vested in the original plaintiffs, this being intended to operate as a full receipt in settlement of the within *fi. fa.* This February 2, 1909. J. H. Gilbert, Sheriff."

Cash claimed the fund in the hands of the sheriff by virtue of the above transfer to him. Upon the issue formed upon the rule the jury found in favor of Cash, transferee of the *fi. fa.* A motion for a new trial was made by Hardwick & Co., which being overruled they excepted.

F. K. McCutchen and Maddox, McCamy & Shumate, all of Dalton, for plaintiffs in error. J. M. Rudolph, of Dalton, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

HALL et al. v. MAYOR AND COUNCIL OF CALHOUN.

(Supreme Court of Georgia. Sept. 28, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§§ 271, 277*)—POWERS—WATERWORKS SYSTEM.

The provisions in the charter of the town of Calhoun (Acts 1895, p. 145), that the municipality shall have perpetual succession, shall have power and authority to make, ordain, and establish, from time to time, such by-laws, ordinances, resolutions, rules, and regulations as shall appear to them to be necessary and proper for good government, security, welfare, and interest of the said town of Calhoun and the inhabitants thereof, and for preserving the health, morals, peace, and good order of the same, not in conflict with the Constitution and laws of this state, and shall have power and authority in and by said corporate name to contract and to be contracted with, to sue and be sued, to plead and be impleaded in any of the courts of this state, to have and use a common seal, to hold all property real and personal, now belonging to said town, for the purpose and interest for which the same was granted or dedicated, to acquire by gift or purchase such real or personal property as may hereafter be deemed necessary and proper for corporate purposes, and to use, manage, improve, sell, convey, rent, or lease any or all of said property as may be deemed advisable for the corporate interest, were sufficient to authorize the municipality to establish and construct a system of waterworks. Mayor, etc., of Rome v. Cabot, 28 Ga. 50; Heilbron v. Mayor, etc., of Cuthbert, 96 Ga. 312, 23 S. E. 206.

(a) The municipality having charter power to establish and construct a system of waterworks,

where necessary to go beyond the corporate limits to obtain its supply of water, it was not ultra vires of the corporation to enter into the contract mentioned in the statement of facts. *Langley v. City Council of Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133. See, also, *City of Quitman v. Jelks & McLeod*, 139 Ga. 238, 77 S. E. 76.

(b) The ruling in *Lloyd v. Columbus*, 90 Ga. 20, 15 S. E. 818, which was criticised and doubted in *Langley v. Augusta*, supra, will not be extended.

(c) It follows that the contract between Hall and the municipality could not be canceled on the ground that it was ultra vires of the corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 726, 732; Dec. Dig. §§ 271, 277.*]

2. WATERS AND WATER COURSES (§ 190*)—MUNICIPAL WATER SUPPLY — CONTRACT — CONSIDERATION.

The contract was not subject to be canceled on the ground that it was void for the want of consideration. It recited a consideration. *Nathans v. Arkwright*, 66 Ga. 179; *Martin v. White*, 115 Ga. 806, 42 S. E. 279. And the grantor received water from the municipality, and the latter expended money in making water connections for the grantor in accordance with the terms of the contract. *Atlanta & West Point Railroad Co. v. Camp*, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. (N. S.) 594, 124 Am. St. Rep. 151, 14 Ann. Cas. 439.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 268; Dec. Dig. § 190.*]

3. WATERS AND WATER COURSES (§ 190*)—MUNICIPAL WATER SUPPLY — CONTRACT — REASONABLE USE OF WATER.

Properly construed, the municipality acquired by the contract the right to the reasonable use of the water, notwithstanding such use might operate to the detriment of the "fish pond."

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 268; Dec. Dig. § 190.*]

4. WATERS AND WATER COURSES (§ 190*)—MUNICIPAL WATER SUPPLY — CONTRACT — RIGHT TO PRIVATE USE—ASSIGNMENT.

The right of the grantor to use water supplied by the municipality free of charge by express terms of the contract was not assignable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 268; Dec. Dig. § 190.*]

5. PRIOR DECISIONS—DISTINGUISHMENTS.

The case differs from that of *Horkan v. City of Moultrie*, 136 Ga. 561, 71 S. E. 785, where an effort was made to compel a city to furnish water "free of charge" for an indefinite time under an agreement by the municipal council for that purpose, though made for a consideration; and from *Tarver v. Mayor, etc., of Dalton*, 134 Ga. 462, 67 S. E. 929, 29 L. R. A. (N. S.) 183, 20 Ann. Cas. 281, where a contract by a municipal corporation not to collect taxes on certain property in excess of a specified amount was involved.

6. MOTION FOR NEW TRIAL.

There was no error in overruling the plaintiff's motion for new trial.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by G. A. Hall and others against the Mayor and Council of Calhoun. Judgment for defendants, and plaintiffs bring error. Affirmed.

H. L. Hall owned a spring near the town of Calhoun, Ga. The municipal authorities of Calhoun decided to establish a system of waterworks, to be supplied in part with water from the spring. The parties mentioned on June 13, 1898, entered into and signed a written contract under seal, witnessed as a deed, which, after making in substance the above recitals, set forth the following in effect: The municipality should pay for the plumbing necessary to convey the water from the main nearest Hall's residence into any room of his house or place on his lot designated by him, with the right to him at his own expense to make other connections, not exceeding four, for the purpose of furnishing water on his own premises: the town to allow him, without any right of alienation, to use the town water free of charge so long as the waterworks should be maintained and operated, and its water supply obtained from the spring. In consideration of such agreement by the town, and \$10 in hand paid, the receipt of which was acknowledged, Hall conveyed to the town the right "to use water for the purpose of supplying the suction basin constructed, or to be constructed, on the "Pauper Farm" premises near thereto of the spring known as "Hall's Fish Pond Spring," located about one mile north or northeast of the courthouse in Calhoun, and other springs on his said premises near to and west of the aforesaid "Pond Spring," together with privileges and rights to drain, improve, and lay pipes to the same through his premises in such way as to safely, cheaply, conveniently, and advantageously use and convey water from said springs to said suction basin; provided, however, that this utilization or use of the water from the "Pond Spring" shall be done without impairments or damage other than by running pipe under or through said dam, if pond water be used, with valves to prevent flow, except when required for filling of the suction basin otherwise, and with the spring or springs on premises of Hall, from which it may be desirable to use water. The municipal authorities "are hereby authorized to make such improvements as they shall deem necessary or essential to the full, complete, thorough, and healthful use and enjoyment of water therefrom to and for the purpose of supplying the town of Calhoun and the inhabitants thereof with water, through the system of waterworks being established and constructed." After describing what the grantor undertook to convey, the contract proceeded thus: "To have and to hold the said rights and privileges and uses, etc., in and to the water, the spring, ways for the pipe drainage, and improvements thereof [unto] the said parties of the first part, their successors and assigns, to and for the uses and purposes aforesaid, and for the consideration aforesaid, without reservation by the said party of the second part, his

heirs or assigns, of any rights by alienation, by adulteration, or any system of drainage, or in any other way, to prevent the full and free use and enjoyment of the water from the said springs, as herein described and contemplated, so long as said system of water-works is maintained. And said parties of the first part hereby promise and agree to perform, stand by, and abide the obligations herein imposed and assumed by them."

After the town had constructed its water-works, connected H. L. Hall's residence therewith, and furnished water to him under the contract for a number of years, he sold the land which embraced the spring and fish pond (which derived its supply of water from the spring) to G. A. Hall and J. A. Hall. Subsequently, in August, 1911, the purchasers instituted suit against the town to cancel the contract, and enjoin diversion of the spring water from the fish pond, to the detriment of the latter, and from using certain pipes which the town had laid through plaintiff's lands, and to compel the town to remove its property from the land. Plaintiffs, being dissatisfied with the result, made a motion for new trial, on the general grounds, and excepted to the judgment overruling the motion.

T. W. Skelley, of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for plaintiffs in error. Neel & Neel, of Cartersville, J. G. B. Erwin, and O. N. Starr, both of Calhoun, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

STARK v. CHAMBERS.

(Supreme Court of Georgia. Sept. 26, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 689*)—TESTAMENTARY POWER—CREATION.

Earl Moats died in 1891, leaving a will. By item 1 he directed that all his just debts be paid, and by item 5 he appointed his wife executrix. The other provisions of the will were as follows: "Item 2. I give, bequeath, and devise to my wife, Vina Moats, all of my estate both real and personal, for her support and control during her lifetime. Item 3. After the death of my wife, Vina Moats, I want what property is left, real or personal, or both, divided or sold, and the money equally divided among my children after paying Abner Griffin, my stepson, one hundred dollars. Item 4. I direct and will that after my death that my said wife, Vina Moats, take charge of all the property mentioned in this my last will and testament, without any appraisement, and use it as she needs for her comfort and support." Held, that the will conferred upon the widow of the testator, during her life, power to convey in fee any part of the estate, where necessary for her support; and where, in order to obtain a support, she sold the land for its reasonable value, and executed to the purchaser a deed conveying the land in fee simple under such power, the purchaser was not subject to be evicted after her death by the testator's admin-

istrator de bonis non cum testamento annexo. The language, "for her support and control during her lifetime," as employed in item 2, and "what property is left, real or personal, or both," as employed in item 3, and "use it as she needs for her comfort and support," as employed in item 4, indicates the intent of the testator to confer an absolute power of sale, where necessary for her support, on the wife so long as she lived, and to exclude the children from any part of the property so sold, leaving that part of the testator's estate which might remain at the death of the widow to be divided among the children. Relatively to the power of sale, item 3 expressly put real and personal property on the same footing. The direction in item 4 that the widow should take all of the property "without any appraisement, and use it as she needs for her comfort and support," was not repugnant to the power of sale, where necessary for her support, and did not restrict it. Mayo v. Harrison, 134 Ga. 737, 68 S. E. 497; Nort v. Healey, 186 Ga. 287, 71 S. E. 471.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1650, 1651; Dec. Dig. § 689.*]

2. WILLS (§ 689*)—CONSTRUCTION.

Where the widow of the testator sold a part of the land mentioned in the will, in order to obtain money necessary for her support, and made a conveyance thereof in fee simple, with warranty of title, and evidence was introduced tending to show that the price paid was its fair market value, and that the widow, owing to age and physical infirmity, was unable to support herself, and the sale was made to obtain money for her support, it was not error as against the plaintiff for the judge to charge, in effect, that if the jury believed from the evidence that on account of her condition in life, considering her age and other things appearing from the evidence, it was absolutely necessary to sell some of the property in order to obtain means of a livelihood, and that acting under authority of the will the widow made the deed for the purpose of procuring a livelihood, and received a reasonable and fair consideration for the property, it would be their duty to find for the defendant. Mayo v. Harrison, supra.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1650, 1651; Dec. Dig. § 689.*]

3. VERDICT AND DENIAL OF NEW TRIAL SUSTAINED.

The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action by W. W. Stark, administrator, against J. R. Chambers. Judgment for defendant, and plaintiff brings error. Affirmed.

In an action of complaint for land by W. W. Stark, as administrator cum testamento annexo, against J. R. Chambers, who claimed under a deed from the widow of the testator, the main issue was whether the deed operated to convey to the defendant the absolute fee-simple estate, or merely an estate for the life of the widow. The suit was instituted shortly after the death of the widow. Her power to make the deed depended on the will of the testator, which was as set forth in the headnotes. In some particulars the evidence was conflicting, but there was sufficient to show the following: The testator was prosperous, and died owning a farm,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on which he resided, equipped with live stock and farming implements, and owing only a few debts, which were paid during the year in which he died. There were several children, besides the widow, who for a time continued to live on the farm; but they were not of frugal habits, and the widow found it necessary to encroach upon the corpus of the estate. This continued, and in order to get money with which to pay off a judgment for "supplies and rations" furnished to the widow after the death of the testator, and to obtain money on which to live, the widow sold to the defendant at its reasonable value the part of the farm land in dispute. The land would have rented for enough to support the widow, but it was never rented. At the time of the sale the widow was old, nearly blind, and unable to support herself. On the trial the jury returned a verdict for the defendant.

The plaintiff moved for a new trial on the general grounds, and further complained of the following charge to the jury: "If you should believe from the evidence that on account of her condition in life at that time, and the surrounding circumstances, her age and other things, as appears from the facts and circumstances in the case, that it was absolutely necessary to sell some of this property in order to procure means of a livelihood, and that acting under the authority of that will, by virtue of the provisions of that will, she (Vina Moats) made this deed for that purpose, and received reasonable and fair consideration for her property (the deed referred to being the deed from Vina Moats to J. R. Chambers, in the evidence, to the land sued for), then it would be your duty to find in favor of Mr. Chambers." The criticism upon the charge was that it amounted to a holding that the widow was authorized to convey the fee, whereas the will gave her no more than a life estate, and did not authorize her to sell the fee, even if necessary to her support. The motion for new trial was overruled, and the plaintiff excepted.

H. H. Perry, of Gainesville, for plaintiff in error. J. J. Kimsey, of Cornelia, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

SPRATLING v. WESTBROOK.

(Supreme Court of Georgia. Sept. 29, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 285*)—ACTIONS AGAINST STOCKHOLDERS—JOINDER OF PARTIES DEFENDANT.

A trustee in bankruptcy of an insolvent corporation may, in one equitable action, recover from any number of the stockholders of

the corporation their unpaid stock subscriptions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1101-1125, 2275; Dec. Dig. § 265.*]

2. CORPORATIONS (§ 228*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—UNPAID SUBSCRIPTIONS—CONDITIONAL SUBSCRIPTIONS.

The petition set forth a cause of action against the demurrant; and his special contract for stock subscription, as therein set forth, was not of such conditional character or on such special terms as would prevent a recovery thereon by the trustee in bankruptcy of the insolvent corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 874, 878; Dec. Dig. § 228.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by J. F. Westbrook, trustee in bankruptcy, against F. J. Spratling and others. Judgment for the plaintiff, and defendant F. J. Spratling brings error. Affirmed.

Daley & Chambers, of Atlanta, for plaintiff in error. Anderson, Felder, Rountree & Wilson, Brown & Randolph, and W. S. Dillon, all of Atlanta, for defendant in error.

FISH, C. J. Westbrook, as trustee in bankruptcy of the Consolidated Motor Car Company, an insolvent corporation, brought an equitable petition against Spratling and a number of others to recover the alleged unpaid stock subscriptions of the corporation. So much of the petition as is necessary for consideration in disposing of the questions made in the record is in substance as follows: Each of the defendants is indebted to the corporation for unpaid stock subscription in the amount charged against him. Such indebtedness of all the defendants, except Spratling and one other, is represented by ordinary promissory notes given to the corporation for the amount of stock subscribed; a copy of one of such notes being attached as an exhibit to the petition. Spratling subscribed for 50 shares of the stock, of the par value of \$100 per share, none of which has been paid (his contract being as set forth in three exhibits, to which special attention will be directed in this opinion). Claims of creditors have been allowed and proved in the court of bankruptcy to an amount larger than the sum of all of the unpaid subscriptions due by the defendants; and credit was extended to the corporation by its creditors "on the faith of said subscriptions being valid and binding." There was a prayer for the appointment of an auditor to hear and determine the questions of law and fact pertaining to the controversy, and that a recovery be had against each of the defendants for the balance due on his subscription to stock, with interest thereon. Spratling demurred to the petition generally, and because his contract, as appeared from the petition

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and exhibits, was a conditional one, and he was not bound therein, as it did not appear that the corporation had performed its part of the contract. He further demurred specially on the grounds that there was a misjoinder of causes of action and of parties defendant. The demurrers were overruled, and he excepted.

[1] 1. We will first dispose of the special demurrer; that is, that there was a misjoinder of causes of action and of defendants. Civil Code, § 2251 declares: "In all suits against the members of a private association, joint-stock company, or the members of existing or dissolved corporations, to recover a debt due by the association, company, or corporation, of which they are or have been members, or for the appropriation of money or funds in their hands to the payment of such debt, the plaintiff or complainant in such suit may institute the same, and proceed to judgment therein against all or any one or more of the members of such association, company, or corporation, or any other person liable, and recover of the member or members sued the amount of unpaid stock in his hands, or other indebtedness of each member or members: Provided, that same does not exceed the amount of the plaintiff's debt against such association, company, or corporation; and if it exceed such debt, then so much only as will be sufficient to satisfy such debt." This section is in the same language as that of Code 1863, § 3279, which was a codification of the act of 1856 (Acts 1855-56, p. 220), and which was incorporated in all subsequent Codes. In *Dalton & Morganton R. Co. v. McDaniel*, 56 Ga. 191, the action was brought by McDaniel in behalf of himself and many others, who were duly made parties complainant, as creditors of the Dalton & Morganton Railroad Company, to compel Carter and a great many others, amounting to several hundred stockholders of the company, to pay in a sufficient amount of the stock subscribed for by them to satisfy certain judgments and debts which the company owed complainants. The bill was demurred to on the grounds, among others, that it was improperly brought against defendants jointly, and that it was multifarious. It was held that the demurrers were not meritorious, and in support of the ruling Code 1873, § 3367, was cited; the language of such section being the same as that of Code 1863, § 3279, and which is now embodied in Civil Code 1910, § 2251. There was also cited, among other cases, *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412, and *Stinson v. Williams*, 35 Ga. 171. The ruling made in *Dalton*, etc., R. Co. v. *McDaniel*, supra, has been recognized or followed in a number of subsequent decisions rendered by this court. See *Brobston v. Downing*, 95 Ga. 505, 22 S. E. 277; *Boyd v. Robinson*, 104 Ga. 793 (3), 794, 31 S. E. 29; *Moore v. Ripley*, 106 Ga. 556 (3), 557, 32 S. E. 647; *Wilkinson v. Bertock*, 111 Ga. 187 (2),

190, 36 S. E. 623; *Harrell v. Blount*, 112 Ga. 711 (4), 717, 38 S. E. 56; *Morgan v. Giblan*, 115 Ga. 145, 41 S. E. 495; *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990 (2, 3), 993, 47 S. E. 536; *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494. The action was properly brought by the trustee in bankruptcy. *Morgan v. Giblan* and *Commercial Bank of Augusta v. Warthen*, supra. It follows that the court did not err in overruling the special demurrers.

[2] 2. Nor do we think there was any merit in the demurrer that the petition set forth no cause of action, and that the contract of Spratling, as set forth in the exhibits, was a conditional one, and that there was no obligation on the part of Spratling to perform it, where it appeared that the corporation had not performed its obligation under such contract. The doctrine is well settled in this state that all the property and assets of an insolvent corporation constitutes a fund, first, for the payment of its debts, and then for equal distribution among its stockholders. Civil Code, § 2245, declares this to be true in the case of the dissolution of a corporation, and the cases cited in the first division of this opinion apply the same rule in reference to insolvent corporations. It is everywhere well recognized that unpaid subscriptions to the capital stock of a corporation constitute part of its assets. Capital stock is largely the basis of the credit of the corporation, and persons dealing with the corporation have the right to look to the authorized capital stock as a fund for the payment of their debts. 3 *Clark & Marshall on Private Corporations*, § 792. See *Hightower v. Thornton*, *Stinson v. Williams*, *Dalton*, etc., R. Co. v. *McDaniel*, and *Allen v. Grant*, supra. The petition alleged that Spratling had subscribed for 50 shares of the capital stock of the Consolidated Motor Car Company, of which the plaintiff was the trustee in bankruptcy, at the price of \$100 per share; that he had paid no part of his subscription, and was indebted to such company in the sum of \$5,000; and that it was necessary to collect the whole of this subscription in order to pay the outstanding debts of the corporation. This allegation, if it stood alone, would, of course, have set out a cause of action.

It is contended, however, that the contract of Spratling, as shown by the exhibits attached to the petition, was a conditional subscription, and that the corporation had never complied with the condition assumed by it in the contract, and therefore Spratling was not liable. The demurrer stated in general terms that the contract was a conditional one, and it does not appear from the demurrer, or from the brief of counsel for plaintiff in error, what the conditions were. From the exhibits attached to the petition it appears that the contract between the corporation and Spratling, entered into November 8, 1910,

and to become effective January 1, 1911, was to the following effect: Spratling, "being elected president of and by" the corporation at a salary of \$2,400 a year, \$200 of which were to be paid monthly during the continuance of the contract, agreed to subscribe for 50 shares of the capital stock of the corporation, of the par value of \$100, which shares were to be paid for as follows: A certificate for 25 shares of such stock was to be issued to Spratling, for which he was to give his note for \$2,500, due six months after date. Upon the maturity of the note he was to pay \$200, "same being part of the salary earned by him as president of said company, and also all dividends that may be earned by his said stock, and as much more as possible"; the corporation agreeing to renew the note, upon its maturity, for six months, "and to continue to make such renewals on the same terms every 6 months until said notes are fully paid up. The \$2,500 remainder of said stock to be issued as per applications secured by party of the second part [Spratling] from other parties, for which, as secured, a note or notes are to be given by said second party, due in 12 months from date, and on which as same mature the notes of such applicant stockholders as are secured by said second party are to be applied as payments as same are paid, until said amount is fully paid up." It was further agreed that the contract might be terminated by either party to it giving the other 30 days' notice, and by restoring the other party, "so far as the financial part of this contract is concerned, to the position that they were in prior to the making of the same." There also appeared as an exhibit a copy of a note of date November 9, 1910, given by Spratling to the corporation, for \$2,500, due 14 months after date, with interest from date at 7 per cent. per annum.

A copy of the following agreement was also attached as an exhibit to the petition: "January 6, 1911.

"Consolidated Motor Car Co., Inc., Atlanta, Ga.—Gentlemen: Upon the statement made me by Mr. Frank M. Myers, Jr., your vice president and general manager, who went thoroughly into the present financial conditions of your company, I agreed with him you could not now afford to pay me the \$200 per month beginning January 1st, as my contract with you called for. But, if agreeable to you, I am willing to accept the presidency of your company, giving you what time I can spare, at \$100 per month, and with the assistance of Mr. W. T. Dregger agree to sell \$2,500.00 worth of stock by July 1st, the sale of which stock to be credited on my note given you November 8th, last, as spoken of in our contract of that date. Each sale as made to be credited on said note until same is paid in full: Provided that you agree to carry out your contract with me made November 8th, last, as soon as you raise enough

money from the sale of stock to carry sufficient stock of cars and accessories to carry on the business. It is to be further understood and agreed that the original contract made November 8, 1910, is only to be annulled as is provided herein, and that same is to be carried out as originally set forth, except in so far as it is herein modified. Yours very truly, F. J. Spratling.

"Accepted: Consolidated Motor Car Co., F. M. Myers, Jr., Vice Pres. & Gen. Mgr."

It does not appear that Spratling even gave his note for the \$2,500, as the price of the 25 shares for which a certificate was to be issued to him, which note was to be payable 6 months after date, nor does it clearly appear for what he gave the note dated November 9, 1910, and due 14 months after date. Spratling's contract, as set forth in the exhibits, was one on special terms. The agreement of the corporation to elect Spratling as its president and to continue him as such until his payment of \$200 at the end of each 6 months out of his salary should satisfy or extinguish the price—\$2,500—for the 25 shares of stock, for which a certificate should be issued to him, and the peculiar arrangement as to the disposition of and as to the payment for the other 25 shares, for which no certificate was to be issued to him, and the further agreement that the whole contract might be terminated by either party to it giving 30 days' notice, constituted a special agreement for the sale of the 50 shares of stock to Spratling, upon special terms. Such an agreement was unfair to other subscribers and to the creditors of the corporation, who had a right to assume that Spratling was a bona fide subscriber, unconditionally and without special terms, for 50 shares of stock; and whatever right he may have had, in an action by the corporation against him for his subscription, to set up his special contract as a defense, he could not do this in the equitable action brought by the trustee in bankruptcy of the corporation against him for the benefit of its creditors. See *Fouche v. Merchants' National Bank of Rome*, 110 Ga. 827, 841, 36 S. E. 256, where the following cases are cited: *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; *Richardson v. Green*, 123 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516.

"In general, a subscription upon special terms is an absolute and unconditional subscription, which makes the subscriber a stockholder, and renders him liable as such, and for the amount of the subscription, as soon as it is accepted, but contains special terms or stipulations. Such a subscription is valid, provided the special terms or stipulations are not such as to constitute a fraud upon the other subscribers or stockholders, or upon the creditors of the corporation, and provided they are not beyond the powers conferred upon the corporation by its charter,

nor contrary to law." 2 Clark & Marshall, Priv. Corp. § 465. In a subscription for stock on special terms, performance of the stipulations by the corporation is not a condition precedent to liability on the part of the subscriber, but is an independent or collateral agreement, for a breach of which the corporation will be liable in damages. Id. § 466. "An agreement by which a purchaser of stock may at his option, at the end of a certain time, return the stock and receive back the price, is in the nature of a conditional sale, with an option to the purchaser to rescind; and if the rights of creditors are not involved, it is valid." Id. § 467a. "A corporation has no authority to accept subscriptions upon special terms, where the terms are such as to constitute a [legal] fraud upon the other subscribers, or upon persons who may become creditors of the corporation in reliance upon a bona fide and regular subscription of the authorized capital stock. In such a case, however, the subscription is not void. [Such] stipulations are void, and the subscriber is liable on his subscription as if no such stipulations had been inserted. It has been held, therefore, in many cases, that any secret agreement between a subscriber for stock in a corporation and the corporation or its agents or promoters, by which he is allowed to subscribe upon different terms than other subscribers, since it is a fraud upon the latter, and any secret agreement by which he is to be released in whole or in part from liability on his subscription, since it is a fraud both upon the other subscribers and upon persons who afterwards become creditors of the corporation, is void, and the subscription may be enforced by the corporation, or by or for the benefit of creditors, as if no such agreement had been made." Id. § 467c.

The mere fact that no certificate was to be issued to Sprattling for 25 shares of the stock for which he subscribed did not prevent him from being a stockholder of the whole 50 shares, nor relieve him from liability as a stockholder. 2 Clark & Marshall on Private Corp. §§ 378, 462d; 1 Cook on Corp. § 192; 1 Thomp. Corp. § 508. It follows from what has been said, that the judgment of the trial court in overruling the demurrers to the petition must be affirmed.

Judgment affirmed. All the Justices concurred.

STRICKLAND et al. v. LOWRY NAT. BANK.

(Supreme Court of Georgia. Oct. 2, 1918.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 141*)—NEW NOTE — COLLATERAL.

An owner of land sold it partly for cash and partly for credit, giving to the purchasers a bond for title and taking negotiable notes for the unpaid portion of the purchase money. The

vendor for value indorsed one of these notes to a bank, and others to another person, and also executed a conveyance to each indorsee for an undivided interest in the property, in the ratio which the part of the debt transferred to such indorsee bore to the whole. Payments were made on the note indorsed to the bank. About three years after the maturity of the note, the bank took from the makers a new note, due five months after its date, for the balance claimed to be due on the original note, but bearing interest at an increased rate. It recited that it was given for value received, and that the makers "have pledged to the said bank, as collateral security," the original note and "security for the same." *Held*, that the second note was not a mere agreement collateral to the original note, extending the time for payment and increasing the rate of interest to be borne by it, but by its terms was a new note for the amount remaining due on the first note, bearing interest at the fixed rate, and the first note was to be held as collateral security for the second.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339, 350-354; Dec. Dig. § 141.*]

2. PLEADING (§ 214*)—DEMURRER—EFFECT AS ADMISSION.

While a demurrer admits facts well pleaded in the petition, where it was alleged by the plaintiff that the second note was collateral to the first, but the copies of the notes attached as exhibits showed on their face that this was not correct, but that the parties agreed that the first note should be held as collateral to the second, on demurrer the contract will be construed in accordance with its terms so appearing, and not in accordance with the interpretation alleged by the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

3. BILLS AND NOTES (§ 141*) — RIGHTS OF HOLDER—NEW NOTE—TERMS OF PRIOR NOTE.

Under the facts stated in the first headnote, the bank could not, after the maturity of the second note, bring suit against the makers upon the first note, and, at the same time, supplement its terms by applying to it the increased rate of interest specified in the second note.

(a) It was accordingly error to overrule the demurrer in so far as it set up that the suit upon the first note could not be supplemented by importing into it the increased rate of interest agreed to be paid in the second note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339, 350-354; Dec. Dig. § 141.*]

4. BILLS AND NOTES (§ 471*) — PETITION — CONSTRUCTION—NOTICE OF INTENT.

An allegation that the plaintiff had caused to be served upon the defendants a written notice of its intention "to bring this suit to this term of this court and to claim attorney's fees in accordance with the terms of said original note," together with a prayer for the recovery of such attorney's fees, was sufficient to show that the notice (based on section 4252 of the Civil Code of 1910) was a notice of intention to sue on the original note and seek to recover attorney's fees according to its terms, and not to recover such fees under the second note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1467-1470; Dec. Dig. § 471.*]

5. VENDOR AND PURCHASER (§ 208*)—MORTGAGES (§§ 412, 427*)—FORECLOSURE — VENDOR'S LIEN—TRANSPEREE.

Section 6037 of the Civil Code of 1910, which provides for the filing of a quitclaim deed and the sale of property under a judgment for purchase money, does not authorize a vendor of land who has taken several notes for the unpaid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purchase money thereof to transfer them to different persons and to convey to each of them an undivided interest in the property in proportion to the part of the unpaid purchase money so transferred to him, and thus empower such transferee to obtain judgment, file a deed, and sell such undivided interest in the manner pointed out by the statute (Civil Code 1910, § 6037), or to obtain a general judgment against the purchaser with a special lien upon the undivided interest in the land so conveyed.

(a) Where land is sold, bond for title given, and notes taken for an unpaid part of the purchase money, the title in the hands of the vendor as a whole stands as a security for the unpaid indebtedness. If the vendor could separate the title into fractional undivided interests and convey them to various transferees of different purchase-money notes, some of which might be paid in whole or in part, while others might remain entirely unpaid, and the transferees could proceed separately to sell the undivided interests conveyed to them as security for the notes transferred to them, danger would arise that the property would not bring its full value if sold piecemeal; and the purchaser would not be subjected to a single sale, which might more than pay the entire balance due, but would be forced to submit to a number of separate and distinct sales of undivided interests.

(b) This danger is well illustrated by the facts of the present case; the property being mill property, and including land, a water power, a mill building, and machinery.

(c) If the transferees of the notes agreed to such conveyances of undivided interests to them respectively, they might not be in a position to complain thereof. But if they did not so agree, and if a conveyance of an undivided interest could be made by the vendor to one creditor, which would authorize him to sell such interest separately, it might affect the security of the holders of other notes. So, also, unless the purchaser agreed to such separate conveyances, or estopped himself from complaining, he could do so.

(d) As a general rule, no decree of foreclosure of a common-law mortgage (where the title was conveyed as security) could be made, unless all the parties entitled to the mortgage money were before the court. In this state there can be but one foreclosure of a mortgage. Whether, under some circumstances, as between the original parties, or as between transferees of purchase-money notes, where the title has been retained by the vendor as security, there may be a right to obtain equitable relief, is not now in question. On this subject, see 27 Cyc. 1504; Civil Code 1910, §§ 3285, 3317; *Brown v. Farmer*, 94 Ga. 178, 21 S. E. 292; *Berrie v. Smith*, 97 Ga. 782, 786, 25 S. E. 757; *Willingham v. Huguenin*, 129 Ga. 835, 840, 60 S. E. 186.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 424; Dec. Dig. § 208; **Mortgages*, Cent. Dig. §§ 1185, 1186, 1269, 1272-1287; Dec. Dig. §§ 412, 427.*]

6. DIRECTED VERDICT—ERROR.

It follows, from what is said in the preceding headnotes, that it was error to direct a verdict in favor of the plaintiff for the balance of the principal due on the original purchase-money note held by the plaintiff, with interest at the increased rate specified in the second note, and 10 per cent. attorney's fees on the amount of such principal and increased interest, and with a special lien on a seven-tenths undivided interest in the land (that being the undivided interest conveyed by the vendor to the bank when such vendor indorsed one of the purchase-money notes to it).

7. APPEAL AND ERROR (§ 1078*)—ASSIGNMENT OF ERROR—ABANDONMENT.

The assignments of error which complained of the striking of an amendment to the an-

swer of the defendants, and of certain statements of the trial judge in connection therewith, were not argued in the brief of counsel for plaintiffs in error, and are treated as abandoned. What is held above substantially disposes of the case in so far as the assignments of error were urged.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Bartow County; A. W. Flite, Judge.

Action by the Lowry National Bank against Albert Strickland and others. Judgment for plaintiff, and defendants bring error. Reversed.

Finley & Hensen, of Cartersville, J. P. Brooke, of Alpharetta, and Geo. F. Gober, of Atlanta, for plaintiffs in error. J. T. Norris, of Cartersville, and J. H. Porter, of Atlanta, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except HILL, J., disqualified.

SETZE v. FIRST NAT. BANK OF PENSA-COLA, FLA.

(Supreme Court of Georgia. Sept. 26, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 235*)—TRANSFER—INDORSEMENT ON NOTE—FORECLOSURE.

A mortgage was executed conveying certain realty to secure a promissory note, which was payable to S. or order. S. indorsed the note in blank and delivered it to the plaintiff for value. The plaintiff, as holder and transferee of the mortgage note, sought to foreclose it by an equitable petition, and also to obtain a general judgment. A demurrer to the petition was filed upon the ground that it did not appear that the legal title to this mortgage had ever been transferred in writing to the plaintiff by name. Held, that the indorsement by the payee of his name on the back of the mortgage note, for value, conveyed such note, together with the mortgage lien, to such holder thereof, and the transferee can foreclose the same in its own name.

(a) In such a case it is not necessary that the name of the transferee shall be set out in writing.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 620, 621; Dec. Dig. § 235.*]

2. MORTGAGES (§ 183*)—FORECLOSURE—ESTOPPEL.

For the reasons set out in the second division of the opinion, the court erred in not sustaining the special demurrer to the petition.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 442-445, 447, 448; Dec. Dig. § 183.*]

3. BILLS AND NOTES (§ 471*)—PETITION—NOTICE.

Where a petition alleges that 10 days' notice of intention to bring suit on a promissory note to a stated term of court, and to enforce the payment of attorney's fees stipulated in the note, has been given the defendant, it is unnecessary to attach to the petition a copy of the notice thus alleged to have been given.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1467-1470; Dec. Dig. § 471.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by the First National Bank of Pensacola, Fla., against Eliza P. Setze. Judgment for plaintiff, and defendant brings error. Affirmed in part, and reversed and remanded in part.

The First National Bank of Pensacola, Fla., brought suit against Eliza P. Setze, alleging that on the 28th day of August, 1908, Mrs. Setze executed a certain mortgage note to C. R. Setze for the sum of \$2,500, which was due on the 28th day of August, 1911, together with interest and attorney's fees, etc., and to secure the payment of the note Mrs. Setze conveyed to the payee and his assigns certain described real estate; that on the 6th day of June, 1911, C. R. Setze "transferred and assigned said mortgage note to petitioner for value, as will more fully appear by reference to said copy hereto attached"; and that Mrs. Setze was indebted to the plaintiff in the amount of the note, and refused to pay it. By reference to the attached copy it appears that the name of "C. R. Setze" was merely indorsed on the mortgage note, and no formal transfer or assignment was made. The note contains the recital: "This is a second mortgage on said property, the first being given to the Society of the African Mission of Baltimore City, for \$2,200, maturing October 16, 1908, and extended for five years from date of maturity." Notice of intention to bring suit and collect attorney's fees was alleged to have been given to the defendant. The prayer was that the mortgage be declared a lien upon the land for the principal, interest, and attorney's fees; that the mortgage be foreclosed, and the equity of redemption therein be forever barred; that the land be sold to pay the debt sued for, after paying the debt, if any, due the Society of the African Mission of Baltimore City; and that the plaintiff have a general judgment for the principal, interest, and attorney's fees. By amendment the plaintiff alleged that there was no such corporation as the Society of the African Mission of Baltimore City, as set out in defendant's answer; that the defendant had no transactions with that society; that the defendant never gave to the society any mortgage on the property held by the plaintiff as security for the note sued on in this case; and that the same is fictitious and puts a cloud on the title and the mortgage held by the plaintiff, and should be removed in order that the plaintiff may have and maintain its equitable rights. Plaintiff prayed that the alleged cloud be removed, and that it have a lien set up and established in favor of the note and obligation of the defendant here sued on.

The defendant filed a demurrer, in which she urged: (a) That the petition sets forth no ground for equitable relief, and shows that there is an adequate remedy at law.

(b) That the petition is insufficient as to parties plaintiff, in that it does not appear that the legal interest to the mortgage sought to be foreclosed has ever been transferred in writing to the plaintiff, but that the legal right of action thereon remains in the mortgagee, C. R. Setze. (c) That there are no sufficient parties defendant, it appearing from the petition that the Society of the African Mission of Baltimore City has a first mortgage on the property, and it is necessary, in order to protect the interests of the society by paying off the debt as prayed for, that the society should be made a party to the cause. (d) Defendant demurs specially, because no copy of the alleged notice of intention to claim attorney's fees is attached to the petition. The court overruled the demurrer, and the defendant excepted.

Candler, Thomson & Hirsch, of Atlanta, for plaintiff in error. John Awtry and W. R. Power, both of Marietta, and Geo. F. Gober, of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. The mortgage note sued on in this case was payable to C. R. Setze, or order. It was therefore negotiable. The petition alleges that it was transferred and assigned to the plaintiff, which brought suit against the maker to enforce it. There is no formal transfer or assignment of the note and mortgage in writing, and the question is whether the simple indorsement of the name of the payee in the note on the back thereof operates to transfer, not only the note, but the lien created by the mortgage, to the plaintiff, who claims to be the holder for value, and sues as such. A promissory note is negotiable by indorsement of the payee or holder. Civil Code, § 4273. Civil Code, § 4276, declares: "The transfer of notes secured by a mortgage or otherwise conveys to the transferee the benefit of the security." See, to the same effect, *Roberts v. Mansfield*, 32 Ga. 228; *Murray v. Jones*, 50 Ga. 109; *Berrie v. Smith*, 97 Ga. 784, 785, 25 S. E. 757. Civil Code, § 3345, is as follows: "All transfers and assignments of rent notes, mortgage notes, and other such evidences of indebtedness, secured either by contract lien or out of which a lien springs by operation of law, shall be sufficiently technical and valid where such transfer or assignment plainly seeks to pass the title to any of such papers in writing from one person to another." The act of 1899 (Acts 1899, p. 90), embodied in Civil Code, §§ 3345-3347, was remedial in its nature, and, as expressed in the caption, was "to provide for the more full and complete transfer and assignment of rent notes, mortgage notes, * * * so that upon a simple transfer for value of such rent note, mortgage note, and other such evidences of indebtedness, the lien connected therewith is carried and follows as a necessary incident

of such transfer so as to allow such transferee or assignee of the same, without more to foreclose and enforce the same in his own name." The purpose of this act was, therefore, not to lessen the power of assignment, but to broaden it, so as to do away with, as much as possible, the formality of transfers of lien notes. Prior to the act of 1899, promissory notes payable to order were negotiable merely by the indorsement of the payee. The transfer of notes secured by a mortgage or otherwise carried with it the benefit of the lien of the mortgage. The expressed purpose of the act of 1899 was to provide for the more full and complete transfer of notes secured by liens, so that upon a simple transfer of such notes the lien connected therewith is carried, and the transferee can foreclose in his own name. Therefore, in this case, the note and mortgage to secure it being embodied in a single instrument, and the indorsement and delivery thereof being sufficient to transfer the title to the note payable to order, it was a sufficient "simple transfer" of the entire paper to carry title thereto to the person to whom it was delivered so indorsed.

But it is argued that mortgage notes cannot be transferred by simple indorsement, inasmuch as the act of 1899 (Civil Code, § 3345) provides that the transfer of mortgage notes shall be "in writing from one person to another." It is insisted that the language of the act of 1899 does not come under the law merchant, where a simple indorsement is sufficient to convey the title and transfer the note to any one who might legally hold it; but that, in order to carry the lien of the mortgage with the note, there must be a written assignment in which the name of the assignee is set forth. At common law the title to a mortgage did not pass by a simple indorsement in blank. The act of 1899 is a remedial statute, designed to do away with the formal and technical rule as to assignments and transfers of liens, so that the law merchant will apply as well to notes carrying liens as to those which do not. Even a casual reading of the caption of the act of 1899 will show that such was the evident purpose of the legislature. And in the body of the act the matter relating to the transfer of liens provides that the effect of such transfer or assignment of such notes will be to completely and fully carry such lien "as a necessary incident thereof." And section 3 of the act provides that upon the "simple transfer" of any mortgage note, etc., the transferee can foreclose in his own name. The whole act breathes with the spirit of simplifying the method of transferring liens which attach to certain notes, including mortgage notes. The act of 1899 did not repeal section 4276 of the Civil Code, quoted supra, but was intended to simplify the manner of transferring notes secured by liens, etc. The act of 1899 should be con-

strued in connection with section so construed, we think the simple ment of the name of the payee in note payable to order, on the balance gives the holder for value the right to close the mortgage in his own name. What has been said, we think the law is in the court below could proceed in the name to foreclose the mortgage. The ruling of the general demurrer was in *Barnes v. Fleetwood*, 5 Ga. App. E. 60.

[2] 2. One of the prayers of the petition is that the "mortgage may be declared void upon said land for the principal interest and attorney's fees, as here set out, and costs, and that said land be foreclosed and the equity of redemption therein forever barred, and that said land be sold to pay this debt, after paying off any, due the Society of the African Mission of Baltimore City." The petition originally brought alleged that the defendant of the African Mission of Baltimore City had a first mortgage on the property described in the petition for \$2,200, which was made on October 16, 1908, and was extended for ten years from the date of maturity. The petition to the petition it was alleged that there is no such corporation as the Society of the African Mission of Baltimore City, and that out in defendant's answer, and that the defendant had no transactions with the plaintiff. We think the special demurrer to the petition should be sustained, and to that extent the judgment of the court below is reversed. That the petition referred to in this case is the opinion should have been stricken out of necessity is shown in the petition. A decree as prayed for. A general demurrer is prayed against the defendant, and the solvency of the defendant is not alleged. The Society of the African Mission of Baltimore City, whose first mortgage would be void by such a decree, is not a party to the petition. The plaintiff does by amendment allege that there is no such corporation, and that the defendant had no transaction with the plaintiff. But the plaintiff will not deny the validity of the first mortgage when the note under which it sued expressly states that it is a second mortgage on the property, the first being given to the "Society of the African Mission of Baltimore City." *Jenkins v. Southern Ry. Co.*, 35 S. E. 355; *Long v. Bullard*, 35 S. E. 355 (3). No reason is shown why the plaintiff above named had not a valid first mortgage lien on the property described in the petition, as declared in the note issued on, as declared in the note. I do not think that the portion of the petition under review alleges any facts which would take the case out of the usual procedure for a foreclosure is sought on property having first and second liens thereon.

we think the court should have sustained the demurrer to this extent.

The note on which suit was brought was a provision for the payment of 10 attorney's fees on principal and a case of collection by suit or through a lawyer. The petition alleged that no attention to bring suit and collect attorneys had been given to the defendant, stating the term of court to which it should be brought 10 days prior to the trial. A special demurrer was filed, holding that a copy of the notice should have been attached to the petition. It was unnecessary. The suit was not on the notice, but on the note. The plaintiff requires notice in order to make this of the note enforceable. It was to allege the giving of such notice; allegations of the petition were sufficient and it was not necessary to attach the notice which had been given. The plaintiff in error has secured a modification of the judgment of the court, she is entitled to the costs of the case to the Supreme Court. Judgment affirmed in part and reversed in the Justices concur.

COLEMAN v. MAYOR AND COUNCIL OF GAINESVILLE.

Court of Georgia. Sept. 29, 1913.)

(Syllabus by the Court.)

QUARE CLAUSUM FREGIT.

Originally construed, this was an action of "quare clausum fregit," for damages for blasting in the defendant's quarry, and for stones to fall on adjacent lands of the plaintiff, injuring his buildings and other property, and by dumping dirt and other material into a branch, which separated the plaintiff's other land, causing it to lower down to change its course across the plaintiff's land, and also to fill the plaintiff's mill pond with debris, and not for anything arising from any negligence in the work which the work was done.

RIGHT LANDOWNERS (§ 8*)—DEED—CONSTRUCTION—DAMAGES.

A quarry was located on a designated tract of land. Defendant held under a deed from the plaintiff. After reciting the consideration, the deed purported to convey "all the rock and soil surface and subsurface, located on" the designated land. It also contained the recital that the first part further grants, and conveys to party of the second part, successors and assigns, the right and power to use said land in any way whatever that may be necessary or expedient to quarry, mine, and remove all of said stone and material, and provided no convict camp or tenant shall be placed on said ten acres of land." The grant and covenant above quoted authorized blasting, and the mere fact that the blasting fell upon plaintiff's adjacent land and destroyed his property would not render the defendant liable in trespass for the injury. See *Ames v. Ames*, 13 Mo. App. 575; *Arthur v. Arthur*, 157 N. C. 398, 73 S. E. 206; *Scott v. Scott*, Md. 431.

This case differs from *Moross & Co. v.*

Burke, 99 Ga. 110, 24 S. E. 969, and *Central Iron & Coal Co. v. Vanderhulk*, 147 Ala. 546, 41 South. 145, 6 L. R. A. (N. S.) 570, 119 Am. St. Rep. 102, 11 Ann. Cas. 346, where the plaintiff had not consented to the blasting.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. §§ 60-66; Dec. Dig. § 8.*]

3. INSTRUCTIONS—DENIAL OF NEW TRIAL.

Considered in the light of the entire charge, and the issues as made in the pleadings and evidence, the excerpts from the charge complained of in the motion afford no cause for the grant of a new trial.

4. DENIAL OF MISTRIAL APPROVED.

Under the circumstances of the case, there was no error in refusing to declare a mistrial.

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The verdict is supported by the evidence, and the discretion of the trial judge in refusing a new trial will not be disturbed.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by John W. Spencer against the Mayor and Council of Gainesville. Judgment for defendant, and plaintiff brings error. Affirmed.

B. P. Gaillard, Jr., and J. G. Collins, both of Gainesville, for plaintiff in error. Wm. M. Johnson, of Gainesville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

COLEMAN et al. v. GEORGE, Judge.

(Supreme Court of Georgia. Sept. 27, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 130*)—CHANGE OF VENUE—PETITION—CONSTRUCTION.

The court did not err in this case in construing the petition for a change of venue to be based solely on the ground that an impartial jury could not be obtained in the county in which the crime is alleged to have been committed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 247, 248; Dec. Dig. § 130.*]

2. CRIMINAL LAW (§ 1023*) — APPEAL — CHANGE OF VENUE—BILL OF EXCEPTIONS.

The court correctly held that the provision in the act approved August 21, 1911 (Acts 1911, p. 74), relating to a change of venue in criminal cases, providing for a direct bill of exceptions, which should "operate as a supersedeas in the trial of said case," is not applicable in case of the denial of a petition for a change of venue, where the same is based solely upon the ground that an impartial jury cannot be obtained in the county where the crime is alleged to have been committed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

Application for mandamus by W. A. Coleman and others against W. F. George, judge. Mandamus denied.

Jno. R. Cooper, of Macon, D. B. Nicholson, of Rochelle, and Haygood & Cutts, of Fitzgerald, for petitioners. J. B. Wall, of Fitzgerald, J. W. Dennard, of Cordele, and Hal Lawson, of Abbeville, for defendant.

BECK, J. The following petition was presented to the judge of the superior court of Wilcox county:

"The petition of W. A. Coleman, Jim Coleman, and W. H. Stephens, citizens of the county of Wilcox and state of Georgia, and who are now detained in the common jail of Wilcox county, Georgia, respectfully shows to this honorable court:

"1. That they have been indicted in the superior court of Wilcox county for murder, in that they did on the 6th day of April, 1913, kill Leon Melvin.

"2. Your petitioners respectfully show that when they were arrested and put in jail in Abbeville, said county of Wilcox, it was necessary, in order to secure the safety of the said W. A. Coleman from the mob, to carry him to the common jail of Ben Hill county, Fitzgerald, Georgia, where he remained for some time. Afterwards he was removed back to the jail of Wilcox county, and remained there a short while, and the mob stormed the jail, and tried to get him out of jail and lynch him. The mob cut the telephone wire, and the said mob was only prevented from getting Coleman by the wife of the jailer, who got the keys and kept them under her apron.

"3. After this storming of the jail by the mob, W. A. Coleman was carried by the sheriff of Wilcox county to the common jail of Dooly county, Vienna, Georgia, for safe-keeping, and there he remained for some time, a month or so, and was only carried back to Abbeville jail a few weeks ago.

"4. Your petitioners further allege that since their incarceration they have heard of numerous threats against their lives, and that while W. A. Coleman was incarcerated in prison his hands were run off his farm, and some of them beaten and warned that if they did not leave the farm they would be dealt with by violence, and that it was necessary for him to employ more men to take their places and run his farm this year. Your petitioners aver that, on account of the great feeling and prejudice against him in said county, it was very hard for him to get his land cultivated this year, and that great damage has been done to him on account of the prejudice existing in the county where the homicide occurred.

"5. Your petitioners show that on account of the excitement and common feeling that existed after the homicide, which was calculated to poison the minds of the jurors, and further that a large portion of the jurors of said county have formed and expressed an opinion in regard to their guilt, either from having heard some part of the evidence at the coroner's trial, or from hav-

ing heard statements of others and from certain evil-disposed persons, relatives and friends of the deceased, who circulated rumors exceedingly damaging to them and prejudicial to a correct termination of the issues involved in the case, that the public mind has been so poisoned and prejudiced by exaggerated rumors in the newspapers of the state that the defendants do not believe that they can get a fair trial by an impartial jury in Wilcox county, Georgia, the sort of trial that they are entitled to under the Constitution and laws of the United States.

"Wherefore they respectfully ask this honorable court to change the venue in said case, and that they be ordered tried upon said bill of indictment in some other county in the circuit and in the state of Georgia other than the county of Wilcox."

After hearing the evidence and argument of counsel upon this petition, the judge overruled it. Thereupon the petitioners presented their bill of exceptions to the judge for his signature, seeking to bring the ruling directly to this court for review. The judge refused to certify the bill of exceptions, and held that the petition was based upon the law in regard to the change of venue in criminal cases as it stood before the passage of the act approved August 21, 1911 (Acts 1911, p. 74), relating to a change of venue in criminal cases. Prior to that act the law provided for a change of venue only in cases where an impartial jury could not be obtained in the county where the crime was committed. The judge below in this case held, further, that the act of 1911 provided an additional ground for a change of venue in criminal cases, and that, when the additional ground provided in that act is embraced in the motion, a movant has the right to a direct bill of exceptions in case the judge should refuse to grant the motion, but that, where the motion is based solely upon the ground that an impartial jury cannot be obtained, a denial of the motion is a proper matter for exceptions pendente lite, and not for a direct bill of exceptions.

[1] We are of the opinion that the judge below properly construed the petition, in holding that it was based solely upon the ground that an impartial jury could not be obtained in the county where the crime was alleged to have been committed. While the petition does allege certain attempted acts of mob violence in the past against one of these petitioners for a change of venue, there is no allegation that at present there is an existing danger of a lynching of this party against whom the attempts were made, or against either of the other petitioners, nor that there have been so recently threats of violence or attempts to lynch either W. A. Coleman, one of the petitioners against whom the former attempts were made, or against either of the other petitioners, as to

show that there is a probability of danger of lynching or other mob violence at the present time, or that there was at the time of filing and hearing the motion a present existing danger or probability of such violence. But the petition distinctly alleges that on account of the excitement and feeling that existed "after the homicide, which was calculated to poison the mind of jurors," and from the fact that a large part of the jurors of the county had formed and expressed an opinion in regard to the guilt of the petitioners, and for other reasons set forth in the petition, the defendants "do not believe that they can get a fair trial by an impartial jury in Wilcox county" (the county in which the crime is alleged to have been committed).

[2] The petition, properly construed, rests the case for a change of venue upon the law granting such a change where an impartial jury could not be obtained. That being true, the court did not err in holding that the denial of the motion was a proper matter of exceptions pendente lite, and not of a direct bill of exceptions to this court. The act of 1911 does not change the law relating to a change of venue in criminal cases, as it existed prior to that act and as it is declared in section 964 of the Penal Code. This section is amended, not by changing the provisions as they stood at the time of the amending act, but by adding another ground upon which a change of venue might be had; and the addition made it lawful for the judge of the superior court to change the venue "on his own motion, with or without petition, whenever, in his judgment, the accused party will be lynched, or there is danger of violence being attempted to be committed on said accused, if carried back, or allowed to remain, in the county where the crime is alleged to have been committed. And if a motion by petition shall be made by the accused for a change of venue, said judge shall hear the same at chambers, with or without the presence of the accused, at such time and place in the state as he may direct. And if the evidence submitted shall reasonably show that there is probability or danger of lynching, or other violence, then it shall be mandatory on said judge to change the venue to such county in the state, as in his judgment, will avoid such lynching. The petitioner shall have the right to except to the ruling of the court at such interlocutory hearing, and the bill of exceptions when signed shall operate as a supersedeas in the trial of said case, until passed on by the Supreme Court." The provision in this amendment, declaring that "the petitioner shall have the right to except to the ruling of the court at such interlocutory hearing, and the bill of exceptions when signed shall operate as a supersedeas in the trial of said case, until passed on by the Supreme Court," is applicable, in our opinion, only where a motion is made based upon the existence of

danger or probability of a lynching or other mob violence. While the provision for a direct bill of exceptions to the ruling of the court at an interlocutory hearing is by the amendment placed in the same section of the Code with the law as it stood prior to the passage of the amending act, we do not think that it should be made applicable to the law providing for a change of venue on the ground that an impartial jury could not be obtained; but it should only be applied in cases of motions based upon the ground for a change of venue added by the amendment.

We are induced to adopt this construction as the correct one from a consideration of the context, and of the reason for the amendment which must have existed in the minds of the Legislature when it enacted the amendment. The law giving the right to a change of venue on the ground that an impartial jury could not be obtained in the county where the crime was committed stood for many years as it is in the present Penal Code, and no right to a direct bill of exceptions to a judgment of a court refusing to make a change of venue upon motion existed. A refusal to grant the motion under the law was treated as rulings upon other incidental or preliminary issues and matters in the trial of criminal cases, such as motions for continuance, pleas in abatement, demurrers, etc. The accused, in cases of adverse rulings, could not as a matter of right, in such matters, have a direct bill of exceptions to this court which would operate as a supersedeas and prevent further proceedings in the cause until the question made in such bill of exceptions was disposed of here. And the mere fact that the Legislature has seen fit to create an additional statutory ground for a change of venue, and give in connection therewith a right to a direct bill of exceptions which should operate as a supersedeas in the trial of a case, and that the statute creating the additional ground has been placed in the same section of the Penal Code with the former legislative declaration upon that subject, does not justify a construction making the provisions in regard to procedure applicable to the provisions which existed formerly, unless the context or the reasons for making the additional ground for a change of venue require it.

As we have said, and as will be seen upon reading the amendatory act, the context does not show that the provision for a direct bill of exceptions in the amendatory act is applicable to the law as it existed prior to the amendment. Nor are there any valid grounds for holding that there was a legislative intent that the provisions now under consideration should be made applicable to the law as it stood prior to the amendment. While there were strong and obvious reasons for making such a provision applicable in cases where there was a motion for a change of venue on the ground that there was a

probability or danger of lynching or other violence committed on the accused, errors in rulings upon such preliminary questions or matters as continuances, demurrers, pleas in abatement, etc., could be corrected after trial as well as before trial. Of course, if there was error in ruling upon preliminary matters, requiring the grant of a new trial in this court, the cost of another trial would be incurred because of such ruling. But we are not prepared to hold that the cost of an additional trial is an evil equal to or greater than that of the delay in the trial of criminal cases, where one who is accused of a crime is permitted to suspend the proceedings in the cause by suing out, to adverse rulings upon preliminary questions, a direct bill of exceptions to this court, which should operate as a supersedeas until the same was considered here, and the questions raised in it adjudicated on review. And without some plain expression of legislative intent to give to the defendant in a criminal case the right, in a matter of procedure, to test the correctness of adverse rulings of the trial court by a direct bill of exceptions, thereby bringing about delay in the trial of the case, this court should not confer the right by construction. The language of the amending act which we have now under consideration requires that, where there is a probability or danger of lynching or other violence, "it shall be mandatory on said judge to change the venue to such county in the state as in his judgment will avoid such lynching." This provision, that a change of venue under the circumstances last recited is mandatory, making it the imperative duty of the trial court to grant a change of venue when those circumstances are shown to exist, clearly has no application to a petition for a change of venue on the ground that an impartial jury cannot be obtained. It makes prominent in the act the legislative command that there must be a change of venue where there is danger or probability of lynching. It lays emphasis upon the necessity for a change of venue to prevent mob violence; and in immediate connection with this expression giving emphasis to that legislative command is the provision for a direct bill of exceptions to an adverse ruling of the court, which exceptions shall operate as a supersedeas in the trial of the case.

The obvious reason for giving additional rights in the matter of procedure where a petition was based upon the ground of danger of lynching were no doubt present in the legislative mind in enacting the statute of 1911; and that was that an error in passing upon a petition based upon this ground had to be corrected before trial, or it could not be corrected. If a court should erroneously deny a motion based upon the ground that there was a probability of a lynching, and

that probability should eventuate in certainty, no reviewing court could then correct the error. There were no such considerations as these to move the legislative body to grant the right of a direct bill of exceptions, and a suspension of further proceedings in the case, where the motion was based upon the ground contained in the law prior to the act of 1911; and we do not find in the act itself, in the context of the provision that we have immediately under consideration, anything to indicate a legislative intent to change the procedure in any case, except where a motion is made in view of an existing danger of lynching.

Mandamus denied. All the Justices concur.

WRIGHT et al. v. HILL et al.
(Supreme Court of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 614*)—CONSTRUCTION.

By the sixth item of his will a testator provided as follows: "All of the other real property I own or may own at my death, exclusive of what has been devised in the foregoing items, I give and devise share and share alike to my seven children [naming them], for the term of their natural lives respectively [respectively?], with remainder in fee to their surviving lawful issue if any; and if any one shall die without issue, his or her share shall be distributed share and share alike amongst the lawful issue of the others surviving, for and during their natural life." The eighth item was as follows: "I desire and request of my executors and executrix named in the first item of this will to keep all the property mentioned in item 6th undivided until the youngest one of the issue of my sons and daughters mentioned in said item 6 shall become of age." After the testator's death one of the sons died, leaving children surviving him. Some of them are of age. They filed an equitable petition for the purpose of having their shares of the property devised in the sixth item of the will delivered to them. *Held*, that the sixth item of the will created a life estate in each of the children of the testator respectively, with a contingent remainder over as to such share to the children of each child, and with an executory devise in case any child of the testator should die without issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.*]

2. WILLS (§ 634*)—PARTITION (§ 14*)—RIGHT—CONSTRUCTION OF WILL.

Where a son of the testator survived him and died, leaving the present plaintiffs as his lawful children, they took vested indefeasible interests in one-seventh of such property. As to such shares there was no active intervening trust; and those of the plaintiffs who were of full age and sui juris were entitled to have the executors assent to the devise as to them and deliver to them their respective interests. (Atkinson, J., dissents from the latter part of this headnote.)

(a) The general rule that, in proceedings for partitioning property among tenants in common, ordinarily there should be a complete partitioning, is subject to some exceptions. It does not affect the right of the devisee, who is entitled to possession of property devised to him, to have his share delivered to him, al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may be other devisees who are not in possession at the same time.

e.—For other cases, see Wills, Cent. 88-1510; Dec. Dig. § 634; * Partition, Dec. Dig. § 14.*]

UTITIES (§ 6*)—WILLS—CONSTRU-

the ruling made in the preceding provisions of the will above quoted conflict with the rule against per-

e.—For other cases, see Perpetuities, §§ 4-47, 49-53, 56; Dec. Dig. § 6.*]

ON (§§ 44, 46, 55, 64*)—PREMATURI-

CTION—PETITION—DEMURRER—PAR-

the plaintiffs who are of age and sui action is not premature. (Atkinson, s.)

allegation that the plaintiffs are tenants in common with the executors and entitled to an action on that basis was demurrable; but the court required the dismissal of the entire

allegations as to the hostile attitude of the executors and of the inability of the court to ascertain what constituted the residue devised by the sixth item of the will to the plaintiff to withstand the demurrer.

For the allegations of the petition, all interest should have been made particular.

te.—For other cases, see Partition, §§ 111-114, 148-159, 182, 186, 187; §§ 44, 46, 55, 64.*]

AND ERROR (§ 1178*)—DISPOSITION OF REAL

such as the court sustained the decision on all the grounds thereof and dismissed the petition thus erring as to the substantial merits of the petition, the judgment is reversed, and the case is reinstated; that the court order to the allegations of the sixth part of the petition, touching the existence of a tenancy in common between the plaintiffs and the executors, be sustained; that the court give the necessary parties to the plain- upon failure so to do, that the action be dismissed for want of proper parties.

te.—For other cases, see Appeal and Error, Dec. Dig. §§ 4604-4620; Dec. Dig. §

from Superior Court, Baldwin County, Ga., Park, Judge.

ple petition by M. H. Wright and against Nora Hill and another, etc. for defendants, and plaintiffs reversed. Reversed, with direction.

Hill Wright and others filed their petition against Nora, Madison, and Stephen Hill, as executors of David B. Hill, in substance as follows: David B. Hill died testate and owing no debts January 27, 1901. After making other bequests, he provided, in items 6 and 8 of his will as follows:

8th. All of the other real property I may own at my death, exclusive of what has been devised in the foregoing, I give and devise share and share alike to my seven children, viz.: Nora, Eula, John, Madison, and Stephen, each to have the term of their natural lives respectively, with remainder in

fee to their surviving lawful issue, if any, and if any one shall die without issue, his or her share shall be distributed share and share alike amongst the lawful issue of the others surviving, for and during their natural life."

"Item 8th. I desire and request of my executors and executrix named in the first item of this will to keep all the property mentioned in item 6th undivided until the youngest one of the issue of my sons and daughters mentioned in said item 6 shall become of age."

The plaintiffs are the surviving lawful issue of Anderson Hill, a son of the testator. Since the death of Anderson Hill April 19, 1907, none of his lawful issue have died. Plaintiffs refer to the real property devised in item 6 of the will as the residuum and claim that they as a unit became entitled, upon the death of their father, Anderson Hill, to a vested estate in fee simple in and to an undivided one-seventh interest therein. The executors of the estate bore to Anderson Hill during his lifetime a hostile attitude and have borne the same attitude since towards the plaintiffs, who have never been able to learn the exact extent of the residuum of the estate or their portion therein. They know, however, that it consists principally of farming land, and to the best of their information and belief it amounts to from 8,000 to 10,000 acres. The plaintiffs are tenants in common with the executors of the estate of David B. Hill in the land constituting the residuum of the estate; and the petition is brought to have the interest of the plaintiffs partitioned and set apart to them in severalty. The executors have never assented to the vesting of the devise contained in item 6 of the will or any part thereof and are still clothed with the legal title to the lands devised therein. Plaintiffs allege that item 8 of the will, in which the testator requests of his executors that they keep all of the property mentioned in item 6 undivided until the youngest one of the issue of his sons and daughters mentioned should become of age, is illegal, contrary to the law and public policy of this state, and void in that it attempts, after devising and creating an absolute estate in fee simple in the plaintiffs, to nullify and destroy such estate by depriving the devisees of the right to the use and enjoyment of it for a stated period and preventing them from aliening, partitioning, or otherwise disposing of it for said period. Item 8 being illegal and void, the plaintiffs have been entitled, since the death of their father, to have partitioned and set aside to them in severalty their interest in the residuum above referred to. Since the death of the testator, his executors have managed the estate upon the theory that item 8 of the will was legal and valid, and have been withholding from the devisees

any possession or use of the residuum, and have excluded them from their right, title, and interest therein.

The plaintiffs' father, Anderson Hill, during his lifetime was not allowed the use and possession of his life estate in the residuum, except as a tenant or renter from the executors and upon the payment of an annual rental, and since his death none of the plaintiffs have been allowed the use or possession of any part of these lands except upon the same terms. Since the death of their father, some of the plaintiffs have been living on a portion of the land in question but have been required to pay an annual rental by the executors. Besides the rental exacted from the plaintiffs just referred to, the executors have collected from other tenants of these lands a rental equivalent to about \$3,000 per annum. This sum has been applied chiefly to making permanent improvements on that part of the residuum on which the executors and their favorite brothers and sisters reside. After these expenditures, the balance remaining was divided among the devisees; each of the plaintiffs receiving a small sum of about \$20. Of the residuum of the estate not more than 1,200 acres are in cultivation. Plaintiffs allege that their interest in the residuum is about 1,000 acres; that they have been forbidden and will be prevented, during the pendency of this suit, from using, possessing, or cultivating more than 100 acres, unless the court shall restrain the executors from interfering with the plaintiffs in the use and cultivation of a greater acreage in proportion to their interest. During the pendency of this suit, the executors continue to demand of the plaintiffs the usual annual rental for the use of about 100 acres; and, as this exaction is illegal, the executors should not be permitted, during the pendency of this suit, to demand of them more than a sufficient amount to pay the taxes on the land which they occupy and cultivate. The children surviving David B. Hill, the testator, were seven. Of this number one died eight days after her father; she not being married. Three others have never married. Two are married and have lawful issue. Another child, Anderson Hill, is the deceased father of the plaintiffs. The youngest of the lawful issue of Anderson Hill was born prior to the death of the testator. At the death of the testator there were surviving him, besides the plaintiffs in this case, four other grandchildren. At the date of filing this suit there are living six other grandchildren, born since the death of the testator. Two grandchildren born since the death of the testator are dead.

The prayers of the plaintiffs were as follows: That the executors be required to assent to the vesting in the plaintiffs of the devise contained in item 6 of the will of David B. Hill; that the court decree that item 8 of the will is illegal, contrary to public policy, and void, and that it constitutes

no obstacle to the immediate delivery and conveyance to the plaintiffs in severalty of their respective interests in the residuum of the estate; that each of the plaintiffs be decreed to be entitled to an immediate and vested estate in fee simple in an equal undivided sixty-third interest in the residuum of the estate; that a decree be entered fixing the acreage and extent of the residuum and the number of acres to which each of the plaintiffs is entitled; that commissioners be appointed to survey the residuum set off by metes and bounds and describe the particular tracts which each of the plaintiffs shall receive, and, upon the confirming of the report of the commissioners, deeds be executed by them to each of the plaintiffs in accordance with the decree; that pending the suit the defendants be enjoined from any acts which may prevent or tend to prevent the plaintiffs from using, possessing, and cultivating an acreage not exceeding 1,000 acres of the lands comprised in the residuum; that pending the suit the executors be temporarily enjoined from demanding of the plaintiffs the payment of any sums as a rental or otherwise, except for their proportionate part of state and county taxes, to be estimated according to the acreage actually occupied by them during the pendency of this suit; for such other and further relief as they may be entitled; and for process.

The plaintiffs amended their petition as follows: David B. Hill, the testator, was a white man. He was never married to Elvira Hill, who was a woman of color, and neither Elvira Hill nor the children of Elvira and the testator, among whom was the father of the plaintiffs, are his heirs at law. The testator was one of a large family of children, most of whom grew up, married, and reared families. His heirs at law are his brothers and sisters and their descendants. The testator began living with Elvira Hill about the time of the Civil War and continued to live with her until his death; she surviving him about five years. He and Elvira lived continuously upon the lands constituting the residuum, known as the Hill place, which he cultivated and gradually enlarged from time to time. All his children were born, reared, and educated on the Hill place and were brought up by him to make their living by farming on this land. With one or two exceptions, all of the children and descendants of David B. Hill are now living on the Hill place and making their living by its cultivation. At the time of the death of the testator, the plaintiffs and their father, Anderson Hill, owned and had nothing except what was given to them by the will, nor at that time did any of the other children or descendants of the testator own much, if anything, except what was given to them by the will. Since the death of the testator, no land constituting a part of the residuum of the estate has been sold, incumbered, or otherwise disposed of, and the same remains

as it was at the time of the death of the testator.

The defendants demurred to the petition. The court sustained the demurrer and dismissed the case, and the plaintiffs excepted.

Henry A. Alexander, of Atlanta, for plaintiffs in error. Johnson & Johnson, of Gray, and Allen & Pottle, of Milledgeville, for defendants in error.

LUMPKIN, J. (after stating the facts as above). This is a peculiar case and a peculiar will, as will appear from the statement of facts. An illustration may be given of the unusual character of other items besides those directly for consideration. Item 3 gave certain land to the three daughters "and to their heirs or lawful issue at their death respectively." It provided that, if a named one of the daughters should die, her share should vest in her sisters or their issue; but said nothing as to such a contingency in regard to the others. By the fourth item a brick store was devised to the testator's three daughters and their issue, with a provision that, if either of them should die without issue, her share should vest in the survivor or surviving issue. By the seventh item it was declared that, the testator desired that the brick store should remain undivided "until the last one of the devisees shall die, and then the said property to be divided share and share alike amongst the lawful issue of the survivors or amongst the lawful issues of the devisees mentioned in items 3 and 4, if any there be." This, however, is only mentioned to show some of the provisions of the will, and the continued use of the words "issues" and "lawful issues," and the want of clearness pervading the instrument.

[1] 1. The sixth item was as follows: "All of the other real property I own or may own at my death, exclusive of what has been devised in the foregoing items, I give and devise share and share alike to my seven children, viz.: Nora, Eula, Inez, Anderson, John, Madison, and Stephen Hill, for the term of their natural lives respectively [respectively?], with remainder in fee to their surviving lawful issue if any; and if any one shall die without issue, his or her share shall be distributed share and share alike amongst the lawful issue of the others surviving, for and during their natural life."

Under the statutory change, in this state, of the rule in Shelley's Case, this created a life estate in each of the children of the testator, with remainder over to the surviving legitimate children of such child, if any, and, if any one (that is, any child of the testator) should die without issue, then as provided. Civil Code of 1910, § 3660 (in the last line of which there is a printer's error, making confusion. See Civil Code of 1895, § 3084). The remainder was contingent. The words of survivorship could not be legiti-

mately referred to the death of the testator. Four of his children were unmarried and had no "lawful issue" to survive him. He could hardly have intended to confine his bounty to the "lawful issue" of the other three children. If so, as he dealt with each child "respectfully" (evidently meaning respectively), although each one of the four who was unmarried when the will was executed might, after the death of the testator, marry and have "lawful issue," the latter would take nothing. Also the provision, in case of the death of any child without issue, that his or her share should be distributed among the lawful issue of the "other surviving" during their natural life shows that the words of survivorship referred to the death of the life tenants, respectively, and not to that of the testator. Considering the context, we think there is no doubt that a life estate was created for each child of the testator, with contingent remainder over to the lawful heirs (that is, children) of such child, and with further provision should there be none. This construction accords with the Civil Code 1910, § 3662.

For the present purpose it is immaterial to discuss the question whether the remainder did not vest at all until after the death of each life tenant, or whether upon the birth of a child to a life tenant the remainder as to that share vested in it, subject to open to let in after-born children and to divest in case of the death of a child before the death of a life tenant. Nor need we discuss the peculiar limitation over to other lawful issue "during their natural life," in case of the death of a life tenant without issue. One who desires to find the silken thread and follow it through the labyrinth of judicial decisions may obtain some aid in the notes to Robertson v. Guenther, 25 L. R. A. (N. S.) 887 et seq. (241 Ill. 511, 89 N. E. 689), and Smith v. Smith, 25 L. R. A. (N. S.) 1045 et seq. (157 Ala. 79, 47 South. 220). See, especially, Van Tilburgh v. Hollinshead, 14 N. J. Eq. 32; Rountree v. Rountree, 26 S. C. 450, 2 S. E. 474.

The father of the present plaintiffs having died, leaving them as his lawful issue, as to the one-seventh of the estate, which was spoken of as his share (not as descriptive of an absolute estate in him, but of the amount of property or size of the share), the contingency as to them was at an end, and they were the absolute owners of it. This is all they claim in the present suit. No question is raised as to the life estate or the devises over upon the death of a child of the testator, leaving no issue. Accordingly we do not deal with them, but only with the vested interests of the plaintiffs in a seventh of the residuum.

[2] 2. The next question arises upon the eighth item, which is as follows: "I desire and request of my executors and executrix named in the first item of this will to keep

all the property mentioned in item 6th undivided until the youngest one of the issue of my sons and daughters mentioned in said item 6 shall become of age." What does this mean, and what effect has it on the rights of the plaintiffs? As the sixth item created in each of the testator's children a life estate, with contingent remainder over to their surviving lawful issue, and the eighth item requested that the property be kept undivided until the youngest one of the issue of the sons and daughters should become of age, unless the testator used the words "youngest of the issue of my sons and daughters" in this item in a different sense from that in which the word "issue" was used in the sixth item, the result would be this: The testator created a life estate for each of his children, with contingent remainder over to their children, but provided that the executors should keep the estate undivided until the youngest of the contingent remaindermen should become of age. He made no express provision for paying the income to the life tenants or for allowing any use by or benefit to them. As in law possibility of issue is not declared to be at an end until death, and therefore the youngest issue of a child might be born at any time before the death of the last life tenant, or might then be in ventre sa mere, this provision would seem to create life estates, and then declared that no life tenant should have his share until after his death. In using the words "the youngest of the issue of my sons and daughters," the testator could hardly have meant the youngest child of a son or daughter living at the execution of the will or at the death of the testator. None of the three daughters were ever married or had children, and one of the sons was unmarried. The context shows that the issue mentioned in that clause referred to the same persons who were described by the word "issue" in creating the contingent remainders. As to the remaindermen, it sought to hold back a division of the estate until the youngest possible child should be born and become of age. In the meantime the contingent remaindermen would become vested remaindermen as to their shares, and in the usual order of nature some of them would probably grow old and die, without ever receiving their fee-simple vested interests. Even if the youngest of the issue of the testator's sons and daughters who was to become of age before division referred to the youngest which might be in life when the testator died, one grandchild was then less than 2 years old; and possession would be postponed, as to the plaintiffs, for some 13 years after their interest finally vested and years after most of them were of age.

Could the testator legally direct his executors to withhold the possession and enjoyment of the land, as provided in the eighth item? A testator may make such a provision that no estate vests except upon the

happening of a certain event. If the contingency is a condition precedent to the vesting of the title or interest, such title or interest of course does not vest until the contingency happens, if the provision does not offend the rule against perpetuities or some other rule of law. But if a fee-simple estate in realty vests, can a testator baldly provide for withholding possession and use from the holder of the estate, unless by interposing a precedent use, or valid trust, or clearly providing for an intestacy as to rents or profits during an intervening time? Some of the text-writers and decisions have stated broadly that a testator may postpone the time for the payment of a legacy or the distribution of his estate. But an examination of the decisions will show that most of them, especially where realty was involved, were in cases where a valid trust or use was interposed. Typical cases of this kind are where a testator provides that his wife shall have the use of land as a home during her widowhood, or until the youngest child shall become of age, or, where the land is directed to be held in trust for the education and maintenance of children, till the youngest becomes of age, or worked in a certain manner by executors or by the wife and certain children for support for a certain time, and then divided as directed. *Sheftall v. Roberts*, 30 Ga. 453; *Trammell v. Johnston*, 54 Ga. 340; *Vansant v. Bigham*, 76 Ga. 759. These cases are cited as illustrative, not exhaustive of all possible instances. There are other cases which did not involve the power of a testator to direct his executors to postpone the division of his estate or withhold possession, without more; but in some of them the power appears to have been assumed to exist, and the only question raised was upon the construction of the will as to the intention of the testator. *Freeman v. Flood*, 16 Ga. 528. And some hold flatly that there may be a postponement of enjoyment by a devisee, without more. In the present discussion we omit any reference to charitable trusts, as no such trust is here involved.

Under the English statute of uses, a passive trust in land became executed at once, and the legal title vested in the beneficiary. Under this statute, prior to our first Code (taking effect January 1, 1863), trusts were declared to be executed although the beneficiaries were minors. *Jordan v. Thornton*, 7 Ga. 517 (a bequest of slaves in trust for a married woman for life, and after her death for her children; after the death of the life usee the trust for the children was held to be executed); *Pope v. Tucker*, 23 Ga. 484 (a gift by deed in trust for a minor, with limitation over if the minor should die before reaching the age of 21); *Bowman v. Long*, 26 Ga. 142 (a bequest in trust for a minor); *Walker v. Watson*, 32 Ga. 264 (conveyance of a slave for the use of a minor having a guardian, with limitation over in

the event of the minor dying without child or children; the trust was held to be executed and the guardian entitled to possession); *Milledge v. Bryan*, 49 Ga. 397.

Our first Code contained the following sections, which have been retained in subsequent Codes: "Trusts are either executed or executory. In the former, everything has been done by the trustee required to secure the property, or to render certain the interest of the beneficiaries, and all that remains for him to do is to preserve the property and execute the beneficial purposes. In executory trusts, something remains to be done by the trustee, either to secure the property, to ascertain the objects of the trust, or to distribute according to a specified mode, or some other act, to do which requires him to retain the legal estate." "In an executed trust for the benefit of a person capable of taking and managing property in his own right, the legal title is merged immediately into the equitable interest, and the perfect title vests in the beneficiary according to the terms and limitations of the trust." Code of 1910, §§ 3736, 3737.

In *Askw v. Patterson*, 53 Ga. 209, the language of the Code was treated as so far making a difference that title might be held by a trustee for a minor and would not pass to him until he became of age.

In *Knorr v. Raymond*, 73 Ga. 749, the subject was discussed at some length, and this change was recognized. There a will made in 1859 was under consideration. It devised and bequeathed real and personal property to the husband of a granddaughter of the testator, in trust for her life, with direction to convey as she might in writing during her life or by will direct, and "in further trust, should she die intestate, to hold said property for the benefit of such persons as may, at the time of her said decease, come under the designation of her next of kin by the statute of distributions at that time in force in the state of Georgia." This was construed to mean her children, and it was held that, as each minor became of age, the legal title vested in him. On page 773 the judge delivering the opinion said: "The will of Mrs. Telfair expressly authorizes and charges Captain Wetter, as trustee, 'to hold for the benefit' of the next of kin. She does not direct when he shall cease to hold. He holds till some law of force comes in and puts an end to his holding. Upon majority of a beneficiary, the statute of uses, having kept quiet pending the minority made exceptional by the Code, comes to the front and sternly transmutes the trust estate, as to such beneficiary, into a legal remainder." This was in a case where there was an express testamentary trust.

In the case before us there was no devise to the executors as trustees. They were not trustees otherwise than as executors. It often happens that executors are clothed by the

will with certain powers, and that the will confers upon them a legal title so far as necessary to execute the testator's wishes, where not in conflict with law, but not to render them trustees in any greater sense. *De Vaughn v. McLeroy*, 82 Ga. 687, 696, 10 S. E. 211. This will does not in terms create a trust for accumulation, but only a bald direction to withhold division and delivery of devises; and it is unnecessary to enter into a consideration of the law of England prior to the celebrated case of *Thellusson v. Woodford*, 4 Ves. 329 (and see note in *Summer's Ed.*), or the legislation which followed that decision. Among modern English authorities, see 2 *Williams on Ex'rs* (7th Am. Ed.; 9th Eng. Ed.) 710; *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beavan, 115; *Rocke v. Rocke*, 9 Beavan, 66; *Re Young's Settlement*, 18 Beavan, 199; *In re Trusts of Will of John Colson*, 1 Kay, 133; *Gosling v. Gosling*, 285; *In re Jacob's Will*, 19 Beavan, 402.

In *Gray on Restraints on Alienation*, the author discusses many cases and aptly expresses his conclusions in two paragraphs as follows: "The law has fixed the age of legal responsibility at 21; if that is too young, let it be changed; but the wisdom of allowing individuals to change it at their pleasure is not clear. And, if paternalism is to be introduced into our law, its introduction in this particular class of cases seems to be without the advantages that may exist elsewhere and to retain only its irritating and demoralizing features." Page 120. And again: "The true ground is that on which the whole law of property, legal and equitable, is based; that inalienable rights of property are opposed to the fundamental principles of the common law; that it is against public policy that a man 'should have an estate to live on but not an estate to pay his debts with' (*Tillinghast v. Bradford*, 5 R. I. 205, 212, § 179, ante) and should have the benefits of wealth without the responsibilities. The common law has recognized that certain classes of persons who may be kept in pupillage, viz., infants, lunatics, married women; but it has held that sane grown men must look out for themselves; that it is not the function of the law to join in the futile effort to save the foolish and the vicious from the consequences of their own vice and folly. It is wholesome doctrine, fit to produce a manly race, based on sound morality and wise philosophy." Page 242.

In considering the law of this state in connection with the decisions in other jurisdictions, legislation here or in such jurisdictions must not be overlooked. Among other changes which have been made by legislative acts in this state may be mentioned that the old devise for avoiding the effect of the statute of uses by limiting a trust upon a trust, and then declaring only the first trust to be executed, has been abolished. Civil Code 1910,

§ 3733. Married women now hold property in their own names and are no longer the subjects of trusts by reason of their coverture. *Id.* §§ 2993, 3007, 6456; *Woodward v. Stubbs & Tison*, 102 Ga. 187, 29 S. E. 119. Spendthrift trusts, as they are termed, were not built up by the courts. *Gray v. Obear*, 54 Ga. 231. They are allowed by statute, but only in certain defined cases. (There is no hint of any spendthrift trust here, and the provision contained in the eighth item of the will is inconsistent with such an idea.) Conditions repugnant to an estate granted are void. Section 3718. The rules of construction as to estates in realty and personalty are the same. Section 3556. An executor cannot, by capriciously withholding his consent, destroy a legacy. In equity the legatee may compel him to assent. Section 3896. From these instances a general tendency in this state, both in legislation and construction, in the direction of vesting estates both in interest and possession will appear, though the provision for a so-called spendthrift trust may be a backward step.

In *Smith v. Dunwoody*, 19 Ga. 237, a will created a trust for certain purposes. Some of these purposes would have required the estate to be kept together in perpetuity and were held illegal; others were legal. It was held that the whole did not fail but only the illegal part. *Lumpkin, J.*, said (page 255 of 19 Ga.): "The only result is that the trust term will continue in the executors just so long as it may be necessary to accomplish the valid purposes of the will and not a moment longer." And again (page 257 of 19 Ga.): "It is a familiar principle that the trust term devised to executors cannot continue so as to retain the legal estate in them a moment longer than is necessary to enable them to perform the objects of the trust, so far as the same are valid and can be carried into effect, according to the rules of law."

In some jurisdictions it is held that a condition in a conveyance to several grantees against partition is valid on the ground that partition was not a common-law right but one arising by statute, and that it could be waived by accepting a deed containing such a provision. *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451. On the other hand, where a testatrix gave to each of four children one fifth of her estate and to the children of her married daughter the other fifth, and provided that none of the real estate should be sold or divided until the testator's youngest child should be 21 years old, it was held that the provision against sale or division was void, and it was not necessary to wait to claim shares of the estate until the youngest should reach majority. *Moore v. Schindehette*, 102 Mich. 612, 61 N. W. 62. It may be that a distinction can be drawn between an agreement arising from accepting a deed containing such a provision and a devise of land in which it is sought in effect to create

a passive trust in executors for beneficiaries of full age and with vested estates, and postpone possession, with no valid intervening estate, use, or trust. However that may be, and whether the authorities can be reconciled or not, under the laws of this state such a passive trust cannot be maintained for a person of full age and capable of taking and managing property in his own right, but as to him it becomes executed. The intention of a testator is to be given due weight; but it is not to be regarded as a fetish, superior to the law. Accordingly, under the allegations of the petition, each of the plaintiffs who is of age is entitled to have his or her share of the property devised in the sixth item of the will delivered to him or her, and each of the minor plaintiffs will be entitled to have his or her share delivered to him or her upon becoming of age. See *Freeman v. Phillips*, 113 Ga. 589, 33 S. E. 943; *Crumpler v. Barfield & Wilson Co.*, 114 Ga. 570, 40 S. E. 808. In the opinion in the latter case, the following excerpt from *Pritchard on Wills* is quoted approvingly: "The power of alienation is necessarily incident to every estate in fee, and a condition in a devise of land in fee simple, altogether preventing alienation, is repugnant to the estate and void. No one can create what is in the intendment of the law an estate in fee simple and at the same time deprive the owner of those rights and privileges which the law annexes to it." *Parks v. Wilkinson*, 134 Ga. 14, 18, 67 S. E. 401, 137 Am. St. Rep. 209; *Lewis v. Moore*, 24 Ontario App. 393; *Mims v. Machlin*, 53 S. C. 6, 30 S. E. 585; *Fowlkes v. Wagoner* (Tenn. Ch. App.) 46 S. W. 586; *Moore v. Schindehette*, 102 Mich. 612, 61 N. W. 62, *supra*; *Thompson v. Sanders*, 118 Ga. 923, 45 S. E. 715.

One ground of the demurrer set up that there cannot be a partial partition. Strictly speaking, what certain of the plaintiffs are entitled to is to have their shares of property devised in the sixth item delivered to them. It is not an ordinary case of partition among cotenants. But even there, in some cases, one may have an allotment set apart to him and leave the remainder to be held in common. But, whether it be called partition or division, the right of the plaintiffs who are of age and sui juris and have vested indefeasible interests as to their shares in one-seventh of the estate cannot be defeated because there are others who are not in that condition as to their separate interests, in the absence of an intervening use, trust, or partial intestacy as to a term; nor does the possibility of some child of the testator dying without issue furnish ground for withholding the estate now vested.

[3] 3. It was contended that the eighth item of the will was violative of the rule against perpetuities and void in toto. We are not, however, prepared to so hold. That rule deals rather with the vesting of an estate

than the postponement of possession, though it may sometimes have been applied to delaying possession. Prof. Gray, in discussing restraints or alienation by postponing possession of a person absolutely entitled to property, says: "If such a direction to pay or convey to a legatee at a period beyond the limit of the rule against perpetuities was, apart from the rule, valid, it would be bad as violating the rule, and the property could never be paid over or conveyed; but as it is invalid, apart from the rule, the objection of remoteness does not apply to it." Gray, *Rule against Perpetuities*, § 121. In this state effect is given to those limitations which are not too remote. Civil Code 1910, § 3678. As we have seen, there is no trust expressly for accumulation but only an expression of a desire or request to the executors to keep the property devised in the sixth item undivided until the time specified. It is therefore unnecessary to discuss the validity of trusts for accumulation for persons sui juris or the extent to which they may be carried.

[4] 4. As to the plaintiffs who are of age and sui juris, the action is not premature. It is not a joint suit in ejectment, and the rule that all must recover or none has no application. A partition so as to give all of the remaindermen, whether vested or contingent, allotments cannot now be had; nor can the plaintiffs who are minors now recover. But the plaintiffs who are of age and sui juris and have vested indefeasible estates are entitled, under the allegations of the petition, to their shares of the estate devised under item 6.

The allegation that the plaintiffs are tenants in common with the executors and entitled to partition on that basis should have been stricken; but it did not require the dismissal of the entire case. The allegations as to the hostile attitude of the executors and the inability of the plaintiffs to ascertain what constituted the residuum were sufficient to withstand the demurrer. There was no merit in the ground as to not specifying the interest of each legatee. Under the allegations, we think that all of the parties in interest should have been made parties to the case.

[5] 5. Inasmuch as the court sustained the demurrer on all of the grounds, we think he erred as to the real substance of the case; and we reverse the judgment and direct that the allegations as to the plaintiffs and the executors being tenants in common be stricken from the petition, and that the court allow a reasonable opportunity for the plaintiffs to make necessary parties, as herein indicated, before dismissing the action for want thereof.

Judgment reversed, with direction. All the Justices concur, except ATKINSON, J., dissenting.

HARDWICK v. CITY OF DALTON.

(Supreme Court of Georgia. Sept. 29, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 544*)—STREET IMPROVEMENTS — ASSESSMENT — COLLECTION—AFFIDAVIT OF ILLEGALITY.

Where an affidavit of illegality is filed, by an owner of property abutting on a street, to an execution issued by the city council of Dalton according to statute for the grading, paving, and improvement of certain streets within that city, which by necessary implication admits that some amount is due on the execution, which is not paid to the levying officer as required by the act of 1911 (Acts 1911, p. 1097 et seq.), such affidavit is subject to general demurrer.

(a) An affidavit of illegality, which alleges that "the amount of the execution is excessive," admits by necessary implication that some amount not excessive, included therein, is due.

(b) In such a case, before an affidavit of illegality will be received, the amount admitted to be due must be paid to the levying officer.

(c) An allegation in an affidavit of illegality that there has been "included" in the amount for which the execution has issued certain sums alleged to be illegal necessarily implies that some amount included which is not illegal is due; and accordingly such affidavit will not be received until the amount admitted to be due is paid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1256-1264; Dec. Dig. § 544.*]

(Additional Syllabus by Editorial Staff.)

2. MUNICIPAL CORPORATIONS (§ 544*)—STREET IMPROVEMENTS—NECESSITY.

An affidavit of illegality in a proceeding to collect a street improvement assessment, alleging that plaintiff's property had been already provided with proper curbing and that no assessment could therefore be levied against him for recurbng the street, was unavailable, since the necessity of an improvement is within the discretion of the municipal authorities, and the exercise thereof will not be disturbed, unless abused.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1256-1264; Dec. Dig. § 544.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by the City of Dalton against F. T. Hardwick. Judgment for plaintiff, and defendant brings error. Affirmed.

F. K. McCutchen, C. D. McCutchen, Julian McCamy, and Sam. P. Maddox, all of Dalton, for plaintiff in error. W. C. Martin, M. C. Tarver, and W. E. Mann, all of Dalton, for defendant in error.

HILL, J. The act of the Legislature of 1910 (Acts 1910, p. 576 et seq.) authorized the city of Dalton to have certain of its streets graded, paved, and otherwise improved, and to assess one-third of the cost of such improvements against each owner of abutting property. The act also provided how the cost of such improvements could be enforced by execution. By an act of the Legislature approved July 19, 1911 (Acts 1911, p. 1097 et seq.), the right to file an affidavit of illegality

to such executions issued under the act of 1910 was provided for. During the latter part of the year 1910, and the early part of the year 1911, certain streets of the city of Dalton were improved in pursuance of the act of 1910; and assessment rolls were made up by the city council, apportioning the cost of the street work between the property owners. The plaintiff in error, F. T. Hardwick, declined to pay his assessment, and execution was issued against him in conformity to the act of 1910, and was levied by the city marshal on certain lots of land located on one of the streets improved. To this levy the plaintiff filed an affidavit of illegality of the execution. General and special demurrers to the affidavit were filed by the city. The court below sustained the demurrer, and dismissed the affidavit, and the plaintiff excepted.

There are numerous grounds of the demurrer, but we shall consider only the general ground, which we think was sufficient to authorize the court below to sustain it and dismiss the affidavit of illegality. The execution on its face shows that the amount of the plaintiff's assessment for grading, paving, constructing, and otherwise improving Crawford street, on which plaintiff had abutting property, was \$731.04. As to this assessment for the Crawford street improvement there are no allegations in the affidavit of illegality which would invalidate the assessment or the execution. It is alleged in the affidavit that "no proper assessment of the costs of improving Hamilton street (on which plaintiff also has property) has been made by the city council of Dalton," etc., but no such allegation is made with reference to Crawford street. There is a general allegation that the execution is proceeding illegally because "said assessment includes the cost of curbing in front of petitioner's property, when the same was already provided with the same or similar curbing for which a charge is now made." This allegation is broad enough to include "the cost of curbing" Crawford street, but it does not include paving, constructing, and otherwise improving Crawford street, and therefore the necessary implication is that some amount is due for the work done on Crawford street other than curbing. This being true, the requirement prescribed by the act of 1911 would apply. That act provides: "Should any owners of abutting property or public service corporation desire to contest the amount of their assessment or the legality of any proceeding growing out of or connected with the paving, grading, constructing, or otherwise improving of said streets, or any portion thereof, they may do so by filing with the levying officer an affidavit of illegality and stating therein the cause of such illegality, and the amount admitted to be due, which amount so admitted to be due shall be paid to the levying officer before the affidavit shall be received; and the affidavit shall be returned to the superior court of Whitfield

county, there to be tried and the issue determined as in cases of illegality," etc. No amount was paid, or tendered, by the plaintiff in this case as being due.

[2] It is alleged in the affidavit of illegality that the plaintiff's property was already provided with proper curbing, and hence an assessment could not be levied against him for the purpose of recurring the streets on which his property was located. This contention is without merit. In the case of *Bacon v. Mayor, etc., of Savannah*, 105 Ga. 62, 31 S. E. 127, it was held: "Questions touching the necessity for improvements placed upon a street, and the nature and terms of the contract entered into by the city with contractors who undertake the work, are in the sound discretion of the municipal authorities, and their action will not be controlled by the courts, unless such discretion is manifestly abused." And to the same effect see *Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428; *Burckhardt v. Atlanta*, 103 Ga. 302, 30 S. E. 32. There is no allegation in the affidavit of illegality in the present case that the discretion of the mayor and council of the city of Dalton was abused in ordering the improvements made on the streets in question, or in making the assessment against the defendant therefore.

[1] The last ground of the affidavit alleges that "the amount of the execution is excessive." We think the necessary implication from this language is that some amount is due. It is true that in the conclusion of the affidavit it is alleged that "because of the facts herein set out deponent insists that he owes the city nothing." But it will be seen from "the facts" set out in the affidavit of illegality that the only reference to Crawford street is as to the recurring, which does not include the other improvements made on that street. It necessarily follows that something must be due for those improvements, the amount of which not having been paid as required by the act of 1911, or tendered, the illegality is subject to the general demurrer filed against it. The court did not err in sustaining the general demurrer, and, regardless of the grounds of special demurrer, the dismissal of the case was proper.

Judgment affirmed. All the Justices concur.

WALLACE v. CITY OF ATLANTA.

(Supreme Court of Georgia. Oct. 2, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 269*)—POWERS—REPAVING SIDEWALKS.

The city of Atlanta issued against Wallace an execution for the cost of repaving a sidewalk upon which abutted property owned by him. This execution was levied upon his property, and he filed an affidavit of illegality, which, upon the trial, was dismissed on demurrer. Held, the mayor and general council of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the city of Atlanta, have, under its charter, power and authority to order such pavements or sidewalks laid as they deem proper (Code of Atlanta 1910, § 340, p. 359); and the power to pave includes the power to repave when the sidewalk becomes so much worn or defective as to be no longer useful.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 718-724, 733; Dec. Dig. § 269.*]

2. MUNICIPAL CORPORATIONS (§ 292*)—REPAVING SIDEWALKS—PETITION.

The provision in section 346, par. 3, of the Code of the City of Atlanta, touching a petition in writing by the owners of at least one-half of the real estate abutting on the street, providing that such petition shall have the approval of the chief of construction, has no reference, and is not a prerequisite, to the exercise of the power to order a repavement of the sidewalk. See act approved September 3, 1881 (Acts 1880-81, p. 359), being an act to amend the charter of the city of Atlanta.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 768-772; Dec. Dig. § 292.*]

3. MUNICIPAL CORPORATIONS (§ 294*) — REPAVING SIDEWALKS—PUBLICATION OF NOTICE.

Nor do the provisions for the publication of notice, in section 347 of the Code of the City of Atlanta of 1910, having reference to action taken or proposed to be taken by the city authorities in regard to the repavement of the sidewalk; but these are applicable to cases in which it is necessary that the owners of at least one-half the real estate abutting on the street to be paved file a petition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 776-783, 791; Dec. Dig. § 294.*]

4. EXECUTION (§ 167*)—AFFIDAVIT OF ILLI-GALITY—SUFFICIENCY.

The remaining ground of the affidavit of illegality, in which the affiant seeks to show that the action of the city council in ordering the laying of the pavement for which the assessment was made was arbitrary and fraudulent, is not sufficient for that purpose. The statement that "deponent alleges that he is advised and believes, and so charges the fact to be, that the recitals in said ordinance whereunder said assessment is made, to the effect that 'the paving originally laid is worn out to that extent that it is no longer useful as a good pavement,' are false and fraudulent, and were so known to be by the members of the general council introducing said ordinance, and that the mayor and other members of the general council were deceived and misled into adopting said ordinance by the aforesaid false and fraudulent representations of the members so introducing the same," does not amount to a sufficiently direct and affirmative allegation that the council itself took fraudulent action in the matter; and therefore this ground failed to raise an issue which the court was bound to submit to a jury.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 488, 489; Dec. Dig. § 167.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Chas. B. Wallace filed an affidavit of illegality to an execution issued by the City of Atlanta against his property for the cost of repaving a sidewalk. From a judgment dismissing the affidavit, he brings error. Affirmed.

J. D. Kilpatrick and Holbrook & Corbett, all of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

ATLANTA & C. RY. CO. v. CAROLINA PORTLAND CEMENT CO. et al.

(Supreme Court of Georgia. Oct. 2, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 556*)—APPOINTMENT OF RECEIVER—PERSONS ENTITLED TO APPLY.

Three general creditors, holding small claims against an electric interurban railway company, without lien upon the property, or interest therein, or claim thereto, have no right to have a receiver appointed, by alleging insolvency on the part of the company, and inability to complete the building of the road, and to carry out the enterprise for which it was organized. *Dodge v. Pyrolusite Manganese Co.*, 69 Ga. 665; *Scott v. Jones*, 74 Ga. 762 (4); *Guilmartin v. Middle Ga., etc., Ry. Co.*, 101 Ga. 565, 29 S. E. 189; *McKenzie v. Thomas*, 118 Ga. 728 (6), 736, 45 S. E. 610; *Barnesville Mfg. Co. v. Schofield Co.*, 118 Ga. 664, 45 S. E. 455; *Virginia-Carolina Chemical Co. v. Provident, etc., Ins. Co.*, 126 Ga. 50, 54 S. E. 929; *Spence v. Solomons Co.*, 126 Ga. 31, 58 S. E. 463; *Civ. Code* 1910, § 5496.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2219-2226; Dec. Dig. § 556.*]

2. PARTIES (§ 47*)—CORPORATIONS (§ 557*)—RECEIVERS—INTERVENTION—RIGHTS OF INTERVENERS.

Interveners take the case as they find it. *Charleston, etc., Co. v. Pope*, 122 Ga. 577, 50 S. E. 374; *Seaboard Air Line Ry. v. Knickerbocker Trust Co.*, 125 Ga. 463, 54 S. E. 138; *McCaskill v. Bower*, 126 Ga. 341, 343, 54 S. E. 942; *Booth v. State*, 131 Ga. 760 (4), 760, 63 S. E. 502. The filing of an intervention by two attorneys, who claimed that the defendant owed them attorney's fees, which were to be paid from the proceeds of the sale of bonds issued by the company, or from the proceeds of other property, or from other funds, not alleging that there were any such funds arising from the sale of bonds, or showing that they had any interest therein, did not save the petition of the original creditors from being demurrable, and was itself demurrable.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 74; Dec. Dig. § 47;* *Corporations*, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. § 557.*]

3. CORPORATIONS (§ 557*)—RECEIVERS—APPLICATION FOR APPOINTMENT—FILING OF INTERVENTION—EFFECT.

Neither did the filing of an intervention by several individual bondholders, who showed no reason why they had a right to proceed otherwise than through the trustees, to whom mortgages were given to secure the payment of the bonds, suffice to save the original petition from demurrer; and such intervention was itself demurrable.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. § 557.*]

4. CORPORATIONS (§ 557*)—APPOINTMENT OF RECEIVER—DEMURRER—ANSWER.

The trustees of the bondholders were made parties defendant to the petition. They filed an

answer, in which they stated that for want of information they were unable to admit or deny the substantial allegations made by the petition. They alleged, on information and belief, that an execution had been levied on the furniture and other property contained in the office of the company, and it had been closed; that suit had been brought against it by the holder of a note for \$10,000; that in order to acquire a continuous right of way for its railway, in certain instances, condemnation proceedings had been taken and assessment of damages had been made, but that the amounts assessed had not been paid by the company, and title had not been acquired; and that taxes were due and had not been paid. They averred that their only interest was that the property and franchises of the company should be conserved for the benefit of the bondholders, whom they represented. They prayed that strict proof be made of all the allegations of the original petition and intervention, that the court make due investigation of the affirmative allegations made in its answer, and "if, in the judgment of the court it is necessary for the best interests of said bondholders that receiver be appointed," that the court so direct. The mortgage was not set out, nor were there any allegations appropriate to its foreclosure. *Held*, that the filing of this answer furnished no reason against the sustaining of the demurrer filed by the corporation to the original petition and the interventions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. § 557.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Carolina Portland Cement Company and others against the Atlanta & Carolina Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Simmons & Simmons, of Atlanta, for plaintiff in error. Evins & Spence, Slaton & Phillips, E. V. Carter, and Robt. C. & Philip H. Alston, all of Atlanta, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

LOUISVILLE & N. R. CO. v. HENDERSON et al.

(Supreme Court of Georgia. Oct. 2, 1913.)

(Syllabus by the Court.)

NEW TRIAL (§ 68*)—GROUNDS—VERDICT NOT SUPPORTED BY EVIDENCE.

The action was brought by two plaintiffs against a railroad company to recover damages for the burning, by the alleged negligence of the defendant, of certain property which it was claimed belonged jointly to the plaintiffs. The verdict for the plaintiffs, which was for the full amount sued for, was not authorized by the evidence, because joint ownership as to much of the property was not proved.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 135-140; Dec. Dig. § 68.*]

Error from Superior Court, Bartow County; A. W. Flite, Judge.

Suit by John Henderson and another against the Louisville & Nashville Railroad

Company. Judgment for plaintiffs, and defendant brings error. Reversed.

D. W. Blair, of Marietta, and Neel & Neel, of Cartersville, for plaintiff in error. Geo. H. Aubrey and Jno. T. Norris, both of Cartersville, for defendants in error.

FISH, C. J. John Henderson and Frank Henderson brought a joint action against the Louisville & Nashville Railroad Company to recover damages sustained by reason of the burning of a barn belonging to the plaintiffs, and certain live stock and other personalty also owned by them and in the barn at the time it was burned. The petition alleged that the burning of the barn and its contents was caused by the negligence of the defendant company and its agents, in and about the running of its locomotive, by negligently and carelessly throwing out sparks therefrom. The petition was specially demurred to on many grounds, all of which were sustained, except one, which was to the paragraph of the petition which merely sought to set forth a portion of the evidence upon which plaintiffs relied. There was a verdict for the plaintiffs. The defendant moved for a new trial, which was refused, and it excepted. The defendant also excepted to the overruling of the one ground of special demurrer to the petition. This exception is not of sufficient importance to require special notice. The motion for new trial contains many grounds; but, as we are of the opinion that the judgment must be reversed on the general grounds that the verdict was contrary to the evidence and without evidence to support it, we deem it unnecessary to pass on the other grounds of the motion.

As noted above, the petition alleged joint ownership of the barn in the plaintiffs. There was no evidence whatever to sustain this allegation. It is true that the plaintiffs put in evidence two deeds, one of which conveyed a described half acre of land to one of the plaintiffs. The other deed conveyed a described parcel of four acres of land to the other plaintiff. While it could be legitimately inferred from the evidence that these two parcels of land were in the vicinity of the barn which was burned, there was no evidence even tending to show that it was situate on land jointly owned by the plaintiffs, nor, indeed, that it was on land owned by either of them. The verdict was in a round sum, and there was considerable evidence as to the value of the barn. It is apparent that its valuation entered into the amount of damages allowed. Moreover, it appeared from the evidence that much of the personalty was the individual property of one of the plaintiffs, and the evidence as to whether the other plaintiff owned an interest in the other portions of the property burned was quite vague and unsatisfactory.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

There was no evidence authorizing recovery by the plaintiffs for the property burned, and this is the character of verdict rendered in their behalf. Therefore the verdict is authorized by the evidence, and all should have been granted. *E. & Tennille R. Co. v. Holmes*, 11 S. E. 658; *East Tenn., Va. v. Herrman*, 92 Ga. 384 (3), 385, 4; *Comer v. Newman*, 95 Ga. 434, 4. If the ruling made, it is not necessary to decide the other questions presented.

reversed. All the Justices con-

ECHOLS v. GREEN.

Court of Georgia. Oct. 4, 1913.)

Syllabus by the Court.

DEED. TITLE (§ 7*)—CLOUD ON TITLE—

A deed of equity will cause to be delivered a forged deed, which casts a cloud on the title of the true owner. *Smith v. Ga.* 10, 76 S. E. 362.

—For other cases, *Quietting Title*, § 14-33; Dec. Dig. § 7.*]

HUSBAND AND WIFE (§ 185*)—TRANSACTIONS BETWEEN—EFFECT OF SEPARATION.

Division of Civil Code 1910, § 3009, provides, "No contract of sale of a wife's separate estate with her husband or shall be valid, unless the same is authorized by the superior court of the wife's domicile," makes no exception, to sales by the wife of her separate estate to her husband while they are living in separation, as well as while they are living together.

—For other cases, see *Husband and Wife*, § 720; Dec. Dig. § 185.*]

HUSBAND AND WIFE (§§ 185, 201*)—TRANSACTIONS BETWEEN—BY SUPERIOR COURT—STARE DECISIVE OF COURT OF EQUITY—LACHES—DEED.

Under this law, a sale by a married woman and, without being allowed by an order of the superior court of the county of her domicile, is not only voidable, but void. *Hood v. Ga.* 310; *Fulgham v. Pate*, 77 Ga. 310; *Philip v. Kear*, 131 Ga. 688, 63 S. E. 248; *Buchanan v. Ga.* 392, 69 S. E. 543.

decisions have long stood, and a writ of error is denied.

The doctrine of the cases cited is that a wife to her husband, execution of a sale of her separate estate by order of the court, cannot be considered a contract of equity as against the wife, and her husband, long after the deed, and can amount to no more than a cloud upon her title, and may be cancelled in equity when it operates to the wife's prejudice.

A wife, continuing in possession of the property, cannot be chargeable with laches in moving to cancel the deed, though as many as 10 years have elapsed since its execution by her. *Warrus, supra*.

of the character above mentioned

being void, the wife will not be estopped, as against the husband, from setting up that it is void, on account of the circumstances that the deed, which conveys the property to her husband, reserving a life estate to herself, was executed while the husband and wife were living in a state of separation, and that she received a consideration.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 720, 735; Dec. Dig. §§ 185, 201; * Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

4. PLEADING (§ 64*)—MULTIFARIOUSNESS.

A petition in an action in a court of equity to cancel a deed as a cloud upon title, which alleges that the deed is void for separate reasons, namely: (a) That it is a forgery; and (b) that it represents a contract of sale by a wife of her separate estate to her husband without having been allowed by an order of the superior court—will not be dismissed on the ground of multifariousness because of the inconsistency in the grounds relied on for declaring the deed void. See *Civil Code* 1910, §§ 5514, 5521, 5469 (2); *Nail v. Mobley*, 9 Ga. 278; *Armstrong v. Penn.* 105 Ga. 229, 31 S. E. 158; *Cutter v. Iowa Water Co. (C. C.)* 96 Fed. 777.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

5. EQUITY (§ 66*)—HUSBAND AND WIFE (§ 201*)—AVOIDANCE OF CONVEYANCE—MAXIMS—HE WHO SEEKS EQUITY MUST DO EQUITY.

He who would have equity must do equity, and give effect to all equitable rights of the other parties respecting the subject-matter of the suit. *Civil Code* 1910, § 4521; *Bispham's Equity*, § 43, p. 66. Accordingly, a petition to a court of equity to cancel a deed as a cloud upon the title of the grantor, on the basis that it was void as representing a sale by a wife of her separate estate to her husband for a valuable consideration, without an order of the superior court of her domicile, when there was no offer to return the consideration recited and acknowledged in the deed to have been received, is demurrable. *Campbell v. Murray*, 62 Ga. 86; *Beach v. Lattner*, 101 Ga. 357, 28 S. E. 110; *Booth v. Atlanta Clearing House Ass'n*, 132 Ga. 100, 63 S. E. 907. The ruling here made does not conflict with the decisions in the cases of *Shuford v. Alexander*, 74 Ga. 293, *Gibbs v. Land*, 136 Ga. 261, 71 S. E. 136, and *Milner v. Vandivere*, 86 Ga. 546, 12 S. E. 879, where the petitions were seeking a merely legal right and in no sense an equitable relief.

(a) The judge committed error in refusing to dismiss that part of the petition which was attacked by the ground of demurrer dealt with in this note.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 188-190; Dec. Dig. § 66; * *Husband and Wife*, Cent. Dig. § 735; Dec. Dig. § 201.*]

6. APPEAL AND ERROR (§ 882*)—REVIEW—INVITED ERROR.

The plaintiff's petition for cancellation of a deed was based on two grounds: First, that it was a forgery; and, second, that it was made by a wife (the plaintiff's ward) to her husband without an order of court. The defendant demurred to the petition, and in the preceding headnote it has been held that the last ground asserted as a basis for cancellation should have been stricken. The defendant also alleged that he had paid to his wife a consideration, including the surrender of certain claims against her predecessor in title, which had since become barred; and he prayed that he have a money judgment for the amount thereof against the wife, in the event that a cancellation should be obtained. *Held*, that the defendant having suc-

ceeded in striking from the plaintiff's petition that part of it which sought cancellation of the deed on the ground that she made it without an order of the court, leaving the petition solely upon the theory that the plaintiff made no deed to the husband, it furnishes no ground for reversal on behalf of the defendant that the court struck from his answer that part of it which sought to recover a judgment against the plaintiff in case there should be a decree of cancellation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

7. DEMURRER PROPERLY SUSTAINED.

Other grounds of demurrer, both to the petition and answer, were without merit.

Error from Superior Court, Oglethorpe County; D. W. Meadow, Judge.

Suit between J. W. Echols and J. Howell Green, as guardian. Judgment for the latter, and the former brings error. Reversed in part and affirmed in part.

Sibley & McWhorter, of Lexington, and Sam'l H. Sibley, of Union Point, for plaintiff in error. Green, Tilson & McKinney, of Atlanta, and Paul Brown, of Lexington, for defendant in error.

ATKINSON, J. Judgment reversed in part, and affirmed in part. All the Justices concur.

HANCOCK v. ROGERS, Sheriff.

(Supreme Court of Georgia. Oct. 4, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1001*)—SUSPENSION OF SENTENCE—POWER OF CITY COURT.

On February 22, 1913, in the city court of Pulaski county, Emory Hancock entered a plea of guilty to a charge of misdemeanor in an indictment against him for such offense, transferred by the superior court of that county to the city court. The judge of the city court thereupon passed the following order: "Sentence suspended and defendant allowed to go on his own recognizance, provided he move from Pulaski county." On May 27, 1913, Hancock was brought before the city court of Pulaski county upon the charge of gambling, and demanded an indictment by the grand jury, tendering bond for his appearance. While thus before that court the presiding judge sentenced him, on the plea of guilty entered on February 22d, to confinement in the state farm for 12 months. Hancock subsequently sued out a writ of habeas corpus, on the ground that he was illegally restrained of his liberty, because the sentence imposed on him by the city court judge was void, for the reason that the city court lost jurisdiction of the case upon the judge passing the order indefinitely postponing the imposition of the sentence, and because he was sentenced without being called upon in writing to show cause why the sentence should not be imposed. The judge of the superior court, who presided in the habeas corpus proceedings, on June 10, 1913, refused to discharge Hancock, and remanded him to the custody of the sheriff. Hancock excepted to the judgment. Held, that it has been held in a number of cases by this court that a judge of the superior court of this state has no authority to suspend the execu-

tion of a sentence imposed by him in a criminal case, except as incidental to a review of the judgment under which the sentence was imposed. Daniel v. Persons, 137 Ga. 826, 74 S. E. 260, and cases cited; Short v. Dowling, 138 Ga. 834, 76 S. E. 359.

(a) The same is true as to the judge of a city court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.*]

2. CRIMINAL LAW (§ 982*)—IMPOSITION OF PUNISHMENT—POWER TO SUSPEND—CITY COURT.

A trial judge has no more authority to indefinitely suspend the imposition of the punishment prescribed by law upon one who has been found guilty of a crime, or has entered a plea of guilty, than to indefinitely suspend the execution of a sentence after its imposition. Neal v. State, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 176.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3877-3879; Dec. Dig. § 982.*]

3. CRIMINAL LAW (§§ 982, 989*)—SENTENCE—ERRONEOUS SUSPENSION—SUBSEQUENT IMPOSITION.

The city court judge was not without jurisdiction, by reason of the order suspending sentence, to subsequently impose the sentence; nor was it necessary that a rule nisi should have been issued, calling upon the defendant to show cause why the sentence should not have been imposed. See cases above cited; Fuller v. State, 100 Miss. 811, 57 South. 806, 39 L. R. A. (N. S.) 242, and cases there cited; Hoggett v. State, 101 Miss. 269, 57 South. 811; 12 Cyc. 772.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3877-3879, 3897; Dec. Dig. §§ 982, 989.*]

4. DENIAL OF WRIT APPROVED.

Accordingly the judgment rendered by the judge of the superior court on the habeas corpus proceedings is affirmed.

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Application for writ of habeas corpus by Emory Hancock against J. R. Rogers, Sheriff. From a judgment denying the application, Hancock brings error. Affirmed.

M. H. Boyer, of Hawkinsville, for plaintiff in error. Marion Turner and W. L. & Warren Grice, all of Hawkinsville, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

LOUISVILLE & N. R. CO. v. KEMP.

(Supreme Court of Georgia. Oct. 2, 1913.)

(Syllabus by the Court.)

1. COMMERCE (§ 27*)—EMPLOYERS' LIABILITY ACT—EMPLOYEES ENGAGED IN INTERSTATE COMMERCE.

The uncontradicted evidence in the case shows that the plaintiff, at the time he received the injuries complained of, was engaged in interstate commerce; and the charge of the court to the jury upon this question was not error.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

2. MASTER AND SERVANT (§§ 285, 278*)—INJURIES TO SERVANT—BURDEN OF PROOF—EVIDENCE.

There was no evidence in the case to support the allegations of the petition showing negligence upon the part of the defendant railroad company or its employes, and the verdict was unauthorized by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 954-958, 960-969, 971, 972, 977; Dec. Dig. §§ 285, 278.*]

3. MASTER AND SERVANT (§ 291*)—COMMERCE (§ 8*)—INSTRUCTIONS—FEDERAL ACT SUPERSEDING STATE STATUTE.

The court erred in giving in charge to the jury the provisions of the state statute raising a presumption against the railroad company upon proof of injuries by the running of its locomotives or cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.* Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action by James Kemp against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

O. N. Starr, of Calhoun, Tye, Peeples & Jordan, of Atlanta, and D. W. Blair, of Marietta, for plaintiff in error. Geo. F. Gober, of Atlanta, for defendant in error.

BECK, J. This was an action under federal Employers' Liability Act April 22, 1908, 35 Stat. 65, c. 149 (U. S. Comp. St. Supp. 1911, p. 1322), to recover for personal injuries sustained by the plaintiff through the negligence of the defendant and the coemployes of the plaintiff. It was alleged as follows: The defendant, the Louisville & Nashville Railroad Company, a railroad corporation of the state of Tennessee, operates a line of railroad in Georgia, in Tennessee, and in other states. The plaintiff was in the employment of the defendant as a foreman of a section of its railroad, and had charge of a force of section hands and track hands employed by the defendant in and upon that section. His duty required him to inspect and maintain the track and roadway upon said section. On the 22d day of May, 1909, in pursuance of orders received, he started over the section to inspect the track and roadbed, and in carrying out said order he placed a hand car upon the track, and with said hands in his charge thereon proceeded along the track, preceded by a flagman whose duty it was to give warning to approaching trains of the proximity of the hand car and to warn the hand car occupants of approaching trains. When they had proceeded some distance along the track, a freight train, not on schedule time, and running at a high and dangerous rate of speed, approached the hand car, and, without slackening speed, continued to approach, endangering the lives of plaintiff and the hands with him, placing

them in an emergency calling for prompt action. To prevent a collision the plaintiff and his hands removed the car from the track. It was heavy and unwieldy, and required the utmost effort and energy on the part of plaintiff and the hands to remove it. In removing the car the plaintiff strained and exerted himself, and was injured by the negligent handling of the car by the hands under him; they lifted the car too much on one side and pushed it too far towards the side on which plaintiff was, and caused it to turn over, thereby injuring him in a manner specifically described in the petition. Negligence was charged also in that the flagman who preceded the car did not warn the freight train of the proximity of the same, and did not give warning to those on the hand car, that the employes in charge of the freight train ran it at a dangerous rate of speed, to wit, 50 or 60 miles an hour, and that they were negligent in running by and passing the flagman, and in not stopping the train, seeing the proximity of the hand car. The freight train was engaged in interstate commerce, handling freight from points in various states to points in this and other states; and the track upon which plaintiff and the section hands were working was for the passage of interstate trains as well as for intrastate trains.

[1] 1. The evidence sustained the allegations of the petition to the effect that at the time the plaintiff received the injuries complained of he was, with a force of hands in his charge, in pursuance of an order received from the proper authorities of the road, going over the track, making an inspection of the entire roadway of his section, roadbed and waterways, that the freight train, in consequence of the alleged negligent running of which he was injured, was engaged in interstate commerce, and that the railway track over which the freight train was being operated was used in both interstate and intrastate commerce. Consequently, under the ruling in the case of *Pedersen v. Delaware, etc., Railroad Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, the plaintiff was engaged in interstate commerce at the time of receiving the alleged injuries of which he complained.

[2] 2. While, under the provisions of the employers' liability act referred to above, contributory negligence upon the part of an injured employe does not bar a recovery, before the injured employe can establish liability for injuries suffered by him while employed by the carrier it is necessary for him to show by his evidence that the injuries received resulted in whole or in part from the negligence of the defendant carrier, its agents or employes. And after a careful examination of the evidence in this case we are of the opinion that the evidence fails to show negligence chargeable to the defendant car-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

rier or any of its employés or agents. The allegations of negligence are not supported by any evidence introduced on the trial. The plaintiff was the only witness who gave testimony as to the manner in which he was injured. His testimony shows that at the time of receiving the injury he was going over his section of the track upon a hand car, with a force of hands under him. There had been rain the night before, and he was making an inspection of the entire roadway of his section, the roadbed and waterways, for the purpose of making a report as to the condition of the track. He had proceeded about a mile and a half over the road, and on approaching a curve, and being about 150 yards from it, he sent forward a flagman, who, soon after reaching the curve, gave the plaintiff a signal to remove the hand car. There were four employés on the car besides the plaintiff, at the time the signal was received. No train was due under the schedule at that time. The plaintiff testified that the freight train which they met "was running fast, but that was nothing unusual. Freight trains over there have a fast schedule; the road is comparatively straight, and they run fast. I knew they run fast, and learned it the first day I was out on the road. I had been in charge of that section from the 23d of March until the 22d of May. There was nothing unusual for an extra train to be running over there; we expect them at any time; in fact we were on the lookout all the time for freight trains. Passenger trains had a regular schedule, and a lot of freight had a regular schedule; but a great deal of the freight handled on the line was by trains that were run extra, or had no schedule at all, so we had to be on the lookout for those trains all the time. I had to look out for them; they did not look out for me. In fact everything on the road had the right of way over my lever car; and it was having that in mind that caused me to send forward this flagman. I did not know what was around the curve. I did not know what minute one of these great big engines would hop around there, coming steaming around there. I sent the flagman because I knew the engineer wasn't on lookout for me; they don't look out for nothing, horses, men, or nothing; if a rail was out, they might look out for the track. In sending out a flag I was doing what the company required me to do—look out for trains and flag around all curves. As far as I know, Mr. Gravett [the flagman sent ahead] gave me a signal just as soon as he discovered a freight train was coming." The plaintiff further testified that when he received the signal to remove his car from the track, the car being loaded heavily, he jumped off to assist the men in removing the car; that when the gang was small he was expected to take hold and help the men; "it was

part of my duty to do that." The bank was very steep, sleek and rough; and he slipped and fell, and the car came over on him, and he became unconscious, remembering nothing further. When he slipped and fell he was trying to get the car off—"easing down the bank with the car." The car went to the bottom of the ditch. The plaintiff did not remember how far that was from the track. The ditch was something like $3\frac{1}{2}$ feet deep. The train was coming before they took the car off; he saw the smoke of it, could not tell at what rate of speed it was running, but it was running pretty fast.

In all of the plaintiff's testimony there is no evidence to show any negligence whatever upon the part of the employés who were operating the freight train, nor upon the part of the employés who were engaged with him in removing the hand car. There is no suggestion in the evidence that the freight train ran at a too high rate of speed, or that there was not time to remove the car safely from the track, or that any one of the section hands whom the plaintiff was assisting in the removal of the hand car from the track was negligent in any respect whatever. The injuries he received were the result of an accident, pure and simple, in no way brought about by negligence upon the part of others. And the defendant railroad company, as it appears from this evidence, being free from all negligence, was free from liability.

[3] 3. The plaintiff has based his right of action upon the provisions of the federal act referred to above; and the rights of the plaintiff and the liability of the defendant are to be determined by that act, and under the construction of its terms. So far as the subject-matter of this suit is concerned, the act of Congress supersedes the legislation of the state, which would have covered the subject in the absence of federal legislation; and, while the case was tried in the state court, it is to be tried under the provisions of the federal statute. That being true, apart from any consideration as to the correctness of the charge in itself, the court should not have charged the provisions of the state statute, which raises a presumption in certain cases against a railroad company upon proof of injury by the running of its locomotives or cars.

In view of the ruling which we have made in the second division of this opinion, reversing the judgment of the court below upon the ground that the verdict was without evidence to support it, thereby disposing of the case upon its merits, we do not think it necessary to discuss certain portions of the charge which the plaintiff in error contends in its motion for a new trial were erroneous.

Judgment reversed. All the Justices concur.

MOUGHON v. MASTERSON.

Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

DECEDES (§ 427*)—FORECLOSURE—PETITION FOR EFFICIENCY AS AGAINST DEMURRER. A mortgage was given by a man upon certain land belonging to which had been set apart as a homestead under the Constitution of 1868. A proceeding to foreclose it was begun in 1876. The wife interposed pleas, setting up the homestead, and that the mortgage was not subject to it. This plea was dismissed. In 1900 the husband died, and in 1908 the wife died, thus terminating the homestead right. In 1910 a mortgagee filed a petition against the administrator of the husband, alleging that he had sold the land, and that the lien of the mortgage had been transferred to the mortgagee. The mortgagee died, leaving a son and only two heirs; that the plaintiff, administrator, and administrator's sister, died intestate, and her estate without administrator. The plaintiff settled with him in the interest in the estate of the mortgagee, and took an assignment from him of all his right in any claim or debt due the mortgagee's estate; and that the plaintiff was discharged as administrator. He alone had both the legal and equitable title to the mortgage, and prayed a decree settling the amount thereof against the administrator, and for relief. *Held*, that the petition was maintainable on the ground that it was not an administrator of the mortgagee, but that a personal representative of the deceased sister of the plaintiff was a party, or that the husband of the sister should have been joined as a party.

Mortgage was not merely upon the right or "estate," but on the land, and the proceeding to foreclose it was against the land.

—For other cases, see Mortgages, §§ 1269, 1272-1287; Dec. Dig. § 1269.

DECEDES (§ 458*) — FORECLOSURE — CURE BY AMENDMENT.

Demurrers based on the ground that the mortgage or of the record in litigation was attached to the petition insufficiently met by amendment.

—For other cases, see Mortgages, §§ 1339-1342; Dec. Dig. § 458.*]

AD (§ 115*)—MORTGAGE—ACTION FOR LOSS—LIMITATION.

The facts stated in the first headnote. The proceeding was not demurrable on the ground that it was barred by the statute of limitations.

—For other cases, see Homestead, §§ 183, 184, 186-190; Dec. Dig. § 183.

DECEDES AND ADMINISTRATORS (§ 402*)—PROPERTY—PROCEEDS—RIGHT OF SALE.

Such facts the plaintiff could prove that his equitable right to have the proceeds of the sale of the land sold out of the proceeds of the sale. The plaintiff was not entitled to a judgment

or decree in excess of such proceeds, and his claim would be subject to proper defenses.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1608; Dec. Dig. § 402.*]

5. MORTGAGES (§ 417*)—FORECLOSURE—PARTIES.

The other grounds of the demurrer were without merit.

(a) Under the special facts of this case, as alleged by the plaintiff, he could proceed for the purpose of having the mortgage held by him satisfied from the proceeds of the sale of the mortgaged land, which had been sold at administrator's sale by the administrator of the mortgagor, and it was not necessary to have a second administration upon the estate of the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1227-1236; Dec. Dig. § 417.*]

Error from Superior Court, Jones County; Jas. B. Park, Judge.

Action by Wallace Masterson against L. J. Moughon, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

Hardeman, Jones, Park & Johnston, of Macon, for plaintiff in error. Sam'l H. Sibley, of Union Point, and Johnson & Johnson, of Gray, for defendant in error.

LUMPKIN, J. [1] 1. The main facts are stated in the first headnote. Other facts will be stated as necessary. The mortgage given by William S. Moughon and Alice K. Moughon to Clement Masterson in 1875 was upon the land which had been set apart as a homestead, and not merely upon the "homestead estate." The proceeding to foreclose it was also against the land. The grounds of the demurrer in the present case based on the theory that the mortgage and the foreclosure proceeding were confined to something less than the land itself are without merit. The petition alleged that the mortgage was given to Clement Masterson; that he died, leaving a solvent estate and only two heirs, the present plaintiff and his sister; that the plaintiff was appointed administrator, and administered the estate; that his sister died intestate, leaving her husband as her sole heir at law, and the husband took possession of her estate without administration; that plaintiff settled with him in full as to the estate, and took an assignment from him of all interest he might have in any claim or debt due to the mortgagee's estate, including that now involved; and that the plaintiff was discharged as administrator. Under these allegations the petition was not demurrable on the ground that an administrator of the mortgagee was the proper party to bring the action, or that a personal representative of the plaintiff's sister was a necessary party, or that the husband of the sister as an individual should have been joined as a party plaintiff.

[2] 2. The special demurrers based on the ground that certain exhibits should have been attached were met by amendment.

See same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] 3. In 1876 proceedings were begun to foreclose the mortgage on the land. Moughon and his wife filed pleas, setting up, among other things, that the mortgaged property had been set apart as a homestead before the mortgage was given. The plea of the wife expressly negated the fact that the mortgage was given for any of the objects for which the "homestead estate" could be incumbered. The presiding judge struck these pleas, and granted a rule absolute foreclosing the mortgage. Exception was taken, and the case was brought to this court. Here the judgment was reversed. *Moughon v. Masterson*, 59 Ga. 835. Bleckley, J., delivering the opinion, said that, assuming the plea of the wife to be true, the mortgage could not be enforced against the property, while the homestead right was in existence; that it might be that it could be so enforced after the homestead right had terminated, but that, if so, it was because the mortgage bound whatever was beyond the "homestead estate" proper. He then added: "Whether it does so or not need not now be decided. Granting that it does, the choice would lie between rendering a judgment of foreclosure now, with a stay of sale until the homestead right is extinct ([*Colquitt v. Tarver*] 45 Ga. 631), and postponing foreclosure, as well as sale, until after the happening of that contingency. At all events, if the matter of the wife's plea is supported by evidence at the trial, the mortgage cannot be foreclosed against the homestead estate, either now or hereafter. It was error to strike the plea." It will be seen that this decision intimates (what we now hold) that the proceeding was against the land itself in which the homestead had been granted, and that the effort to foreclose was against the property, including what is sometimes spoken of as a homestead estate or right therein, as well as the reversionary interest; these words being used for want of better descriptive terms, though not strictly accurate. The decision held that a plea which sought to prevent a foreclosure so as to interfere with the homestead right, or, as it was called, a foreclosure against the homestead estate, was good, and that a foreclosure could not take place so as to interfere with the homestead right or "estate." What, then, was to be the result of such a plea, if sustained? Judge Bleckley clearly indicated that it might be one of two things, either to allow a foreclosure, with a provision staying the sale until the homestead right should become extinct, or a postponement of the foreclosure, as well as the sale, until after the happening of that contingency. When the case was returned to the court below, the plaintiff acted upon this statement, and dismissed the proceedings, recognizing the existence of the homestead, and awaiting its termination before commencing the foreclosure.

It was contended by counsel for the plaintiff in error that the statement above men-

tioned was obiter dictum, and that the mortgagee was compelled to foreclose his mortgage at least within 20 years from the time when the debt became due, or that the foreclosure would be barred by the statute of limitations, and that this foreclosure must be had, although the homestead right still continued. In other words, the contention was that the mortgagee was compelled to proceed with the foreclosure pending the existence of the homestead, though he could not sell the property until after the termination thereof. Under the decision above cited we do not think that this result follows. A mortgage foreclosure is different from a judgment in an ordinary suit in this: In the latter the lien is created by the judgment; in the former it is created by the contract. Where suit is brought for a breach of contract or for a tort, and judgment is recovered, it creates a lien upon the leviable property of the defendant, and the execution requires the sum to be made of his real or personal estate. It can be prevented from becoming dormant by entries of nulla bona, and proper entries on the docket, and the levying officer may make such entry, notwithstanding the existence of property in which a homestead is taken, because it would not be subject to seizure and sale under the execution. But a judgment of foreclosure of a mortgage is quite different from an ordinary judgment. It is not a general judgment in personam, and binds only the mortgaged property. It is a judgment to enforce a specific lien, created by agreement of the parties. "It is not alone a judgment as to the amount due on the mortgage, but it is also a judgment that the property mortgaged shall be sold to pay the sum adjudged to be due. The statute authorizes, indeed requires, the judgment to go to that extent." *Wallace v. Holly*, 13 Ga. 389, 393 (58 Am. Dec. 518). Of what avail would it be to obtain such a judgment, directing the seizure and sale only of the mortgaged property, when the mandate could not be obeyed during the continuance of the homestead right? The plaintiff could not well have an entry of nulla bona made thereon, because the judgment itself is a command to seize and sell certain property. The mortgagee has as much lien on the property before foreclosure as he has afterward, and requiring the mortgagee to obtain a judgment directing a levy and sale of the specific property, which the law would not permit to be enforced pending the homestead, would seem, during that time, to be a legal demand for a brutum fulmen.

It must be borne in mind that this homestead was granted under the Constitution of 1868, and the mortgage was given upon the land in 1875. Accordingly its validity is to be tested by the provisions of that Constitution, and not by those of the Constitution of 1877. *Huntress v. Anderson*, 110 Ga. 427, 35 S. E. 671, 78 Am. St. Rep. 105; *Waters v. Waters*, 124 Ga. 349, 52 S. E. 425. Under

the ruling in the case above cited in 59 Ga. we are satisfied that the mortgagee was not compelled to proceed with a foreclosure of the mortgage pending the existence of the homestead, on pain of having such foreclosure barred by the statute of limitations, if not commenced within 20 years from the date when the debt fell due. Suit on the note to obtain a judgment in personam may have been barred by the statute of limitations; but a foreclosure of the mortgage was not. It was alleged that the homestead terminated in 1908, and the present proceeding was commenced in 1910.

[4] 4. It was further alleged that Moughon, the owner of the land, died in 1900; that in 1909, after the termination of the homestead by the death of the wife, an administrator was appointed on his estate; and that the land had been sold at administrator's sale, and the lien of the mortgage was thus transferred to the proceeds. The plaintiff sought to have the mortgage paid from such proceeds. Under the allegations we see no legal objection to this. Civil Code 1910, § 4029; Newsome v. Carlton, 59 Ga. 516. Although the mortgage was not foreclosed, the mortgagee could by proper proceedings claim the fund arising from the sale of the property by the administrator. National Bank of Athens v. Exchange Bank of Athens, 110 Ga. 692, 36 S. E. 265. He could not obtain a general judgment *de bonis decedentis*; but he could claim that the fund arising from the property, or so much thereof as might be necessary, should be applied to the payment of the mortgage, subject, of course, to have legitimate defenses raised as to the legality and priority of the mortgage lien, or the amount due thereon.

[5] 5. It was contended that the title to personal property of a decedent vests in his administrator, and not in his heirs; that both of the heirs of Masterson could not have brought an action to foreclose the mortgage; and that the alleged assignment from the husband of the deceased heir to the plaintiff (the other heir) could not confer on the latter any power to bring such a suit. It is true that the title to personalty of an intestate vests in his administrator for the purposes of administration, and he is the proper person to bring a suit upon a chose in action which belonged to the decedent. In some states it has been held that, where there are no debts of the intestate and no administration, the heirs may bring suit upon such a chose in action, and it is held by a number of courts that this can be done at least in equity. In this state it has been held that, although there may be no debts and no administration, an heir at law of an intestate cannot maintain an action for the recovery of personalty which belonged to the decedent, and which during his lifetime was wrongfully converted by another to his own use. *Smith v. Turner*, 112 Ga. 533, 37 S. E.

705. In *Juhan v. Juhan*, 104 Ga. 253, 30 S. E. 779, there was an intimation that perhaps, if there were no debts against an estate, and no necessity appeared for an administration, and all the heirs were *sui juris*, they could, by agreement among themselves, take charge of the estate, and collect and distribute among themselves its assets. But the same justice who made that intimation wrote the opinion in *Smith v. Turner*, *supra*. See, also, *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Murphy v. Pound*, 12 Ga. 278; *Morgan v. Woods*, 69 Ga. 599; *Carr v. Berry*, 116 Ga. 372, 42 S. E. 726; *Allen v. Hurst*, 120 Ga. 763, 765, 48 S. E. 341; *Hill v. Maffett*, 3 Ga. App. 89, 59 S. E. 325. An examination of those decisions will show that they are not unsupported by reason. If the heirs of a decedent should bring suit against one who was his debtor, alleging that there were no debts of the estate and no need for administration, the defendant would frequently have no means of knowing whether there were such debts or not, or by combating such allegations. If the heirs should recover against him, and subsequently it should appear that there were in fact creditors, and an administrator should be appointed and bring suit against the same defendant, the former judgment would be no protection to him so far as the rights of creditors were concerned, while a judgment for or against him in a suit by the legal representative of the estate would be conclusive upon heirs and creditors.

It has further been declared by this court that without some special reason a suit in equity cannot be maintained by a creditor, distributee, or legatee for the recovery of personal property of a decedent from a third person, and that the fact that the decedent had been dead for more than 15 years, and that there had been no administration upon his estate, did not furnish a sufficient ground for equitable interposition. *Mason v. Atlanta Fire Co. No. 1*, 70 Ga. 604, 48 Am. Rep. 585. On the other hand, there are cases in which it has been held that equity would be authorized to grant relief. Without undertaking to give an exhaustive statement of the special circumstances which will authorize such a proceeding, they may be illustrated by cases where there is on the part of the administrator collusion, insolvency, unwillingness to collect the assets, or other like peculiar circumstances. The title to real estate descends to the heirs, and their right to sue in regard to it stands upon a different basis, where there is no administration. It has also been held that, where a conveyance, which included both real estate and personalty, was procured by fraud from one who afterward died, and there was no administration and no need of any, the heirs might bring an equitable action to set it aside; proper indemnifying bond being required as to the personalty, if deemed necessary. *Kent*

v. Davis, 89 Ga. 151, 15 S. E. 457. In Eagan v. Conway, 115 Ga. 130, 41 S. E. 493, in a similar case, it was said that equity, having taken jurisdiction for the purpose of canceling the conveyance as to the realty, would retain it as to the entire controversy. *Belt v. Lazenby*, 126 Ga. 768 (5), 56 S. E. 81. In *Drummond v. Hardaway*, 21 Ga. 433, 27 Ga. 221, 73 Am. Dec. 730, it was broadly stated that the heirs were entitled to recover, there being no debts; but the facts show that fraud and collusion, in which the administrator took part, were alleged, and also that the administrator was beyond the jurisdiction of the court. On the facts there involved, it is reconcilable with other cases.

In the case before us it was alleged, in substance, that the plaintiff was appointed administrator of his father's estate, and fully administered it; that he and his sister were the sole heirs; that she died intestate, leaving no debts and no heir except her husband; that he took charge of her estate without administration (Code 1910, § 3930); that he settled with the plaintiff as to the estate of the plaintiff's intestate, and made an assignment to the plaintiff of all claims or debts due to the mortgagee's estate, including the mortgage, as a portion of plaintiff's share of the estate; and that the plaintiff was thereafter dismissed as administrator in 1894. If these allegations be true, in effect, the administrator fully administered the estate, and delivered to the present plaintiff this claim as a part of his interest in the estate, and the only other person who might have an interest therein relinquished it to him. The administrator did not assign the claim in writing, so as to convey a perfect legal title; but the plaintiff obtained a perfect equitable title. If a new administrator should be appointed under such circumstances, no doubt he could be compelled to complete the plaintiff's title by making a written assignment. We do not think it is necessary to have an administrator appointed in such a case merely in order to make a written assignment or to bring suit for the use of the plaintiff. The facts alleged present such a peculiar case as authorizes the plaintiff to assert his equitable rights in a proper proceeding, and in the present action he alleges that he has both a legal and an equitable title, and prays that it be enforced, and that he be paid from the fund arising from a sale of the land, and for general relief.

There is no allegation as to how much the land brought at the sale by the administrator of the mortgagor; but no point was raised on this by the demurrer.

6. The other grounds of the demurrer are not such as to require a reversal. There was no error in overruling the demurrer.

Judgment affirmed. All the Justices concur.

STEVENS et al. v. STEADMAN et al.
(Supreme Court of Georgia. Oct. 4, 1913.)

(Syllabus by the Court.)

DEATH (§ 47*)—ACTION FOR—PETITION—SUFFICIENCY—CONCLUSION.

The court erred in refusing to sustain a general demurrer to the petition in this case, which was an action brought by a widow against the defendants to recover damages for the tortious homicide of her husband, it being alleged that the defendants, in pursuance of a conspiracy to bring about the death of the plaintiff's husband, had written a letter calling upon the decedent to resign his official position in a corporation of which he was vice president, and advising him not to inquire into the reasons for the demand; that, owing to the nervous condition of the decedent and his impaired mental and physical condition, this letter, which was delivered to and read by him, had the effect of causing him to take a portion of some narcotic or drug which caused his death, and that the defendants intended and knew that the letter should produce this effect and bring about the death of the decedent.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 61; Dec. Dig. § 47.*]

Error from Superior Court, Madison County; D. W. Meadow, Judge.

Action by Mattie Steadman and others against O. A. Stevens and others. Judgment for plaintiffs and defendants bring error. Reversed.

Mrs. Mattie Steadman, for herself and in behalf of her three minor children, brought an action against O. A. Stevens and nine other defendants, for the alleged wrongful homicide of G. M. Steadman. So much of the petition as needs now to be considered was to the following effect: G. M. Steadman, hereinafter referred to as the decedent, was the husband of Mrs. Mattie Steadman, and the father of the three minor children. He and the defendants were stockholders of the Tiller-Glenn Company, a domestic corporation doing an extensive and lucrative business. He was vice president and assistant general manager of the corporation, and owned 10 shares of its capital stock, which, by reason of his efficient management of the affairs of the corporation, had about doubled in value since he became a stockholder. He "was naturally of a very nervous, excitable temperament." About two years prior to the time hereinafter referred to, "he had an attack of fever, which left his kidneys affected, and causing him thereafter to suffer more or less with dyspepsia, and occasional attacks of neuralgia, which tended at times to augment his said nervous disposition, and rendered him more easily influenced and depressed by unjust criticism, or other improper action or conduct of others towards him"; and "each and all of these facts were well known to said defendants." O. A. Stevens, one of the defendants, was book-keeper for the corporation, and had held

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on for many years. He was re-
 od or marriage to all of the other
 He "had a grudge against"
 nt, and, "for the purpose of hu-
 him] and driving him out of said
 nd that he, O. A. Stevens, could
 rid of [decendent] and get him out
 and dispose of him finally, and
 the defendants] might thereafter
 stock of [decendent] at a greatly
 ue after [decendent] was dead and
 posed of, as it was intended he
 thereby, conceived the idea of
 unjust, unfounded, and mysterious
 against [decendent], well knowing
 and probably fatal result that
 would have on and to [decendent],
 is very nervous temperament and
 health." And the other defendants
 well knowing the said facts, con-
 confederated with the said O. A.
 bring about said end. With this
 y, and well knowing the disastrous
 results that would be caused there-
 decendent] on account of his nervous
 nt and state of health, which was
 to them, the said O. A. Stevens
 defendants conspiring and confed-
 ch him prepared and had served
 t] a paper which contained vague
 ous and unfounded charges, and
 that if he did not turn over his
 president without question, and
 position in said company, and
 connection therewith immediately,
 e worse for himself and his fam-
 at they would at once have him
 from said company and driven
 usiness, and thus publicly humili-
 rtify him, said paper being signed
 d all of the defendants, and also
 ed a clause containing an oath to
 hat they would not mention their
 any except the members of said
 oath clause being likewise signed
 all of the defendants."

If the paper was attached to the
 meet a special demurrer, and was
 "To G. M. Steadman, Carlton,
 the undersigned members of the
 Tiller-Glenn Co., respectfully ask
 sign your position immediately up-
 on of this notice. Unless same
 e will at once discontinue your
 y longer. We would ask that you
 into the details for reasons:
 use it will be best for you and
 ; second, because it will be best
 n; third, because we know you
 to force your service on us when
 want it, and are not satisfied with
 t have it. You will be at liberty
 to your stock in said firm or cor-
 to sell, as you desire. We are
 et our friendship and sociality re-
 fore. We do not propose to men-

tion our reason for this to any one except
 the signed members of this notice which ap-
 pears below, unless we are forced to in
 order to protect our business; this we make
 oath to below. This is only a business mat-
 ter with us, and have caused us considerable
 trouble for several months. We will all sell
 out before we will accept your service any
 longer. If you will buy all of us, then we
 will get out. You will exercise good judg-
 ment to resign at once, deliver your keys to
 the president without any questions what-
 ever. We sincerely wish for you all the good
 luck that a young man might have, and that
 your relations towards us and ours towards
 you may be pleasant. We request the secre-
 tary and treasurer to keep copy of this notice
 and to enter same into the minute book of
 said firm. Witness our hands and seals this
 7th day of September, 1911." Signed by
 the defendants. "Now come the above-signed
 members of the firm of Tiller-Glenn Co., who
 on oath say that they will not mention their
 reasons to any one except the members of
 said firm, unless the said G. M. Steadman
 begin saying some unpleasant things about
 said firm, trying to damage said firm in any
 way." Signed, sworn to, and subscribed by
 the defendants.

The paper was delivered to the decendent by
 one of the stockholders on Saturday night,
 September 9, 1911, after he had left the store
 and the business for the week had been clos-
 ed. Decendent, as the defendants knew, had
 a number of business engagements with the
 customers of the corporation on the follow-
 ing Monday. "The time, place, and manner
 of thus imposing on [him] these unjust and
 mysterious charges and threats, and which
 it was stated would not be explained or dis-
 cussed with him, and which he was not to
 attempt to discuss with them, or any of
 them, or to investigate under said mysterious
 and dire threats, was further calculated, as
 was well known to defendants and intended
 by them, to throw [decendent] into a high
 state of nervous excitement, to unbalance him,
 and to cause his reason to become dethroned,
 and in such unbalanced and uncontrolled con-
 dition to take his own life in order to be
 rid of the nameless horrors by which they
 had surrounded him, and from which, it
 would seem to him in his said unbalanced
 condition, which was produced by their ille-
 gal and criminal conduct, there was no other
 escape from." He had ever been an upright
 and honest official of the corporation, and
 had faithfully discharged his duties as such.
 and defendants had no just cause of com-
 plaint against him; and the first intimation
 he had that defendants had anything against
 him or any desire or intent to injure him was
 the delivery to him of the paper containing
 the unfounded and mysterious threats and
 charges against him. He "was greatly mortif-
 fied, and rendered very nervous and ex-

cited," by reading the paper, and "begged and implored the deliverer of said paper to inform him what the said defendants had against him, and with what did they seek to charge him, and why did they threaten publicly to disclose him, as aforesaid, and without any just cause whatever." The bearer of the paper declined to give him any information on the subject, by reason of his promise to the other defendants not to do so. The natural result of said conduct on the part of the defendants, "and as was known and contemplated by the defendants that it would be, owing to his nervous temperament and state of health [decedent] was rendered very nervous and excited, could not sleep, and could not eat, and was in a state of great despondency and despair all day Sunday, owing to said mysterious charges and direful threats." Late Sunday afternoon he found another of the defendants, and endeavored to ascertain from him the same information he had sought from the other defendant, but with like failure to do so. He was thus rendered more nervous and excited and became very despondent. The making of such mysterious charges and threats against him and the refusal of the defendants to inform him of their nature, so that he could explain and refute them, and "owing to his nervous temperament and condition of health, which was well known to him, caused him to become unbalanced, and his reason to be dethroned, and while in such condition to take a large amount of morphine or other narcotic, hoping thereby, in his unbalanced and unreasoning condition, to escape from the horrors of said nameless charges and threats and the public disgrace threatened by them. From which said large dose of narcotic he died on the following Monday morning, his death being due and chargeable to the illegal and criminal conduct of the said defendants, as aforesaid, and the natural and almost inevitable result of the illegal and criminal conduct of said conspirators, and in their contemplation in signing and sending said paper, and in making said charges and threats to him." The plaintiff "charges that the said conduct of said O. A. Stevens and the other defendants who conspired with him, as hereinbefore stated, was a criminal conspiracy, resulting in the death of her husband, as was in contemplation of and intended by the said O. A. Stevens with the other defendants conspired and confederated, as hereinbefore stated, and that each and all of them are liable to her therefore." The defendants demurred to the petition, on the grounds, that it set forth no cause of action, in that the injury complained of was not actionable, that the damages claimed were too remote to be recoverable, and that the charges made were not the proximate cause of the injury complained of. The demurrer was overruled, and the defendants excepted.

Worley & Nall, of Elberton, Paul Brown, of Lexington, J. F. L. Bond, of Danielsville, and Jno. J. & Roy M. Strickland, of Athens, for plaintiffs in error. Jno. E. Gordon and B. T. Moseley, both of Danielsville, and E. K. Lumpkin, Jr., and E. K. Lumpkin, both of Athens, for defendants in error.

BECK, J. (after stating the facts as above). Evidently, from the allegations in the petition in this case, the plaintiff seeks to show a cause of action arising out of the tortious homicide of her husband. We do not think that, when all the allegations are considered, it is made to appear that the defendants committed any tortious act which has any causal relation to the death of the plaintiff's husband. However odious such a conspiracy as that charged upon the part of the defendants may have been, and however reprehensible their conduct, the resulting product of the alleged conspiracy was not a crime under the Code of Georgia. It was a letter which subsequently went into the hands of the plaintiff's husband, and after the reception of it he took an overdose of some narcotic or drug, from the effects of which death ensued. But we do not think that it can be charged, so as to withstand a general demurrer, that the letter which was written to and received by the decedent was the cause of the unfortunate man's act in taking the drug. We say that such a fact cannot be so charged as to withstand a general demurrer. Of course, such a charge can be put into words, and the words can be made a part of the petition, and they may be so formulated as to make a clear, distinct statement alleged to be a fact; the idea at the time of stating it, in the mind of the pleader, may be called a fact, and may be so stated that it could be said of it that it was well pleaded, and therefore that the rule that all facts well pleaded should be taken as true should be applied. But it is not unusual that, when some statement which is insisted upon as a statement of fact is contrary to natural law and universal experience, it is held to be demurrable. For instance, in the case of *Southern Railway Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312, where it was alleged that a child one year eight months and ten days old was capable of rendering services to its parent of the value of \$2 per month, it was held as a matter of law that a child of the tender years alleged was without earning capacity. And so in this case, when it is charged that the letter alleged to have been written by the defendants would, when read by the decedent, naturally result in a certain state of mind upon the part of the decedent, and that this "was known" by the defendants, we are prepared to hold that this was not such a statement of fact as will withstand a demurrer. What is termed fact is, after all, in such cases merely a conclu-

sion of the pleader, though it is set forth as fact and put in the place of a fact among other facts joined together in laying the foundation of the plaintiff's case. While the state of mind produced in the decedent, and as a result of which it is charged that he took the fatal potion, may be to some extent traceable to the reading of the letter, it cannot be said to be the legal and natural result of the act of the defendants. It must be borne in mind that there was nothing said in the letter which could bring the writers of it within the category of those who advise or counsel one to commit a specific act or to take a certain line of conduct looking to the termination of the life of the one counseled, as in those decisions dealing with cases of persons advising, aiding, or abetting another to commit suicide, and holding that the one so advising or abetting may be convicted of murder, whether he be absent or present at the time of the suicide. The writers of the letter now under consideration, which it is charged had such direful consequences, did not advise or counsel the plaintiff's husband to take a drug or narcotic nor did they advise or counsel him to commit suicide. If they had advised him to commit suicide, and he had then taken the drug with suicidal intent, the case of the defendants might have fallen within the class of cases above referred to.

But the plaintiff in this case, in the absence of any word or statement in the letter showing the intent of the writers thereof, charged that they did it with the intent to produce a certain mental effect, and that they knew what effect it would have. It is true that juries are called upon frequently to say what intention existed in the minds of a person in performing certain acts, but that is where the person whose intention was sought had performed some act the natural result of which could be foreseen. Whoever uses a gun and shoots another, inflicting a wound from which death results, is presumed to have intended the death of the one who is shot. But in such a case there is a natural causal connection between the shooting and the death, and the one who does the act is presumed to have intended the natural consequences thereof. But we do not think it can be said that any one could know that the effect of a letter containing a request for the person to whom it was addressed to resign from a certain position, and advising him to make no inquiry as to the reasons for the demand, would be to cause him to adopt any particular line of conduct, whether the person receiving the letter was sane or insane. If the defendants in this case were guilty of the tortious homicide of the decedent, they were guilty of murder, because the homicide was committed with the circumstances all indicating malice aforethought. But does any one believe for an instant that the defendants should be held to be guilty of murder under the stat-

utes of Georgia, under the facts alleged in this petition, as in the case of one who aids and abets and counsels a suicide, where suicide upon the part of the one advised and counseled follows? Suppose that a grand jury should return an indictment charging A. with the offense of murder, for that A. being the son of B. who was a wealthy man, did, for the purpose of causing his father's death, knowing that the latter was of a nervous and excitable temperament, and that he loved his son even in excess of the usual measure of paternal affection, and that it would break his heart should the son commit any act that was dishonorable or which exposed the son to public hatred or contempt, had written a letter to his father threatening at once to begin a career of notorious shamelessness, and, knowing that this letter would cause such a shock to the father as to result in his immediate death, had caused it to be delivered into the hands of his father, with intent that it should cause the father's death, and that the father upon reading it had immediately died of a broken heart, and that all this was done with malice aforethought, contrary to the laws, etc. Would this court hold for an instant, in case the judge of the trial court should overrule a demurrer to such an indictment, that the judgment should be permitted to stand, for that all facts well pleaded are admitted, and that the facts here pleaded show a wrongful and malicious homicide? We think that this question answers itself, and answers it in the negative, and that the supposed case, legally viewed, is a close parallel to the case under consideration. I do not think that it could be successfully charged, so as to uphold an indictment, that A. illegally and wrongfully pursued a course of conduct which was calculated to break the heart of B.; that the breaking of the heart of B. was the known and natural consequence of A.'s conduct; that B.'s heart did break as the result of A.'s conduct; that B. then and there died; and that A. had pursued that course of conduct with malice aforethought, intending to break B.'s heart; and that he was guilty of murder. Mere positiveness of the terms alleging the psychological results which we have set forth above would not prevent the court from holding, upon demurrer, that the results charged could not have been the known and natural results of the acts charged against the accused, although it might be different if it were charged that A. had advised B. to kill himself by shooting himself with a pistol or by taking poison. For there the accused would have been counseling and advising the commission of a physical act which it might be said would naturally and probably have tended to produce certain results. We are of the opinion that, in the present state of our knowledge concerning the laws governing the operation of the mind, it cannot be asserted that any particular state of mind

would naturally result on the part of a person who received a communication from another person, or that the communication would have the effect of causing the person receiving it to perform any certain physical act, in the absence of suggestion, advice, or counsel that he should do that particular act.

Judgment reversed. All the Justices concur, except LUMPKIN, J., disqualified.

FISH, C. J., and HILL, J., concur in the judgment.

CRAVEN v. MARTIN.

(Supreme Court of Georgia. Oct. 2, 1913.)

(Syllabus by the Court.)

JUDGMENT (§ 853*)—DORMANCY—ENTRY OF EXECUTION—SUFFICIENCY.

Upon a judgment rendered on the 12th day of May, 1902, an execution was duly issued on the 28th day of September, 1907. On the back of the *fi. fa.*, after stating the case, there is an itemized statement of the principal, interest, and costs due upon the execution, as well as an entry as follows: "Superior Court, Habersham County, Georgia. Entered on the general execution docket, page 164, this 28 day of September, 1907. J. A. Erwin, Clerk." Following this is an entry of a levy of the execution upon certain described real estate, dated January 4, 1909, and signed by the sheriff; and on the execution docket of the superior court of the same county are entries showing the names of parties, the amounts due on the *fi. fa.*, and under the head, "Date Issued and to Whom Delivered," is the date September 28, 1907. Nothing further appears showing the date of entry of the *fi. fa.* upon the execution docket. *Held*, that the entry set forth above is not, under the ruling in the case of *Oliver v. James*, 131 Ga. 182, 62 S. E. 73, a sufficient compliance with the provisions of sections 4355 and 4357 of the Civil Code of 1910 to prevent the dormancy of the execution after the expiration of the period of seven years from the date of the rendition of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1565-1570; Dec. Dig. § 853.*]

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action between W. J. Craven and W. B. Martin. From the granting of a new trial, Craven brings error. Affirmed.

McMillan & Erwin, of Clarkesville, for plaintiff in error. J. C. Edwards, of Clarkesville, for defendant in error.

BECK, J. In view of the elaborate discussion of the question here involved which is to be found in the cases of *Hollis v. Lamb*, 114 Ga. 740, 40 S. E. 751, and *Oliver v. James*, 131 Ga. 182, 62 S. E. 73, no further discussion is necessary here. It is proper, however, to call attention to the fact that this case falls within that class of cases where the entry on the execution and on the execution docket was relied on, instead of "bona fide attempts to enforce the same against the defendant within the stated period," to prevent dormancy of the *fi. fa.*

Had it appeared from the record, by evidence duly submitted on the trial of the case, that there had been, within the statutory period, bona fide attempts to enforce the *fi. fa.* against the property of the defendant, then a different question would have been made. It is true that there is on the *fi. fa.* itself an entry of a levy and of written notice given to the defendant of the levy. But this, after all, is a mere entry; and such entries, without some further showing as to the actual seizure of the property, or of a bona fide public effort on the part of the plaintiff in *fi. fa.* to enforce his execution in the courts at such times and periods that seven years will not elapse between such attempts, or between such attempts and a proper entry, will not suffice to keep the execution alive. There is nothing in the record to show, beyond the entry itself, that the notice was given to the defendant, or that a claim was filed by the defendant within seven years. The claim filed in this case was not in the record as originally transmitted to this court from the superior court; but under the authority given in Civil Code, § 6149 (4), this court directed the clerk of the superior court of Habersham county to certify and transmit the claim filed in the case, and in compliance with the order the claim was duly certified and transmitted. Upon examination of the same it appears that the claim was not filed until December, 1910. Consequently there is no sufficient evidence of any bona fide attempt to enforce the judgment against the defendant within the statutory period, and the court did not err in holding that the *fi. fa.* was dormant. And, so holding, a new trial was properly granted.

Judgment affirmed. All the Justices concur.

LUMPKIN, J. (concurring specially). The decision in *Oliver v. James*, 131 Ga. 182, 62 S. E. 73, was rendered by the entire bench, and is binding as to the exact points there determined. I am not, however, prepared to abandon what was said in the dissenting opinion in *Columbus Fertilizer Co. v. Hanks*, 119 Ga. 955, 47 S. E. 222, cited in *Rountree v. Jones*, 124 Ga. 395, 52 S. E. 325.

COFFEY v. COBB.

(Supreme Court of Georgia. Oct. 2, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

The plaintiff rested her prayer for a decree of specific performance upon the contentions that there had been a parol gift of the land, possession under the gift, and substantial improvements made by her, and that there was an agreement which amounted to a contract of sale and purchase, and that she had entered into possession under this contract

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and made valuable improvements. There was no evidence to support the theory that there was a parol gift of the land, possession taken, and substantial improvements made in pursuance thereof, and the court in the charge to the jury should have distinctly confined them, in determining whether or not the plaintiff was entitled to a decree of specific performance, to the allegations of a contract of sale and purchase, and to the evidence upon that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

2. APPEAL AND ERROR (§ 843*) — REVIEW — MATTERS CONSIDERED.

The court's statement of the contentions of the parties was not entirely accurate; but it is not decided whether this inaccuracy will be sufficient ground for a new trial, as the judgment refusing a new trial is reversed upon another point.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

3. SPECIFIC PERFORMANCE (§ 121*) — CERTAINTY OF PAROL CONTRACT—EVIDENCE.

To entitle the plaintiff to a decree for specific performance of a parol contract for the sale of land, the contract must first be established to a reasonable certainty, and the consideration claimed to have been paid or rendered therefor must be clearly and satisfactorily proved to have been paid or rendered in performance of that contract. Or, if the plaintiff seeking the decree relies upon possession with valuable improvements, it must be established, by evidence of the character just described, to have been made with reference to the contract. In the present case the evidence fails to show that the payments alleged to have been made were actually made with reference to the contract, and fails also to show the making of valuable improvements with reference to the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by Mrs. R. N. Cobb against W. R. Coffey. Judgment for plaintiff, and defendant brings error. Reversed.

R. N. Steed, of Spring Place, Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. C. N. King, of Spring Place, and W. E. Mann and W. C. Martin, both of Dalton, for defendant in error.

BECK, J. The plaintiff brought her petition for a decree of specific performance, making in substance the following allegations: The defendant, who is the father of petitioner, decided about four years prior to the bringing of this suit to make a division of his lands in Murray county among his six children, and executed deeds to two of them for parts of the land, and turned over the remainder, consisting of 172 acres, to petitioner and her other three brothers, without executing deeds, and without specifying as to the interest of each; but he did point out to each of the four where he thought their respective interests would be. In 1910 he went over said land with the four children, and laid off the interest of each, making

lines and setting up stakes showing how each interest was bounded, allotting 43 acres to each. Relying in good faith upon the gift to her by her father, she went into possession of the land, built a dwelling house thereon, and made valuable improvements, and is still in possession of the land. She further alleged that in the fall of 1910 "the said father pointed out said interest of each of said children in said land, and then agreed with the children that each should pay to the said father during his lifetime the sum of \$50 per year; he valuing the interest of each child at the sum of \$625. Petitioner claims that by reason of said gift, and her entering into possession of the land in good faith, and making valuable improvements thereon, she is entitled to have a deed to the 43 acres set apart to her, charging that her father, the defendant, is now undertaking to repudiate the gift and agreement. The defendant denied the making of the parol contract as alleged, and denied that the plaintiff had made any such valuable improvements, or had made payments for the land under any contract which would entitle her to the decree sought. On the trial the jury returned a verdict for the plaintiff. The defendant made a motion for a new trial, which was overruled.

[1] 1. While the plaintiff, in more than one place in her petition, refers to the agreement as to the land involved in this controversy as a gift, other allegations show that the agreement really was a contract of purchase and sale. The allegations are extremely vague and indefinite, and, while there are, in the first part of the petition, allegations that the father made a gift to the plaintiff of the land which the petitioner seeks to compel him to convey, these allegations relate to an agreement, or, rather, to statements made by the father before there was any division of the land or attempt to definitely fix the boundaries of the land which was the subject of the agreement. The allegation that "some four years ago plaintiff's father decided to make a division of his lands in Murray county among his children" fixes the time in the year 1907, and in view of such an entire lack of definiteness as to the property which it is alleged the father intended to give to his children, without more, there could, of course, be no decree for specific performance. But in the fall of 1910, as it appears from paragraph 6 of the petition, "the said father pointed out said interest of each of said children in said land, and then agreed with the children that each should pay [him] during his lifetime the sum of \$50 per year for the land." And in the evidence the plaintiff testifies, relatively to this last agreement, that she was to pay the \$50 a year during the lifetime of the father, and the further sum of \$125 if he should demand it. It also appears from her testimony that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

during the years while she, with her husband, was occupying the land before the marking of it out and fixing the exact boundaries she paid the usual rent of one-third and one-fourth of the crops. This evidence, considered in connection with the allegation which we have quoted from paragraph 6, shows that the agreement as to the land constituted a contract for the sale and purchase of the land for a valuable consideration, and the theory which the plaintiff first presents in her petition (that there had been a parol gift to her by her father, and that she was entitled to specific performance of the gratuitous promise, on the ground that she had entered into possession under the promise, and made valuable improvements upon the land) is completely eliminated. It may be that the court adopted this view of the case in the instructions to the jury; but the charge was inaccurate in presenting this view to them, for, in that portion of the charge complained of in the fifth ground of the motion for a new trial, the judge instructed the jury as follows: "I charge you this: If the contentions of the plaintiff are correct, she is entitled to recover; otherwise she would not be entitled to recover. In other words, if the contentions of defendant are correct, the plaintiff cannot recover; but in this connection I charge you that, if you find that there was such a contract as she contends, and she entered upon the land under the contract, then she would be entitled to recover, whether she made any substantial improvements on the land or not. In other words, if she purchased in the way which she contends, and entered upon the land as her own, and cultivated and lived upon it as her property, it would not be necessary, for her to recover, that she should have put any substantial improvements upon the property; but it would be so if it was a gift pure and simple. As I have said, it partakes of the nature of a gift, if as plaintiff contends; but, if the allegations of the plaintiff are true, it is a contract of purchase and not a gift." The language employed in the opening sentence of this excerpt from the charge, that, "if the contentions of the plaintiff are correct, she is entitled to recover," was necessarily confusing, because the court did not attempt to distinguish those contentions in the pleadings which were supported by the evidence from those which were not. As we have shown above, one of the contentions was that there was a parol gift by the father, and, while the court afterwards instructed the jury that, "if the allegations of the plaintiff are true, it is a contract of purchase and not a gift," he had also instructed them that "the contentions of the parties are as set out in the pleadings, the declaration, and answer. * * * You will have them out with you, and can read them and refer to them for that purpose." The court should,

in order to prevent confusion in the minds of the jury, have distinctly informed them that the contention of the plaintiff to the effect that the father had made a parol gift of the land to her should not be considered by them, as it was unsupported by evidence in the case, and should have limited, by proper instructions, the right of the plaintiff to a recovery to those allegations showing a contract of sale and purchase.

[2] 2. In stating the contentions of the plaintiff to the jury the court instructed them as follows: "The plaintiff contends that she is one of six children, and that her father became desirous of dividing his property, his real estate, among his children, and that a contract was entered into between her and the balance of them and their father, with reference to the estate, by which it was agreed that four of them should take certain portions of the estate pointed out at the time (some four or five years ago), and pay a rental or an amount of \$50 a year during the lifetime of this defendant and wife, and pay \$125 additional if it should be demanded or become necessary on account of the needs of the parents, and that at the time she entered on the portion of the land pointed out to her, and built a house and some outbuildings, and took possession of the portion of land indicated which would go to her and her brother living with her; but that the same was not divided at that time, but later on in 1910 there was a division made. She contends that at the time that the contract was first made she entered into possession of the property, and exercised control over it, and used it as her own, and claimed it as her property, and still claims it under the contract." This was not an accurate statement of the contentions of the plaintiff as shown by the evidence, nor as stated in the petition. There was no contention in the petition that at a time "some four or five years ago" a contract was entered into between her and the balance of the children and their father, with reference to the estate, by which it was agreed that four of them should take certain portions of the estate pointed out at that time, and pay a rental or an amount of \$50 a year during the lifetime of the defendant and his wife, and pay \$125 additional if it should be demanded. The contract, according to the contentions of the plaintiff, to pay \$50 a year during the lifetime of the defendant was not made until the year 1910. When the plaintiff first went into possession of the land, three or four years before 1910, according to the allegations of the petition, she went in "relying upon the gift to her of said land by her father," and it was not until the fall of the year 1910 that the father "pointed out the interest of each of the children, and agreed with the children that each was to pay the father during his lifetime the sum of \$50 per year." Up to the year 1911, according to the plaintiff's own testimony, she

paid "rent every year, * * * one-third and a fourth, and the year 1911 I tendered \$50 to Father, and [he] refused to accept it, and said for me to pay the same rent I had been paying, one-third and one-fourth." One of the effects of this erroneous statement of the contentions of the plaintiff by the court was to create confusion in the minds of the jury as to the time when the contract in reference to the land, which we have held to be a contract of sale and purchase, and not a parol gift of the land, was actually made. We have thought it proper to call attention to this inaccuracy in the statement of the contentions of the plaintiff, without deciding whether it would be sufficient ground for a new trial or not, as the judgment refusing a new trial is to be reversed upon another point.

[3] 3. But apart from the inaccuracies in the charge which we have pointed out a new trial is demanded in this case, on the ground that there is not sufficient evidence to support the verdict. This case was tried in 1912, and the witnesses for the plaintiff do not testify as to the year in which the plaintiff and her husband moved upon the land in controversy; but they refer to the time at which they claimed to have gone into possession as "some five or six years ago." This would fix the year in which the plaintiff went upon the land in 1906 or 1907, and for convenience of reference we shall refer to the entry into possession of the land as in 1907. As we have held above, the theory of the plaintiff, that at the time of her going into possession of certain land pointed out to her by her father in 1907 this possession was taken under such an agreement as would make a parol gift of the land, is untenable in view of the evidence, no certain boundaries or any particular lot of land having been fixed, and, moreover, the plaintiff shows by her own evidence that up to the year 1910 she was a mere tenant, paying rent. And we now consider whether or not in the year 1910 such an agreement with reference to the sale and purchase of the land was made by the plaintiff and her father as would give her a right to a decree of specific performance on the ground that an enforceable parol contract for the sale of the land was made and entered into. Section 4634 of the Civil Code provides: "The specific performance of a parol contract as to land will be decreed, if the defendant admits the contract, or if it be so far executed by the party seeking relief, and at the instance or by the inducements of the other party, that if the contract be abandoned he cannot be restored to his former position. Full payment alone, accepted by the vendor, or partial payment accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to be done with reference to the parol contract, will be sufficient part performance to justify a decree." Under the

terms of the contract made in 1910, according to the evidence of the plaintiff, she was to have the land upon the payment of \$50 a year during the lifetime of her father, and the payment of the sum of \$125 in case he demanded payment of the same. Viewing the evidence in the light of the last sentence of the code section we have quoted, the plaintiff submitted testimony to show that she was in possession of land which had belonged to her father, and which she claimed he had agreed to let her have on the terms last stated; there is no such clear and satisfactory evidence of anything done with reference to the parol contract as to show sufficient part performance to justify the decree sought. The plaintiff herself testified: "This is the fifth year that I have lived on the place. I have paid rent every year. I paid my contract \$50. I paid rent until 1911; up to 1911 I paid one-third and a fourth, and the year 1911 I tendered \$50 to Father, and [he] refused to accept it, and said for me to pay the same rent I had been paying, one-third and one-fourth. Last year he never did demand third and fourth until late in the fall after the crops were gathered. I had tendered him my \$50 as I had contracted to do before he levied on my crop. * * * Father told me that day [about November, 1910] they had run the line, and told me it was mine, and I could pay him \$50 a year; he valued my part at \$625. I was not to pay the \$125 unless he come to want, and said that he wanted it, and the \$125 was to be accounted for in the final wind-up after he was dead; that was to be accounted for in settling around with each other after he was dead." The husband of the plaintiff testified, in part: "I paid \$50, 8 per cent. on \$625; he said that \$125 was to be accounted for some time on a general settlement. I suppose if he ever demanded the \$125 he would get it, and if he never did on a general wind-up it would show which one got the \$625 worth. Mr. Coffey said that he didn't know he would ever want the \$125; but if he did we would pay that much. He said that he would have to be in want more than he had ever been if he ever needed it; if he ever needed it, if he ever did want it, we were to pay it. He said that all that he wanted was \$50 a year, and he said, 'That will be plenty to keep me and my wife up.' * * * I never did agree to pay the \$125; if my wife agreed to pay it it is all right. I don't say that she agreed to pay it; he talked with her a heap of times." We do not think that this clearly proves a part payment of the purchase money with reference to the parol contract. The wife and the husband each speak of having paid \$50. This must have referred to the same \$50. The husband's testimony does not show at what time he made the payment, nor does it clearly show that it was done in part performance of the contract for the sale of the land,

because he says he never did agree to pay the \$125 which the vendor was to have in case he demanded it, and in case he did not demand it it was to be paid after his death. The wife, in speaking of the payment of \$50, makes the statement which we have set out above, and it is clear from that statement, considered in connection with all the other testimony, that she merely made a tender of \$50, which the father refused to accept, claiming the rent which had previously been paid him. It follows that, if the father had ever entered into a parol contract for a conveyance of the land, it never became binding upon him because of any payment received by him with reference to that contract. Certainly it cannot be said that it is clearly proved that there was any payment made in pursuance of the terms of the alleged contract made with the father. It seems inferable to us from the whole evidence that the father rejected the tender. Certainly, considering it in the most favorable light for the plaintiff, it leaves it exceedingly doubtful as to whether there was any proof of part compliance with the contract by the making of a payment.

If the plaintiff relies upon possession given under a parol contract and valuable improvements made upon the premises, then there is a clear lack of testimony to support that theory. The evidence of the plaintiff and of all of her witnesses shows that the improvements which were made upon the land to which she claims a right to have a conveyance, and which were not made subsequently to the commencement of this suit, were made before the alleged contract of 1910, and while the plaintiff and her husband were on the land as tenants, paying as rent a third and a fourth of the crops. No improvements at all were shown to have been made upon the land with reference to the contract of sale prior to the bringing of this suit. Having failed to clearly prove the making of payments with reference to the parol contract, and having failed to show improvements made after possession given under the contract, as required by the statute, the plaintiff's case fails for want of proof. *Shropshire v. Brown*, 45 Ga. 175.

Except as indicated in the first two divisions of this opinion, there were no material errors in the charge of the court.

Judgment reversed. All the Justices concur.

BANKS v. BRADWELL.

(Supreme Court of Georgia. Oct. 2, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 576*)—TESTIMONY AT FORMER TRIAL—COMPETENCY—CONVERSATION WITH DECEASED PERSON.

Where the plaintiff is incompetent to testify as to conversations with a person since deceased, under whom the defendant claims, and

another person is introduced who gives testimony as to such conversations, and subsequently the plaintiff dies, leaving this witness as heir at law, who thus becomes interested in the result of the suit, and later the witness also dies, on a subsequent trial (a new trial having been granted, and the case proceeding in the name of the administrator of the plaintiff) the evidence given by the witness at the former trial is admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2401-2405; Dec. Dig. § 576.*]

2. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

It was erroneous to exclude certain evidence referred to in the second division of the opinion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

3. TRIAL (§ 259*)—INSTRUCTIONS—DUTY TO REQUEST.

In the absence of an appropriate written request, there was no error in omitting to charge relatively to certain admissions relied upon by the plaintiff to establish a resulting trust.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 648-650; Dec. Dig. § 259.*]

4. TRUSTS (§ 72*)—IMPLIED WHEN.

Where a trust would be implied from payment of the purchase price of land with money furnished by another person, a trust will be implied if, after receiving the money to buy the land, the recipient uses the money for other purposes, and, substituting his own money for that furnished to him, pays for the land, intending to make the payment for the other person.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 102, 103; Dec. Dig. § 72.*]

5. EVIDENCE (§§ 236, 256*)—ADMISSIONS—PRELIMINARY EVIDENCE—BURDEN OF PROOF.

The request to charge, set out in the fifth division of the opinion, perhaps intimated an opinion; but it embodied a correct principle of law applicable to the case.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 876-882, 1003, 1005; Dec. Dig. §§ 236, 256.*]

6. SUFFICIENCY OF EVIDENCE.

The verdict was not demanded by the evidence. On another trial the defendant will have an opportunity of offering the alleged newly discovered evidence.

Beck, J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. D. Bradwell, administrator, against M. A. Banks. Judgment for plaintiff, and defendant brings error. Reversed.

This case has been before the Supreme Court on two occasions. *Killian v. Banks*, 103 Ga. 245, 29 S. E. 971; *Id.*, 111 Ga. 850, 36 S. E. 635. Banks instituted proceedings to dispossess Killian of certain land, and Killian filed a suit to enjoin those proceedings, to cancel certain deeds under which plaintiff claimed, and to have title decreed to be in defendant. On the first occasion the Supreme Court decided that there was no abuse of discretion upon the part of the trial judge in refusing the injunction, and also that the judge properly rejected an affidavit of the plaintiff in the injunction suit on the ground

that she was incompetent to testify; in the course of the opinion it was said that under the allegations in the petition the defendant was not an innocent purchaser, and, if plaintiff "can, by allunde evidence, establish her claim to the satisfaction of the jury, she will be entitled to recover the whole property." On the second occasion, the plaintiff having recovered, this court refused to interfere with the exercise of the judge's discretion in the first grant of a new trial. Subsequently the plaintiff died, and the case was prosecuted by the administrator on her estate. A second verdict was rendered against the defendant, who made a motion for a new trial on the general grounds, and upon several special grounds which included exceptions to rulings on the admissibility of evidence, to the charge of the court, and to a refusal to charge on written request. The judge overruled the motion, and the movant excepted. The other material facts appear in the opinion.

C. W. Smith, M. A. Hale, and R. B. Blackburn, all of Atlanta, for plaintiff in error. Rosser & Brandon, L. Z. Rosser, Jr., and Stiles Hopkins, all of Atlanta, for defendant in error.

ATKINSON, J. [1] The defendant was the widow of James Banks. She claimed a half interest in the land under a deed executed by James Banks to herself, and the other half interest by inheritance from James Banks, who died after the execution of the deed. The plaintiff was a sister of James Banks, and claimed by virtue of an alleged resulting trust; it being contended that she supplied the consideration to buy the land, and requested James Banks to buy it for her, and that he made the purchase, but took the deed in his own name. James Banks died before the suit was instituted. The plaintiff, being incompetent to testify as to conversations with the deceased James Banks, produced two other witnesses, one a niece, and the other a nephew, to testify as to conversations with James Banks before his decease, wherein he was said to have made statements which, in effect, tended to support the plaintiff's theory of a resulting trust. Subsequently to the trial at which such testimony was given, the plaintiff died, leaving among her heirs at law the two witnesses who had delivered testimony as above indicated, who, by virtue of being heirs of the plaintiffs, became interested in the recovery. Before another trial, however, both of these witnesses died. After their death, an administrator having been appointed to prosecute the case, another trial proceeded, which resulted in the verdict which formed the basis of the motion for new trial, upon the overruling of which the present bill of exceptions was sued out. On the last trial the evidence delivered on the former trial by the

two witnesses just mentioned was admitted over the objection that, if such witnesses were in life, they would be heirs at law of the plaintiff, now deceased, represented by the administrator, and would be incompetent to testify as to conversations with the plaintiff's deceased husband, and, being dead, their evidence taken at the former trial was incompetent. There is no merit in this ground of the motion. Under the Civil Code, § 5773, the testimony of a witness since deceased, given under oath on a former trial upon substantially the same issue and between the same parties, may be proved by any one who heard it, and who professes to remember the substance of the entire testimony as to the particular matter about which he testified. Under this rule the evidence was admissible. It was not thereafter rendered inadmissible under other rules as to the competency of witnesses to testify, as set forth in the Civil Code, §§ 5858 (pars. 1, 4), 5867. In paragraph 1 under section 5858 it is declared: "Where any suit is instituted or defended by a person insane at time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person," etc. In paragraph 4 under section 5858 it is declared: "Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if as a party to the cause he would for any cause be incompetent." These rules are directed against temptation of a witness to perjure himself, and were not intended to affect testimony which might have been delivered on some former trial when the witness was not incompetent, and which would be admissible under other provisions of law. After stating in section 5858 that no person offered as a witness shall be excluded by reason of incapacity for crime or interest, or from being a party, from giving evidence, etc., and that every person shall be competent and compellable to give evidence on behalf of either or any of the parties to the suit, except in certain instances as set forth in six separate subparagraphs, including 1 and 4 already quoted, it is declared in section 5859: "There shall be no other exceptions allowed under the foregoing paragraphs." None of the paragraphs purport to render inadmissible testimony of a witness since deceased, which was delivered on the former trial.

[2] 2. The deed which James Banks took in his own name to the land in dispute was executed in 1870, and recorded in 1872. The deed from James Banks to his wife (the defendant), conveying an undivided half interest in the property, was executed in 1871. In 1889 James Banks erected six houses on the property, and died in 1893 while residing

in one of the houses. Before the houses were constructed Mrs. Killian resided in a small house on the same lot, and continued to reside there until institution of suit, several years after the death of James Banks. On the trial the defendant offered in evidence certain joint promissory notes, executed by herself and James Banks in 1889, payable to a third person, and certain mortgages on the land in dispute to secure the same, which notes and mortgages had been paid off and canceled. In connection with such evidence, the defendant offered to testify that the houses were constructed on the property by James Banks, that the notes and mortgages were given for building the houses, that a large portion of the debt was paid by the defendant after the death of James Banks, and that defendant expended specified sums in building and repairing fences and the like, while the plaintiff was living on the property. The notes and mortgages were rejected, and the defendant was not permitted to testify as just indicated. Error was assigned upon this ruling. James Banks and his wife were residing on the land at the time the notes and mortgages purported to have been signed, and remained in possession until the death of James Banks. After that event Mrs. Banks continued to reside on the land until the suit was instituted. During the entire period Mrs. Killian also resided on the land, but in a separate house, and was cognizant of the improvements placed thereon by James Banks. The plaintiff's case depended upon the establishment of a resulting trust. It was the theory of the plaintiff that the possession of Banks during his lifetime, and that of his wife afterwards, were subordinate to the title of the plaintiff, by reason of the fact that the land had been purchased by James Banks for Mrs. Killian, and paid for with her money under circumstances which raised an implied trust, and that during his lifetime he regarded his possession as that of Mrs. Killian, and after his death Mrs. Banks continued possession merely as his representative. The evidence relied on to establish the resulting trust consisted almost entirely of parol admissions and declarations upon the part of James Banks, to the effect that he bought the land for Mrs. Killian, and paid for it with her money, and that he intended to make a deed to her. Under these circumstances, evidence that, after having conveyed a half interest in the land to his wife, he, with her, executed notes for a large amount, secured by mortgages on the property, and thereby procured money, and with it made valuable improvements on the property, would tend to explain the character of their possession, and to that extent rebut the theory of the plaintiff's case. Such evidence would be in the nature of declarations favorable to themselves; but declarations of that character are admissible for

the purpose of explaining possession. *Hansell v. Bryan*, 19 Ga. 167, cited and applied in *Drawdy v. Hesters*, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190. See, also, *Smith v. Haire*, 58 Ga. 449.

[3] 3. Complaint is also made on the ground that the judge did not caution the jury and charge them fully relative to certain admissions by James Banks, proof of which was relied upon by plaintiff to establish a resulting trust. There was no request for instruction upon this subject, and under the circumstances the omission to charge was not erroneous. *Hawkins v. Kermod*, 85 Ga. 116, 123, 11 S. E. 560.

[4] 4. It was alleged that the plaintiff, through her agent James Banks, sold a lot on Davis street, and out of the proceeds bought the land in dispute, hereinafter referred to as the Bellwood property, to which it was intended that title should be taken in the name of the plaintiff; but without her knowledge or consent it was taken in the name of James Banks. Both transactions involved the extension of credit, and considerable time intervened in each instance before the deeds were executed. The Davis street lot was never conveyed to the plaintiff, though she paid for it, and resided on it, but was conveyed by the person from whom she bought directly to the person to whom she sold; James Banks representing plaintiff in both transactions, and collecting the money for which the property was sold. There was evidence of declarations and admissions by James Banks tending to establish these allegations. There was also evidence to the effect that, when James Banks bought the land in dispute, he paid a part of the price, and gave his notes for a series of deferred payments, which he met as he drew his monthly wages. The witness who testified to this effect also testified that the lot purchased cost less than the price obtained for the lot sold, and that James Banks stated that he used "the balance of the money," and that he bought the land in dispute for plaintiff "with her money." The judge was requested to charge: "If you believe from the evidence that James Banks in his lifetime contracted in his own name for the purchase of the property referred to in the petition as the Bellwood property, and now being sought to be secured by the plaintiff, and at the date of the purchase paid a small cash payment and delivered to the seller, Seage, his promissory notes for the deferred payments, and, after paying the notes so executed by himself, took a deed to himself from Seage, then and in that event no trust could be claimed to exist in so far as this transaction is concerned, and the plaintiff could not recover, and this would be true, nevertheless you believe from the evidence that he, Banks, did hold the property alleged to have been purchased from Hayden in trust in Mrs. Killian, and the alleged admissions made by Banks in reference to how he

held the property purchased by him from Seage would not be considered by you. In other words, I charge you that, if you believe from the evidence that Banks purchased the property from Seage in his own right, and at the time of such purchase none of the money of Mrs. Killian entered into the purchase price of the property sought to be recovered from this defendant, then I charge you that any admissions made by Banks that he held the property so purchased for his sister, Mrs. Killian, would not be binding either upon Banks or any one claiming under him, and it will be your duty to find for the defendant." It was alleged in the motion for new trial that this request should have been given, because it was a statement of the law directly applicable and pertinent to the issues involved.

The charge was not given as requested; but the judge instructed the jury as follows: "If one person holds the title to property, and another person has paid the purchase money, and has therefore a beneficial interest in the property, the law implies a trust, and the person who holds the legal title holds it as trustee for the beneficiary. If you find in this case that James Banks, acting as the agent for Mrs. Killian, bought the Bellwood property, and paid for it with Mrs. Killian's money, and took the title to himself, the plaintiff in this case would have the right to recover. If you find that James Banks did not represent Mrs. Killian, or did not buy the Bellwood property with Mrs. Killian's money, but bought it with his own money, and paid for it with his own money, and took the deed to himself, the plaintiff in this case cannot recover. It is not necessary, gentlemen, that the identical money, the identical bills, or the identical coin which James Banks may have received as the money of Mrs. Killian should have been used in payment for this property; but, it must have been Mrs. Killian's money. To illustrate: Banks received \$600, or other sum, for Mrs. Killian as her money, to be used in the purchase of the Bellwood property, and, to further illustrate, he put it in the banks where he had other money, and drew a check upon the general amount, and that check was paid, that would be paying with Mrs. Killian's money; so, if he had the money, and kept it or mixed it with his own money, and he paid for the Bellwood property with money that was partly his and partly Mrs. Killian's by reason of it having been mixed, why that would be paying with Mrs. Killian's money. Now these are merely intended as illustrations, and not to tell you anything that there is in the evidence in this case with reference to these facts, but simply to illustrate. I have stated to you that it must be the money of Mrs. Killian that paid for this property; that is subject to this qualification: If the money of Banks was substituted for the money of Mrs. Killian, that is to say, if Banks re-

ceived money that belonged to Mrs. Killian, for the purpose of paying for the Bellwood property, but he did not use that money in paying for the Bellwood property, but kept it or used it for other purposes, for his own purposes, and thus intending to substitute his own money for the payment of the Bellwood property, intending thereby to carry out the instructions which he had received from Mrs. Killian, and he substituted his money for the money of Mrs. Killian in paying for the property which it purchased, then the plaintiff would have the right to recover in this case. But if he had no such purpose, if he received the money of Mrs. Killian, and did not use it to pay for this property, but used it or kept it for other purposes, and paid for this property with his own money, intending to take the title to himself, his own purchase, then the plaintiff in this case could not recover, although you may believe that he had the money to pay for it, and ought to have paid for it with that money; but if he did not, and did not intend to substitute his money to make the purchase for her account, then she could not recover in this case."

It thus appears that in substance the court instructed the jury as requested, except that he informed them that it was not essential to the creation of a trust that Banks, in purchasing the property in dispute, must have used the particular money received by him for plaintiff; but, having received money for plaintiff for the purpose of buying the property, it would suffice if he devoted that money to some other use, and substituted therefor his own money, intending at the time of making the substitution to employ it for the benefit of the plaintiff in making the purchase for her. There was also an exception to the latter part of the charge as given, which is quoted above, on the grounds: (a) That there was no evidence to support it; (b) that, even if Banks received the money of the plaintiff to invest in the property, but used it otherwise, and paid for the property in dispute out of his own money, no trust could be implied, but the misuse of the money would be a matter of indebtedness between the plaintiff and Banks; and (c) that no trust could be implied unless the money of plaintiff was actually invested in the property. Construing together the request and the charge as given and the criticism upon each ruling of the court, when boiled down to the last analysis, the point for decision is whether there would be a resulting trust if Banks in making the purchase did not use the identical money which he received for plaintiff to be invested in the property. The judge in effect told the jury that it was not essential to the existence of the trust that the identical money received by James Banks for the plaintiff in the sale of the Davis street lot should have been paid for the Bellwood property, but that it would

suffice if, having received money of the plaintiff and used it himself, he substituted his own money therefor, intending it for the plaintiff, and paid it for the Bellwood property on account of a purchase which he had made for her. Substituting money under these circumstances would amount to repayment by him of money which he had used, and the purchase of property with it for her would be a purchase for the plaintiff with her own money, though not the identical money which in the first instance he had received for her. After such purchase, nothing further appearing, James Banks, taking title in his own name, could not in equity and good conscience hold it against plaintiff, and a trust would be implied. Civil Code, §§ 3739, 3780. See, also, *Wolfe v. Citizens' Bank* (Tenn. Ch.) 42 S. W. 39; *Rarick v. Vandevier*, 11 Colo. App. 116, 52 Pac. 743. There was evidence to authorize the charge which was given. There was no error in refusing to charge as requested, nor any error in the charge of which the defendant can complain.

[5] 5. The judge refused a written request to charge the following: "The plaintiff claims, among other things, that James Banks, the husband of the defendant in this case, after purchasing the property in dispute from Seage, and while in possession of the same, admitted that this property was the right and property of his sister, Mrs. Killian, and that he, Banks, had paid for it with the money of Mrs. Killian. Now, if you believe from the evidence that these admissions are true, and were made at the time at which the said Banks was the owner of the property, then I charge you that such admissions would be binding upon Banks or any one holding under him; but if, on the other hand, you believe from the evidence that Banks in his lifetime disposed of any part of the property in dispute, and that the title to the property or any part of the same had passed out of Banks prior to the time at which he is claimed to have made such admissions, then and in that event the admissions would not be binding, and would not affect the interest in the property that had passed out of Banks prior to the time at which such admissions are said to have been made, and I charge you that, if you find from the evidence that James Banks at any time disposed of the property or any part of it by gift or otherwise, then the burden would be on the plaintiff to establish that the admissions relied upon, if any, were made by Banks before the title to the property had passed out of him." While this request is perhaps subject to criticism, in that the use of the words "owner," and "disposed of part of the property," and "title to the property passed out of him," might tend to intimate that as a matter of fact Banks at one time held the title to the property in his own right, the principle of law

contained in the request was pertinent to the facts of the case, and on another trial should be given in charge; care being taken to couch it in such language as will eliminate any possible expression of opinion by the court as to the ownership of the property. *Howard v. Snelling*, 32 Ga. 195-203; *Shields v. Blanchard*, 74 Ga. 806; *Marion v. Hoyt*, 72 Ga. 117; 16 Cyc. 992; 5 *Michie's Dig.* Ga. R. 320, 334.

[6] 6. The ruling announced in the sixth headnote does not require elaboration.

Judgment reversed. All the Justices concur, except BECK, J., dissenting, and LUMPKIN, J., disqualified.

FISH, C. J., and EVANS, P. J. (specially concurring). We concur in the judgment and also in the opinion except so much as relates to the ruling upon the competency of the evidence of witnesses delivered at a former trial, but who died since that trial; it appearing that, if the witnesses had been living, they would have been disqualified from testifying against the estate of a deceased person on the ground of interest.

BECK, J. (dissenting). I do not think that the exceptions to the rulings made pending the trial nor those complaining of the charge to the jury show any material error.

FORD et al. v. BLACKSHEAR MFG. CO.
(Supreme Court of Georgia. Oct. 4, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 973*)—REFUSAL TO DIRECT VERDICT.

While a trial judge may, within the restrictions prescribed by Civ. Code 1910, § 5331, direct a verdict, this court will in no case reverse a judgment refusing to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3846; Dec. Dig. § 973.*]

2. NEW TRIAL (§ 124*) — MOTION — SUFFICIENCY.

A ground of a motion for a new trial, complaining of the admission in evidence, overstated objections of the movants, of certain documents, which are neither set out literally or in substance in the motion nor attached thereto as exhibits properly identified, but are merely referred to in the motion in general terms as being "fully set out in the brief of evidence accompanying this motion," presents no question for adjudication.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 250-253; Dec. Dig. § 124.*]

3. HUSBAND AND WIFE (§ 129*)—EQUITABLE TITLE IN WIFE—CREDITORS OF HUSBAND—ESTOPPEL.

If a wife, having an equitable title to land to which a deed is taken in the name of her husband, permits him to hold the property and use it in his business and commercial transactions for the purpose of obtaining credit, and a third person, without notice of the equity, extends credit to the husband on the faith that the land is his, the wife, after the creditor has reduced his debt to judgment, will be estopped from asserting title to the land as against the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lien of the judgment, although before rendition of the judgment the husband, in recognition of the equity, may have conveyed the land to her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 283, 468-470; Dec. Dig. § 129.*]

4. BANKRUPTCY (§§ 421, 426*)—APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CASE—DISCHARGE IN BANKRUPTCY—EFFECT.

Where a creditor who holds a promissory note for the purchase price of goods reduces it to judgment, after a subsequent discharge of the debtor in bankruptcy the creditor cannot enforce an execution based on such judgment against property of the debtor acquired after such discharge.

(a) Whether or not such a creditor might have a right to enforce, by appropriate proceedings, a liability for obtaining property by false pretenses or false representations, such is not the nature of the present case. It is an effort to enforce the liability based on contract.

(b) Under one phase of the evidence, the charge was erroneous in that it excluded from consideration the principle above announced.

(c) The error does not affect the whole case; and, in reversing the judgment, direction is given in regard to restricting the issues on another trial.

(d) The evidence authorized the verdict in so far as it found certain portions of the property subject to the plaintiff's *fi. fa.*

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 772-774, 776, 777, 779-781, 783-807; Dec. Dig. §§ 421, 426.* *Appeal and Error*, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Claim case by J. H. Ford and others against the Blackshear Manufacturing Company. Judgment for defendant, and claimants bring error. Reversed, with directions.

On July 4, 1906, the Blackshear Manufacturing Company obtained several personal judgments against J. H. Ford. During the same month separate executions based on the several judgments were issued. On November 19, 1906, J. H. Ford, on his voluntary petition, was adjudicated a bankrupt, and on the 15th day of June, 1909, he obtained in the court of bankruptcy a judgment discharging him from all debts and claims provable under the bankruptcy act against his estate, which existed at the time he was adjudicated a bankrupt. On July 29, 1910, the executions above mentioned were levied on a tract of land comprising a farm, and also on several separate lots in the town of Ty Ty, Ga. Thereafter further proceedings under the executions were arrested by interposition of a claim by J. H. Ford in his own right and as agent for five other persons designated by name and declared to be *sui juris*. The claim affidavit specified that J. H. Ford claimed one undivided sixth interest acquired after his discharge in bankruptcy, and that the other claimants were owners of the remaining five-sixths interest. On the trial of the claim case a verdict was returned finding all of the town lots subject, and one undivided sixth interest in the farm subject, and the five-sixths interests in the farm not sub-

ject. Claimants made a motion for a new trial, and excepted to the judgment denying the motion. The other material facts appear in the opinion.

J. J. Forehand & Son and J. B. Williamson, all of Sylvester, for plaintiffs in error. C. W. Fulwood, of Tifton, and Wilson, Bennett & Lambdin, of Waycross, for defendant in error.

ATKINSON, J. [1] 1. One ground of the motion for a new trial complains that the court refused, on motion, to direct a verdict in favor of the claimants. While a trial judge may, within the restrictions prescribed by Civil Code, § 5331, direct a verdict, this court will in no case reverse a judgment refusing to do so. *Green v. Scurry*, 134 Ga. 482, 68 S. E. 77.

[2] 2. Complaint was made, in another ground, of a ruling of the judge admitting in evidence, over appropriate objection, a designated "commercial report" of the "financial condition of J. H. Ford, the defendant in *fi. fa.*" It was alleged that the report was fully set out in the brief of evidence; but neither in form nor in substance was the document set out in the ground of the motion for new trial, by exhibit or otherwise. Under these circumstances, this ground of the motion was incomplete within itself, and insufficient to present any question for decision. *Roberts v. Devane*, 129 Ga. 604, 59 S. E. 289.

[3] 3. J. H. Ford was the defendant in *fi. fa.*; but no question was raised as to his right to interpose a claim, or as to the remedy in any respect. For title the claimants relied in part on a deed executed by J. H. Ford to Mrs. S. D. Ford, his wife. This was attacked by the plaintiff as fraudulent on the ground that it was a mere conveyance, without consideration, to defeat creditors. To meet this attack the claimants introduced evidence tending to show that the property was purchased with money of the wife, that legal title was taken in the name of the husband by mistake, and that before the plaintiff's judgment was obtained the husband had executed a deed to the wife in recognition of her equitable title. In reply the plaintiff introduced further evidence, and contended that if the money of the wife paid for the land, she permitted her husband to hold the legal title thereto and use it in his business and commercial transactions for the purpose of obtaining credit, that the plaintiff, without notice of any equity of the wife, and on the faith that the property belonged to the husband, extended credit to the latter, thereby creating the debt on which the judgment was based, and that under such circumstances the title of the wife could not be asserted against plaintiff's judgment. Concerning these contentions the judge delivered a concrete charge, instructing the jury.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 79 S.E.—37

in effect, that if they should find that the deed was based on a valuable consideration and not made by the husband to defeat his creditors, or, if he had such intention, the intent was not disclosed to the wife, the verdict should be for the claimant, unless they should further find that, although the wife was the owner of the land, she nevertheless permitted the husband to hold the same in his own name as a basis for credit in the conduct of his business and commercial transactions, and the plaintiff, without notice that she was the owner, extended the husband credit on the faith that his apparent ownership was real, in which latter event the property should be held subject. The claimants excepted to the charge on account of the qualification contained in the last part, urging as ground for exception that, as under the undisputed evidence the husband had executed the deed to the wife before the plaintiff obtained judgment, and assuming the deed to have been executed in good faith, and upon a valuable consideration, as hypothesized by the judge in his charge, the wife thereby acquired legal title, which would prevail in the contest with the judgment creditor.

There was no exception on the ground that the charge was otherwise contrary to the evidence. Under this criticism of the charge, the question is not one of mere comparison of equities between the judgment creditor and the person holding the equitable title. Some of the cases in this state on that subject are: *Reed v. Holbrook*, 123 Ga. 781, 51 S. E. 720; *Roberts v. Devane*, 129 Ga. 604 (5), 605, 59 S. E. 289; *Kennedy v. Lee*, 72 Ga. 39; *Gorman v. Wood*, 68 Ga. 524; *Zimmer v. Dansby*, 56 Ga. 79; *Dill v. Hamilton*, 118 Ga. 209, 44 S. E. 989. But the competition is between a judgment creditor and one claiming legal title to the property, the latter holding under a deed executed by the defendant before judgment was rendered against him, the deed having been executed in recognition of a pre-existing equitable title in the grantee, arising from the fact that the money of the latter paid for the land, while the legal title was taken in the name of the grantor. Cases in which the competition was of this character are: *Hunt v. Doyal*, 128 Ga. 416, 57 S. E. 489; *Bell v. Stewart*, 98 Ga. 669, 27 S. E. 153; *Dodd v. Bond*, 88 Ga. 355, 14 S. E. 581. Under the principle of the cases last cited, the property would not be subject to the judgment if there were nothing more than the extension of credit by the creditor on the faith that the property, which was apparently that of the debtor, really belonged to the wife. But if, among other things, it further appeared, in addition to the extension of credit under the circumstances enumerated, that the conduct of the person holding the equity tended to induce third persons erroneously to believe that the property was in fact the property of the husband, as it appeared to be, and the creditor, upon the

faith of the property being that of the husband, and without notice of the outstanding secret equity, extended credit to the husband, and thereby suffered loss, the holder of the title would be estopped from asserting it against the judgment obtained by the creditor. This is the doctrine of the Civil Code, § 4419, and is recognized in the cases last above cited. See, also, 5 *Bigelow on Estoppel* (6th Ed.) 624. The portion of the charge excepted to did no more than apply the doctrine of equitable estoppel. In substance, it merely informed the jury that a wife could not place her property in the name of her husband to be used by him for the purpose of obtaining credit in his business or commercial transactions, and after he had induced a third person, without notice of her equity, to make advancements to him on the faith that the property was his own, then take back the property from the husband, leaving the debt unsatisfied. As the estoppel is based on the acts and conduct of the wife in aiding her husband to procure credit, it would be operative against the legal as well as the equitable estate. The question as to whether in fact the property was bought with the money of the wife and the title taken in the name of the husband, or whether it was the property of husband and was conveyed to the wife for the purpose of delaying or defrauding creditors, was also involved in the case, and was submitted to the jury by the judge in his charge, and no exception was taken.

[4] 4. The court further instructed the jury: "If you should believe from the evidence that the defendant, J. H. Ford, now one of the claimants, represented the property as belonging to him, and that upon the faith of his apparent ownership the plaintiff in *fa. fa.* extended credit to him, but that his deceased wife's money paid for the property, and that it therefore belonged to her, and that under the circumstances in the case the deceased wife would not be estopped from setting up her title to the property, but that defendant represented said property as belonging to him as a basis of credit from the plaintiff aforesaid, it would then be your duty, should you so believe, to find the interest of the claimant J. H. Ford subject, although the interest of the other claimants would not be subject." The plaintiff obtained several judgments against J. H. Ford, in suits upon promissory notes given to cover the purchase price of certain fertilizers, which had been sold to him by plaintiff on open account. Before judgment the defendant held title to the land in dispute, and made conveyance under circumstances discussed in the third division of this opinion. More than four months after judgment the defendant was adjudicated a bankrupt and discharged in bankruptcy. The plaintiff's judgments were duly scheduled in the petition in bankruptcy. Subsequently to the adjudication in bankruptcy the defendant's wife, to whom he had conveyed the property

before that adjudication, died, leaving J. H. Ford as one among her six heirs at law. It was by virtue of being such heir at law that J. H. Ford claimed one undivided sixth interest in the property in dispute, and upon such basis he insisted that it was acquired after the discharge in bankruptcy, and was never affected by plaintiff's judgments. The evidence did not demand a verdict against the contention that it was after-acquired property; and the plaintiff contended that, conceding it to be such, it was subject to the lien of the judgments, because the debt on which the judgments were based was a liability for obtaining property under false pretenses and false representations, and therefore was included in exception 2, or exception 4, of paragraph 17 (a) of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), as amended by the act of 1903 (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1911, p. 1496]). The charge quoted above seems to have adopted the view of the plaintiff on this subject, and to have affected the verdict, which was in favor of the remaining heirs at law of Mrs. Ford, relatively to the farm tract, but found J. H. Ford's interest subject. The town lots stood on a different footing, as there was no evidence to show an implied trust in Mrs. Ford relatively to them; it only being contended by claimants, according to the testimony of J. H. Ford, that she loaned him the money with which to pay for them, and that he bought the property and took the deeds in his own name. The entire interest in the town lots was found subject. Error was assigned upon the charge above quoted, upon the ground that it excluded from consideration claimants' contention that the sixth interest claimed by J. H. Ford was after-acquired property and unaffected by the plaintiff's judgments as above stated. Error was also assigned upon a refusal of a request to charge, embodying the same question. They need not be treated separately.

The plaintiff's debt was provable in bankruptcy under section 63 (a) of the bankruptcy act of 1898 (30 Stat. 562, 1 Fed. Stat. Ann. Supp. 1912, p. 753), and dischargeable under section 17 (a) of that act as amended by the act of 1903 (32 Stat. 798, 1 Fed. Stat. Ann. Supp. 1912, p. 753; *Tindle v. Birkett*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, and citations), unless it fell within one of the exceptions therein set forth. It was contended by counsel for the plaintiff that it fell within exception 4 or exception 2. The debt had no reference to fraud, etc., while Ford was "acting as an officer or in any fiduciary capacity," and could not be included in exception 4. *Tatum v. Leigh*, 136 Ga. 791 (6), 792, 72 S. E. 236, Ann. Cas. 1912D, 216. Did it fall within exception 2 of section 17 (a) of the act as amended? Before amendment that provision of the act excepted provable debts, except judgments in actions for fraud or

obtaining property by false representations or false pretenses. This contemplated judgments based on no less than actual fraud. *Moody v. Muscogee Mfg. Co.*, 134 Ga. 721 (4), 733, 68 S. E. 604, 20 Ann. Cas. 301; *Forsyth v. Vehmeyer*, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723. In the latter case it was held: "A representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong, and such debt is not discharged by a discharge in bankruptcy." The case before the court was a suit upon a judgment. The state court had ruled that the action was for the tort; and in rendering the decision the Supreme Court declared: "Where the state court has decided that the action was for fraud and deceit, and has held that in order to have maintained such action the fraud must have been proved as laid in the declaration, it must be assumed that the verdict and judgment in that action were obtained only upon proof and a finding by the jury of the fact of the fraud." In *Tindle v. Birkett*, supra, it was held: "Where a claim is founded upon an open account or upon a contract, express or implied, and can be proved under section 63 (a) of the bankruptcy act, if the claimant chooses to waive the tort and take his place with the other creditors, the claim is one provable under the act and barred by the discharge." Since the amendment of 1903 it has been held that: "Proof of a claim in bankruptcy as one upon contract, and participation in the distribution arising from a composition with creditors, is not a bar to an action for deceit in obtaining on credit, by false reports to a commercial agency, the goods, the price of which formed the basis of such claims." *Friend v. Talcott*, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718. These cases, and many others which might be cited, in determining whether a debt falls within the exceptions enumerated in section 17 (a) generally consider whether the action was for the tort or on the contract. On general principles, where transactions partake of the nature both of tort and of contract, the party injured may waive the tort and sue on the contract. In *Tindle v. Birkett*, supra, where the injured person sued on the contract rather than on the tort, it was held that the judgment rendered in such case was not for the fraud, and did not fall within one of the exceptions. The amendment of 1903 was in the interest of creditors; it displaced the words, "judgments in actions for fraud or," and substituted the words, "liabilities for." The exception before amendment discharged the bankrupt from all his provable debts except such as "are judgments in actions for fraud or obtaining property by false representations, or for willful and malicious injuries to the person or prop-

erty of another." After amendment it discharged the bankrupt from all provable debts except such as "are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation." Under the amendment, in order to bring existing debts within the exception which would prevent it from being discharged, it was no longer necessary that it should be a judgment for fraud, but it would fall within the exception if it were a liability for obtaining property under false pretenses and false representations, which in law would amount to actual fraud. The plaintiff's judgment is founded on contract. Where, instead of enforcing the liability based on fraud, the creditor still insists on enforcing a judgment on the contract as to after-acquired property, the debtor's discharge in bankruptcy is effective. The judge committed error in his charge above set forth, in that it excluded from the consideration of the jury that part of the claimant's case referred to in his assignment of error, and also in failing to give appropriate instructions on the subject. The error, however, could not affect the verdict relatively to the town lots; and, in reversing the judgment, direction is given that upon another trial the issues be restricted to the farm property. The evidence authorized the verdict relatively to the other property in dispute.

Judgment reversed, with direction. All the Justices concur.

TEDDER v. STATE. (No. 5,089.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The court committed no error of law, and the evidence authorized the conviction of the accused.

Russell, J., dissenting.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Frances Tedder was convicted of crime, and brings error. Affirmed.

John R. Cooper, of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

RUSSELL, J. The court is unanimous in the opinion that there is no merit in the special grounds of error, nor any in the exceptions to the charge of the court. A majority of the court are of the opinion that the evidence authorized the conviction of the accused. In my opinion, the evidence is not suffi-

cient to point conclusively to the accused as the thief or as a participant in the theft from the prosecutor.

Judgment affirmed.

RUSSELL, J., dissents.

MYRICK v. STATE. (No. 5,074.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—EVIDENCE.

There was sufficient evidence to authorize the verdict, and this court has no power to direct a new trial on the ground that the verdict was against the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 1059*)—APPEAL—EXCEPTIONS—SUFFICIENCY.

A general exception, that an act of the General Assembly "is illegal and void and contains subject-matter not expressed in the caption of said act," is too indefinite to raise a question for decision.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

3. CRIMINAL LAW (§ 1179*)—APPEAL—DISCRETIONARY RULINGS—SENTENCE.

This court has no authority to control the discretion of a judge of the superior court in reference to setting aside on certiorari a sentence within statutory limits imposed by a city court in a criminal case. A complaint that a sentence within legal limits is tyrannical and oppressive is one that can only be addressed to the court that tried the case or to the superior court which reviews the trial on certiorari.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. § 1179.*]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

J. T. Myrick was convicted in a city court of carrying a pistol without a license, and from the superior court's approval of the sentence on certiorari brings error. Affirmed.

J. H. Smith, of Eden, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, for the State.

POTTLE, J. [1-3] It appears from the record and the brief that the plaintiff in error was a white man with a wife and children. He became involved in a difficulty with one of his cousins and drew a pistol on him. The cousin did not institute the prosecution, but was compelled to testify. The accused was convicted of carrying a pistol without a license, but was recommended to clemency by the jury. In spite of this recommendation and the eloquent plea of his counsel, which appears in the record, the court imposed an unconditional sentence of two months in the chain gang. The judge of the superior court approved the sentence on certiorari. It is perhaps true that the sentence was unduly severe, but the judgment imposed was not er-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

roneous, and the authority of this court is limited to the correction of errors of law. There was evidence which authorized a conviction, and no error of law was committed. Judgment affirmed.

BEDDINGFIELD v. STATE. (No. 5,057.)
(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY (§ 91*)—SHOOTING—SUFFICIENCY OF EVIDENCE—NO ERROR.

No error of law was committed, and the evidence authorized the verdict.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 136; Dec. Dig. § 91.*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—FAILURE TO INSTRUCT.

In a prosecution for assault with intent to murder, failure to instruct that accused was not guilty of such offense unless actuated by malice and intent to kill, if error, was harmless where he was convicted only of shooting at another.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

3. CRIMINAL LAW (§ 1208*)—APPEAL—DISCRETION—PUNISHMENT.

The trial court's exercise of discretion in fixing the quantum of punishment to be imposed within the statutory limits cannot be disturbed by the reviewing court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3281–3287, 3289–3295; Dec. Dig. § 1208.*]

4. ASSAULT AND BATTERY (§ 63*)—SHOOTING—DEFENSE.

In a prosecution for shooting at another, it is no defense that accused did not know the identity of the person at whom he shot.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 89; Dec. Dig. § 63.*]

Error from Superior Court, Bibb County;
H. A. Mathews, Judge.

Mallary Beddingfield was convicted of shooting at another, and brings error. Affirmed.

W. D. McNeil and C. A. Glawson, both of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

POTTLE, J. The accused was indicted for the offense of assault with intent to murder and was convicted of shooting at another, with a recommendation to mercy. A sentence of one year in the penitentiary was imposed. His motion for a new trial was overruled, and he excepted.

[1,2] Complaint is made in the motion that the court failed to charge that the accused would not be guilty of assault with intent to murder, unless he was actuated by malice and intended to kill the person shot. Since the accused was not convicted of assault with intent to murder, we need not examine the record to ascertain whether this assignment of error is well founded.

The only other special complaint in the motion for a new trial is that the court ignored the recommendation of the jury and imposed a sentence which was, in view of the evidence, too severe.

[3] It has been many times held both by the Supreme Court and this court that the quantum of punishment to be imposed within the statutory limits is a matter absolutely within the discretion of the trial judge, and that the reviewing court cannot interfere.

Counsel for the accused earnestly argued that the verdict is without evidence to support it. The person shot was the neighbor of the accused and on friendly terms with him. It is apparent, from the testimony, that when the pistol was fired the accused did not know that he was shooting at his neighbor. The theory of the defense was that, hearing a noise in the yard and supposing some one was attempting to steal ducks which belonged to him, the accused got his revolver, came out on the porch, which was 12 or 14 inches above the ground, saw his ducks running about in the yard some 15 or 20 feet away, and fired into the ground. The person shot was in his own lot adjoining that of the accused, had just driven his automobile to his garage, and was in about the center of his lot. There was a fence between the two lots and the moon was shining brightly, so that a person could be recognized at a distance of 100 yards away. The contention of the accused is that he did not shoot at any person, but that one of the bullets in some way was deflected so as to go through a crack in the fence and strike the person who was shot.

[4] It is true, as contended by his counsel, there is no positive evidence that the accused intentionally shot at the person who was struck by the bullet; but the circumstances were such as to authorize a finding by the jury that the accused did shoot at the person who was struck by the bullet, evidently supposing this person was attempting to steal his ducks. The occurrence was extremely unfortunate, and, as stated above, it is apparent that the accused did not intend to shoot his neighbor, but he had no right, under the law, to shoot at anybody simply because he thought an effort was being made to steal his ducks. Juries have a right to deduce reasonable conclusions from proved facts; and when it appeared that on a bright moonlight night a person was shot by the accused at a distance where he could have been easily seen, and from a position from which he could have been hit if shot at, the jury were authorized to reject the theory of accidental shooting set up by the defense, especially when this theory involved, as it did, the unreasonable conclusion that the bullet struck the ground and was then deflected through a crack in the fence. Based upon the presumption of law alone, which is a rule

of evidence, that a man intends the natural consequences of his act, the jury had the right to conclude that the shooting was intentional. Hence it was entirely immaterial whether, at the time the shot was fired, the accused knew the identity of the person at whom he shot.

Judgment affirmed.

BROWN GUANO CO. v. COKER.
(No. 4,731.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

(*Syllabus by the Court.*)

1. EXECUTION (§ 177*)—ACTION ON FORTHCOMING BOND—DEFENSE.

Where an execution against two persons was levied on personal property in the possession of one of them, who thereupon filed an affidavit of illegality, and gave a forthcoming bond, it was a good defense to an action on the bond that the issue made by the affidavit of illegality was adjudicated in favor of the affiant, and that the property in question was the property of that defendant and not of the other defendant in the execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 460-465; Dec. Dig. § 177.*]

2. EXECUTION (§ 222*)—SALE—ADVERTISEMENT.

The advertisement of sale of the property levied on was a substantial compliance with section 6062 of the Civil Code 1910, providing the manner in which sheriff's sales shall be advertised.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 620-633; Dec. Dig. § 222.*]

(*Additional Syllabus by Editorial Staff.*)

3. EXECUTION (§ 177*)—ACTION ON FORTHCOMING BOND—BURDEN OF PROOF.

While, in an action on a forthcoming bond, the title to the property levied on under the execution is not involved, plaintiff has the burden of proving not only a breach of the bond, but that such breach has caused damage to him.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 460-465; Dec. Dig. § 177.*]

Error from City Court of Dawson; M. C. Edwards, Judge.

Action by the Brown Guano Company, for use of A. J. Hill, against Mrs. F. C. Coker. Judgment for defendant, and plaintiff brings error. Reversed.

The Brown Guano Company, for the use of A. J. Hill, foreclosed a crop mortgage against F. C. Coker and Mrs. F. C. Coker. Upon the levy of the *fi. fa.* the defendant Mrs. Coker filed an affidavit of illegality, and gave to the levying officer a forthcoming bond. Suit for a breach of the bond was brought against the principal and the surety. Mrs. Coker answered, denying liability, and by an amendment to her answer alleged that, when the *fi. fa.* was levied upon the property mentioned in the bond, she filed an affidavit of illegality, alleging that she did not owe the debt, and gave the bond sued on, and retained the property, and that the issue upon the affidavit of illegality was found in her favor, and a final

judgment entered accordingly, that the property levied upon was her individual property, and F. C. Coker had no interest in it, and that, being a party to the execution, she could not file a statutory claim, and she prayed that her title to the property be adjudicated in this suit. A general demurrer to the amendment was overruled.

The plaintiff offered in evidence "the official newspaper file of Terrell county, containing the issues of the Dawson News" in which appeared the following advertisement once a week for four weeks preceding the day of sale named therein: "Sheriff's Sale. Georgia, Terrell County. Will be sold on the first Tuesday in June next, at public outcry, at the courthouse in said county, within the legal hours of sale, to the highest bidder for cash, the following described property: 800 bushels of corn, more or less, 500 pounds of fodder, more or less, 120 bushels of cotton seed, more or less, 5,000 pounds of hay, more or less, and 8 bushels of peas. Said property will be sold by sample and delivered where now located on the E. E. Moran estate in the fourth district of Terrell county, Georgia. Said property levied on as the property of F. C. Coker to satisfy a mortgage *fi. fa.* issued from the city court of Dawson, said county, in favor of the Brown Guano Company, for use of A. J. Hill. This April 7, 1912. M. G. Hill, Sheriff." This advertisement was objected to by the defendant on the ground that it was an "invalid and insufficient advertisement." The trial judge sustained the objection, and excluded the advertisement. The plaintiff proved the value of the property levied upon, that it was turned over by the levying officer to Mrs. Coker upon the giving of the forthcoming bond, and that the property was not produced on the sale day. No demand for the property was shown. At the conclusion of the evidence the court awarded a nonsuit. Error is assigned as to each of the rulings stated.

H. A. Wilkinson and M. J. Yeomans, both of Dawson, for plaintiff in error. J. G. Parks and W. H. Gurr, both of Dawson, for defendant in error.

HILL, C. J. (after stating the facts as above). [1, 3] 1. The trial judge did not err in overruling the demurrer to the amendment to the answer. While the general rule is that in suits on forthcoming bonds the title to the property levied upon is not involved, yet it is incumbent upon the plaintiff to prove not only a breach of the bond, but also that the breach has resulted in damage to him. "In order for a levying officer suing for the use of a plaintiff in *fi. fa.* on a forthcoming bond to recover, he must show both breach and damage." Breach of the bond is shown by proof that the property was not delivered at the time and place of sale.

Grace v. Finleyson, 10 Ga. App. 480, 73 S. E. 689. The defendant would have the right to show that the breach of the bond did not result in damage to the plaintiff, for the reason that the property levied upon, and for the forthcoming of which the bond was given, did not belong to the defendant in execution, but did belong to the principal obligor in the bond. In *Williams v. Herrington*, 12 Ga. App. 76, 76 S. E. 757, it was held, with reference to the foreclosure of the lien of a laborer on logs hauled by him for another, that, "where an execution issued upon such a lien foreclosure is levied upon lumber in the possession of a person other than the one for whom the logs were hauled, the giving by such a person of a forthcoming bond to produce the property at the time and place of sale does not estop him, when suit is brought upon the bond, from asserting that at the time the execution was issued and the levy was made he was the owner of the property levied upon." See, also, *Lackey v. Mize*, 75 Ga. 692, and *Jones v. Spillers*, 9 Ga. App. 473, 71 S. E. 777.

[2] 2. The advertisement of the sale of the property levied upon, which was excluded from evidence, was a substantial compliance with the Civil Code (1910), § 6062, which provides the manner in which the sheriff's advertisements shall be made. It does not appear from the record that any specific objection was made to the advertisement; the ground of objection stated is merely that it was "an invalid and insufficient advertisement." Counsel in the argument before us urged the objection that no defendant is named in the advertisement, whereas, the statute provides that the advertisement must make known the plaintiff and the defendant, and that it is further defective because it states that the property "will be sold by sample and delivered where now located on the E. E. Moran estate in the fourth district of Terrell county, Georgia." An inspection of the advertisement will show that the first objection certainly was not good, for it is distinctly stated in the advertisement that the property was levied on "as the property of F. C. Coker to satisfy a mortgage *fi. fa.* issued from the city court of Dawson, said county, in favor of the Brown Guano Company, for use of A. J. Hill." The only inference from this statement is that F. C. Coker was defendant in *fi. fa.* A sufficient description of the property and its location is given in the advertisement, and we do not know of any valid reason why the property could not have been sold by sample and subsequently delivered where located as described in the advertisement. Civil Code (1910) § 6060. We think, therefore, that the court erred in ruling out the advertisement. With this advertisement in evidence, and with the other evidence offered by the plaintiff, the ques-

tions of breach and damages should have been submitted to the jury for determination, and not decided by the court as a matter of law.

Judgment reversed.

HADDON v. STATE. (No. 5,081.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1092*)—APPEAL—BILL OF EXCEPTIONS—DISMISSAL.

The bill of exceptions in this case was certified by the judge on June 20, 1913, and was filed in the office of the clerk of the trial court on July 7, 1913. Not having been filed within 15 days from the time of the certificate of the judge, in compliance with the mandatory terms of the statute, the writ of error must be dismissed. Civil Code 1910, § 6167; *Goodin v. Mills*, 137 Ga. 282, 73 S. E. 399; *Woods v. State*, 11 Ga. App. 383, 75 S. E. 491, and citations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. § 1092.*]

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

A. H. Haddon was convicted of crime, and brings error. Writ of error dismissed.

J. H. Smith, of Eden, for plaintiff in error. R. W. Sheppard, Sol., of Guyton, and N. J. Norman, Sol. Gen., of Savannah, for the State.

HILL, C. J. Writ of error dismissed.

JONES v. MAYOR, ETC., OF CARROLLTON. (No. 5,099.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 642*)—VIOLATION OF ORDINANCES—APPEAL—CREDIBILITY OF WITNESSES.

The reviewing court will not attempt to pass upon the credibility of witnesses in a prosecution for keeping intoxicating liquors on hand.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

2. MUNICIPAL CORPORATIONS (§ 640*)—VIOLATION OF ORDINANCES—TRIAL—CREDIBILITY OF WITNESSES.

In a prosecution for keeping intoxicating liquors for sale in violation of a municipal ordinance, the mayor is authorized to credit one witness, rather than any number of witnesses who may contradict his testimony, and notwithstanding any efforts to impeach him.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1410; Dec. Dig. § 640.*]

3. SUFFICIENCY OF EVIDENCE.

There was evidence sufficient to authorize the conviction of the accused in the municipal court, and the judge of the superior court did not abuse his discretion in refusing to sanction the writ of certiorari.

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Geo. Jones was convicted of violating a municipal ordinance prohibiting the keeping of intoxicating liquors for sale, and from the refusal of the superior court to sanction a writ of certiorari brings error. Affirmed.

Boykin & Boykin, of Carrollton, for plaintiff in error. J. O. Newell, of Carrollton, for defendant in error.

RUSSELL, J. Judgment affirmed.

ROCHELLE GIN & COTTON CO. v. FISH-ER. (No. 5,015.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

CUSTOMS AND USAGES (§ 15*)—EVIDENCE (§ 448*)—TRIAL (§ 256*)—WAREHOUSEMEN (§ 22*)—PAROL—DUTY TO REQUEST INSTRUCTIONS—CONSTRUCTION OF CONTRACT.

This case is controlled by the ruling of the Supreme Court in *Hamilton v. Moore*, 94 Ga. 707, 19 S. E. 993, and the trial judge did not err in refusing a new trial.

(a) The evidence was sufficient to prove the existence of a custom by virtue of which the defendant, as warehouseman, undertook to insure the cotton of its customers.

(b) The stipulation in the warehouse receipts delivered to the plaintiff by the defendant as warehouseman, that the cotton was "subject to the presentation of this receipt only, the paying of customary expenses and advances, acts of fire and Providence excepted," so far as the same related to "acts of fire and Providence," was subject to explanation, and was controlled by proof of a custom, universally recognized in the locality, and which consequently entered into the contract, by virtue of which the defendant undertook to insure all cotton deposited in its warehouse.

(c) In the absence of timely and appropriate requests, directing attention to those features of the case as to which more specific instructions were desired, the charge of the trial judge fairly presented the law applicable to the issues.

(d) The jury being authorized to find, from the evidence as to custom, that the defendant had agreed to insure the plaintiff's cotton stored in its warehouse, which was destroyed by fire, it was immaterial whether the defendant, in its settlement with the insurers of the cotton in its warehouse, acted in good faith and used good judgment in compromising any of the policies of insurance covering the cotton. The custom, if proved, became a part of the contract of bailment, and it thereby became the duty of the defendant, as warehouseman, to pay the plaintiff the value of his cotton in case the cotton should be destroyed by fire while in the defendant's warehouse, even if the defendant had not protected itself by taking out insurance.

(e) Proof of negligence on the part of the defendant was not essential to a recovery by the plaintiff, and it is entirely immaterial, under the contract as proved by the plaintiff, whether the defendant was negligent or not. In the case of *Zorn v. Hannah*, 106 Ga. 61-64, 31 S. E. 797, proof of negligence was necessary because the negligence of the defendants was alleged to be, and was, the essential basis of the plaintiff's right to recover. That was a case in which the plaintiff was seeking to recover for

the failure of the defendant to deliver cotton which, when demanded, could not be found in their warehouse, and the burden was upon the defendants to present such a reason for the disappearance of the cotton as would excuse their failure to deliver. In the present case there is no question as to the destruction of the cotton, and the only issue is whether the defendant had contracted to insure the plaintiff against loss in the event his cotton was destroyed by fire.

(f) In the case of *Atwater v. Hannah*, 116 Ga. 745, 42 S. E. 1007, as in the case at bar, the action was to recover for the loss of cotton deposited with warehousemen which was destroyed by fire, but from the ruling of the Supreme Court upon that portion of the warehouse receipt which related to the insurance of the cotton, and in which the Supreme Court held that the "mere statement in a warehouse receipt that 'all cotton stored with us fully insured' will not alone constitute a contract * * * requiring the warehouseman to insure the cotton of his customer, and rendering him liable for the value of the same when destroyed by fire," it is plainly inferable that the general rule that receipts are subject to explanation by parol was borne in mind; and consequently it must be held in the present case that the statement in the receipts accepted by the plaintiff not only did not furnish conclusive evidence of a contract relieving the warehouseman from liability for loss by fire, but that this statement would be of no effect in the face of satisfactory proof of a custom to the contrary which had become a part of the contract. There was sufficient testimony to authorize the jury to find that the custom was universal in the locality.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 30-33; Dec. Dig. § 15;* *Evidence*, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448;* *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256;* *Warehousemen*, Cent. Dig. § 17; Dec. Dig. § 22.*]

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by A. K. Fisher against the Rochelle Gin & Cotton Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Max E. Land, of Cordele, for plaintiff in error. Hall & Dennard, of Cordele, and Hal Lawson, of Abbeville, for defendant in error.

RUSSELL, J. Judgment affirmed.

LEARY v. STATE. (No. 5,077.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 89*)—ASSAULT WITH INTENT TO MURDER—WHAT CONSTITUTES.

The act of maliciously putting broken glass into food with intent that the food shall be eaten by another, and that he shall in this manner be killed, does not, without more, constitute the offense of assault with intent to murder, when he does not eat the food after the glass has been put into it.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 115-118; Dec. Dig. § 89.*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 1023*)—APPEAL—FINAL JUDGMENT.

An order overruling a demurrer to an indictment is reviewable under Civ. Code 1910, §

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6138, authorizing a bill of exceptions either to a final judgment or to a judgment which would have been final if rendered as claimed by the excepting party.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

8. CRIMINAL LAW (§§ 1058, 1063*)—APPEAL—PRESENTATION BELOW.

To entitle accused to bring error from the overruling of a demurrer to the indictment, it is not essential that he move for a new trial or except to the final judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2669, 2673, 2676-2684; Dec. Dig. §§ 1058, 1063.*]

4. CRIMINAL LAW (§ 1058*)—APPEAL—PRESENTATION BELOW.

Where an exception is made to an interlocutory order which is neither final nor would have been final if it had been rendered as requested by accused, he must except to the final judgment of conviction before a reviewing court can pass upon the interlocutory ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2669; Dec. Dig. § 1058.*]

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Jule Leary was convicted of assault with intent to murder, and brings error. Reversed.

Geo. E. Simpson and Franklin & Langdale, all of Valdosta, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, for the State.

POTTLE, J. The plaintiff in error was arraigned under an indictment charging him with the offense of assault with intent to murder. Omitting the formal parts, the indictment charged that Jule Leary "unlawfully, feloniously, and with malice aforethought did put broken glass into the collar greens and corn bread of Lucius Zeigler, the said broken glass being a weapon likely to produce death, and the said broken glass being then and there deposited in said collar greens and corn bread with the intent then and there to cause the said Lucius Zeigler to eat the same, and the said acts in and upon the said Jule Leary did thereby make an assault with the intent the said Lucius Zeigler to kill and murder, and the said Jule Leary with said broken glass which he then and there deposited as aforesaid did unlawfully, feloniously, and with malice aforethought attempt to kill the said Lucius Zeigler, contrary to the laws of said state, the good order, peace, and dignity thereof." The accused demurred on the ground that the facts set forth in the indictment did not constitute the offense of assault with intent to murder, that the indictment failed to charge any overt act indicating that the accused procured and induced the prosecutor to swallow or otherwise use the broken glass, and because the indictment failed to charge how or in what manner said broken glass was deposited, or in what manner the same was placed before, or whether it was of-

fered or administered to the intended victim at all. The demurrer was overruled, and the accused was convicted. Within 20 days from the overruling of the demurrer he sued out a writ of error to the Court of Appeals, complaining of the judgment overruling the demurrer, but did not assign error upon any other judgment rendered in the case. In this court a motion was made by the solicitor general to dismiss the writ of error, upon the ground that the accused could not assign error upon the judgment overruling his demurrer without also excepting to the final judgment of conviction.

[2] 1. There is no merit in the motion to dismiss the writ of error. A bill of exceptions may be sued out to this court, complaining either of a final judgment or of one which would have been final if it had been rendered as claimed by the excepting party. Civil Code, § 6138. If the demurrer had been sustained, the indictment would have been quashed, and this would have been an end of the case.

[3] The fact that the accused was convicted and sentence imposed before he excepted to the judgment overruling the demurrer is immaterial. It was not necessary that he should file a motion for a new trial, or that he should except to the final judgment of conviction. Doubtless, if the demurrer was not well taken, the accused was properly convicted, and has no just cause of complaint. It would be useless to require him to file a motion for a new trial when no errors of law were committed during the progress of the trial, or to interpose a formal exception to the final judgment of conviction. It is settled by a number of decisions of the Supreme Court that this was not necessary. "A writ of error lies to a judgment overruling a demurrer to the whole bill, notwithstanding the complainants may have proceeded to a hearing and obtained a decree, and though the decree be not excepted to, nor any motion made for a new trial." *Lowe v. Burke*, 79 Ga. 164, 3 S. E. 449. See, also, *Kitchens v. State*, 80 Ga. 810, 7 S. E. 209; *Central Railroad Co. v. Denson*, 83 Ga. 266, 9 S. E. 788; *City of Augusta v. Lombard*, 86 Ga. 165, 12 S. E. 212; *Turner v. Camp*, 110 Ga. 631, 36 S. E. 76.

[4] Where an exception is made to an interlocutory ruling which is neither final nor would have been final if it had been rendered as claimed by the excepting party, it is necessary to except to the final judgment in the case before a reviewing court will acquire jurisdiction to pass upon the interlocutory ruling. *Lyndon v. Georgia Railway & Electric Co.*, 129 Ga. 353, 58 S. E. 1047; *Carpenter v. First Nat. Bank of Sandersville*, 13 Ga. App. —, 79 S. E. 360, and cases cited. In these cases the question raised by the exception was not one which would have finally ended the case no matter which way decided.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

If the ruling made was a final termination of the case, or would have been so if rendered as claimed by the excepting party, then this court has jurisdiction to pass upon the exception of the ruling, although no other judgment is excepted to.

[1] 2. In *Johnson v. State*, 92 Ga. 36, 17 S. E. 974, the indictment charged the accused with having committed the offense of assault with intent to murder by putting arsenic and other poison into coffee, "and administering the said poisons" to the person named in the indictment. The proof showed that the person thus named drank of the coffee containing the poisons; it was held that the indictment sufficiently charged the offense of assault with intent to murder, and that under the evidence the accused was properly convicted. This decision was based upon the English case of *Reg. v. Button*, 8 C. & P. 660. In *Peebles v. State*, 101 Ga. 585, 28 S. E. 920, it was held: "The act of maliciously putting poison into a well with the intent that the water thereof shall be drunk by another, and that he shall in this manner be killed, does not, without more, constitute the offense of an assault with intent to murder, when the person whose death was intended never in fact drank of the water after the poison had been introduced into the same." The case of *Johnson v. State*, supra, however, was distinguished from the case then under consideration by reason of the fact that in the *Johnson* Case the intended victim actually drank of the coffee. In the opinion the court said: "We think the *Johnson* Case and the English case of *Reg. v. Button*, 8 C. & P. 660, cited in support of it, go to the full extent authorized in holding that an assault has been committed in cases of this character. The case in hand closely resembles one where a pitfall has been dug, or a spring gun set, or a gun loaded, with the felonious intent of depriving another of his life, but where the criminal intent did not proceed sufficiently far to bring the individual whose death was meditated into immediate and present danger." See, also, *Groves v. State*, 116 Ga. 516, 42 S. E. 755, 59 L. R. A. 598; *Chelsey v. State*, 121 Ga. 340, 49 S. E. 258. The indictment in the present case does not allege either that the intended victim partook of the food containing the bits of glass, or that the accused administered glass to the victim with the intent to kill him. The effect of the ruling in the *Johnson* Case, as explained and restricted by the decision in the *Peebles* Case, is that in cases of this character there can be no assault unless the poison is administered to the victim, and there can be no administration of it unless the victim partakes of the substance containing the poison. The present indictment charges merely that the accused put broken glass into the intended victim's food with

intent that he should eat it, and did thereby make an assault with intent to kill. There is no averment that the broken glass was administered to the intended victim, or that he partook of any of the food in which the glass was contained. This being so, the indictment did not set forth the offense of assault with intent to murder, and the demurrer thereto should have been sustained.

Judgment reversed.

WATSON et al. v. AMERICAN NAT. BANK.
(No. 4,680.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 203*)—NOTICE—DISMISSAL.

Where the written notice of the sanction of a certiorari and of the time and place of hearing, which is required by the Civil Code 1910, § 5190, is not given at least ten days before the time fixed by law for the beginning of the term of the court to which the writ is returnable, the certiorari should be dismissed, unless it appears that the failure to have the prescribed notice given was due to providential cause.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 790, 791; Dec. Dig. § 203.*]

2. JUSTICES OF THE PEACE (§ 203*)—NOTICE—"THE SITTING OF THE COURT."

The phrase "the sitting of the court," as employed in the Code section to which reference is made in the preceding headnote, is not used to denote the time during a term of the court when the court may sit to hear the particular case in question, but refers alone to the day fixed by law when the court must begin to sit for the disposition of all cases legally cognizable at that term of the court, and is used as the equivalent of the expression "the first day of the term."

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 790, 791; Dec. Dig. § 203.*]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action in a justice court by the American National Bank against T. H. Watson and others. Judgment for plaintiff, and, from dismissal of certiorari in the Superior Court, defendants bring error. Affirmed.

Sidney W. Hatcher, of Macon, for plaintiffs in error.

RUSSELL, J. The American National Bank of Macon, Ga., obtained in a justice's court a judgment against the present plaintiff in error, who thereupon sued out a writ of certiorari to the superior court. Upon the call of the case the certiorari was dismissed by the judge of the superior court, upon the ground that no legal service of the notice of the sanction of the writ of certiorari required by law had been perfected upon the defendant in certiorari within the legal time limit. Upon the hearing of the motion it was agreed that the petition for certiorari was sanctioned

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

ed May 11, 1912, and that the writ of certiorari was returnable to the November term, 1912, of Bibb superior court, which convened on November 4, 1912, in accordance with the law regulating the terms of that court, and that the answer of the justice to the writ was duly filed. It was admitted that the notice of sanction of the writ and of the time and place of hearing was given on November 16, 1912. The judge of the superior court sustained the motion to dismiss the petition, and exception is taken to this judgment.

[1, 2] The question raised by the writ of error is whether the notice required by Civil Code, § 5190, may be given at any time ten days before the date when the certiorari is called for hearing, or whether the expression "at least ten days before the sitting of the court to which the same shall be returnable" requires that the notice shall be given ten days before the date fixed by law for the convening of the court at which the hearing upon the petition for certiorari may legally be had. We do not think there can be any doubt that the trial judge correctly held that the notice required by this section of the Code must be given at least ten days before the opening of the court to which the certiorari was returnable, and the Code section is mandatory in the provision that when this has not been done "the certiorari *shall* be dismissed."

Judgment affirmed.

BECK v. A. N. TUMLIN CO. (No. 4,934.)
(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 155*)—INJURY TO SERVANT—FAILURE TO WARN.

"In an action by a servant against a master for alleged failure of duty on the part of the latter in not giving to the servant warning of a danger incident to his employment, it must appear that the master knew or ought to have known of the danger, and that the servant injured did not know and had not equal means with the master of knowing such fact, and by the exercise of ordinary care could not have known it. If the danger be obvious and as easily known to the servant as to the master, the latter will not be liable for failing to give warning of it." *Hendrix v. Vale Royal Mfg. Co.*, 134 Ga. 712, 68 S. E. 483; Civil Code (1910) § 3131.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

2. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—BURDEN OF PROOF.

An adult servant of ordinary intelligence who has been at work on a machine a sufficient length of time to discover patent and manifest defects and dangers will be presumed to have knowledge of such defects or dangers. In other words, the duty is placed upon a servant charged with the operation of a machine to observe every visible and manifest defect in the machine which would render his work dangerous. If his opportunity to discover such defects is equal to that of the master, he cannot recover damages for personal injuries caused by his operation of the machine; and, in a suit by the servant to recover

such damages, the burden is upon him to show that he did not have equal means with the master of discovering these defects and dangers, and by the exercise of ordinary care could not have known of them. *Roland v. Tift*, 131 Ga. 683, 63 S. E. 133, 20 L. R. A. (N. S.) 354; *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13; *Vinson v. Willingham Cotton Mills*, 2 Ga. App. 53, 58 S. E. 413; 1 *Labatt, Master and Servant*, § 394, and cases cited.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 159*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Except in the case of railroad companies, a servant cannot recover against a master for personal injuries caused solely by the negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 318-325; Dec. Dig. § 159.*]

4. MASTER AND SERVANT (§ 235*)—INJURY TO EMPLOYÉ—NONSUIT.

The evidence in behalf of the plaintiff showing that his injuries were due either to the negligence of a fellow servant, or to visible and patent defects in the machine that he was operating, and that he had equal means with the master of knowing of such defects or dangers, the judgment awarding a nonsuit was not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

Russell, J., dissenting.

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by Spencer Beck against the A. N. Tumlin Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Eubanks & Mebane, of Rome, for plaintiff in error. Maddox & Doyal, of Rome, for defendant in error.

HILL, C. J. This is a suit to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the plaintiff's employer. The substance of the petition, so far as material, is as follows: The plaintiff was employed by the defendant company in its cotton gin. His work consisted of attending to the lever of the press used in the baling and pressing of cotton. The press had a maximum capacity of 500 pounds. On the day of his injury the defendant put into the press a bale of cotton weighing 530 pounds. The plaintiff, in the discharge of his duty, took hold of the lever and unhooked it, where it was fastened near the bottom of the press by means of a link, but after he had unfastened it, and while he was holding it in his hand for the purpose of letting it assume a horizontal position, so that the pressure and tension thereon might be released and the hook be detached from the link and the bale be released from the press, the lever suddenly, instantly, and powerfully, and without any warning to him, jerked loose from his hand, flew upwards, and struck him on the chin, knocking him clear of the floor a distance

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of 16 feet, and inflicting upon him the injuries set forth in the petition. He alleges that the press was defective, in that it was two inches wider at the bottom than at the top, and that this caused the tension and strain to be greater on the lever; that the hooks on the end of the rod were defective, in that they were old and worn, having been used by the defendant for nine years without repairs; that the inside of the hooks had, instead of one plain curvical surface, a double curvical surface with two concave surfaces in the inner parts, and that near the middle of the hook there was a ridge or raised surface dividing the hook into two parts, and the link slipped over this raised place, thus making the tension and strain on the lever less and causing the lever to fly up and strike the plaintiff; that this defective condition was the cause of the lever being suddenly jerked from his hand; that if the hook had had only one plain surface, he would not have been injured in this manner. He alleges that he did not know of the defective condition of the hook; that this condition could be observed only by inspection and examination, and that it was no part of his duty to inspect and examine the machinery, but that this was the duty of the defendant, and that the defendant knew and by the exercise of ordinary care could have known of the defective condition; also that the defendant was negligent in not warning him of the danger. He alleges, also, that the defendant was guilty of negligence in putting into the press more than 500 pounds of cotton, in that it exceeded the capacity of the press, and caused the straining and tension on the hook, thus causing the link to jerk from the side of the hook and pull the lever from his hand. The plaintiff substantially proved these facts, and also proved that there had been no change in the press during the two years he had been running it, and which time it had been in his charge. He proved, also, that there was nothing to prevent him from seeing the alleged defects in the hooks, some of his witnesses testifying that he was necessarily compelled to handle each of these hooks every time he operated the press; that the inside of the hooks would fall directly under his eye every time he operated it. He testified that the tendency in every instance was for the lever to fly up just as it did when he was injured. As to this he said: "I guess the lever would fly up if you were not to hold it anyway. If you were just to turn the lever loose at first, before you loosened the door, it would fly up. Then the reason you put both hands on there when you loosen it is to prevent it from doing that very thing. Then if you have got your head over out in this way, and you fail to hold it, it is going to hit

you under the chin. If there was a large enough bale of cotton to throw it up, it would hit a fellow. The tendency is, when you loosen that (the tendency of the lever is), to fly up. Of course, you want to loosen it to raise it up. The pressure of that bale of cotton tends in every case to make it fly up; if it was just to be turned loose, just get off out here and prize it off, of course the lever would fly up. The tendency is to go up. The reason I took hold of it with both hands was to keep it from flying up." A witness for the plaintiff testified that he had known the press ever since it was put in, that he had frequently seen it in operation, and that every time the link was loosened the lever came up with a jump. The plaintiff testified that the ginner put the cotton into the gin and into the press, and that no one else had anything to do with this part of the work except the ginner and himself. At the conclusion of the plaintiff's evidence a nonsuit was awarded; and he excepted.

The foregoing statement is sufficient for an understanding of the rulings announced in the headnotes.

Judgment affirmed.

RUSSELL, J., dissenting.

JOHNSON v. HARRIS. (No. 4,933.)
(Court of Appeals of Georgia. Oct. 21, 1913.)

(Syllabus by the Court.)

HABEAS CORPUS (§ 113*)—APPEAL—MOOT QUESTION.

A writ of habeas corpus was sued out to test the validity of a sentence imposed by a municipal court, requiring the prisoner to serve 30 days in the city chain gang. He began to serve the sentence on April 19th, the habeas corpus proceeding was heard on May 5th, and the prisoner remanded to the custody of the city marshal, to serve out his sentence. A writ of error was sued out to this court on May 10th, but it does not appear that any supersedeas of the judgment remanding the prisoner into the custody of the marshal was obtained. The case was called and argued in the Court of Appeals on June 9th. It must, therefore, be assumed that, when the case was reached in this court, the sentence had been satisfied. The questions raised for decision have become moot, and will not be decided.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Habeas corpus proceedings by Ella Johnson against C. I. Harris. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry Walker, of Rome, for plaintiff in error. Max Meyerhardt, of Rome, for defendant in error.

POTTLE, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

CARSWELL v. STATE. (No. 5,058.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

*(Syllabus by the Court.)***DRUNKARDS (§ 11*)—DRUNKENNESS—EVIDENCE.**

The accused was convicted, under an accusation in the city court, of the offense of drunkenness on church grounds. The evidence shows that he had a bottle containing a small quantity of whisky, but there is no evidence whatever that he was in a condition of drunkenness while on the church grounds. His conviction was therefore unauthorized.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 12-18; Dec. Dig. § 11.*]

Error from City Court of Dublin; Jas. B. Hicks, Judge.

Jim Carswell was convicted of drunkenness on church grounds, and brings error. Reversed.

Hal. B. Wimberly, of Dublin, for plaintiff in error. Geo. B. Davis, Sol., of Dublin, for the State.

HILL, C. J. Judgment reversed.

MOULTRIE COMPRESS CO. v. BYROM COTTON CO. (No. 4,802.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

*(Syllabus by the Court.)***1. TRIAL (§ 256*)—INSTRUCTIONS—DUTY TO REQUEST.**

The instructions of the court covered substantially the issues of the case as made by the pleading and evidence, and in the absence of any request for a more specific charge as to its contentions the defendant cannot be heard to complain that its contentions were not more specifically given. *Smith v. Bibb Mfg. Co.*, 112 Ga. 680, 37 S. E. 861.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

2. BAILMENT (§ 31*)—ACTION FOR LOSS—BURDEN OF PROOF.

In all cases of bailment, after proof of bailment and loss, the burden of proof is shifted to the bailee to show that he exercised ordinary diligence and care in taking care of the property of the bailor. In the present case the plaintiff proved the delivery of the property sued for to the defendant, the failure of the defendant to deliver the property on demand, and the value of the property. The prima facie case of liability thus shown was not successfully overcome by the defendant.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124-131; Dec. Dig. § 31.*]

3. VERDICT SUSTAINED—NO ERROR.

The controlling questions in this case were issues of fact. The verdict for the plaintiff was fully supported by the evidence, and no error of law appears, either in the rulings on evidence or in the instructions given to the jury, and no reason appears why there should be a new trial.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by the Byrom Cotton Company against the Moultrie Compress Company.

Judgment for plaintiff, and defendant brings error. Affirmed.

Shipp & Kline, of Moultrie, for plaintiff in error. Crum & Jones, of Cordele, and Edwin L. Bryan, of Moultrie, for defendant in error.

HILL, C. J. Judgment affirmed.

ADAIR v. SPELLMAN SEMINARY.

(No. 4,695.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

*(Syllabus by the Court.)***1. COURTS (§ 163*)—JURISDICTION—"CASES RESPECTING TITLE TO LAND."**

Exclusive jurisdiction to try cases respecting title to land is by the Constitution of this state vested in the superior courts. Cases where the title is only incidentally involved, such as one for the recovery of damages for trespass to realty, possessory warrant, and forcible entry and detainer cases, and a summary proceeding to abate a nuisance in a public street or a private way, are not "cases respecting title to land" (Civ. Code 1910, § 8510), within the meaning of the Constitution. It would seem, however, that, where in a summary proceeding to abate a nuisance it appears from the pleadings that the only real and substantial issue involved is one respecting title to realty, a court other than the superior court should hesitate to entertain jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410-411, 443, 479, 1297; Dec. Dig. § 163.*]

2. EASEMENTS (§ 17*)—MUNICIPAL CORPORATIONS (§ 663*)—STREETS—PURCHASE ACCORDING TO PLAT—ABANDONMENT.

Where streets and roads are marked on a plat of a tract of land, and lots are bought and sold with reference to the plat, not only those who buy lots abutting on a street or road laid out on the map, but all who buy with reference to the general plan or scheme disclosed by the plat, acquire a right of user in all of the roads and streets designated on the plat.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 45-49; Dec. Dig. § 17.* Municipal Corporations, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.*]

3. EASEMENTS (§ 61*)—NUISANCE (§ 18*)—OBSTRUCTION—ABATEMENT.

The stopping or impeding of a private way which has been opened and in use by those entitled to traverse it is a private nuisance, and may be abated by the summary proceeding provided for in section 5329 et seq. of the Civil Code 1910.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.* Nuisance, Cent. Dig. §§ 48, 50; Dec. Dig. § 18.*]

4. EASEMENTS (§ 61*)—OBSTRUCTION—ABATEMENT.

The summary proceeding provided for by the Code is not available to remove an obstruction in an alleged private way, which exists only on a plat or map, and which has never been opened or used as a way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.*]

5. MUNICIPAL CORPORATIONS (§ 655*)—CONTROL OF STREETS—CONSTRUCTION OF CHARTER.

Power granted in the charter of a city "to open, lay out, to widen, straighten, or otherwise change streets, alleys, and squares in the city" is broad enough to authorize the changing of a street so as to straighten it and remove from it pronounced irregularities; the termini of the changed portion of the street remaining the same, the distance between them being shortened, and the changed street affording a more convenient way of travel to and from the same points reached by the old street. *Coker v. Railway Co.*, 123 Ga. 483, 51 S. E. 481, distinguished.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 655.*]

6. NUISANCE (§ 72*)—PUBLIC NUISANCE—ABATEMENT—PARTIES.

A private individual cannot complain of a public nuisance, unless he shows some special damage accruing to him in which the public does not participate.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

7. NO ERROR—JUDGMENT SUSTAINED.

The evidence authorized the judgment entered by the city recorder in behalf of the defendant, and there was no error in overruling the petition for certiorari.

(Additional Syllabus by Editorial Staff.)

8. MUNICIPAL CORPORATIONS (§ 697*)—OBSTRUCTION OF STREETS—ESTOPPEL.

A party suing as executor was not estopped to have obstructions upon certain streets removed by the fact that his testator had closed a part of a street not involved in the suit; the remedy, if any, of the persons injured by the closing of such street being to proceed against plaintiff to require him to open it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Forrest Adair, executor, against the Spellman Seminary. Judgment for defendant, and, from the overruling of a petition for certiorari, plaintiff brings error. Affirmed.

Rosser & Brandon and King & Spalding, all of Atlanta, for plaintiff in error. Hooper Alexander, of Atlanta, for defendant in error.

POTTLE, J. On July 23, 1901, Forrest Adair, as executor of the last will of George W. Adair, filed in the recorder's court of the city of Atlanta a petition against the Spellman Seminary, a corporation conducting an educational institution in said city, to abate certain alleged nuisances which the plaintiff averred the defendant had erected and maintained in certain streets over which the plaintiff had an easement. The petition avers that at the time of his death George W. Adair was the owner of two city lots, known as Nos. 10 and 11 according to a plat of what was formerly known as the James property, and consisting of about 50 acres of land, bounded on the north and east by Greens Ferry Avenue South, by Chapel street, and west by Chapel and Lee streets;

that on this plat the tract of land was divided into 140 lots, including Nos. 10 and 11, which were owned by George W. Adair and are in the control of the executor; that upon this plat the streets bounding the land appeared the following streets north and south, to wit: Henry, Culver, Leonard, and Lizzie; and running west: Ella, Keith, Phelps, Brown, and Leonard. It is alleged that each of these streets are public streets of Atlanta, and were such that they were laid out and during the time hereinafter mentioned. The plaintiff complains that the defendant has erected obstructions across Leonard, Reynolds, Keith, and Broomhead streets, so as to prevent free use and enjoyment of the same by the plaintiff and the public. The effect of the erection of this fence is to prevent the use of the streets of parts of Leonard and Broomhead streets, the whole of Reynolds, Keith, and Broomhead streets within one inclosure, and to stop the use of all of said streets. It is further alleged that the defendant has erected obstructions upon the tract, which buildings over and into and across the streets above mentioned, so as to prevent the use of these streets by the plaintiff and the public. The plaintiff avers that he is entitled to use these streets as public streets of Atlanta, and that he has sustained injury not common to the public by the fact that all of the streets within the James tract were so closed to these streets; that George W. Adair bought lots Nos. 10 and 11, a part of this tract, with reference to the streets, which afforded more easy access to and from these streets than the streets of the tract; that the streets of the tract, by the defendant, have been depreciated. The defendant filed a special plea to the jurisdiction of the court, setting aside the streets which the plaintiff alleged to be obstructed by the defendant, and claiming that the streets of the city of Atlanta were open streets or ways; that the plaintiff's right, if he had any, is a mere easement in land, and that the plaintiff sought to be raised by said proceedings involving title to land, being brought for the purpose of testing the question whether the defendant has such right in the land covered by the streets as to authorize it to close the streets. Such a proceeding is, under the laws and customs of this state, and laws, cognizant only in the court of Fulton county. Subject to the jurisdiction, the defendant demurred and answered. The demurrer was overruled and an order was passed, requiring the plaintiff to file a special plea to the jurisdiction, but the plaintiff failed to do so.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series.

could file the same as a part of its defense. The defendant answered, and set up the following defenses. (1) That the alleged streets obstructed by it were never opened or traveled or used and accepted by the public as streets; (2) that neither the plaintiff nor his testator ever had acquired the right to use any of the alleged streets, except that the public had occasionally used a part of Leonard and Broomhead streets for a passageway through the defendant's property, and that in closing the Leonard-Broomhead way the defendant acted with the consent of the public and every person interested therein, and at the same time opened a better and shorter way through its property and around it from the same point on Ella street northward to Greens Ferry avenue; (3) that the entire tract occupied by the defendant has been for a number of years openly and notoriously in its possession, and held by it as one piece of property, with no streets through it except the Leonard-Broomhead way, which has been straightened as above mentioned; that more than a year before the filing of the petition the defendant entered upon an extensive scheme of building and improvement, and in pursuance thereof, and before any objection was made by the plaintiff, had laid out and expended on the buildings complained of in the plaintiff's petition more than \$100,000, with no suggestion by the plaintiff of any rights claimed by him or his testator; that the defendant's expenditure for improvements on said land represents an outlay of more than \$300,000, nearly all of which would be rendered useless for the purposes for which it was expended, if the prayers of the petition were granted, and that the circumstances under which the streets were closed and the improvements made are such as to estop the plaintiff from interfering at this time with the progress of the work; (4) that George W. Adair, owner of lots Nos. 10 and 11, without the consent of the defendant, closed up a part of Chapel street which was a part of the James plat, and his estate is now in possession of a part of the street so closed. The defendant avers that the closing up of this part of said street by George W. Adair is evidence of his assent to the abandonment of the street scheme as indicated by the plat, and operates to estop his executor from complaining of the obstruction of other streets by the defendant.

The case came on to be heard before the recorder in 1901, and, after the evidence was introduced, he rendered a judgment in favor of the defendant, upon the ground that under the evidence no nuisance existed. The plaintiff sued out a writ of certiorari in the latter part of 1902. The case was continued from time to time in the superior court, and finally on January 1, 1913, a judgment was entered overruling the certiorari. The plaintiff excepted. The evidence before the recorder was voluminous and somewhat conflicting. From the evidence it appeared that

about the year 1879 John H. James caused a plat to be made of the 50-acre tract described in the plaintiff's petition, divided it into 140 lots, and laid out as a part of the plat Lizzie, Ella, Leonard, Henry, Keith, Phelps, and Broomhead streets. The tract was bounded by Chapel and Lee streets and Greens Ferry avenue, all of which were original highways, were no part of the plat, and have not been obstructed in any way by the defendant. The property occupied by the defendant was acquired by it as an educational institution at different times, either from James or from various persons holding under him. The conveyances to the seminary covered a period beginning in 1883 and extending down to 1899. In each deed the property conveyed was described by lot numbers with reference to the James plat and the streets which had been laid out thereon. The evidence abundantly authorized, if it did not demand, a finding by the recorder that none of the streets laid out on the James plat, except Leonard and Broomhead, had ever been actually used as streets, and that certainly the dedication of them had never been accepted by the public. It seems from the evidence that what is referred to in the brief as the Leonard-Broomhead way, which consisted of Leonard street and part of Broomhead street, had been used for some years as a way from Ella street northward to Greens Ferry avenue. For the purposes of this case it may be considered that the evidence demanded a finding that this Leonard-Broomhead way was a public street. On June 15, 1900, the city council of Atlanta authorized the defendant to straighten Leonard street from Ella to Broomhead, and Broomhead from Leonard to Greens Ferry avenue by moving the street eastward 100 feet to the edge of the Spellman Seminary property, the new street to be the same width as the old street, and to be paved by the defendant with rock, sand, or chert. In pursuance of this permission the defendant made a change in the streets. Starting at the point on Chapel street where the old street touched it, and running northward into Greens Ferry avenue, thereby straightening the street, and affording easy and convenient access to Greens Ferry avenue along the new street. A part of the fence which the plaintiff complains was built across several of the streets had been erected prior to the purchase of the land by the defendant, and portions of the fence were built and repaired by the defendant after its purchase. George W. Adair died in 1899, and shortly thereafter the plaintiff qualified as the executor of his will. Some time in 1900 the attention of the plaintiff was called to the fact that the defendant was constructing buildings projecting into certain of the streets. He immediately complained to the defendant, and negotiations and conferences covering a period of several months were had. No

adjustment having been reached, the present proceeding was instituted.

[1] 1. The exhaustive and able briefs prepared by counsel for both sides have greatly lessened the labor of this court in examining the record and the law touching the various questions which have been presented for our consideration. The recorder did not in terms adjudge that he was without jurisdiction, though his general judgment in favor of the defendant was based upon the issues raised by the petition and the defendant's pleadings. But in view of the fact that the special plea to the jurisdiction was filed, and a general judgment entered in favor of the defendant, if this judgment was right for any reason, it ought to stand. The question raised by the plea to the jurisdiction is an interesting one. Exclusive jurisdiction to try "cases respecting titles to land" is vested by the Constitution in the superior courts. Civil Code, § 6510. Many cases arise, however, where title is only incidentally involved, and jurisdiction may be entertained by other courts. For instance, an action for damages for trespass to realty may be brought in a city court, and frequently it becomes necessary, as an incident to the plaintiff's case to pass upon the question of title. And so in possessory warrant and forcible entry and detainer cases we say that the question of title is not involved; but it may, and frequently does, become necessary to pass upon the question of title as an incident to the issues involved. Both from the pleadings and the evidence in the present case it appears that the defendant is standing squarely upon its claim of title to the land covered by the streets upon which the alleged obstructions were erected. There is nothing in the evidence to impeach the bona fides of the defendant's claim of title. There could be no question that the obstructions were nuisances, and hence on this point there could be no issue, so that really the controlling question to be decided by the recorder was whether or not the defendant had valid title to the streets superior to the plaintiff's alleged right of user. This being so, were it not for certain decisions of the Supreme Court which apparently lay down a contrary rule, there would be much force in the argument in behalf of the defendant that the recorder was without jurisdiction to pass upon the issues raised by the pleadings in this case. A court ought to hesitate to adjudicate title to land upon summary proceedings such as are now involved. Wood, Nuisances (3d Ed.) § 843.

[2] 2. It is unquestionably true that, when George W. Adair purchased lots 10 and 11, he acquired an interest in the streets designated on the James plat. "It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of the street or road; but, where streets and roads are marked on a plat, and lots are

bought and sold with reference to the plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as it well may be, that the public ways add value to all the lots embraced in the general scheme or plan. Certainly, as every one knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication. "1 Elliott, Roads and Streets (3d Ed.) § 132; 9 Am. & Eng. Enc. Law (2d Ed.) 57. The law as thus announced is in accordance with the decisions of our Supreme Court. Bayard v. Hargrove, 45 Ga. 343; Ford v. Harris, 95 Ga. 97, 22 S. E. 144. Where a street which has been used by the public has been abandoned, the fee in the soil reverts to the owners of the abutting lots. Bayard v. Hargrove, supra; Harrison v. Augusta Factory, 73 Ga. 447. If, therefore, the case is otherwise made out, the plaintiff has shown such a right to the use of the streets designated on the plat as to entitle him to maintain the proceeding.

[3] 3. The law now in the Code on the subject of abatement of nuisances was taken substantially from the act of 1833; the only material change in the law having been made by the act of 1892, which authorized the abatement of nuisances before a recorder in cities having a population exceeding 20,000. See Acts 1833, p. 143; Acts 1892, p. 64; W. & A. Railroad v. City of Atlanta, 113 Ga. 555, 38 S. E. 996, 54 L. R. A. 294; Peginis v. City of Atlanta, 132 Ga. 302, 63 S. E. 857, 35 L. R. A. (N. S.) 716. The act of 1833 provides: "All nuisances not here mentioned, which tend to annoy the community, or injure the health of the citizens in general, or to corrupt the public morals, shall be indictable, and punishable by fine, or imprisonment in the common jail of the county, or both, at the discretion of the court. And any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health and safety, or tends greatly to corrupt the manners and morals of the people, may be abated and suppressed by the order of any two or more justices of the peace of the county, founded upon the opinion and verdict of twelve freeholders of the same county, who shall be summoned, sworn and empanelled for that purpose; which order shall be directed to, and executed by the sheriff of the county or his deputy." This act, with the amendment by the act of 1892, has been carried forward in the Code, and is now embraced in section

5329 et seq. of the Civil Code. It will be observed that the act undertakes to declare what nuisances may be summarily abated; they are such as tend to the immediate annoyance of the citizens in general, are manifestly injurious to the public health and safety, or tend greatly to corrupt the manners and morals of the people. From the plain language used, it would seem that the only nuisances which can be summarily abated under the statutes are public nuisances, that is to say, nuisances which affect the citizens in general, and not those which merely injure the property of one of the citizens without affecting the public in general. And this seems to have been the view which the Supreme Court took of the law in one of the earlier decisions. *Vason v. South Carolina R. Co.*, 42 Ga. 631. In that case a proceeding was instituted to abate as a nuisance a railway which was operated on one of the public streets of Augusta. In discussing the question, Judge McCay refers to the distinction between a public and a private nuisance, and adds: "But our proceeding to abate is only another mode of doing what it was one of the principal objects of an indictment, at common law, to do, to wit, to abate the nuisance. It was a part of the judgment of the court on conviction of the offender, if the nuisance was continuous, to direct the sheriff to abate the nuisance. Wharton's Amer. Crim. Law, § 2369; 2 Ralls' Ab. 84, § 15; 2 Burns' Jus. 222; 1 Hawk's Bl. Cro. 365; *Taggart v. Commonwealth*, 9 Harris, 527. Indeed, there was no other way by which a public nuisance could be abated, by process of law. There was an old writ, called an assize of nuisance, by which a private nuisance against a freehold might be abated; but as to public nuisances an indictment was the only remedy, except by the act of a person taking the law in his own hands. 2 Bouv. Inst. 577, 579. Our statute defining an abatable nuisance defines an indictable nuisance, save that it adds 'immediate,' 'manifestly,' and 'greatly,' before the words 'annoyance,' 'public health,' and 'public morals,' and was evidently intended not to authorize the abatement of an act which was not indictable, but to authorize the abatement of indictable nuisances of peculiar virulence without waiting for an indictment. Sections 4023, 4478, Revised Code. It is a public proceeding in behalf of the public, and, according to section 2946 of the Code, it ought to be in the name of the state. It is true that sections 4023 and 4024 do not point out what particular form shall be used, nor would we insist that any particular form is necessary; but the whole scope and design of the law indicates that it is a proceeding in behalf of the public to cure a public wrong."

Most of the language thus used by Judge McCay was obiter, because the ruling made in the case was that the railroad, having been legally authorized to be constructed,

could not be abated as a nuisance. However, in *Ruff v. Phillips*, 50 Ga. 180, it was decided that a private nuisance may be abated under the provisions of the act of 1833. The decision in this case was also delivered by Judge McCay, and the conclusion that a private nuisance could summarily be abated was based upon the language of sections 4027 of the Code of 1868 and 4098 of the Code of 1873, to the effect that "a public nuisance may be abated on the application of any citizen of the district, and a private nuisance on the application of the party injured." The law as thus stated appears in sections 4908 of the Code of 1882 and 4766 of the Code of 1895, and 5338 of the Code of 1910. In *Salter v. Taylor*, 55 Ga. 311, it was held that the stopping or impeding of a private way is a private nuisance, and may be abated by a summary proceeding before two justices of the peace and a jury under the Code. In *Powell v. Foster*, 59 Ga. 790, it was held that the Code furnished a summary remedy for the abatement of nuisances, public and private. See, also, *Hart v. Taylor*, 61 Ga. 156; *Holmes v. Jones*, 80 Ga. 659, 7 S. E. 168; *Broomhead v. Grant*, 83 Ga. 451, 10 S. E. 116; *Savannah Ry. Co. v. Gill*, 118 Ga. 737, 45 S. E. 623. In the case last cited it was held that, "while section 4760 in terms provides only for the abatement of a public nuisance in the manner therein specified, it has been several times held that a private nuisance may be abated under that section." It must therefore be accepted as the settled law of this state that a private nuisance may summarily be abated by the same procedure as that provided for the abatement of a public nuisance.

Counsel for the defendant in error insist that all of the decisions of the Supreme Court from *Ruff v. Phillips*, supra, to *Broomhead v. Grant*, supra, are upon their facts distinguishable from the present case, for the reason that in none of those cases was there any real contest over the title, that the party complaining of the nuisance was in the present enjoyment, possession, and control of the property, and the only question at issue was whether or not the thing complained of was in fact a nuisance and abatable as such. It is also pointed out that in *Savannah Ry. Co. v. Gill*, supra, the road obstructed was a public road, and no question as to the abatement of a private nuisance was involved. We are not at liberty to thus narrow the scope and effect of the decisions of the Supreme Court holding that an obstruction of a private way may be summarily abated by the remedy which the plaintiff invoked in the present case. There is, to our mind, much force in counsel's contention; but we are constrained by the above cited decisions of the Supreme Court to a contrary conclusion.

[4] 4. It does not follow, however, from what has been said that the plaintiff was entitled to an order of abatement. The evi-

dence abundantly authorized a finding by the recorder that none of the streets, save Leonard and Broomhead, had ever been actually opened and used as streets. The mere platting of the streets upon paper did not amount to a dedication of the streets to the public use, and the dedication was not complete unless the public authorities received and adopted the streets. *Parsons v. Atlanta University*, 44 Ga. 529. In *Bryans v. Almand*, 87 Ga. 564, 13 S. E. 554, it was held: "While the municipal authorities of a city or town may, on complaint of a citizen, cause an obstruction to be removed from any public street in actual use by the public, yet where a street exists only in the plan of such city or town, and has not been actually opened, worked by the municipal authorities, and used by the public, but, on the contrary, has been in private occupation for 30 or 40 years, this mode of procedure is not available." This ruling was reaffirmed in *Robins v. McGehee*, 127 Ga. 431, 58 S. E. 461. In the opinion in that case it was said: "The present proceeding is not intended to settle the title as a primary issue; indeed, title is only incidentally involved, if at all. It is founded upon the hypothesis that a street has been laid out and opened, and has been obstructed. Any permanent structure in a street which materially interferes with travel therein is a nuisance per se. *Mayor of Columbus v. Jaques*, 30 Ga. 506; *City Council of Augusta v. Reynolds*, 122 Ga. 754 [50 S. E. 998, 69 L. R. A. 564, 106 Am. St. Rep. 147]. Under some circumstances even a private individual may abate a common nuisance which obstructs his individual right by removing it to enable him to enjoy that right. *Brown v. Perkins*, 12 Gray (Mass.) 89. The positive obstruction of a public street may be abated by indictment or by injunction. *Elliott on Roads and Streets*, §§ 662-664. The rationale of the principle that an obstruction in a street may be summarily abated is upon the theory that the obstruction of a public street is a nuisance. It is not until a street has been defined by survey and laid out and opened by work that it becomes a street. There must be a street to be obstructed before the structure alleged to be an obstruction amounts to a nuisance. This principle was recognized in *Bryans v. Almand*, 87 Ga. 564 [13 S. E. 554], where it was held that, 'while the municipal authorities of a city or town may, on complaint of a citizen, cause an obstruction to be removed from any public street in actual use by the public, yet, where a street exists only in the plan of such city or town, and has not been actually opened, worked by the municipal authorities, and used by the public, but, on the contrary, has been in private occupation for 30 or 40 years, this mode of procedure is not available.' The error into which the learned judge inadvertently fell was in confusing a proceeding to enjoin a summary

abatement of an obstruction of a street with a contest between a sovereign political subdivision (municipal corporation) and an individual over the ownership of the land. In the former the issue is whether a street in the actual use of the public has been obstructed, while in the latter the issue is that of title. The cases are altogether dissimilar, and are controlled by rules of law entirely different." These two decisions seem to us to be decisive of the question of the plaintiff's right summarily to have removed the obstructions in any of the streets except Leonard and Broomhead. They are clearly distinguishable from the earlier decisions above cited, to the effect that the summary remedy provided by the Code may be employed to remove an obstruction from a private way. This is true where the way is actually in existence and being used for travel; but under the decisions in *Bryans v. Almand* and *Robins v. McGehee*, the rule is altogether different where the way is a mere paper street which has never been opened or used for travel, and which exists only on a plat or map of the property surveyed and subdivided into lots. In such a case the summary method of abatement is not available, but the injured party must resort to some other form of action to obtain redress.

[8] 5. As to the Leonard-Broomhead way the plaintiff insists that neither the consent by other property owners to the closing of it nor the permission granted by the city council of Atlanta conferred upon the defendant any right as against the plaintiff to change the street. Certainly it is true that, George W. Adair having at the time of the purchase of his lots obtained a vested right in the use of this street, the consent of other adjoining property owners for it to be closed cannot affect him. The charter of the city of Atlanta provided that: "The said mayor and general council shall have full power and authority to open, lay out, to widen, straighten, or otherwise change, streets, alleys, and squares in the said city of Atlanta." Acts 1874, p. 131, § 60. "This grant is comprehensive enough to embrace the alteration of a street in any respect, whether on, below, or above the surface of the earth." *Trustees v. City of Atlanta*, 93 Ga. 468, 474, 21 S. E. 74. The plaintiff contends that under the decision of the Supreme Court in *Coker v. Atlanta & Knoxville Ry. Co.*, 123 Ga. 483, 51 S. E. 481, the city of Atlanta had no power to authorize the defendant to change Leonard street. In that case *Coker* filed a petition to enjoin the city and the railway company from closing a street known as Waverly place. The city proposed to abandon Waverly place as a street, and to convey land occupied by it to the railway company, and change the location of Waverly place so that it would occupy a strip of land belonging to the railway company of equal width and length lying some 26 feet south of the southern boundary of Wa-

verly place where it connected with Central avenue, and some 30 feet south of the point where its southern boundary touched Washington street. In other words, the proposition was to move Waverly place bodily over 86 feet in a southerly direction, and deposit it upon the lands of the railway company over 26 feet distant from its extreme southern boundary. As stated in the opinion of the Supreme Court: "The journey involves 86 feet of travel, the street being 60 feet wide and every inch of it journeying southward; none of it is to remain at its present abode, but it is in its entirety to seek other quarters provided for it further down Washington street. The proposed 'change' in Waverly place is one of location or residence, and after it moves there will be nothing to identify it but its name, for the ordinance contemplates that all luggage, in the shape of sidewalks and other personal effects, shall be left behind." It was held that the city had no power under its charter to thus abandon Waverly place, and devote it to a purpose inconsistent with its use by the public. In *Adair v. Atlanta*, 124 Ga. 288, 52 S. E. 739, *Coker's Case* was discussed, and it was there said: "The case of *Coker v. Railway Company*, 123 Ga. 483, 51 S. E. 481, is not in any sense in conflict with what is here ruled. There it was proposed virtually to abandon a street, and close it for all time to the public. For a brief time a substitute was to be provided in the form of an improvised parallel street, which was to furnish an outlet for the travel which would have gone over the street which it was proposed to close; but the agreement between the city and the railroad company contemplated that eventually the new street should be given back to the railroad company, while no substitute was provided to take its place. It was held that the power to 'open, lay out, to widen, straighten, or otherwise change' streets contained in the city's charter did not comprehend the power to make the changes indicated. Here there is no question of abandoning a street or of changing its course. The public will have the same thoroughfare open to it that it has today. Its convenience will not be lessened nor the distance one will have to go between any two points increased in the slightest degree by the proposed improvement. The only difference will be that instead of going over a dirt surface it will pass over a metal viaduct."

In *Patton v. City of Rome*, 124 Ga. 525, 52 S. E. 742, it was held: "Under legislative authority granted to a municipality in its charter to 'open, lay out, to widen, straighten, or to otherwise change streets, alleys, and squares in said city,' the city may vacate and sell to an abutting landowner, a private individual, a strip or part of a street, which strip will be thereafter closed to the use of the public, where it appears that the selling and closing of the strip or tract will have the effect to straighten and make more uniform in width the street from which the

tract is taken and sold, without having the effect to close or prevent the free use by the public of said street." This decision is direct authority for the proposition that the power granted to the city of Atlanta to "widen, straighten, or otherwise change streets" is broad enough to authorize it to change a street so as to make it more uniform in width and appearance, and to straighten it so it will be free from pronounced irregularity in shape. In *Athens Terminal Co. v. Athens Foundry Works*, 129 Ga. 393, 58 S. E. 891, it appeared that the power of the city of Athens over its streets was substantially the same as that conferred upon the city of Atlanta. There an injunction was sought to restrain the Athens Terminal Company from changing the course of Washington and Clayton streets in the city of Athens under permission so to do from the city. The court said that the plan of improvements as outlined in the ordinance of the city council of Athens did not contemplate the closing of either Clayton or Washington streets, but that the course of the streets should be deflected near their entrance into Foundry street. It was expressly held that the charter of the city was sufficiently comprehensive to authorize the deflection of a street near one of its termini. It appears from the evidence in the present case that under the permission granted by the city council the defendant straightened the Leonard-Broomhead way, and in so doing moved it eastward about 100 feet. The new street as thus changed touched Chapel street at the same point as the old street, and Ella street immediately north of Chapel was extended eastward so as to connect with the new street. The old street was irregularly shaped, and 999 feet long; the new street is comparatively straight, and is 829 feet long, and begins and ends at the same point that the old street did. The city of Atlanta had full power, we think, to authorize this change. The street was not abandoned entirely as was Waverly place referred to in the decision in *Coker's Case* supra. The termini of the street remained the same. It was merely changed and straightened, and under the evidence afforded more direct and convenient access to Greens Ferry avenue from Chapel and Ella streets than the old street did. This improvement comes well within the charter power of the city to straighten or otherwise change the streets of the city.

[§] 6. Even if this had been a proceeding brought in behalf of the public to require the old route traversed by the Leonard-Broomhead way to be opened, no case would have been made out for the plaintiff. Under the evidence the recorder was not obliged to find that any special damage flowed to the plaintiff from the change in Leonard street. In order for a private individual to complain of a public nuisance, he must show some special damage accruing to him in which the public

does not participate. Civil Code, § 4455; *Adair v. Atlanta*, 124 Ga. 290, 52 S. E. 739; *East Tenn. V. & Ga. Ry. Co. v. Boardman*, 96 Ga. 358, 23 S. E. 403; *Ison v. Manley*, 76 Ga. 804. The new street which is paved and maintained as a convenient highway from Chapel to Greens Ferry avenue affords the plaintiff convenient access from his property along Ella and Chapel streets to Greens Ferry avenue. It is difficult to understand how any special damage could result to the plaintiff from this change in Leonard street; but, conceding that the evidence would have authorized the finding of special damage, certainly it did not demand it, and upon the case here we must take that view of the evidence which is most favorable to the party who prevailed in the court below.

[7, §] 7. We attach but little importance to the plea of estoppel set up by the defendant. Under the testimony for the plaintiff he was not estopped to proceed to abate some of the obstructions mentioned in his petition, nor would the mere fact that his testator had closed up a part of Chapel street afford any basis for the application of the doctrine of estoppel against his executor to have obstructions in other streets removed. The remedy of the persons injured by the closing of Chapel street, if they have any, would be to proceed against the plaintiff to require him to open it. Neither in law nor in morals do two wrongs make a right. Upon a careful consideration of the whole case, we are clearly of the opinion that the judgment of the recorder was right, and that the judge of the superior court properly overruled the certiorari.

Judgment affirmed.

BLAKE v. SMITH.

(Supreme Court of North Carolina. Oct. 15, 1913.)

TRIAL (§ 203*)—INSTRUCTIONS—DUTY TO GIVE.

Under Revisal 1905, § 535, providing that the trial judge shall state to the jury in a plain manner the evidence in the case, and explain the law arising thereon, in an action for the value of a hog, where much evidence was introduced as to ownership and value, and defendant relied on estoppel, it was error merely to instruct the jury to take the case and settle it as between man and man.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

Appeal from Superior Court, Wake County; Carter, Judge.

Action between A. J. Blake and Thomas Smith. From a judgment for the latter, the former appeals. New trial.

B. C. Beckwith, of Raleigh, for appellee.

BROWN, J. This is a controversy over \$14.88, the value of a hog. The plaintiff and defendant introduced much evidence tending to prove the ownership and value of the

hog. Defendant seems to have relied upon an estoppel. The case on appeal states that: "His honor did not charge the jury. He simply said, 'Take the case, gentlemen, and settle it as between man and man.'" This constitutes one of the defendant's assignments of error. In this state the trial judge is required to charge the jury to the extent of stating in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon, except where the facts are few, and no principle of law is involved, and he is not requested to charge. *Holly v. Holly*, 94 N. C. 96; Revisal, § 535. The manner in which the judge is to state the law and evidence for the assistance of the jury must necessarily be left to a great extent to his sound discretion and good sense; but he must charge on the different aspects presented by the evidence, and give the law applicable thereto. *State v. Rippey*, 104 N. C. 756, 10 S. E. 259; *Matthews Case*, 78 N. C. 523.

For this error there must be a new trial.

MOORE v. CAROLINA POWER & LIGHT CO.

(Supreme Court of North Carolina. Oct. 15, 1913.)

1. MUNICIPAL CORPORATIONS (§ 661*)—USE AND REGULATION OF STREETS—POWER OF MUNICIPALITY.

Though the mile square upon which the city of Raleigh was originally located was purchased by the state, and lots within that district were sold with the reservation to the state of the title to the streets, the control of the city over such streets is the same as in other cities, except perhaps in exceptional cases.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1432, 1434-1436; Dec. Dig. § 661.*]

2. MUNICIPAL CORPORATIONS (§ 678*)—USE AND REGULATION OF STREETS—TREES BORDERING STREETS.

The city of Raleigh, for the purpose of its government and management, may in its discretion cut down and trim up trees bordering streets, in the district wherein title to the streets is in the state, and cannot be restrained, except in case of willfulness or oppression.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1458; Dec. Dig. § 678.*]

3. MUNICIPAL CORPORATIONS (§ 663*)—USE AND REGULATION OF STREETS—RIGHTS OF ABUTTING OWNERS—TREES IN STREETS.

The owner of property abutting on a street in a city has an easement or property in the shade trees standing along the sidewalk in the street which the law will protect, subject to the right of the city government over the same.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.*]

4. MUNICIPAL CORPORATIONS (§§ 680, 681*)—USE AND REGULATION OF STREETS—TREES BORDERING STREET.

A city cannot transfer its right of control over shade trees standing along the edge of

its streets to an individual or quasi public corporation, such as an electric light company, which is authorized to use the streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.*]

5. EMINENT DOMAIN (§ 69*)—TAKING PROPERTY—SHADE TREES IN STREETS—INTERFERENCE WITH SHADE TREES.

An electric light company authorized to place poles and wires along the streets of a city cannot invade the rights of a property owner as to the trees in the street in front of his property, without paying compensation therefor.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 171-179; Dec. Dig. § 69.*]

6. MUNICIPAL CORPORATIONS (§ 663*)—USE AND REGULATION OF STREETS—RIGHTS OF ABUTTING OWNERS—TREES—PUNITIVE DAMAGES.

Where an electric light company authorized to place poles and wires along city streets invades the rights of an abutting owner in the trees on the street in front of his property, and there is wantonness, oppression, or bad motive, the abutting owner may be awarded punitive damages.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.*]

7. MUNICIPAL CORPORATIONS (§ 663*)—USE AND REGULATION OF STREETS—RIGHT OF ABUTTING PROPERTY OWNERS—TREES—DAMAGES.

Where an abutting owner is damaged by an electric light company cutting off limbs of the trees standing in a city street in front of his property, he is entitled to damages for the deterioration, if any, in the value of his property, though the trimming was done in a skillful manner, as cutting the limbs in a negligent manner would simply have added to the damages.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.*]

8. ACTION (§ 32*)—REMEDY OF OWNER—FORM OF ACTION.

Forms of action are no longer of supreme importance, and the objection that an ordinary action for damages for injury to shade trees in the street in front of plaintiff's property should not have been brought, an action for compensation for taking property by eminent domain should have been brought instead, is of no weight.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 257-261, 316; Dec. Dig. § 32.*]

Brown and Hoke, JJ., dissenting.

Appeal from Superior Court, Wake County; Carter, Judge.

Action by Van B. Moore against the Carolina Power & Light Company. From a judgment for the defendant, plaintiff appeals. Error.

Peele & Maynard, of Raleigh, for appellant. James H. Pou, of Wilson, for appellee.

CLARK, C. J. This is an action to recover damages to the value of plaintiff's lot in Raleigh, by cutting limbs from and disfiguring an ornamental shade tree, which stood on the sidewalk in front of plaintiff's residence. The defendant claimed that it had a right

to cut the limbs out of the way of its wires because necessary for its purposes, without incurring any liability to the owner of the property abutting the sidewalk whereon the tree stood, and further that the fee simple of the streets, including the sidewalk, was in the state of North Carolina, and hence that the plaintiff had no property rights in the tree.

[1-4] It is historically true that the mile square upon which the city of Raleigh was originally located, and within which limits this tree stood, was purchased by the state and the city so far as it is within those limits was divided into lots and sold, reserving the title to the streets in the state. But so far as it affects this matter and all matters, except possibly in exceptional cases, the control of the municipality over its streets is the same in Raleigh as in all the other cities and towns in the state. The city for the purpose of its government and management can, in its discretion, cut down or trim up the trees bordering the streets, and cannot be restrained, unless in cases of willfulness or oppression. *Jeffress v. Greenville*, 154 N. C. 499, 70 S. E. 919; *Rosenthall v. Goldsboro*, 149 N. C. 128, 62 S. E. 905, 20 L. R. A. (N. S.) 809, 16 Ann. Cas. 639; *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671. But subject to such right of the city government the abutting owner has an easement or property in the shade trees standing along the sidewalk which the law will protect. *Brown v. Electric Co.*, 138 N. C. 533, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554. The city cannot transfer to any individual or to a quasi public corporation for its convenience and profit this superior right which it can exercise only for the public benefit.

[5] It is also true that the defendant company is empowered by its charter and by the permission of the city to place its poles and wires along the streets for the purpose of carrying the electric light. But it does not follow that therefore it can invade the property rights of the plaintiff in his shade tree without compensation, nor that the plaintiff would not be entitled to an injunction in case the cutting of the tree was about to be done unnecessarily or wantonly or oppressively. The defendant is a public service corporation, or as it is usually termed a quasi public corporation, and can take the property of the plaintiff but only upon compensation. This is true even if it had been necessary for the defendant to run its wires through the tree and to cut the limbs, for the defendant cannot invade the property rights of the plaintiff without compensation because convenient or necessary for its benefit to do so. As a matter of fact it could not be necessary, because the wires could have been strung above the top of the tree, or could have swerved either side, or could

have been placed underground, as is required in many cities and even in North Carolina in progressive towns like Charlotte for instance, on some of its streets. The latter indeed must ultimately be required everywhere, for the present system of stringing the wires above ground is unsafe for the public, as we have an instance in *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, where a broken wire hanging down became charged by contact with a trolley wire, causing the death of a boy passing by. The overhead wires are very unsightly, are troublesome in cases of fires, and are subject to interruption by storms. They are allowed only as a matter of economy on the part of the light company, and not to entitle them to take the property of others as a matter of right.

[6] The plaintiff is entitled to compensation for the injury done him, and, if there was wantonness, or oppression, or other bad motive, punitive damages might be added. The subject has been so fully discussed and elucidated in *Brown v. Electric Co.*, 138 N. C. 533, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554, that we need not do more than refer to the reasoning and the conclusions reached in that case.

[7] The plaintiff avers that a great inducement to him in buying the premises was the ornamentation of his grounds by this tree and others, and that he spent considerable money in improving and beautifying them. His honor erred in instructing the jury that the plaintiff was entitled to recover only if the cutting of the limbs had been done in a negligent or unskillful manner. That would add to the amount of the damages which he would be entitled to recover. But it is not the measure of his rights, for he is entitled to compensation for the deterioration, if any, in the value of his property, from the trimming or cutting of the tree, however skillfully done, just as he would have been if the tree had been cut down, however skillfully and carefully and even necessarily the tree had been felled. The plaintiff's property in the tree (subject to the superior right of the city to cut or remove it for public purposes) and his right to enhance the value of his lot by its improvement on which he had spent care and money entitle him to compensation for the loss which he may have sustained by the act which the defendant has done for its own convenience and advantage.

[8] It was suggested that the defendant might have obtained the right to trim the tree, or even to cut it down if necessary, under the right of eminent domain, and therefore that the plaintiff could recover damages only in the same method. But forms of action no longer are matters of supreme importance. If the defendant so desires, this may be styled an action to recover damages

under the right of eminent domain. The plaintiff's property rights have been invaded by the defendant for its own benefit, and the plaintiff is entitled to recover compensation therefor, and is not restricted to such damages as may have been caused by the unskillfulness or negligence of the defendant.

Error.

BROWN and HOKE, JJ., dissent.

WOODLEY v. CAROLINA TELEPHONE & TELEGRAPH CO.

(Supreme Court of North Carolina. Oct. 15, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 28*) — DUTY TO FURNISH SERVICE.

Telegraph and telephone companies take and hold their charters subject to the obligation to render service at uniform and reasonable rates without discrimination, and they have no right to make or continue a contract which renders them unable to perform those duties.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 16, 17; Dec. Dig. § 28.*]

2. TELEGRAPHS AND TELEPHONES (§ 33*) — CONDUCT OF BUSINESS—RULES AND REGULATIONS.

Telegraph and telephone companies may make such just and reasonable rules and regulations as are required for the conduct of their business, including a rule requiring the payment of established rates monthly in advance.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

3. TELEGRAPHS AND TELEPHONES (§ 33*) — PRELIMINARY INJUNCTION—GROUNDS.

Where a telephone company at first allowed its subscribers to pay at the end of the month, although the contract called for payment in advance, but found that their losses from such method were so great as to interfere with their business, and therefore notified the subscribers that they would be required thereafter to pay monthly in advance, to which rule all the subscribers but one acceded, a preliminary injunction should not be issued to restrain the severing of connections with the telephone company of that one subscriber, pending a final hearing on the merits, since that would amount to an unlawful discrimination in his favor.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

4. TELEGRAPHS AND TELEPHONES (§ 33*) — CONTRACTS FOR SERVICE—MODIFICATION.

Where a telephone subscriber struck out from the form of contract the provision requiring payment in advance, such erasure left the matter undetermined and subject to future regulation by the company.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

5. TELEGRAPHS AND TELEPHONES (§ 33*) — CONTRACTS FOR SERVICE—ORAL AGREEMENT.

An oral agreement that a telephone subscriber should pay at the end of the month instead of in advance, which was indefinite as to

time, would be determinable at the will of either party upon reasonable notice.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

6. TELEGRAPHS AND TELEPHONES (§ 33*) — CONTRACTS FOR SERVICE—CONSTRUCTION.

Where a written contract for telephone service provided that it should continue for one year, and thereafter until terminated by the company at its option, the company could terminate an oral agreement supplementing the written subscription, and which permitted the subscriber to pay at the end of each month instead of in advance.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

7. TELEGRAPHS AND TELEPHONES (§ 33*) — REGULATIONS — CONSTRUCTION OF ORDINANCE.

An ordinance, permitting a telephone company to require its subscribers to give a bond to secure the payment of the first year's rental, was manifestly intended to secure the cost of installing the service, and does not prevent the company from requiring its subscribers to pay their rentals monthly in advance.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

8. TELEGRAPHS AND TELEPHONES (§ 33*) — CONTRACTS FOR SERVICE—WAIVER.

Where a telephone company temporarily permitted its subscribers to pay at the end of the month instead of in advance, as their contracts required, it did not thereby waive its right to require the payment in advance, since there was no consideration for the waiver and no element of estoppel.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

9. TELEGRAPHS AND TELEPHONES (§ 28*) — DUTIES TO FURNISH SERVICE—WAIVER OF RIGHTS.

A telephone company cannot, by waiver of the provisions of its contract, put itself in a position which will prevent a proper performance of its statutory duties, and the providing of service at reasonable rates without discrimination.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 16, 17; Dec. Dig. § 28.*]

10. TELEGRAPHS AND TELEPHONES (§ 33*) — CHARGES—TENDER.

Where a telephone subscriber made a tender for a few days' service in advance, while at the same time insisting that he had a right to pay at the end of the month, the tender was not sufficient to prevent the removal of the telephone by the company.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

Appeal from Superior Court, Lenoir County; Allen, Judge.

Action by Chas. B. Woodley against the Carolina Telephone & Telegraph Company. From an order granting a preliminary injunction, the defendant appeals. Reversed.

The action was brought to recover damages of defendant for severing plaintiff's telephone connection in the city of Kinston, and to compel defendant to restore same. Defendant justified on the ground that plain-

tiff wrongfully refused to pay the rates monthly in advance, and plaintiff contended that the rates were only due at the end of each month, and that defendant had no lawful excuse for its conduct. The court, on the facts as presented being of opinion with the plaintiff, entered judgment restraining defendant till the hearing, and compelling it to restore connection pending the controversy. Defendant, having duly excepted, appealed.

Y. T. Ormond and T. C. Wooten, both of Kinston, and G. M. T. Fountain & Son, of Tarboro, for appellant. G. V. Cowper, of Kinston, for appellee.

HOKE, J. [1] Our decisions are to the effect that these public service corporations, including telegraph and telephone companies, take and hold their charters subject to the obligation of rendering services at uniform and reasonable rates, and without discrimination, and, further, that they have no right to make or continue in the performance of a contract "which renders them unable to perform the duties imposed upon them by their charter," and whether such contract is evidenced by municipal ordinance or by agreement between the parties. *Telegraph v. Telephone Co.*, 159 N. C. 9, 74 S. E. 636; *Horner v. Water Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681; *Griffin v. Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

[2] It is also recognized that those companies, subject to the provisions of their charter and the general law, may make such just and needful rules and regulations as are required for the proper performance of their statutory duties and in reasonable furtherance of the company's general business, and, in reference to companies of this character, that a rule requiring payment of established rates in advance for a limited period will be considered as reasonable and valid, and we are of opinion that in case of telephone companies the term of one month comes well within the principle. *Washington v. Independent Tel. Co.*, 59 Wash. 156, 109 Pac. 366, 81 L. R. A. (N. S.) 329; 37 Cyc. p. 1619.

[3] In the present case, on a perusal of the facts in evidence, it appears that defendant company duly incorporated, desiring to install and operate a new and efficient telephone system for the city of Kinston, was granted the privilege by ordinance of the city, and had printed a form of contract for general use, requiring payment of monthly rates in advance; that for a year or more after commencing operations the company desiring to oblige its patrons as far as possible, did not insist on prepayment, collecting very generally at the end of each month, but having ascertained by trial that the loss in collections by this method was

so great that the company would not be able to "properly maintain its system and give efficient and satisfactory service to its patrons, it was determined to enforce the feature of the contract requiring payment in advance," and that it was necessary to do this to properly perform its duties; that by the 1st of January, 1913, a large portion of the subscribers had acquiesced in the requirement, and by May of this year all of the 600 subscribers had done so but 11, and since that time all of these 11 except the plaintiff.

In reference to the various notices given plaintiff in this connection the affidavit of defendant's general manager made averment as follows: "That the said plaintiff was notified in January that, unless he complied with this rule of the company, his phone would be disconnected. That he was given said notice several times in the month of May, and on the 7th of May he was notified that if he had any special contract that did not require him to pay his rentals in advance, the company hereby cancels same, and unless he paid his rentals in advance by the 15th of June, service would be discontinued. That plaintiff was notified in January, 1913, that he must comply with the rules of the company to pay in advance. He stated to affiant that the company had no right to adopt the rule; he did not object to the same, however, but that it was a matter of finance with him, and that he hoped to be able to pay in advance soon. That thereafter every effort was made to induce said plaintiff to comply with said rule and regulation, and upon his persistent failure and refusal to do so his phone was disconnected, and service was discontinued on the 16th of June, 1913."

We find no substantial denial in the record of the facts relevant to this phase of the inquiry, and it will thus sufficiently appear that for defendant to defer to plaintiff's position in this matter would be an unlawful discrimination in plaintiff's favor on the part of the company, and in violation of its statutory duties as a public service corporation. Applying the legal principles, as heretofore stated, we are of opinion that, on the facts as they now appear of record, the defendant company was well within its rights when it severed plaintiff's connection for nonpayment of monthly dues.

[4-8] While this disposes of the present appeal it may be well to refer to some of the positions urged in support of plaintiff's claim. It is contended that he is entitled to present relief by reason of certain averments in his own affidavit to the effect that when the contract of subscription was presented to him for his signature of date October 18, 1910, stating the rates, "at \$36 (dollars) per annum in equal payments of \$3.00 each monthly in advance during the continuance of the contract," etc., plaintiff declined

to sign same as written, and did not sign till he had erased the words "monthly in advance," and further that there was an oral agreement at this time that plaintiff was to pay at the end of each month. So far as the erasure is concerned, this would seem to leave the matter indeterminate, and subject to future regulation by the company (*Horner v. Water Co.*, supra), and as to the alleged oral contract, even if the same were made and valid, it being indefinite as to time, would ordinarily be determinable at the will of either party, certainly on giving reasonable notice (*Soloman v. Sewerage Co.*, 142 N. C. 439-445, 55 S. E. 300, 6 L. R. A. [N. S.] 391); and, if considered a part of the written subscription and controlled by its terms, this contains specific stipulation "that this contract shall continue for one year from 19th day of October, 1910, and thereafter until the expiration of thirty days after written notice shall be given by the subscriber of a desire to cancel this agreement, unless the same shall be terminated by the company as specified in the conditions aforesaid," and one of these conditions is, in part, as follows: "That for any reason which appears to the company sufficient, the company may at its option terminate the contract and remove the instrument." On the facts, therefore, there is nothing in the contract itself restraining the company from making the change and requiring payment on giving proper notice of the monthly rates in advance.

[7] Again it is insisted that this collection of rates in advance is prohibited by the municipal ordinance granting defendant the privilege of operating its system in the city of Kinston. Section 13 of the ordinance upon which plaintiff relies, after requiring of defendant service for all citizens of good standing who apply for it, concludes as follows: "That the said Carolina Telephone and Telegraph Company may require such person or persons to keep, and pay the rental on such telephones for a period of twelve months and to guarantee the payment of said rental for said period, the said company having the right to require the said party to give bond in the sum of fifty (\$50) dollars as an assurance of the faithful performance of the terms of said contract." This, to our mind, in no way interferes with the right claimed by defendant, but, as its terms clearly import, was only intended as a protection to the company against the initial expenses of installing the telephone at the beginning of the service.

[8] It is further argued that the company has waived the right in question by not having enforced it for a year or so after making the regulation, but such a position cannot at all be maintained. In order to a valid waiver, there must be an agreement founded on consideration, or there must be some element of estoppel. Neither is present here.

It was only a case of temporary acquiescence in a different method on the part of the company, and from a disposition to oblige its patrons, and there was nothing to prevent defendant from enforcing its regulation when it was ascertained by trial that the business could not be satisfactorily conducted in the other way.

[9] Apart from this, the doctrine of waiver is subject to the control of public policy, and a public service corporation no more by waiver than by contract is allowed to put itself in position which prevents the proper performance of its statutory duties, and affording its service at reasonable rates and without discrimination amongst its patrons. 29 A. & E. pp. 1097 and 1107.

[10] The suggestion of a tender by plaintiff for a few days' service and demand of reinstatement is without merit. The plaintiff was at the time insisting on its right to pay at the end of each month, and the tender was not in accord with a valid regulation of the company.

We are of opinion, that on the facts as they now appear, the plaintiff has shown no right to a preliminary injunction and the judgment of the lower court must be reversed.

Reversed.

BROWN, J., did not sit.

WILLIAMS v. SEABOARD AIR LINE RY.
(Supreme Court of North Carolina. Oct. 15, 1913.)

MASTER AND SERVANT (§ 114*)—INJURIES TO SERVANT—MASTER'S LIABILITY—SAFE PLACE TO WORK.

The fact that a railroad company in cutting bushes from its right of way left pointed stubs eight or ten inches high does not constitute a breach of its duty to provide a safe place for work, which renders it liable for injuries to a section hand who left the track at a place of his own selection to get a drink of water, and in going down the side of a fill tripped over a snag, and fell.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 179, 200; Dec. Dig. § 114.*]

Appeal from Superior Court, Wake County; Carter, Judge.

Action by N. G. Williams, Jr., against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action to recover damages for personal injury, alleged to have been caused by the negligence of the defendant.

The complaint alleges that the plaintiff was an employé of the defendant railway company in the capacity of sectionman or assistant section foreman; that on the 11th day of July, 1911, the section foreman ordered the plaintiff, together with three other employés of the company, to go over the section and tighten bolts; that the section

foreman and the portion of the crew with him were engaged in the usual work on the section; that the section foreman advised the plaintiff that the water bucket would be kept with the foreman and his portion of the crew, and instructed the plaintiff and the others with him to get water at the nearest places as they proceeded along the line tightening bolts; that about 2:30 o'clock in the afternoon they had reached a fill some 12 or 15 feet in height; that prior to this time the company, through its employés, had permitted the sides of the fill to become dangerous by cutting bushes and small trees with a hook, leaving them sharp and pointed, sprouts growing out and weeds growing up on the sides of the fill, concealing the dangerous condition of the right of way; that the plaintiff, not knowing the dangerous condition of the right of way, started down the sides of the fill for water, stumbled on one of these hidden snags or stumps, and fell, and was injured.

The plaintiff testified as follows: "I am the plaintiff in this action. I live four miles west of Cary, N. C. On July 11, 1911, I was at work on the section for the Seaboard Air Line Railway between Cary and Apex. I went to work for the Seaboard about the 16th or 17th day of June of that year. I was assistant section foreman, and my wages were \$1.25 per day. Mr. E. D. Medlin was section foreman. On the morning of the 11th of July the foreman ordered four of us to go along the section and tighten bolts. The three others and myself were J. A. Marcum, Hinton Hobby, and Charlie Singleton, and the section foreman and the other members of the crew remained behind at work on the right of way. The section foreman told us that he would keep the water bucket with him and those behind, and we should get water at the nearest places along the line. About 2 o'clock in the afternoon we were tightening bolts on a fill near the 11-mile post. The fill is 75 or 100 yards long. It was very hot, and we were thirsty. Arthur Marcum and I started to a well about 300 yards away to get water. We were not far from the middle of the fill. We started down the embankment, when my foot struck one of the snags, and in throwing my other foot ahead to try to catch I fell, rather sat, down on one of the snags. On the sides of the fill were many snags where the bushes had been cut off with a hook some time before, leaving the snags eight or ten inches or one foot high. These snags were very sharp. Sprouts had grown out from these stumps or snags, and weeds had grown up about three feet high and very thick, hiding the snags. I had never worked on the right of way, and did not know the snags were there. I have worked on the section on the Southern Railroad, and have observed other railroads, and never knew one in as bad condition as this with reference to the snags and bushes. I

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

was rendered unconscious; stayed in Rex Hospital one month. I haven't been able to work regularly since. I am not well now. In April, 1912, I went to work for the Carolina Power & Light Company as conductor. I worked 12 hours a day. When I was working with the section force on the morning of this accident, whenever we felt like it we stopped and got water and came back; that was the order we had. Mr. Medlin wasn't with me at the time of the accident. Mr. Hobby was about two rails behind me. A rail is about 30 feet long. I think he was going after water, too. Mr. Marcum had gone down the fill, and was a little ways from me. I think he went under the fence. There was a barb-wire fence at the bottom of the fill. The fill is about 15 feet high, and extends something like 40 or 50 feet towards Apex. I guess we were nearer the end towards Apex than towards Cary. The accident happened on a bright sunny day about 2 o'clock. I could see the bushes, but couldn't see the ground where I was going. The fill is a gradual slope. The section force are supposed to go over this fill once a year and cut down the bushes for the purpose of keeping them from getting dry and burning property. The rule is that they cut the bushes once a year. I guess they do that so that the engines will not set them on fire. The stick was much larger than a pencil, and eight inches high. In cutting the bushes they used a blade something like a reaping hook. By going to the end of the fill you could get to Mr. Spence's well, where I was going, without having to pass through the bushes. Nobody pointed out the place where I should go. I could start for water from any point."

At the conclusion of the evidence, his honor allowed the motion of the defendant for judgment of nonsuit, and the plaintiff accepted, and appealed.

J. C. Little, of Raleigh, for appellant.
Murray Allen, of Raleigh, for appellee.

ALLEN, J. (after stating the facts as above). The rule that the employer must furnish the employé a reasonably safe place to work is fully recognized, and has been applied in numerous decisions of this court; but it is equally well settled that, before one can recover damages for personal injury on account of negligence, he must prove a breach of duty, causing him damage, and we find in the record no evidence of a breach of duty.

The plaintiff was injured several miles from a station, while going down a steep embankment, by falling on a small snag six or eight inches high, which had been left after the defendant cut down the bushes on the right of way to avoid danger from fire. We would not hold that leaving an obstruction of this character on an embankment in the

country, not usually used by the employés of the defendant or other persons, would be evidence of negligence, and the liability of the defendant would not be increased by the fact that the snag on which the plaintiff was injured was the result of cutting bushes on the right of way to protect the roadbed and the property of adjoining landowners from fire. The plaintiff was not ordered to go down the embankment, and it appears from his evidence that he not only selected the place for going down, but that he could have avoided the bushes altogether by going to the end of the embankment, a distance of 75 yards.

There is no error.

Affirmed.

DR. SHOOP FAMILY MEDICINE CO. v. DAVENPORT.

(Supreme Court of North Carolina. Oct. 15, 1913.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE—WRITTEN CONTRACT.

Where defendant purchased certain medicines under a written contract containing no provision for the return thereof and declaring that there was no other agreement written or oral than that stated in the writing, parol evidence that it was agreed between defendant and plaintiff's agent that the goods might be returned if unsatisfactory was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

2. SALES (§ 272*)—IMPLIED WARRANTY—MERCHANTABILITY.

A sale of goods by a manufacturer for resale imports an implied warranty that the goods are merchantable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 747; Dec. Dig. § 272.*]

3. SALES (§ 284*)—IMPLIED WARRANTY—MERCHANTABILITY—RETURN.

A buyer may return goods, if they are unsalable and worthless, for breach of an implied warranty of merchantable character.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803-805; Dec. Dig. § 284.*]

4. SALES (§ 287*)—MERCHANTABILITY—IMPLIED WARRANTY—BREACH—ACTION FOR PRICE—RETENTION OF PART OF GOODS.

Where a seller accepted a return of a part of goods sold for alleged breach of warranty of merchantable character, it could not recover a balance of the contract price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 811-816; Dec. Dig. § 287.*]

5. INTEREST (§ 50*)—COSTS (§ 42*)—SUSPENSION—CONTINUING TENDER.

A plea of tender was insufficient to stop interest and costs where the tender was not kept good and defendant did not produce the money and pay it into court.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. § 50.* Costs, Cent. Dig. §§ 137-164; Dec. Dig. § 42.*]

6. COSTS (§ 42*)—OFFER OF JUDGMENT—STATUTES—APPLICATION.

Revisal 1905, § 860, providing that defendant may serve an offer in writing to allow judgment to be taken against him in a specified sum, with costs, and, if plaintiff does not accept the offer and does not obtain a more favorable judg-

ment, he cannot recover costs, has no application to a tender of a specified sum by check, which tender was not kept good by continued readiness to pay and payment of the money into court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 137-164; Dec. Dig. § 42.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Action by the Dr. Shoop Family Medicine Company against J. R. Davenport. Judgment for plaintiff for less than the relief demanded, and it appeals. Modified.

This is an action to recover the price of certain medicines alleged to have been sold and delivered to the defendant. The indebtedness is denied by him. It appears that plaintiff sold and shipped the goods to defendant, who sold some of them to different customers, amounting to \$8.45; and, finding that the medicines were worthless, he refunded the money to some of his customers who had bought from him and returned the rest of the medicines by freight to plaintiff, with a bill of lading for same and a check for the \$8.45. Plaintiff returned the check but kept the goods and the bill of lading. There was evidence that the goods were worthless. Defendant offered to show that the agent, at the time of the sale, agreed that he could return the goods if they were not satisfactory, but this evidence was excluded by the court, as the contract was in writing, and it is stated therein that there is no other agreement, written or oral, than the one stated in the writing. Defendant tendered payment of the \$8.45, which was refused upon the ground that the tender should have been of the whole amount which is justly due the plaintiff and claimed by him, but he did not allege or show continual readiness to pay or a payment into court. Judgment for \$8.45 and costs in justice's court, where tender was first made and refused, and appeal by defendant.

Albion Dunn, of Greenville, for appellant. Harry Skinner, of Greenville, and Lewis G. Cooper, of Henderson, for appellee.

WALKER, J. [1] The court properly rejected the evidence as to the parol agreement of the plaintiff's agent. The contract could not be contradicted or varied in this way. *Medicine Co. v. Mizell*, 148 N. C. 384, 62 S. E. 511, and cases cited.

[2] But defendant relies upon the principle that, when the plaintiff sold the goods to him it impliedly represented that they were fit for the use for which they were intended, or that they were merchantable, and that this representation turned out to be untrue, for they were not only not merchantable but worthless, to the knowledge of the plaintiff. Mr. Benjamin states the rule on this subject in substance to be that in all sales by sample there is an implied warranty that the bulk

shall be of equal quality to the sample. Where goods are sold without an opportunity for inspection, there is also an implied warranty that they shall be at least "merchantable," not that they are of the first quality, or even of the second, but that they are not so inferior as to be unsalable among dealers in the article. This is especially true where, as in this case, the vendor is the manufacturer of the articles sold. *Benjamin on Sales*, 683, 686, and cases cited in notes. "If a man sells an article, he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose." *Jones v. Bright*, 5 Bing. 544. The principle was clearly expressed by Lord Ellenborough in *Gardiner v. Gray*, 4 Campbell, 143, where he denied the application of the rule as to sales by sample: "I am of opinion, however, that under such circumstances the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as *waste silk*. The witnesses describe it as unfit for the purposes of waste silk and of such a quality that it cannot be sold under that denomination." See, also, *McClung v. Kelley*, 21 Iowa, 508; *Gaylord Manufacturing Co. v. Allen*, 53 N. Y. 518. The principle, as stated, has been recognized and the above authorities approved in *Main v. Field*, 144 N. C. 307, 56 S. E. 943, 11 L. R. A. (N. S.) 245, 119 Am. St. Rep. 956. See, also, *Manufacturing Co. v. Davis*, 147 N. C. 267, 61 S. E. 54, 17 L. R. A. (N. S.) 193; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Fitch v. Archibald*, 29 N. J. Law, 160; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *Tiffany on Sales*, p. 260.

[3] Defendant, therefore, had the right to return the goods if they were unsalable and worthless.

[4] But it appears that the plaintiff received and kept that part of the goods reshipped to him by the defendant. There was ample evidence of this fact (35 Cyc. pp. 193 and 321) which the court fairly submitted to the jury, and they have found with the defendant. Surely it is not just that plaintiff should retain the goods and recover their

value from the defendant. If he had refused to receive the goods or had returned them after discovering what they were, a different case might be presented, upon which, though, we express no opinion.

[5] We do not think there was a sufficient tender of the \$8.45 to stop interest and costs. To have this effect, the tender must be kept good by being always ready to pay and by producing the money and paying it into court. *Bissell v. Heyward*, 96 U. S. 580, 24 L. Ed. 678. In a recent case Justice Allen, referring to this plea of tender and its sufficiency, says: "The plea of tender is defective in that, in addition to alleging that he tendered the amount due, the defendant fails to allege that he has at all times since the tender been ready, able, and willing to pay, and in failing to accompany the plea by payment of the money into court; and the evidence in support of the plea is equally defective." *Lee v. Manley*, 154 N. C. 247, 70 S. E. 386. And again, quoting with approval *Dixon v. Clark*, 57 E. C. L. 376: "The principle of the plea of tender, in our apprehension, is that the defendant has been always ready (*toujours prêt*) to perform entirely the contract on which the action is founded, and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prêt*) but must be accompanied by a profert in curiam of the money tendered"—citing, also, *Bank v. Davidson*, 70 N. C. 122. In *Soper v. Jones*, 56 Md. 503, it was held that "a plea of tender, not accompanied by profert in curiam, is bad." The same was said in *De Bruhl v. Hood*, 156 N. C. 52, 72 S. E. 83. This plea of tender applies peculiarly to actions of debt and assumption; the present action being assignable to the latter class, if we were proceeding under the former system of pleading. The tender does not pay or satisfy the demand.

In this view it may be well to reproduce what this court said (by Rodman, J.) in *Bank v. Davidson*, 70 N. C. 118: "We have recently said in several cases that contracts such as that now before us have been always regarded by the Legislature and by this court as contracts to pay money and not as contracts to deliver specific articles (*Wooten v. Sherrard*, 68 N. C. 334), and that consequently the effect of a tender refused is not to discharge the debt but merely to stop the interest. That this is the law of contracts to pay money ordinarily is settled. It is so laid down in all the text-books and must follow from the rule that a plea of tender must aver that the defendant has always been ready and willing to pay and must be accompanied by a payment of the money into court for the use of the plaintiff. An omission to pay the money into

court makes the plea a nullity, and plaintiff may sign judgment. *Bray v. Booth*, 1 Barnes, 131; *Kether v. Shelton*, 1 Stra. 638."

The rule is thus stated in 38 Cyc. 162, 169, 170: "Ordinarily a tender of money does not operate as a satisfaction of the debt and is no bar to an action thereon; the effect, when the tender is maintained, being to discharge the debtor from a liability for interest subsequent to the tender or damages that would accrue by reason of nonperformance and costs afterwards incurred. * * * If the debt or duty is discharged by a tender, or the tender is relied upon as a defense to a foreclosure of a lien or the enforcement of some collateral right, it is sufficient, without more, to plead the tender and refusal, and in pleading a tender of chattels it is not necessary to plead a continuing readiness to pay. But, where the debt or duty remains after a tender and refusal, it is not enough for the party who pleads a tender, in an action to recover the debt, or damages for a failure to perform the duty, to plead the tender and refusal alone, but he must plead that ever since the tender he has at all times been and still is ready to pay the money or perform the duty; and, where it is necessary to keep the tender good, the rule in equity in reference to pleading continued readiness to pay is no less strict than at law. Where the debt or duty is not discharged by a tender and refusal, or the tender is made the ground of the cause of action or defense, the tenderer must plead in addition to a continuing readiness a profert in curiam; that is, that the money has already been brought into court or is now brought into court ready to be paid."

In our case it was not averred, nor does it appear, that defendant was ready with the money at the time of the alleged tender or that he kept himself in readiness to pay or actually paid it into court. The mere offering of the check was not sufficient; nothing else appearing. *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288; *Matter of Collyer*, 124 App. Div. 16, 108 N. Y. Supp. 600; *Poague v. Greenlee*, 63 Va. (22 Grat.) 724; *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; 38 Cyc. 146. It was said in *Matter of Collyer*, supra: "His right to money was not affected by the fact that this check was once tendered in open court with a consent to an adjournment until it should be honored and that he refused it. The check was not legal tender. It was but a direction to a bank to pay the payee; the money represented did not thereby become the property of the payee, nor was it put beyond the control of the maker of the check, nor did the check before presentation work an assignment of the moneys thereby ordered to be paid"—citing *O'Connor v. Mechanic's Bank*, 124 N. Y. 324, 26 N. E. 816. The bank on which the check was drawn was in a different state from that of the creditor's residence. The case of *Smith v. B. & L. Asso.*, 119 N. C. 257, 26 S. E. 40, presents a

different question and is not like this case in its facts. Nor is *Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231, in which the question was whether the lien of a mortgage was released by a tender. There seems to be a distinction between a tender for a simple, unsecured debt and one made when the debt is secured by indorsement or a lien; it being declared by some courts, contrary to what was held in *Parker v. Beasley*, supra, that a proper tender discharged the lien. But that question is not now before us. Nor is the principle which is sometimes applied by courts of equity applicable to this case. In *Bateman v. Hopkins*, 157 N. C. 470, 73 S. E. 133, Ann. Cas. 1913C, 642 (where the facts were peculiar), will be found a discussion of the law in regard to this difference. We there said: In general the rules of equity concerning the necessity of an actual tender are not so stringent as those which prevail at law, as the decree can be so framed as to protect the parties, and more exact justice can be attained than under the technical rules of the law which are of greater universality. There may be cases, even at law, or rather governed by strict legal principles, where the tender need not be renewed or kept good, as, for illustration, in *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642, Id., 137 N. C. 140, 49 S. E. 88, *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586, 3 Ann. Cas. 903, it being useless to do so, but this rule depends for its application upon the exceptional facts of that class of cases, which may, though, embrace quite a variety of transactions.

[6] Revisal, § 860, does not apply, as there was no offer of judgment, which must be in writing and signed by the party making it. The other exceptions are untenable.

The judgment will be modified so as to conform with this opinion in respect to the insufficiency of the tender, and in other respects is affirmed. Costs divided here.

Modified.

W. J. DOWNING LUMBER CO. v. RILEY et al.

(Supreme Court of North Carolina. Oct. 15, 1913.)

LOGS AND LOGGING (§ 3*)—CONVEYANCE OF TIMBER RIGHTS—MERGER OF TITLE.

The owner of timber land, in 1899, conveyed to A. the timber thereon above 12 inches in diameter with 10 years' time in which to cut it. Thereafter the owner conveyed the land to D., who in 1905 conveyed all the timber thereon above 10 inches in diameter to the plaintiff, giving him 8 years in which to cut it. D. later conveyed the land to C., excepting from the conveyance the timber rights conveyed to plaintiff. A. conveyed its timber rights to the defendants, who subsequently acquired the title to the land from C. Held, that since the deed to the land under which defendants claimed excepted the timber rights conveyed to plaintiff, defendants' right to cut timber, acquired through A., did not merge with the title, and after the 10 years which defendant had in

which to cut, the plaintiff remained the owner of the timber described in D.'s conveyance to it.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Superior Court, Onslow County; Justice, Judge.

Action by the W. J. Downing Lumber Company against John T. Riley and others, to settle title to timber. Judgment for plaintiff, and defendants appeal. Affirmed.

Duffy & Koonce and Herbert McClammy, all of Jacksonville, for appellants. J. O. Carr, of Wilmington, and Frank Thompson, of Jacksonville, for appellee.

BROWN, J. The land originally belonged to one G. E. Simmons, who sold the timber thereon, down to 12 inches in diameter, to the Angola Lumber Company, by deed dated the 23d day of September, 1899, and gave the company 10 years within which to cut it. This timber was conveyed through mesne conveyances to defendants. The time for cutting it expired September 23, 1909. On December 11, 1899, Simmons conveyed the land upon which the timber grew to E. W. Dixon. On the 14th day of December, 1905, E. W. Dixon and wife conveyed all of the timber down to 10 inches in diameter, situated upon said land, to the plaintiff, and gave it eight years within which to cut. On March 22, 1907, Dixon conveyed said lands upon which the timber was then standing and uncut to Sanders & Costin, who conveyed to defendants on February 5, 1907. After describing the two tracts of land conveyed therein, the deed from Dixon to Costin contains this exception: "Provided that the timber on said lands is hereby excepted above ten inches at the base, also one acre excepted for burial purposes near the Mill Creek Crossing, where the graveyard is. The exemption of the timber mentioned in this deed is only for the time that the timbermen hold option for them to be good to the parties of the second part mentioned in the deed."

It is contended that when defendant acquired title to the land upon which the Angola timber grew (the time within which it must be cut not having then expired), there was a merger of the two interests. This would be generally true. *Rountree v. Cohn Bock Co.*, 158 N. C. 153, 73 S. E. 796; *Lumber Co. v. Brown*, 160 N. C. 281, 75 S. E. 714. But the deed from Dixon to Sanders & Costin excepted the timber theretofore conveyed from its operation. Consequently there could be no merger, for the ownership of the timber and the land did not unite in one person. Dixon had thereby conveyed all the timber on same land down to 10 inches to plaintiffs. This, of course, was subject to the prior right of the Angola deed. This Angola timber was not cut when the 10 years expired, September 23, 1909. Inasmuch

as by reason of the exception in the Costin deed, the defendant acquired no further title, or right to the Angola timber, than he already possessed, when the 10 years expired defendant's right to cut the timber expired with it. As plaintiffs' timber deed from Dixon conveys "all the pine, oak and poplar timber of and above the size of ten inches at the base when cut," and as the eight years' time limit in that deed did not expire until December 14, 1913, the plaintiffs became the owner of all of such timber growing on the land after September 23, 1909, and have the right to cut and remove the same up to December 14, 1913. If the defendants cut and removed any of such timber after September 23, 1909, they are liable to plaintiff for its value.

Affirmed.

BLACKSTAD MERCANTILE CO. v. PARKER & GLOVER.

(Supreme Court of North Carolina. Oct. 15, 1913.)

EVIDENCE (§ 431*)—PAROL EVIDENCE—NEGATIVES DELIVERY.

In an action upon a written contract for goods, oral evidence is admissible to prove that the contract was left with the salesman on condition that he should not send it in until he had further instructions from the buyer, since such evidence does not contradict the written agreement but shows that it was never delivered and therefore did not become effective.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1975-1980; Dec. Dig. § 431.*]

Appeal from Superior Court, Wake County; Carter, Judge.

Action by the Blackstad Mercantile Company against Parker & Glover. Judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff declared on a written contract for purchase of a lot of cheap jewelry to the amount of \$198; the order containing a stipulation as follows: "Date, July 14, 1911. Blackstad Mercantile Company, St. Louis, Mo.—Gentlemen: On your approval of the terms and conditions of the above order, please deliver to us, at your earliest convenience, f. o. b. factory or distributing point, the goods above listed on the above terms. We agree that no statement made by ourselves or the salesman will be a part of this agreement, unless written in the original order received and accepted by you. [Signed] J. B. Legters, Salesman. [Signed] Parker & Glover, Customer. Postoffice, Wendell, N. C."

Defendants denied liability, claiming that they had not made any such contract. On the issue thus raised, plaintiff presented the written order and proved it had shipped goods to defendants from St. Louis, Mo., July 18, 1911, as specified in contract, and on arrival at destination at Wendell, N. C., defendants declined to receive same and had

never taken them from express and railroad offices.

The defendant Parker was allowed to testify, over plaintiff's objection, that the transaction had taken place with a salesman of plaintiff, and that, when the order was prepared, he handed it to the salesman with the express understanding and agreement that it was not to be sent in to plaintiffs until the defendants gave further order to that effect, and that the salesman, in violation of this understanding, sent the order off immediately; some of the goods coming by freight and some by express. As soon as defendant heard that goods were shipped, he notified plaintiffs that the order had been sent in contrary to the agreement and that the defendants had already written the salesman not to have the goods shipped, and further saying they were overstocked and could not handle them at that time. This letter was also in evidence.

The court, among other things, charged the jury, in effect, that, in order to constitute a contract, delivery was necessary, and if they found from the evidence that the paper writing as signed by defendants was left in possession of the salesman, with the understanding that he should hold the same until he heard further from the defendants and sent it to plaintiffs in violation of such agreement, there would have been no delivery and plaintiffs would not be entitled to recover. (2) That a production of the paper in evidence and proof of shipment of goods as therein directed, the burden was then on defendants to negative the fact of delivery, etc., etc. Verdict for defendants. Judgment, and plaintiffs excepted and appealed.

N. Y. Gulley & Son, of Wake Forest, for appellant. Peele & Maynard, of Raleigh, for appellee.

HOKE, J. The reception of the evidence of the defendant Parker and the charge of the court in reference thereto are in accord with several recent decisions of the court on the subject. *Garrison v. Machine Co.*, 159 N. C. 285, 74 S. E. 821; *Bowser & Co. v. Tarry*, 156 N. C. 35, 72 S. E. 74; *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768. In *Bowser's Case*, supra, the court, after approving the general rule that oral evidence will not be received to contradict or vary a written contract, made statement of the present position as follows: "While this position is unquestioned, it is also fully understood that, although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

occurred the instrument did not become a binding agreement between the parties. It never in fact became their contract. The principle has been applied with us in several well-considered decisions, as in *Pratt v. Chaffin*, 136 N. C. 350 [48 S. E. 768], *Kelly v. Oliver*, 113 N. C. 442 [18 S. E. 698], *Peniman v. Alexander*, 111 N. C. 427 [16 S. E. 406], and is now very generally recognized (*Ware v. Allen*, 128 U. S. 590 [9 Sup. Ct. 174, 32 L. Ed. 563]; *Wilson v. Powers*, 131 Mass. 539; *Rym v. Cambill*, 88 E. C. L. 370; *Clark on Contracts*, p. 391; *Lawson on Contracts* [Amer. Ed.] p. 318), and, except in deeds conveying real estate, obtains, though the instrument is under seal and delivery has been made to the other party (*Blewitt v. Boorum*, 142 N. Y. 357 [37 N. E. 119, 40 Am. St. Rep. 600])." The cases chiefly relied upon by plaintiff, to wit, *Machine Co. v. McClamrock*, 152 N. C. 405, 67 S. E. 991, and *Medicine Co. v. Mizell*, 148 N. C. 385, 62 S. E. 511, are not in conflict with this position. Both of these cases proceed upon the theory that there was an existent written contract between the parties, and the question was whether its terms could be contradicted or varied by parol.

In the present case, as stated, the question was whether there was or ever had been any written contract between plaintiffs and defendants; and the issue having been determined against plaintiffs, under a correct charge, the judgment in defendants' favor must be affirmed.

No error.

DAMERON et al. v. ROWLAND LUMBER CO.

(Supreme Court of North Carolina. Oct. 15, 1913.)

REFORMATION OF INSTRUMENTS (§ 45*)—PROCEEDINGS—EVIDENCE—SUFFICIENCY.

In an action where it was sought to reform a timber deed on the ground of mistake, evidence held insufficient to show any mutual mistake, it appearing that the plaintiff read a part of the deed, and that it was prepared by his counsel.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

Appeal from Superior Court, Sampson County; Justice, Judge.

Action by L. L. Dameron and another against the Rowland Lumber Company. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

See, also, 77 S. E. 694.

This is an action to restrain the cutting of timber and to reform a deed and to recover damages. On June 23, 1892, the plaintiffs executed a deed, in consideration of \$150, to H. L. Pope, trustee, conveying the timber in controversy, with the right to enter and cut and remove the same within 15 years, and the defendant is the owner, by purchase, of the property rights and ease-

ments in said deed. On December 21, 1906, the plaintiffs executed a deed to the defendant, in consideration of \$500, extending the time for cutting and removing the timber in the deed to Pope, trustee, three years. This extension deed was prepared by one of the attorneys for the plaintiffs, and it has the following recital: "Whereas, we, L. L. Dameron and wife, Sallie Dameron, have heretofore conveyed to Hugh L. Pope, trustee, certain timber trees and privileges on the lands hereinafter described, by deed recorded in Book 80, at page 447, of the register's office of Sampson county, which deed is about to expire limitation therein named; and whereas said trustee has conveyed said timber and easements to the Rowland Lumber Company, and said company is desirous of securing an extension of time within which to exercise the privileges and rights conveyed in said deed." The plaintiffs allege in their complaint that the execution of the deed to Pope, trustee, and of the extension deed was procured by fraud, or was the result of a mutual mistake, and that both covered more land and timber than was intended to be conveyed, but on the trial they stated in open court that they would go to the jury upon the question of mutual mistake in reference to the drawing of the extension deed referred to in the complaint, and that they would not insist that the defendant had actual notice of any fraud or mistake in connection with the original deed to H. L. Pope, trustee. The plaintiffs offered evidence tending to prove that the deed to Pope was not drawn according to the contract of sale, and that it included more land and timber than was intended to be conveyed, and one of the plaintiffs testified, among other things, as follows: "In October, 1906, I signed an option to the defendant for an extension of three years on the Pope deed, and I was paid \$1 option money at that time; the agreed price for the extension being \$500. This trade was closed by Mr. Turnbull; Joe Faison was out in his buggy. Mr. Turnbull at that time may have had the original deed made to Pope; I don't recollect. He came back on December 21, 1906, and took up the option, and I and my wife executed the extension deed. I think one of my attorneys wrote the extension deed. I reckon I read a little of the extension deed. He may have handed it to me to read. On his paying me the \$500 that day I just simply extended the time for three years on the timber in the original deed. In February 1909 Joe Faison came and asked me to show him the timber I had sold. I went and showed him, and he blazed a line across my land, cutting off what I claimed to be about 75 acres. There was no chopped or blazed line prior to that time. The timber blazed is shown on the map. Faison blazed according to my directions. This was three years after the execution of the ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tension deed. Faison never had either the original or extension deed at the time blazes were made under my direction. My wife and I can both read and write. I did not mean to swear in my complaint that at the time of the execution of the extension deed that the boundary of the 75 acres was well defined, and that the trees along said line were blazed. There are about 90 acres of cleared land in my tract." At the conclusion of the evidence his honor entered judgment of nonsuit on motion of the defendant, and the plaintiff excepted and appealed.

H. A. Grady and Fowler & Crumpler, all of Clinton, for appellants. A. McL. Graham and Geo. E. Butler, both of Clinton, for appellee.

ALLEN, J. (after stating the facts as above). When this case was here on a former appeal (Dameron v. Lumber Co., 161 N. C. 498, 77 S. E. 694), the court ordered a new trial, and said: "As this case is to be tried again, we will repeat, what has been often decided, that a deed cannot be corrected or reformed because of the mistake of one of the parties to it, but only when the mistake is mutual, that is, the mistake of both parties, or else upon the mistake of one party brought about by the fraud of the other"—and on the new trial the plaintiffs abandoned all allegations of fraud, and relied solely on the allegation of mutual mistake in the execution of the extension deed. We find no evidence of a mistake on the part of the defendant, and it is doubtful if there is any evidence of mistake on the part of the plaintiffs justifying the intervention of a court of equity, as one of them, and the only one who was a witness, testified that he could read and write; that the deed was prepared by his attorney; that he read a part of it; and that "on his (defendant) paying me the \$500 that day, I just simply *extended the time for three years on the timber in the original deed.*"

We are therefore of opinion that his honor properly entered judgment of nonsuit, as there is no evidence of mutual mistake.

Affirmed.

PATE v. BLADES.

(Supreme Court of North Carolina. Oct. 15, 1913.)

1. FRAUD (§ 11*)—DECIT—FALSE ASSERTIONS AS TO VALUE.

While expressions of commendation or opinion or extravagant statements as to value or prospects, etc., though untrue, are not generally actionable, yet, when a party to a bargain knowingly makes false assertions as to the value of the property as an inducement to the trade, and these are accepted and reasonably relied on as such, they constitute an actionable wrong, justifying a recovery of pecuniary damages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

2. FRAUD (§ 13*)—DECIT—STATEMENTS OF FACT.

One who intentionally asserts a fact to be true of his own knowledge, when he does not know whether it is true or false, is as culpable, in case another is thereby misled or injured, as one who makes an assertion which he knows to be untrue.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

3. APPEAL AND ERROR (§ 927*)—NONSUIT—REVIEW.

On appeal from a judgment of nonsuit, the court must accept as true the facts which make for plaintiff's recovery, and construe them in the light most favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

4. FRAUD (§ 58*)—SALE OF LAND—VALUE—FALSE REPRESENTATIONS—ACTION FOR DAMAGES.

While plaintiff, an enlisted soldier under 21 years of age, was at his post awaiting transportation to the Philippines, defendant approached him, desiring to purchase a tract of land which he owned and supposed to contain between 100 and 150 acres, and induced plaintiff to sell same to him for \$1,000, representing that the land was of very little value, that such amount was a very favorable price, and that defendant knew the land thoroughly. Plaintiff, relying on such representations, made the conveyance in 1899. In 1905, after his return to the United States, defendant, ascertaining that plaintiff was under age when he executed the deed, requested a new one, and offered plaintiff \$200 therefor. This plaintiff executed, being entirely ignorant of the quantity of land or its value. In 1911 for the first time he ascertained that the tract contained between 1,000 and 2,000 acres, "nearer two than one," and was worth from \$11,000 to \$12,000. *Held* that, since the original deceit was existent when both deeds were executed, and the procuring of the second was the natural result of the fraud inducing the first, the facts were sufficient to warrant a recovery for fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

Appeal from Superior Court, Craven County; Allen, Judge.

Action by W. R. Pate against Chas. G. Blades to recover damages for fraud and deceit in the purchase of land. From a judgment of nonsuit, plaintiff appeals. Reversed.

There was evidence on part of plaintiff tending to show that in April, 1899, plaintiff, then under 21, an enlisted soldier in United States Army, was at Ft. McHenry, Baltimore, Md., awaiting transportation to Philippine Islands; that he had been in the army since 1896. While at Ft. McHenry, plaintiff received from defendant, by mail from New Bern, N. C., a proposition for an option on a tract of land in Craven county, N. C., abutting on Slocumb creek and Neuse river, about 20 miles below New Bern, and which plaintiff supposed to be about 100 acres, some of the land, about 150 acres, having been previously sold; that soon after receipt of option defendant appeared at Ft. McHenry, and after much persuasion induced plaintiff to sell and convey to him the land in question for the sum of \$1,000. The con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

versation and transaction by which the trade was brought about was given at great length in plaintiff's testimony, and containing, among other things, evidence to the effect that defendant estimated the tract at 100 to 150 acres, and represented that it was of very little value, that \$1,000 was a very favorable price for it, and, in this connection, plaintiff further testified as follows: "At the time I sold the land in Baltimore I thought I owned about 100 acres. I did not know the value of the property at the time I executed the deed in Baltimore. I had not seen the land since I was a child. I did not know the extent of the property at the time I executed the quitclaim deed. I was relying upon Mr. Blades absolutely at the time I executed the deed in Baltimore. He said he had been over the land, and looked over it, and knew it thoroughly, and he would not take advantage of me, for I knew nothing about it, and he was offering me a very good price. I was 21 years old in September after executing the deed in April, 1899." Plaintiff's evidence further tended to show that after making this deed, in the line of duty, he went to the Philippine Islands, and after serving out his time in January, 1900, he returned to his home in Craven county, about nine or ten miles above New Bern, married in 1902, and has since resided in that same neighborhood; that in 1905 plaintiff, who was building a home, was at defendant's lumber plant in New Bern for the purpose of procuring lumber, and on one occasion defendant, having ascertained that plaintiff was under 21 when he executed the former deed, broached the subject and offered plaintiff \$200 to execute an additional deed for the property, describing same as that piece of land lying on south side of Neuse river between Slocumb and Hancock creeks, adjoining lands of John Pittman, etc., etc., except the portion formerly sold, containing description further: "It is the purpose and intent of this party of the first part to convey hereby all the lands which he now owns in said county of Craven on the south side of Neuse river and between Slocumb and Hancock creeks," etc. Plaintiff testified further that his mother had died when he was an infant, and his father, having moved to Hancock creek, died in 1885, when plaintiff was about seven years of age, when plaintiff went to live with his uncle in the upper part of the county, and had lived there since except when in the army, as stated; that plaintiff was entirely ignorant of the quantity of the land or its value, or that the facts were otherwise than as represented by defendant, both when he made the first and second deeds, not having been on or about it since he was seven years of age, and having no occasion to look into it since; that some time in 1911, being down in that locality on other business, and having attention aroused by some very fine timber land he was passing through, he made

inquiry, and ascertained it was a part of the land he had conveyed to defendant. Pursuing such inquiry, he ascertained further that the tract was a very valuable one, and contained from 1,000 to 2,000 acres, and he therefore entered present suit. There was further testimony to the effect that this tract conveyed was a good purchase at the price of \$10,000, and that the timber on it could have been sold for \$11,000 or \$12,000 at the time of the first conveyance. There were phases of plaintiff's evidence tending to show that defendant did not have full personal acquaintance with the property, and that no actionable fraud was committed; but, as the cause was nonsuited, the testimony which makes in plaintiff's favor is more particularly referred to, that being the aspect in which the cause must now be considered. At the close of testimony, on motion, there was an order of nonsuit, and plaintiff, having duly excepted, appealed.

W. D. McIver and R. A. Nunn, both of New Bern, for appellant. Gulon & Gulon, of New Bern, for appellee.

HOKE, J. (after stating the facts as above). It was formerly held in this state that an action to recover damages for fraud and deceit would not lie in the case of a sale and purchase of land, in reference to the quantity or correct placing of the property; the position being that the facts were very readily ascertainable, and that the purchaser should have informed himself on these matters by a survey. The principle on which these decisions were made to rest was disapproved in case of positive fraud on the part of the vendor or purchaser in *Walsh v. Hall*, 66 N. C. 233, and in the subsequent case of *May v. Loomis*, 140 N. C. 350, 52 S. E. 728, the decisions wherein the former doctrine was upheld, and, more directly relevant to the question, *Credle v. Swindell*, 63 N. C. 305, and *Lytle v. Byrd*, 48 N. C. 222, were expressly overruled; this case of *May v. Loomis* being to the effect, among other positions, that the action lies in proper instances both in sales of real and personal property. A succinct reference to this change in the attitude of the court on this subject, and some of the cases by which it was announced, appears in a still later case of *Gray v. Jenkins*, 151 N. C. 83, 65 S. E. 645, as follows: "Older cases have gone very far in upholding defenses resting upon this general principle, and, as pointed out in *May v. Loomis*, 140 N. C. 357, 358 [52 S. E. 728], some of them have been since disapproved, and are no longer regarded as authoritative, and the more recent decisions on the facts presented here are to the effect that the mere signing or acceptance of a deed by one who can read or write shall not necessarily conclude as to its execution or its contents, when there is evidence tending to show positive fraud, and that the injured party was deceived and thrown off

his guard by false statements designedly made at the time and reasonably relied upon by him. Some of these decisions, here and elsewhere, directly hold that false assurances and statements of the other party may of themselves be sufficient to carry the issue to the jury, when there has been nothing to arrest attention or arouse suspicion concerning them. *Walsh v. Hall*, 66 N. C. 233; *Hill v. Brower*, 76 N. C. 124; *May v. Loomis*, 140 N. C. 350 [52 S. E. 728]; *Griffin v. Lumber Co.*, 140 N. C. 514 [53 S. E. 307, 6 L. R. A. (N. S.) 463]. In *Griffin v. Lumber Co.*, 140 N. C., just cited, there is a very full and learned discussion by Associate Justice Connor of many of the questions embraced in the present inquiry.

[1, 2] Again, it has been held that, while "expressions of commendation or opinion or extravagant statements as to value or prospects or the like," not infrequently used by a party in the ordinary effort to puff up the value and quality of his wares in a trade, will not as a rule be considered as fraudulent in law (see the well-considered case of *Cash Register Co. v. Townsend*, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349), yet, when a party to a bargain makes false assertions as to the value of the property, and the same are knowingly made as an inducement to the trade, and are accepted, reasonably relied upon as such, statements of this kind may constitute an actionable wrong, justifying recovery in case of pecuniary damage. And, in reference to the scienter, it has been held that, under some circumstances, "one who intentionally asserts a fact to be true of his own knowledge, when he does not know whether it is true or false, is as culpable, in case another is thereby misled or injured, as one who makes an assertion which he knows to be untrue." *Mollin v. Railroad*, 145 N. C. 218, 58 S. E. 1075. The doctrine sustained in the cases already cited, and referring more particularly to sales of real estate, has been approved and further applied to sales of personal property in several later decisions. *Unitype Co. v. Ashcraft*, 155 N. C. 63, 71 S. E. 61, and *Sewing Machine Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634, and *Machine Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004, and a reference to these cases will no doubt be of aid to a proper consideration of the one now presented.

[3, 4] Applying the principles as stated, we are of opinion that, on the facts as they now appear of record, the judgment of nonsuit should be set aside, for, accepting the facts which make for plaintiff's recovery as true, and construing them in the light most favorable to him, this being the established rule, when a nonsuit has been ordered, it appears in evidence that plaintiff, under 21 years of age, in the city of Baltimore, where he was stationed as an enlisted soldier, awaiting transportation to the Philippine Islands, by the false statements and asser-

tions of defendant as to value and quantity, has been induced to convey to the latter for \$1,000 between 1,000 and 2,000 acres of land, "nearer two than one," situate in the county of Craven, and worth from \$11,000 to \$12,000; the plaintiff being entirely ignorant of the real facts, and relying on the statements of defendant to the effect that the price paid was a just equivalent, and "that defendant had been over the land, had looked over it, and knew it thoroughly."

It is urged for defendant that, even if this view should prevail as to the first deed, there are no sufficient facts impeaching the second, and nothing occurred at that time to prevent full investigation of the property; but this position may not be allowed as a necessary or legal conclusion from the testimony, for, if the plaintiff was induced to make the first deed by fraud and deceit of the defendant, and he then made a second deed, believing and having reason to believe the assurances made in reference to the first, and there was nothing occurring in connection with the execution of the second deed to arouse attention or provoke inquiry into the amount and value of the property, and plaintiff, under all the facts and attendant circumstances, acted as a man of reasonable business prudence in making the second deed without further investigation, in that event it may well be determined that the fraud and deceit existent when the first deed was obtained was effective in procuring the execution of the second, and the one was the natural result of the other.

On the evidence, as it now appears, the plaintiff is entitled to have the issues submitted to a jury, and it is so ordered.

Reversed.

HUNTER v. ATLANTIC COAST LINE RY. CO. et al.

(Supreme Court of North Carolina. Oct. 15, 1913.)

1. JUSTICES OF THE PEACE (§ 194*)—WRIT OF RECORDARI.

Where a writ of recordari is desired to compel a justice of the peace to send up the record in a case where the defendant defaulted and lost the right of appeal, defendant has the burden of showing excusable neglect as well as a reasonably meritorious defense.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

2. JUSTICES OF THE PEACE (§ 209*)—RECORDARI—REMAND OF CAUSE—EFFECT.

When a case is not finally disposed of on appeal, but is remanded for further proceedings, trial amendments are discretionary with the trial court, consequently, where a judgment granting a writ of recordari to bring up a judgment of a justice, was reversed and remanded on appeal, the trial court might properly permit the filing of additional affidavits by the petitioner.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 818-828; Dec. Dig. § 209.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. JUSTICES OF THE PEACE (§ 194*)—WRIT OF RECORDARI—EXCUSABLE NEGLECT.

Where defendant defaulted in justice court, and lost its right of appeal, a showing that it engaged a law firm to represent it in the action, but that the partner who usually handled such business by reason of illness left the state without notifying his copartner of the pendency of such a suit, is not a showing of excusable neglect, for one member of a law firm is charged with knowledge of all the business of the firm, and so the failure of the member who was ill to attend to the case was no ground for the neglect of the one who was not shown to be incapacitated.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

Allen, J., dissenting.

Appeal from Superior Court, Lenoir County; Carter, Judge.

Action by W. F. Hunter against the Atlantic Coast Line Railway Company and the Southern Railway Company. From a judgment granting a writ of recordari, plaintiff appeals. Reversed, and petition denied.

T. C. Wooten and Y. T. Ormond, both of Kinston, for appellant. Rouse & Land, of Kinston, for appellees.

BROWN, J. This cause was before us at former term, 161 N. C. 504, 77 S. E. 678, and the report of the case is referred to in connection with this opinion. On that appeal it was deemed unnecessary to pass on the question of excusable neglect, as we held that the affidavit of Rouse and the petition for recordari did not set out a meritorious defense to plaintiff's cause of action, and we set aside the order granting the writ.

[1, 2] The burden is on defendants to show both excusable neglect as well as a reasonably meritorious defense. The defendants renewed their motion for the writ, and his honor, Judge Allen, permitted them to file the affidavit of Land in addition to the former affidavit of Rouse for the purpose of showing a meritorious defense. This was excepted to by the plaintiff. We see no objection to this. It was a matter in the sound discretion of the court below. Where a case is not finally disposed of on appeal, amendments are discretionary with the court below, and the court may hear additional facts. *Foy v. Haughton*, 83 N. C. 470; *McMillan v. Baker*, 92 N. C. 110; *Jones v. Swenson*, 94 N. C. 700; *Ashby v. Page*, 108 N. C. 6, 13 S. E. 90; *Beville v. Cox*, 109 N. C. 285, 13 S. E. 800. His honor found the facts set out in the two affidavits to be true, and held that the facts made out a case of excusable neglect as well as a meritorious defense.

[3] All that is before the court as to the question of excusable neglect is contained in the affidavit of N. J. Rouse, and the excuse therein urged is the sickness of his partner, Land, who, in accordance with the custom and practice in the office of the firm,

had charge of this case, and upon him was the duty of its preparation, etc., and who on account of sickness left Kinston without informing his associate of the pendency of the action. We do not think these facts make out a case of excusable neglect. In actual practice it may be otherwise; but in law each copartner is charged with knowledge of the business of the firm. When Land left the office of his firm on account of illness, it was his duty to give notice of the pendency of this action in the court of the justice of the peace to his copartner Rouse. No facts are given in the affidavits tending to show that he was mentally and physically incapacitated to mention the matter to his copartner. Independent of that his copartner is charged in law with knowledge of the firm's business. The same excuse was urged in *White v. Rees*, 150 N. C. 679, 64 S. E. 777, and held to be insufficient. In that case Justice Walker says: "The member of the law firm who had special charge of the case was too sick to attend, but no sufficient excuse is shown for the failure of the other two members of the firm to attend."

The petition for recordari is denied.

Reversed.

ALLEN, J., dissents; WALKER, J., concurs in result.

IN RE DUPREE'S WILL.

(Supreme Court of North Carolina. Oct. 15, 1913.)

1. WILLS (§ 261*)—PROOF—CAVEAT—LIMITATIONS.

While there is no statute of limitations directly affecting the right of parties, claiming under a will, to have the same proven, and in so far as it may affect their own interests, yet when a will has been regularly proven in common form, the right to caveat the same may be lost by lapse of time, especially when, after knowledge of the will and its probate, the adverse parties have acquiesced for such a length of time as would make it unreasonable and unjust to permit further question of its validity.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 607; Dec. Dig. § 261.*]

2. WILLS (§ 261*)—CONTEST—RIGHT TO CAVEAT—LACHES.

Testator died in 1887, bequeathing the most of his property to his son, his minor married daughter receiving only a nominal legacy. In December the will was probated and recorded, and the son kept possession until 1889 or 1890, when he sold the land. The daughter, within a year after her father's death, submitted a written protest to the will to the clerk, but he declined to entertain the same for lack of a bond, and in 1893 an insufficient bond was offered, but refused, and no valid caveat was filed until March 6, 1911. The daughter, with her husband, continuously resided in the neighborhood, and had knowledge of the probate of the will, and that her brother was in possession and had conveyed the land. *Held*, that she was guilty of such laches as precluded a maintenance of the caveat, notwithstanding her coverture and the absence of her brother from the state after he sold the land.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 607; Dec. Dig. § 261.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Caveat against the will of John Dupree, deceased. From a judgment dismissing the caveat, the caveators appeal. Affirmed.

On the trial it was made to appear that Jno. Dupree died in 1887, having made a last will and testament, and leaving him surviving two children, Robert Dupree and Olivia, a daughter; that in the will the land and chief part of the personal property was devised and bequeathed to Robert, the son, the daughter receiving a nominal legacy of \$5; that in December, 1887, said will, attested by three witnesses, was duly admitted to probate in common form and recorded; that Robert, as owner, went into possession of the land immediately on his father's death, and so remained till 1889 or 1890, when he sold and conveyed the same to Wiley Webb, who then went into possession and remained there until his death in 1908, and since that time his heirs have been in possession of the same; that on the 6th of March, 1911, caveat to said will was duly entered on behalf of the daughter, Olivia A. Williams, and her husband, J. A. Williams, and bond given, and the heirs at law of Wiley Webb duly cited to appear, etc.; that prior to her father's death, the daughter, Olivia, was married to J. W. Williams when she was under age, and she and her husband have continuously resided in the neighborhood from the time of their marriage to the present, and were duly cognizant of the fact that the will had been admitted to probate, and that Robert was in possession, claiming to own same as devisee; that within a year from the father's death for the daughter and her husband a written protest to the will or caveat was submitted to the clerk, who declined to entertain the same for lack of a bond, and later, in 1893, on an insufficient bond being offered, the clerk again declined to receive the paper as a caveat, or docket same, and no citation was ever issued for any of the parties interested, and the paper was kept on the clerk's desk as papers "not perfected nor ready to go on the docket," until they were destroyed by burning of the courthouse in 1910. There was further evidence that some time after selling the land to Webb the son Robert had gone to Florida and lived there since. There was testimony on the part of caveators tending to show that J. W. Dupree was not competent to make a will, and for the other parties that he was of sound and disposing mind and memory at the time. At the close of the testimony his honor, being of opinion that on the evidence and from perusal of the pleadings the right of caveators to proceed in the cause was barred by lapse of time, etc., which was fully and properly pleaded, entered judgment dismissing the proceedings, and the caveators excepted and appealed.

Harding & Pierce and Ha of Greenville, for appellants. Greenville, and Allsbrook & boro, for appellees.

HOKE, J. (after stating the [1] There is no statute of this state directly affecting the claiming under a will to have been, and in so far as it may interests. *Steadman v. Steadman*, 346-349, 55 S. E. 784. Nor such statute relating to the prior to 1907, when the period was established from the time of its adoption to prove the will in common form." It has, however, been long held that when a will has been recorded in common form, the right to cancel it may be lost by lapse of time, and after knowledge of such will by the adverse parties have acquired a length of time as would make it inequitable and unjust to make further inquiry into its validity. In *re Will of Benjamin C. 254*, 59 S. E. 687; *Etheridge v. Etheridge*, 48 N. C. 14; *Gray v. Gray*, 20 N. C. 47.

[2] In *Beauchamp's Case*, the right may be forfeited, either by lapse of time or unreasonable delay." The principle at common law for the operation of the statute was not established with respect to wills, nor was it always uniform, but unless shortened by statute, the presumptions to 10 years, and in some instances, the period of 20 years, have been generally prevalent. Undoubtedly as to this jurisdiction (*W. v. W.*, 144 N. C. 656-660, 57 S. E. 144; *Brower v. Brower*, 114 N. C. 422, 57 S. E. 144; *Headen v. Womack*, 88 N. C. 18; *Hamlin v. Hamlin*, 112 Mo. 300, 20 S. W. 647; *Ruffin v. Ruffin*, Judge, in *Headen's Case*, the presumption of payment arises under the act of 1826, that the payment of a claim may become a bar, when the facts of the case lead to a conclusion of law from facts by the court, and not left to the jury." This being the case, we are of opinion that his honor's ruling in dismissing the proper ruling in dismissing

ings. From the facts admitted in the pleadings and evidence, it appears that this will, properly drawn and attested, was duly proven and recorded in Pitt county in 1887, and that the devisee occupied as owner under the will until 1889 or 1890, when he sold to Wiley Webb, and he and his heirs have since been in possession and control of the property as owners, the same being under a deed from the devisee; that during all of this time the caveators J. W. Williams and wife have resided within short distance of the property, were fully cognizant of the existence of the will and its terms, and of the possession of the property by the purchasers and the nature of their claims, and this delay and long acquiescence has been properly held to bar all right on their part to make further question of the validity of the will.

Our conclusion is not affected by the facts in reference to the attempted caveat in 1887, nor its renewal in 1893. This application was never entertained by the clerk for lack of a proper bond, which he had the right to require. Revisal, § 3136; Code 1883, § 2159. The cause was never docketed, nor was any notice, or citation even, ever issued. No caveat, therefore, has ever been made nor constituted till this of 1911, and if there had been, in the absence of notice issued in reasonable time, it should be held for a discontinuance by analogy to failure to issue an alias summons to term held at stated periods. *Etheridge v. Woodley*, 83 N. C. 12.

Nor should the marriage of the daughter under 21 and continuous coverture since, be allowed to prevent in this instance the effect of the presumption, for when applied in strictness as a common-law principle, neither the infancy nor marriage of the parties is allowed to interfere as a matter of positive right, but is only a relevant circumstance on the question whether the presumption shall prevail. *Houck v. Adams*, 98 N. C. 519, 4 S. E. 502. True this position was qualified to some extent in *Summerlin v. Cowles*, 101 N. C. 473, 7 S. E. 881, but this qualification only extended to cases where courts of equity adopted 10 years as a legal bar in analogy to the statutory period prevailing in action at law, and the court held that when so adopted as a statute limitation, the disabilities provided for in the statute should also be recognized. And the same answer may be made to the position that the devisee Robert Dupree left the state a year or two after the death of his father, and has since resided in Florida. This absence of a party and the effect claimed for it exists by reason of the statutory provision affecting the statute of limitations proper (Revisal, § 366), and is not necessarily controlling as to the common-law presumption. In such case this absence, as in the case of infancy and coverture, is only a relevant fact bearing on the question presented, and more especially is

this true when the party remained in the state and in possession of the property for more than a year, and the cause is one where jurisdiction could be acquired by publication.

In the two North Carolina cases of *Gray v. Maer*, 20 N. C. 47, and *Etheridge v. Corprew*, Executors, 48 N. C. 14, the application of the principle was denied, but in the first case the time was not over 10 years, and it appeared in explanation of the delay that the parties were "numerous and much dispersed, and several of them were infants and married women," and in the second the time was something over 10 years, and it was shown that the petitioners were numerous, and all the time had been under the disabilities of coverture, absence beyond seas, residence in another state, and lunacy, "and, further, that they had no notice of the death of the testator or of the will or its probate." In both of these decisions, however, the principle was recognized as existent here; and neither in any way conflicts with the disposition made of the present case, where, as noted, a will, properly witnessed and duly proved and recorded, has remained on the record unquestioned for more than 23 years, with full rights enjoyed under it by devisee and the person to whom he had conveyed it, and the adverse claimants during all this time have resided in the immediate neighborhood and were fully cognizant of all the facts concerning it.

In *Cox v. Brower*, supra, Burwell, judge, delivering the opinion, quotes from a Pennsylvania decision (*Foulk v. Brown*, 2 Watts, 216) as follows: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them, they would accumulate to a burdensome extent. Hence statutes of limitation have been enacted in all civilized communities, and in cases not within them prescription or presumption is called in as an indispensable auxiliary to the administration of justice."

After giving the case our full consideration, we hold there was no error in dismissing proceedings, and the judgment of the court below is affirmed.

No error.

KNIGHT v. FOSTER.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. LANDLORD AND TENANT (§ 167*)—INJURIES TO THIRD PERSONS—LANDLORD'S LIABILITY.

A landlord is only liable to third persons for injuries caused by failure to repair the premises where he contracts to repair or knowingly rents the premises in a condition which is dangerous or amounts to a nuisance, or where he authorizes a wrongful act making the premises dangerous.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.*]

2. LANDLORD AND TENANT (§ 167*)—INJURIES TO THIRD PERSONS—LANDLORD'S LIABILITY.

A landlord who knowingly rented premises when the gate thereto swung outward so as to be dangerous to pedestrians was liable for personal injuries resulting from the condition of the gate seven years thereafter.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.*]

3. LANDLORD AND TENANT (§ 150*)—REPAIRS—WHAT CONSTITUTES—"REPAIR."

The changing of a gate which swung outward so as to make it swing inward would be a change in the condition of the premises, and not technically a "repair," so that the duty of making it was upon the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536, 538, 544-548, 555, 556; Dec. Dig. § 150.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6096-6102; vol. 8, pp. 7785.]

4. NUISANCE (§ 6*)—VIOLATION OF ORDINANCE.

A continued violation of a valid ordinance constitutes a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 35-38; Dec. Dig. § 6.*]

Appeal from Superior Court, New Hanover County; Justice, Judge.

Action by Eugene S. Knight against Gertrude S. Foster. From a judgment of nonsuit, plaintiff appeals. Reversed.

Ricaud & Jones, of Wilmington, for appellant. Kellum & Loughlin and John D. Bellamy & Son, all of Wilmington, for appellee.

CLARK, C. J. This is an action for damages sustained by coming in contact with a gate opening upon the sidewalk in front of certain premises in Wilmington owned by the defendant, which gate, the plaintiff alleges, had been left open and so long neglected, without any fastenings, that it had become permanently fixed in the sand on the sidewalk, and settled at the angle at which it stood August 29, 1911, when the plaintiff, rightfully using said sidewalk, in which the gate had become imbedded, and in ignorance of the danger, ran into said gate on a dark and rainy night, there being no light on the street, and sustained the injuries complained of. The defendant demurred to the evidence, upon the ground that the tenant and not the owner was liable, if any liability

existed, and moved for nonsuit, which motion was allowed.

There was evidence that the monthly tenant, had rented the premises for seven years, and had repeated to the owner's agent of the intention of the premises, but that the owner promised him had not been made.

[1] 1 Jaggard, Torts, 223, touches the law: "Normally the occurrence of the owner or landlord is liable to third persons for injuries caused by failure to keep the premises in repair. This duty may, however, be extended to the tenant or owner (a) when he contracts to repair, (b) where he knowingly demises the premises in a ruinous condition or in a condition of nuisance, (c) where he is negligent or wrong." To same effect, 5 Corp. (5th Ed.) 3028 et seq.

There was evidence from the owner in this case that he contracted to repair, and had promised the tenant to repair the gate. There was evidence that the owner knew of the ruinous condition of the premises, and that he had been in this condition for several months, and one of the witnesses testified that it had been in that condition for several years. We have found no case where a landlord has been held not liable for an injury resulting from obstruction or a defect known to the landlord to exist at the time of the injury, if it was permitted by him to continue.

[2, 3] It was in evidence that the ordinance of the city (section 40 of the city charter of 1902, and which is still in force) provided: "It shall be unlawful for any person to leave a gate so connected with the sidewalk of the city of Wilmington as to swing out on the sidewalk of the city of Wilmington. This gate swung outward, and the condition when the premises were let to the present occupant several years ago, which was at a date subsequent to the enactment of the ordinance. The injury resulting therefrom was upon the owner, under the ordinance above quoted from Jaggard. The ordinance had been passed before making this lease, this was a change, and hence the duty was devolved upon the owner and not the tenant. In 1 Taylor, Landlord and Tenant, § 175, it is said: "Where injury is caused to a third person from the faulty construction of the premises, the landlord is liable in a ruinous condition at the time of the injury, or because they then contained a defect, even if this only becomes active in the tenant's ordinary use of the premises." The landlord is still liable, notwithstanding the ordinance—citing authorities.

Besides, speaking only of the county of New Hanover the "ordinance"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series

as been in force for 13 years, and in the city of Wilmington cattle and stock have been forbidden to run at large for a longer period than that. The retention of a fence and gate was therefore entirely unnecessary as a matter of law, which is further demonstrated as a matter of fact, also, because this gate had been permanently left open for months and years. If notwithstanding the owner wished to keep up an unnecessary fence and gate, the liability for any injury resulting from its negligent condition is upon him and not upon the tenant who had no authority to remove them. He says he could have removed the fence and gate; but the owner's agent kept promising to fix them. There is evidence that in that quarter there are now useless gates are in a ruinous condition, sagging and hanging over the sidewalk. If this action shall call attention to this state of things and secure their removal, it may prevent similar injuries, and prove a public benefit.

Biggs v. Ferrell, 34 N. C. 1, relied on by defendant, merely holds that the owner of a ferry is not liable for damages caused by the mismanagement of the lessee in operation of the ferry, and is obviously not in point. While the authorities are not entirely in accord, the consensus seems to be that, where an obstruction or defect in the abutting property is created and continued by the tenant, without the knowledge or sanction of the landlord, during the term of tenancy, then the liability rests with the tenant; but, where dilapidated premises are leased in a ruinous condition, known to the landlord, and such condition causes the use of public highways and thoroughfares in populous cities to become unsafe and insecure, and the landlord knows of the conditions, and suffers them to continue, both the landlord and tenant are tort-feasors, and may be sued jointly or severally. *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778, is an instructive case, in which the authorities as to the liability of landlord and tenant to third parties are collected and differentiated. It is there held, *Atting Woods, Landlord and Tenant*, 230: "If a nuisance existed upon the premises at the time of the demise, the landlord as well as the tenant is liable for the damages resulting therefrom." The ordinance prohibiting gates from swinging outward was held reasonable and within the domain of municipal regulations. *Rosedale v. Hanner*, 157 Ind. 390, 61 N. E. 792. Under Revisal, 3702, the violation of a city ordinance is a misdemeanor.

[4] A continual violation of a valid ordinance is a nuisance.

We need not consider the exceptions to evidence, because they may not arise upon another trial.

The judgment of nonsuit is reversed.

WALKER, J. (concurring). I concur in all that is decided by the opinion of the court. I do not assent to the proposition that the "no fence law" has any application to the case. It was intended to fence in cattle, it is true, and not to fence them out; but it still leaves it optional with the owner of land whether he will fence his premises for their protection or other purposes than barring out straying cattle, and does not increase his responsibility for doing so. There are other roving animals than cattle, and he has the right to keep them out, and to erect fences for privacy or for ornamentation as much so as he may plant trees for that purpose, or erect structures for his comfort and convenience.

BROWN, J., concurs in this opinion.

WITHERS v. BOARD OF COM'RS OF COLUMBUS COUNTY.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. MANDAMUS (§ 111*)—SUBJECTS OF RELIEF—MINISTERIAL ACTS.

Mandamus was a proper remedy to enforce an order of the judge of the superior court requiring a county to pay all expenses of a chemical analysis of the stomach of a person believed to have been murdered, since mandamus is the proper remedy against a public officer who refuses to discharge a specific duty required of him by law.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 231, 232, 234; Dec. Dig. § 111.*]

2. COUNTIES (§ 139*)—COUNTY CHARGES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Within Const. art. 7, § 7, providing that no county shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by its officers except for the necessary expenses thereof, unless by a vote of the voters therein, the expense of a chemical analysis of the stomach of a person believed to have been poisoned was a necessary expense, and hence the judge of the superior court had authority to order the county to pay such expense, especially in view of Revisal 1905, § 3152, providing that in all cases of homicide any officer prosecuting for the state may direct a post mortem examination, and that the physicians making such examination shall be paid a reasonable compensation, to be determined by the court, and, if not collected from the defendant, paid by the county.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 207; Dec. Dig. § 139.*]

3. COUNTIES (§ 132*)—COUNTY CHARGES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Revisal 1905, § 3152, providing for post mortem examinations in homicide cases and for the payment of the expense thereof by the county, is a valid exercise of the police power of the state, since counties are but state agencies, and subject to legislative authority, which can direct them to do all such matters as it can empower them to do, and in the administration of a criminal law they are necessarily under legislative control.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 208; Dec. Dig. § 132.*]

4. COUNTIES (§ 139*)—COUNTY CHARGES—PROCEEDINGS TO DETERMINE.

Where in a homicide case the judge of the superior court made an order requiring the county to pay the expenses connected with a chemical analysis of the decedent's stomach, it was not necessary to the validity of such order that the Board of Commissioners of the county should be a party to the action, or that they should have notice before the order was made, such matters being left to the sound discretion of the trial judge, which will not be interfered with unless grossly abused.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 203-207; Dec. Dig. § 139.*]

Appeal from Superior Court, Columbus County; Ferguson, Judge.

Mandamus proceedings by W. A. Withers against the Board of Commissioners of Columbus County. From an order granting a peremptory writ, defendants appeal. Affirmed.

This is a proceeding in mandamus, brought by the plaintiff to compel the defendant to obey an order made at November term, 1911, of the superior court of Columbus county, directing the payment of \$200 to the plaintiff. The cause was heard at April term, 1913, of the superior court of said county by his honor, Judge Ferguson, who adjudged "that the defendants be and are hereby required and commanded to issue warrants for the payment of the order made by his honor, Frank Carter, in this cause on the 2d day of December, 1912." The defendant excepted and appealed.

David J. Lewis and Homer L. Lyon, both of Whiteville, for appellants. Walter H. Powell, of Whiteville, for appellee.

BROWN, J. This proceeding is brought to enforce obedience to an order of Carter, judge, made in a criminal proceeding pending before him. As the facts are fully stated in the order, we set it out in full: "State of North Carolina, Columbus County. State v. Edgar Thompson. This cause coming on for hearing at the November term of the superior court of Columbus county, before his honor, Frank Carter, judge presiding, and it appearing to the court that a bench warrant was issued for the aforesaid Edgar Thompson upon the affidavit of one J. V. Fore, on the charge of murdering Mrs. Edgar Thompson, his wife, by means of poison, and it further appearing to the court that said warrant was duly served on the ——— day of November, 1911, and that after a hearing before his honor, Judge Carter, hold the courts of the Seventh judicial district, the said Edgar Thompson was placed in prison to await the report of the chemist, and the stomach of Mrs. Edgar Thompson, deceased, wife of Edgar Thompson aforesaid, having been duly packed and sealed and forwarded to said chemist for a thorough analysis, the court deeming such analysis proper and necessary in said cause; it also ap-

pearing to the court that the sentiment of the good citizens of Columbus county demanded that public justice be quickly and speedily administered in this cause; and it further appearing to the court that, after a full and complete analysis of said stomach by the chemist, Prof. W. A. Withers reported to the court that he found no traces of poisonous substance therein; and it further appearing that these facts were made known to the solicitor N. A. Sinclair, and that a nol. pros'd was taken in the above case; the examination of said stomach of Mrs. Edgar Thompson, deceased, having been ordered by his honor, Frank Carter, acting upon the advice of the solicitor N. A. Sinclair, and the above facts set forth: It is now ordered, adjudged, and decreed that the bill of \$200 charges of the said Prof. W. A. Withers for making said analysis, together with all other necessary expenses in transporting to Raleigh said stomach and for procuring the evidence of the coroner's inquest and forwarding the same to said chemist, be paid by the county of Columbus, including bill of J. V. Fore, heretofore approved by the solicitor N. A. Sinclair. Frank Carter, Judge Presiding. This December 2, 1912."

It is contended on behalf of the defendants, the Board of Commissioners: (1) That the proceeding should be dismissed, as no such action can be maintained to enforce the order of Carter, judge; (2) that this not being a necessary expense, his honor had no legal authority to make said order; (3) that they had no notice of said order, no day in court, and therefore said order was not a legal judgment against the county.

[1] The proceeding by mandamus in this case to compel obedience to the order of Carter, judge, is proper, and the only effective remedy the law gives in case of this character. That mandamus is the proper remedy against a public officer who refuses to discharge a specific duty required of him by law has been too often decided to be now open to doubt. *Railroad v. Jenkins*, 68 N. C. 502; *Russell v. Ayer*, 120 N. C. 186, 27 S. E. 183, 37 L. R. A. 246; *Bennett v. Commissioners*, 125 N. C. 468, 34 S. E. 632.

[2] In their brief the learned counsel for the defendants say: "We take the position that the analysis of the stomach of a person who died under circumstances that might excite suspicion of foul play is not a necessary expense of the county, and the county would therefore be prohibited from contracting a debt for same under article 7, section 7, of the Constitution of North Carolina. If this position is correct, it certainly follows that a superior court judge would have no right to make an arbitrary order requiring the county commissioners to do an unlawful, or forbidden act, certainly when no notice was served on the commissioners, and they not made parties to the proceeding." The-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

section of the Constitution relied upon reads as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." In *Bear v. Commissioners*, 124 N. C. 204, 32 S. E. 558, 70 Am. St. Rep. 586, construing this section, it is held that, to obtain a mandamus to pay a judgment against the county by levying a special tax, the plaintiff must show affirmatively that the consideration for the judgment was for a necessary county expense, or had been sanctioned by a vote of the people. The section of the Constitution indirectly, but explicitly, permits the exercise by municipal corporations of the power of making provision for necessary expenses free from the restraints in other cases. What are such necessary expenses has been the subject of many judicial decisions. Applying the principles laid down in all of them, we think his honor, Judge Carter, had authority to make the order and that it is a necessary expense of the county of Columbus.

[3] There is express legislative authority for the order. Section 3152 of Revisal reads as follows: "In all cases of homicide, any officer prosecuting for the state may, at any time, direct a post mortem examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs and if not collected out of the defendant the same shall be paid by the county." That the General Assembly in the exercise of the police power of the state is authorized to make such an enactment cannot be doubted. Counties are but state agencies, and subject to legislative authority, which can direct them to do as a duty all such matters as it can empower them to do. Under our system of state government, the counties, cities, and towns of the state are very important and essential factors in the administration of the criminal law, and the burden and expense of administering such laws are largely borne by them. In such matters they are necessarily under legislative control. *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352; *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534; *Jones v. Commissioners*, 137 N. C. 579, 50 S. E. 291.

[4] It is further contended that the defendants were not parties to the action in which the order was made, had no day in court, and are consequently not bound by the order. This position cannot be maintained. The order was made in the administration of the criminal law by the proper officer of the state, and in pursuance of the

statute. The Board of Commissioners are not parties to such a proceeding and ex necessitate rei cannot be. Nor are they entitled to any notice before such orders are made. In such cases the matter is left to the sound discretion of the trial judge; and, unless such discretion is grossly abused, this court will not interfere. The county must rely for the protection of its treasury upon the sound discretion and sense of duty of the judge of the superior court. They should and doubtless do personally examine into such matters with care, and see to it that improper and extravagant allowances are not made. The order in question was made by Judge Carter in a criminal proceeding, and in full accordance with the statute, and must be obeyed.

The order of Ferguson, Judge, granting a peremptory mandamus is affirmed.

LOCKLEAR v. PAUL et al.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. BOUNDARIES (§ 35*)—EVIDENCE—REPUTATION.

While evidence of both hearsay and common reputation is received in cases of disputed private boundary, the reputation must have its origin at a time comparatively remote and always ante litem motam, and must attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some definite location.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 153-155, 157-159, 163, 165, 177-183; Dec. Dig. § 35.*]

2. EVIDENCE (§ 324*)—HEARSAY—REPUTATION—OWNERSHIP.

Where, in an action to recover for alleged wrongful cutting of timber, the chief issue was as to the title of the land where the cutting occurred, and in large measure depended on whether L. had occupied the tract claimed by him adversely and under known and visible lines and boundaries for a sufficient time to mature his title, evidence that the land in question was reputed in the neighborhood to belong to L. was hearsay and inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1218-1229; Dec. Dig. § 324.*]

3. TRESPASS (§ 30*)—CUTTING TIMBER—PERSONS LIABLE—GRANTOR.

Where P. conveyed the timber on certain land in controversy, with rights of way, etc., required to remove the same, to a planing mill company, which deed contemplated and authorized the removal of the timber, if trespass was established against the planing mill company in removing the timber, P. was also liable therefor.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 69; Dec. Dig. § 30.*]

Appeal from Superior Court, Robeson County; G. S. Ferguson, Judge.

Action by Katie Ann Locklear, as administratrix of John Locklear, deceased, against A. W. Savage, one Paul, and others. Judgment for plaintiff, and defendants appeal. Reversed.

The action was to recover damages for the wrongful cutting of timber on the part of defendants, and was made dependent, chiefly, on the issue as to title to the land where the cutting occurred. The cause was before the court at spring term, 1912, on appeal of plaintiffs from a judgment of nonsuit, and will be found reported in 159 N. C. 236, 74 S. E. 347. The judgment of nonsuit was reversed for reasons appearing in the opinion by Associate Justice Walker, and, this opinion having been certified down, the case was tried on the issues of title, trespass on part of defendants, statute of limitations, and damages. There was evidence on part of plaintiff tending to show title in John Locklear, plaintiff's intestate, by reason of adverse occupation and assertion of ownership and up to known and visible lines and boundaries covering locus in quo. Evidence contra on the part of defendants.

McLean, Varser & McLean, of Lumberton, for appellant Paul. McIntyre, Lawrence & Proctor, of Lumberton, for appellant Planing Mill. McNeill & McNeill and Britt & Britt, all of Lumberton, for appellee.

HOKE, J. (after stating the facts as above). On the trial of the issues the following evidence was admitted over objection by defendants to both questions and answers, and exceptions duly noted: "Yes, I know who was reputed to be the owner of the land between these lines I have described. Q. Whose was it? A. The country all around knowed who it was. Q. Whose land was it reputed to be? A. John Locklear's."

[1] It has been held in numerous cases with us that, under certain circumstances, evidence of general reputation is admissible on questions of private boundary. In one of the later decisions on the subject (*Bland v. Beasley*, 140 N. C. 630, 53 S. E. 444) the court said: "It is true that evidence of both hearsay and common reputation is received with us in cases of disputed private boundary; but this is an exception to the general rule, which requires that the rights of litigants must be determined on sworn testimony. Such testimony in England is not admitted in questions of private right, and the principle was only adopted here from necessity, and where, from lapse of time or changing conditions, it has become 'difficult, if not impossible,' that better evidence should be had." And in the same opinion, quoting with approval from some of the former decisions, it was said further: "This reputation, whether by parol or otherwise, should have its origin at a time comparatively remote and always ante litem motam. Second, it should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location."

[2] Assuming that the other conditions for the reception of such evidence have been

met, it would doubtless be a correct application of the principle, on the question of identifying a tract of land, or of giving the same a general placing when it had been otherwise identified and sufficiently described, to hear evidence to the effect that a given tract of land was generally known or reputed to be "the old Locklear tract" or "the old Paul homestead" or the like; but the testimony received in this instance was not of that character. There was no question here of identity of tracts or the correct general location of the locus in quo. On the evidence the right of these parties was, in a large measure, made to depend on whether John Locklear had occupied the tract of land claimed by him adversely and under known and visible lines and boundaries for a sufficient length of time to mature his title, and, in our judgment, this evidence, in the form in which it was presented, was not relevant on the question of boundary, but was an opinion on the title, and had the effect of throwing into the jury box the force and effect of public opinion on that issue. Not coming, therefore, under this principle of evidence on boundary, which is an exception to the more general rule, it was incompetent as hearsay testimony, and was further objectionable as being an opinion bearing directly on the merits of the controversy as embraced in the entire issue. *Deppe v. Railroad*, 154 N. C. 523, 70 S. E. 622; *Smith v. Smith*, 117 N. C. 326, 23 S. E. 270; *Lawson on Expert Opinion Evidence*, p. 557.

We were referred by counsel to *Toole v. Peterson*, 81 N. C. 180, as being an authority against this position; but we do not so understand the decision. In that case, being an action to recover certain lots in the city of Wilmington, a grant to John Watson or Whatson, bearing date in 1735, was located and shown to include the town of Newton, which was the former name of Wilmington. In the course of the trial it became desirable to show the identity of the two towns, with the view of proving title to the lots out of the state, and proof was offered and rejected that for 60 or 70 years there was a general reputation that the city of Wilmington was situate within the bounds of the John Watson grant. On appeal, the evidence was held competent, and a new trial was granted. Here was a case of disputed identity, and the evidence was clearly relevant on the question of location, and was not, as in our case, an opinion on the title.

[3] The other and numerous questions presented on the appeal are not dealt with, as they are chiefly rulings of the court on questions of evidence, and may not arise on a further hearing of the case. It may be well, however, to refer to an exception that the defendant Sarah A. Paul is not responsible for the trespass complained of, inasmuch as she had made an outright conveyance of the timber to her codefendant, the Planing Mills, and this company alone had

done the cutting. The deed conveyed the timber, with rights of way, etc., etc., required to remove the same. It clearly contemplated and authorized the acts complained of, and, if trespass is established against the company, the grantor in the deed is also responsible. *Dreyer v. Ming*, 23 Mo. 434.

For the error indicated, there must be a new trial of the cause, and it is so ordered. New trial.

PAGE v. SPRUNT et al.

(Supreme Court of North Carolina. Oct. 22, 1913.)

MASTER AND SERVANT (§ 177*)—LIABILITY FOR INJURIES — NEGLIGENCE OF FELLOW SERVANT.

An employer is not liable for the injuries of an employé caused by the negligence of a fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 307, 352, 353; Dec. Dig. § 177.*]

Appeal from Superior Court, New Hanover County; Justice, Judge.

Action by Daniel Page against James Sprunt and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

This is an action to recover damages for personal injuries caused, as the plaintiff alleges, by the negligence of the defendant. At the conclusion of the evidence, judgment of nonsuit was entered upon motion of the defendant, and the plaintiff excepted and appealed.

Ricaud & Jones and E. K. Bryan, all of Wilmington, for appellant. J. O. Carr, of Wilmington, for appellees.

PER CURIAM. Upon an examination of the evidence, it is doubtful if there is any evidence of negligence; but, if there is, it is the negligence of a fellow servant, for which the defendant is not responsible.

The judgment of the court is affirmed.

STATE v. WATKINS.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. INTOXICATING LIQUORS (§ 223*)—OFFENSES—INDICTMENTS—PROOF.

While an indictment for selling intoxicating liquors to persons to the grand jurors unknown is authorized, yet the state to procure a conviction must offer evidence tending to prove an actual sale to the unknown persons, and in the absence of such proof a conviction will not be supported.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 263-274; Dec. Dig. § 223.*]

2. INTOXICATING LIQUORS (§ 236*)—PROSECUTIONS—EVIDENCE—SUFFICIENCY.

In a prosecution for unlawfully selling intoxicating liquors evidence held insufficient to support a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

3. INTOXICATING LIQUORS (§§ 132, 196*)—OFFENSES—STATUTES.

Laws 1913, c. 44, which created two new offenses with regard to intoxicating liquors, and also by section 5 changed rules of evidence, did not go into effect until April 1, 1913; consequently a conviction in February, 1913, cannot be supported thereby.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 141, 215; Dec. Dig. §§ 132, 196.*]

4. INTOXICATING LIQUORS (§ 236*)—STATUTES—LOCAL LAWS.

Where a local law making the possession of more than one quart of whisky prima facie evidence that the possessor had it for the purpose of sale did not apply to the county in which accused was charged with the crime, the mere fact that a barrel of whisky was consigned to accused will not support a conviction for the unlawful sale of intoxicating liquors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 800-822; Dec. Dig. § 236.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Columbus County; Ferguson, Judge.

Oscar Watkins was convicted of unlawful sale of intoxicating liquors, and he appeals. Reversed and remanded.

Indictment for the sale of liquor to persons whose names are to the jurors unknown. At the conclusion of the evidence, the defendant requested the court to instruct the jury to return a verdict of not guilty. Refused.

Schulken, Toon & Schulken, of Whiteville, for appellant. The Attorney General and Assistant Attorney General, for the State.

BROWN, J. The following is all the evidence introduced on the trial of this case.

G. W. Rushing, witness for the state, testified as follows: "I saw one barrel in the railroad depot at Hallsboro, marked 'O. Watkins.' This barrel had whisky marked on it. The barrel looked like it would hold about 80 gallons. I do not know what was in the barrel."

H. O. Harvel, witness for the state, testified as follows: "I am agent for the Atlantic Coast Line Railroad Company at Hallsboro, N. C. On the 5th day of August, 1912, a barrel containing about 30 gallons, marked 'O. Watkins,' and also marked on the barrel 'Whisky,' was put off the train at Hallsboro, N. C. Some time after the arrival of this barrel, and while I was agent, some one came to the railroad office and receipted for this barrel. I do not know whether Oscar Watkins carried the barrel away or not. I do not know who got the barrel. I only know that some one receipted for it in the name of Oscar Watkins. I do not know where the defendant lives. I did not know Oscar Watkins at the time the barrel was receipted for."

C. L. Benton, witness for the state, testified as follows: "I saw a barrel of whisky, containing about 80 gallons, in the railroad warehouse at Chadbourn, N. C., marked 'O. Watkins.' When I saw the barrel of whisky

in the warehouse it was in bad order and the whisky was leaking out. I saw some parties catching the whisky as it was leaking out of the barrel, drinking it, and others catching it in buckets and carrying it away. The defendant, Watkins, was not there when I saw it. I do not know what became of the barrel of whisky. Oscar Watkins lives at Pine Log, about five miles from Chadbourn and about eight miles from Hallsboro."

[1] It is to be observed that the defendant is indicted for selling whisky to some person to the jurors unknown. While this form of indictment is recognized, yet it is as much incumbent on the state to offer evidence tending to prove an actual sale to the unknown person as if his name had been inserted in the indictment. *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002; *State v. Dunn*, 158 N. C. 654, 74 S. E. 359; *State v. McIntyre*, 139 N. C. 599, 52 S. E. 63.

[2] There is no evidence that the defendant in this bill ever received the whisky, much less sold it. The evidence wholly fails to identify this Oscar Watkins with the person who received the whisky. The receipted book was not put in evidence, and there was no attempt to prove the defendant's handwriting, as well as no attempt to prove that he ever sold any of it.

[3] This case seems to have been tried as if the Act of 1913, c. 44, had been in effect. That act creates two new offenses in respect to intoxicating liquors as well as a new rule of evidence contained in section 5; but that act went into effect on April 1, 1913. This bill was returned in November, 1912, and the trial took place and judgment was pronounced in February, 1913. Therefore the act of 1913 can have no bearing upon this case and it must be determined under the law in force prior to that act.

[4] Nor does the act considered by us in *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626, apply. This statute declared that the possession of more than one quart of whisky should be prima facie evidence that the party in whose possession it was found had it for the purpose of sale.

The act applied only to Union county, and there was no such special act in force in Columbus county when this offense is alleged to have been committed. His honor erred in refusing the instruction.

New trial.

CLARK, C. J. (dissenting). There was ample evidence to go to the jury tending to show possession of the barrel of whisky by the defendant. The agent of the railroad testified that on August 5, 1912, a barrel of whisky containing about 30 gallons, marked "Whisky," and addressed to O. Watkins, was put off the train at Hallsboro; that soon after some one came to the railroad office, signed the receipt for this barrel, in the name of Oscar Watkins, and carried it off. Another witness testified that he saw a barrel of

whisky containing about 30 gallons in the railroad warehouse at Chadbourn, N. C., marked "O. Watkins." It is also in evidence that the defendant, Oscar Watkins, lived about five miles from Chadbourn and about eight miles from Hallsboro. There is no evidence that any other Oscar Watkins lived in that section. Nor is there any evidence tending to show that the man who got the barrel of whisky at Hallsboro was not the consignee nor that his signature on the books of the company receipting for the same was a forgery. Unless such signature was a forgery, and unless the party who committed the forgery and received the whisky was guilty also of larceny, then there was evidence to go to the jury that the defendant was in possession of 30 gallons of whisky and possibly of 60 gallons, for there was one barrel consigned to him at Hallsboro and another at Chadbourn. This evidence was more than a scintilla.

There is no presumption of law that any one committed two felonies, larceny and forgery. The entry was made in due course of business. Receipting for the whisky on the railroad books in the name of Oscar Watkins and taking it away, in the absence of any evidence to the contrary, was certainly sufficient to go to the jury on the question of possession. This was all the evidence that the state can reasonably be called on to trace the whisky to his possession. It was easy for the defendant to negative this fact if he did not receive the whisky, and he would have done so, if he could. There is no evidence to show that there was another O. Watkins in that section. The evidence was sufficient to satisfy the jury, and did satisfy them, that the defendant was the party who got the whisky. It was addressed to him and receipted for in his name.

His honor correctly charged the jury: "The possession of one barrel of whisky shipped to the defendant at one depot, if you find that it was shipped to him and receipted for by him, and the shipping of another barrel to him at another date, if you so find, are circumstances tending to show that the defendant sold whisky as charged; but that is for you to say." In *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626, which was an indictment under the Union county statute which made the possession of more than one quart of whisky prima facie evidence of an intent to sell, Walker, J., says in his concurring opinion that independent of the statute (the defendant having in possession two five-gallon kegs, a half-gallon jug, and one pint bottle) "having with him so large a quantity of liquor in packages of different size and covered over with a lap robe, was sufficient of itself to constitute prima facie evidence of the defendant's guilty possession. * * * The mere fact that reference was made to the statute did not prejudice the defendant, when his possession,

under the circumstances clearly shown by the evidence and not disputed, was sufficient to carry the case to the jury."

In this case there was ample evidence to satisfy a jury that the defendant was in the possession of 30 gallons receipted for and carried away in his name, and, if the possession in the Barrett Case of 10½ gallons was sufficient to carry the case to the jury, certainly there was more than sufficient in this case.

In *State v. Barrett, Brown, J.*, in his dissenting opinion, says: "Irrespective of the provisions of the act, I am of opinion that there was sufficient testimony to be submitted to the jury that the defendant did have in his possession liquor with the intent to sell it." Under our decisions proof of possession supports the charge of selling as effectively as it does the charge of having possession with the intent to sell. *State v. Dunn*, 158 N. C. 654, 74 S. E. 359.

There was evidence to satisfy the jury that this defendant was receiving whisky in large quantities, a barrel at a time, and, in the absence of any evidence tending to show the character of the possession of so much whisky, the jury was warranted in finding, as they did, that the defendant was engaged in selling whisky to persons unknown, as charged in the bill of indictment. *Hoke, J.*, *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002; *State v. McIntyre*, 139 N. C. 599, 52 S. E. 63. For what other purpose, if unexplained, did he have it?

The court carefully and correctly charged the jury that they "must be satisfied beyond a reasonable doubt that the defendant sold liquor to persons unknown; that the possession of the whisky, if the jury should find that it was shipped to and receipted for by him, are circumstances tending to show that the defendant sold whisky, but that it was for the jury to say what was the weight to be given to those circumstances." The jury found the defendant guilty. There being no evidence that there was any other O. Watkins in that neighborhood, and not the slightest evidence tending to show that any one committed forgery or larceny to get possession of the whisky, nor that the railroad company would have delivered the barrel without the identification of the consignee, could the jury find otherwise than that the defendant obtained possession of the whisky? Under the authority of the concurring opinion of Walker, J., and the dissenting opinion of Brown, J., in *State v. Barrett*, supra, the possession of one barrel was the possession of three times as much as was necessary to constitute sufficient possession to submit the question of having the liquor to sell. If the defendant received both barrels, which he did not deny by any evidence, then the case was six times as strong against the defendant as in Barrett's Case.

The public policy of a state is declared by the Legislature, which is the lawmaking body. The policy of this state in regard to suppressing the traffic in intoxicating liquor was clearly declared by the Legislature of 1907 and ratified on a Referendum in 1908 by an overwhelming majority at the ballot box. The province of the courts is to construe the law in accordance with the intent with which it was enacted. Whenever the courts in this state have found a defect that would interfere with the enforcement of this law, the Legislature has promptly corrected it. And the public intent to do this has been declared in the most explicit way, in the "Search and Seizure" Law of 1913, c. 44, whose title is "To secure the enforcement of the laws against the sale and manufacture of intoxicating liquor."

It is doubtful if a jury could be impaneled in this state who would not find upon this uncontradicted evidence that the defendant received this whisky and that the presumption which, under the opinions in *State v. Barrett*, above cited, was raised from the possession of this quantity of liquor, was not rebutted. Indeed, there was no evidence whatever tending to rebut either the possession of the whisky by the defendant or that he sold it. Certainly this "jury of the vicinage" had "no reasonable doubt," and the defendant sought to get the court to hold him not guilty as a matter of law and not of fact.

His honor did not charge, as he might have done, under the authority of the opinions in *State v. Barrett*, above cited, that the possession of so large a quantity of whisky raised a presumption that he had the whisky for sale, nor that the whisky being consigned to the name of the defendant and receipted for in his name raised a presumption that he received it. The court merely charged that the jury should consider these as evidence and, unless they were satisfied beyond a reasonable doubt that the defendant sold whisky, to find him not guilty. The court might well have charged that the delivery of the barrel to the person who receipted for it in the name of the defendant and consignee raised a presumption that such consignee received the whisky (16 Cyc. 1072); but he did not do so and left the evidence on both points to the jury, not as presumptions, but merely as circumstances to be weighed by them.

FELLOWS et al. v. DURFEY et al.
(Supreme Court of North Carolina. Oct. 22, 1913.)

WILLS (§ 597*)—CONSTRUCTION—ESTATE DEVISED.

Testator by a holographic will devised to his wife all his estate, desiring her to own the same just as "I now hold and own or shall hold and own at the date of my death," her interest to be as absolute as testator's and not to be taken

as a trust to be enforced by any other court than her own conscience, etc. The next paragraph enjoined on her to reserve to herself the homestead and sufficient means for the support of herself and family, and provided that if she should marry (which event did not occur) the property should be divided between her and his children according to the statute of distribution. The next paragraph appointed her sole executrix, and added the desire that testator's interest in a mercantile firm should remain unchanged unless a change was necessary. *Held*, that the will vested in the widow the fee in testator's property without trust or other limitation.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1319-1326; Dec. Dig. § 597.*]

Appeal from Superior Court, Wake County; Carter, Judge.

Action between E. H. Fellows and others and C. K. Durfey and others, to construe the will of Rufus S. Tucker, deceased. Judgment for the latter, and the former appeal. Reversed.

The will is as follows:

"Raleigh, N. C., Feb. 6, 1880.

"I, Rufus S. Tucker, merchant, residing in the city of Raleigh and state of North Carolina, do make and publish this as my last will and testament, at my own home and in my own handwriting.

"I give, devise, and bequeath to my dear wife, Florence Perkins Tucker, all my estate, real or personal, wherever located or however held, or all that I may acquire or hold at the time of my death, of whatever nature or description, then belonging to me. I desire that my wife shall take, hold, and own, just as now I hold and own or shall hold and own at the day of my death; I declare her interest in my estate, real and personal, shall be as absolute as my own, and not be considered or taken as a trust, technically so called, to be enforced by the judgment or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it. In thus bestowing on my dear wife, Florence, all that I am worth, I wish my children to understand that in so doing I act upon the best convictions of my judgment and from knowledge of their mother's affection, love, and interest in the welfare, comfort, and happiness of each and all of our children, and in the belief that thereby I best protect and control them, and that she will from time to time, as her judgment, sense of justice, and duty shall in her own will direct, and as the necessities and wants of our children shall require, make to them such advancements, in cash or property, as she shall think best and proper.

"I enjoin it upon her at all times to reserve to herself, as the occupant of the homestead (which is her home) and the proper head of the family, sufficient means for the proper living of herself and family. That in making advancements to our children she shall charge such child with his or her advancement, if in property, at its market or cash value at the time of the advancement;

and if any child shall be advanced by me during my life, such child or children shall be charged, of which I will file for my wife's instruction with this will a full statement, and for which such child or children must account in any division that may be made by my wife, or otherwise, of my property. She will understand that the proper nurture and education of her children is not to be regarded as advancements and have never been so regarded or charged by me.

"Should my wife marry again, then it is my will that my wife and children that select three disinterested friends, my brother William (if living) being one, who shall make an equal and just division of my property between her and all of our children, or their legal representatives, as if made under the statute of distributions in this state; and in the event of her death as my widow, she may direct by writing the selection of three intelligent and disinterested friends (my brother William being one, if living), who shall make such equal and just division of all my property or estate remaining in her hands, bringing into view and account all previous advancements.

"I constitute and appoint my wife, Florence, the executrix of my last will and testament, without security or bond, and desire that so long as she can have the aid and direction of my brother William's advice, that she will be directed by him in the care and management of the property and the investment of any funds not needed or required by her in the proper nurture and maintenance and education of her family. Most of my personal and real estate is now in the name of W. H. & R. S. Tucker, and my desire is that it should remain in the same name or firm, unless there should be found some good reason why it should be changed; in that event my wife can make the change.

"In testimony of all which I have hereunto placed my name and seal.

"Rufus S. Tucker. [Seal.]

"Raleigh, N. C., Feb. 6, 1880.

"Executed before C. McKimmon, W. T. McGee.

"Note.—Raleigh, N. C., February 9, 1894. I have decided to keep no record of advances made to my married children, as I have advanced to them as their necessities required. My wife knows about the amounts advanced.

"Rufus S. Tucker.

"No advances have been made to my unmarried children. R. S. T."

Rufus S. Tucker died August 4, 1894, seised of a large estate, real and personal, and his widow, Florence P. Tucker, who was named therein as devisee and executrix, qualified and entered into possession, claiming the property in fee under said will. She died December 11, 1909, leaving a will whereby she disposed of the property, which she had taken possession of under the terms of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

her husband's will, under the belief that she possessed the same in fee simple, and at the same time disposed, without distinguishing it, of her property which she had received from other sources. The court below being of opinion that the property devised to her under the will of her husband was not held by her in fee, but in trust, so adjudged, and the defendants appealed. This action was begun September 8, 1911. The parties, plaintiffs and defendants, other than C. K. Durfey, the surviving executor named in the will of Florence P. Tucker, are her five daughters and their living husbands and the children of a deceased son.

Tillett & Guthrie, of Charlotte, and Winston & Biggs, of Raleigh, for appellants. J. H. Pou, S. B. Shepherd, and W. H. Pace, all of Raleigh, for appellees.

CLARK, C. J. The decision of this case affects the present control and custody of a large amount of property, and to a lesser extent its ultimate destination; for the will of Mrs. Tucker substantially divides it equally among her children and the children of a deceased son, share and share alike, but, with the exception of a cash devise to each and some personal property, gives her children the annual interest only, and devises the principal of each share in trust to be divided among the grandchildren at the death of their mothers. The will of Florence P. Tucker is not presented for construction, but the fact that the bulk of the principal of the estate is thus tied up during the lifetime of her children, who are to receive merely the interest, is the ground of the action on the part of the plaintiffs, who contend that the property was not devised to her by her husband in fee, and that the estate should be divided at this time.

The elementary rule for the construction of wills is that every will shall be construed to effectuate the intent of the testator, and that this intention must be gathered from the terms of the will itself. The testator was a man of large estate and of high intelligence, a graduate of the State University, and, as the will itself states, it is written entirely in his own handwriting and is dated 14 years prior to his death.

The language of the will is explicit, and the testator's intention is very clearly expressed, in these words: "I give, devise, and bequeath to my dear wife, Florence Perkins Tucker, all of my estate, real or personal, wherever located or however held, or all that I may acquire or hold at the time of my death, of whatever nature or description, then belonging to me. I desire that my wife shall take, hold, and own, just as I now hold and own or shall hold and own at the date of my death. I declare her interest in my estate, real and personal, shall be as absolute as my own, and not be considered or taken as a trust, technically so called, to be en-

forced by the judgment or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it." These words are so clear and peremptory that we cannot conceive that the testator meant other than to devise his entire property to his wife to "hold and own just as he held and owned or should hold and own it at the day of his death," and that "her interest in his estate, real and personal, should be as absolute as his own, and not to be considered or taken as a trust, technically so called, to be enforced by the judgment or decree of any court other than her own conscience, judgment, and affection should prompt her to so regard it." There is nothing that follows in this will which can shake or throw a doubt upon this so clear expression of the testator's intention, which was declared to be to vest the estate "as absolutely in his wife as the testator held it at his death," and by anticipation forbids any construction of the will which should hold its terms as giving her an interest as trustee and not absolutely.

The next paragraph in the will is an explanation to his children of the reason why he has thus devised the estate absolutely to his wife. He then enjoins upon her to reserve to herself the homestead and sufficient means for the proper support of herself and family. Counsel for the plaintiffs place emphasis upon the word "enjoin." But with the context it is merely the expression of solicitude, and a desire that his wife should not, out of affection for her children, strip herself of a sufficient support and maintenance.

The next paragraph of the will is advice to his wife as to the method of making advancements, which he naturally and evidently expected she would make to the children, and that the children shall be charged for such advancements at the market value at the time, and, further, he expresses the desire that the support and education of the children shall not be regarded as an advancement.

The next paragraph provides that in event his wife should marry (which event did not occur) the property should be divided between her and his children according to the statute of distribution, and by the method he suggested. In short, the testator gave his wife a fee in his estate, defeasible on the contingency of her marriage.

The next paragraph of his will appointed his wife sole executrix without security or bond, and expresses a desire that she will avail herself of the advice of his brother, William (who predeceased him), in the management of the property and the investment of surplus funds, adding a desire that his interest in the mercantile firm of which he and his brother were members should remain unchanged, unless his wife should find good reason for a change, which was left entirely to her judgment. This is the whole will.

The very able and learned counsel on both sides who argued this cause have cited us to a very large number of cases. But we do not think that they can add to the understanding of this will, which is the clear expression of his intentions as to the disposal of his property, by an educated, intelligent gentleman, who knew how to make himself understood in other matters, and whose words in this important matter admit of no doubt or ambiguity. Citations of the decisions of many courts as to other wills, whose language is more or less similar to that here used, cannot aid us, for in few of them, if any, has the intention to confer a fee been contested when so clearly expressed as in this case.

In *Griffin v. Commander*, 79 S. E. 499, at this term, the devise to the widow was of all the testator's estate, "with power to give and devise the same after her death to our beloved children and grandchildren, that inasmuch as they are and should be our lawful heirs and that they are equally our own and well beloved by each of us, as their joint parents, she has the same right of distribution of our estate as I have, knowing no partiality or discrimination in the same." We held that the widow held the property in fee, and that the rule applicable was clearly stated in *Borden v. Downey*, 35 N. J. Law, 77: "Where an estate for life is expressly given, and a power of disposition is annexed to it, in such case the fee does not pass under such devise, but the naked power to dispose of the fee. * * * It is otherwise in case there is a gift generally of the estate, with a power of disposition annexed. In this latter case the property itself is transferred."

In *Jackson v. Robins*, 16 Johns. (N. Y.) 538, it is held to be settled law that, "where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee * * * will not take an estate in fee." This case was cited and approved in *Bass v. Bass*, 78 N. C. 374. To the same effect, *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684; *McKrow v. Painter*, 89 N. C. 437; *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649; and there are other cases in our court to the same effect.

Counsel for the plaintiffs rely upon two cases in our own courts: *Young v. Young*, 68 N. C. 309, which in no wise resembles this, for there the property was given to the testator's wife "to be managed by her (and that she may be able the better to control and manage our children) to be disposed of by her to them in that manner she may think best for their good and their own happiness." In that case there was simply a trust in the

wife, and nothing more. The plaintiffs also rely upon *Russ v. Jones*, 72 N. C. 52. In that case the devise was to the wife, who was empowered "to give to my daughter E. * * * any of said property at any time, or from time to time, as said wife may think proper." The court held that this was a trust, and the wife had only a life estate, quoting as authority the above case of *Young v. Young*, which clearly does not sustain it. The case was evidently not well considered, and no reasoning is given and no authority cited other than *Young v. Young*, which, as we have said, is not in point. It is, however, not necessary to do more than to point out that the language there construed is no precedent for the construction of the language used in this case.

In *Burnes v. Burnes*, 70 O. C. A. 370, 137 Fed. 794, the court said: "The tendency of the modern decisions, both in England and in this country, is to restrict the practice which deduces a trust from the expression by a testator of a wish, desire, or recommendation regarding the disposition of property absolutely bequeathed (citing 2 Story, Eq. Ju. par. 1069; *Lambe v. Eames*, L. R. 10 Eq. Cas. 287; *In re Hutchinson and Tenant*, L. R. 8 Ch. Div. 540; *Pomeroy's Eq. Jur.* [2d Ed.] par. 1015; *Foose v. Whitmore*, 82 N. Y. 405, 406, 37 Am. Rep. 572)."

In *Holt v. Holt*, 114 N. C. 241, 18 S. E. 967, it is said: "In a disposition by will no words are necessary to enlarge an estate devised or bequeathed from one for life into one absolute or in fee. Indeed, it is generally necessary that restraining expressions should be used to confine the gift to the life of the legatee or devisee." Indeed the act of 1794, now Revisal 3138, requires that a devise shall be held to be in fee unless the contrary appears by "clear and express words or it shall be plainly intended." *Jones v. Richmond*, 161 N. C. 555, 77 S. E. 950.

Whatever may be said as to the consistency of testators who confer unrestricted power over property upon their grandchildren or more remote descendants, but who do not see fit to place the same power and confidence in their own children, who are restricted to the receipt of interest merely upon life estates (*Hodges v. Lipscomb*, 128 N. C. 57, 38 S. E. 281), testators as yet have such power, for the statute of wills which conferred the power to dispose of property by will (*In re Garland's Will*, 160 N. C. 555, 76 S. E. 486), has not been restricted beyond limiting the power to devise to a life or lives in being or 21 years thereafter, and by the recent restriction as to contingent remainders (whether created by will or deed), under Laws 1903, c. 99, now Revisal 1590 (*Anderson v. Wilkins*, 142 N. C. 159, 55 S. E. 272, 9 L. R. A. [N. S.] 1145). Besides, the will before us for consideration is not the will of Mrs. Tucker but that of Rufus S. Tucker, which contains no such limitations.

It would be the merest affectation of learn-

ing to quote the almost infinite number of cases in which language differing more or less from that used in this will has been construed by the courts in an effort to arrive at the testator's meaning, and to point out at great length wherein the words in each approximate or differ from the language used in the will before us.

Why darken counsel by multitude of words? The sole duty before us is to declare the meaning of the words of the testator in this case. To our apprehension, the testator gave his entire property, as absolutely to his wife as he held it himself, and without annexing any trust; and he said this clearly and intelligibly and without ambiguity. He made this devise defeasible in the event of his wife's remarriage, an event which did not occur. His will expresses solicitude that his wife should retain sufficient property for her own use, and he evidently expected that she would pass it on to her children. But he did not confer on her any power of appointment, because he had given her the property absolutely; and, if he had annexed the power of appointment, after the devise to her generally, indeed explicitly, in fee, it would not have restricted her interest to a life estate, as the authorities cited from our own court above amply demonstrate.

The judgment of the court below is reversed.

SIMMONS et al. v. McCULLIN.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. HOMESTEAD (§ 172*)—WAIVER—CONSENT TO LEVY AND SALE.

Where a man convicted of murder in the second degree, in order to get a lighter sentence, agreed that a judgment should be entered in an action by the administrator and the widow of the murdered man for the support of the widow, and that it should be satisfied out of the property attached by the sheriff in that action, the judgment defendant consented to waive his homestead in the land attached, and could not thereafter ask that it be set aside to him, as he might have done had the judgment been obtained without his consent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 339; Dec. Dig. § 172.*]

2. HOMESTEAD (§ 169*)—WAIVER—CONSENT TO SALE—JOINDER OF WIFE.

It appearing that the homestead exemption of the debtor had not been set apart, the consent of the wife to the judgment waiving the homestead was not necessary, since Const. art. 10, § 8, requiring her consent to a deed conveying the homestead, applies only when the homestead has been set apart, or there is a judgment docketed and in force which is a lien upon the land.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 335; Dec. Dig. § 169.*]

3. HOMESTEAD (§ 172*)—WAIVER—FORM—CONSENT JUDGMENT.

A debtor can waive his homestead exemption by consenting to the entry of a judgment and its satisfaction out of the homestead, since

a judgment entered by consent of the parties is at least as conclusive upon them as one rendered by the court after trial.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 339; Dec. Dig. § 172.*]

Appeal from Superior Court, Sampson County; Lyon, Judge.

Action by Sallie Simmons and another against W. R. McCullin. From a judgment requiring the sheriff to allot and set apart the homestead of the defendant before proceeding to sell certain land to satisfy a judgment, the plaintiffs appeal. Judgment modified.

This is an injunction against a sale of defendant's land. W. R. McCullin and James McCullin were indicted for the murder of Jonah Simmons, and were convicted of murder in the second degree. Plaintiff and the widow brought civil suits to recover damages for the killing. The court, after the verdict was returned in the criminal case, suggested that, if a liberal provision was made for the widow, by allowing a judgment in the civil case for \$3,000, he would consider it in passing sentence, and award the minimum punishment. The parties all agreed to this, and consented that judgment should be entered in favor of the widow for \$3,000 and costs. This was accordingly done, and judgment was entered by consent for that sum and costs against W. R. McCullin, and for \$1 and costs against James McCullin; it being provided therein that "she recover of the defendants the sum of \$3,000 and costs of the action, and the sheriff shall satisfy the same out of the property attached by him in the case of Charlie Bradshaw, administrator of Jonah Simmons, against the said defendants, and that the said Charlie Bradshaw, administrator of Jonah Simmons, recover of defendants the sum of \$1 and the costs of action, which the sheriff shall collect out of said property." The property was advertised by the sheriff in obedience to the judgment of the court, and pending the said advertisement defendants applied for and obtained an order restraining the sale of the property, and an order to show cause why a perpetual injunction should not issue, upon the ground that the sheriff proposed to sell without allotting the homestead. Judge Lyon found as facts, on the hearing of the order to show cause before him, that James McCullin has a wife and child, but owns no real property, and that W. R. McCullin owns real property in Sampson county, and has a wife. Upon his findings, the pleadings, and admissions, he adjudged that defendants are not entitled to any exemption in the personal property, and that W. R. McCullin is entitled to a homestead in the land owned by him, which is all he had, and he further adjudged that the sheriff allot and set apart the homestead of W. R. McCullin before proceeding to sell the land, and that he sell only the surplus of

the land, and what is called the "reversionary interest" and the personal property, and apply the proceeds to the payment of the judgment and costs. Plaintiff appealed.

Faison & Wright and Geo. E. Butler, all of Clinton, for appellants. H. A. Grady, of Clinton, for appellee.

WALKER, J. (after stating the facts as above.) [1] It is evident that the judgment entered by the consent of the parties was the result of the compromise between them, and intended to relieve the two convicted defendants of the heavy pains and penalties of the law which they had violated. In accordance with the agreement, the verdict was changed to one of manslaughter, and the lightest sentence imposed, instead of confining the defendants in the penitentiary at hard labor for a long term. No question of duress is raised in the case. It presents the naked question, in the plaintiff's appeal, whether the defendant W. R. McCullin is entitled to a homestead as against this judgment. We observe that the argument of the defendant's counsel is based almost entirely upon the assumption that the judgment was taken in invitum; whereas, it appears on its face to have been entered by consent of the parties. It is not like the judgment of a court ascertaining their rights, with or without a verdict, and decreeing against them of its own will. In such a case, where it is adjudged that money be paid, the sheriff should have the homestead laid off to the defendant before selling the surplus, if any, of the land. The part so allotted and set apart is exempt from sale under the process for the period prescribed by law, and no part of it can be sold under execution until this quality of exemption has ceased to exist. It is not necessary to discuss the right to sell what is called the "reversionary interest," in the view we have taken of the case. Instead of being a judgment in invitum, this has all the attributes of a consent judgment, and it expressly provides, as we construe it, that all of the property, real and personal, upon which a former levy, under an attachment, had been made shall be sold and the proceeds applied to the "satisfaction" of the judgment and costs. This must be the meaning and sense of it, not only in view of the facts and circumstances surrounding the parties at the time it was entered, but by the very terms of the judgment itself. By consent and with the sanction of the court, it is adjudged that the whole of the property be appropriated to the payment of the amount recovered and costs, without regard to any right of exemption.

[2] The only remaining questions are, Was the wife's joinder necessary to thus condemn the property to the satisfaction of the judgment? and, second, could the husband, in that form, part with his right of exemption? We think that both questions must be

answered against the defendant W. R. McCullin. It has been held for a long time and in many cases, that the wife's joinder is not required, unless there is a judgment docketed and in force, which is a lien upon the land, or unless the homestead has been actually set apart. Const. art. 10, § 8; *Mayho v. Cotton*, 69 N. C. 289; *Hughes v. Hodges*, 102 N. C. 249, 9 S. E. 437; *Scott v. Lane*, 109 N. C. 155, 13 S. E. 772; *Joyner v. Sugg*, 132 N. C. 580, 44 S. E. 122; *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877; *Shackleford v. Morrill*, 142 N. C. 221, 55 S. E. 82. In *Hughes v. Hodges*, the court (by Avery, J.) said: "The defendant conveyed his land by mortgage deed to secure money (loaned to him on the land, as we infer). Until proof to the contrary is offered, the presumption is in favor of this power to convey, and the defendant offers no evidence of the existence of a judgment against himself. For the purpose of this discussion there can be no difference between a mortgage and an absolute deed. His first wife, who was then living, did not join, and did not, therefore, convey her right to dower, had she survived her husband. But she died in 1881 and it is not necessary to discuss the rights of defendant's second wife. It is sufficient to say that neither she nor any other person can be allowed a homestead in the land. No homestead having been allotted before the deed was executed in 1876, or since, the deed of the defendant to the plaintiff's testator was valid, and passed the land to the grantee for the purposes mentioned therein, subject only to a contingent right (of dower) no longer hanging over it. We therefore hold that the judge erred in ordering the sale of the reversionary interest, and should have adjudged that the entire interest, instead of the reversionary interest only, be sold, unless the debt should be paid by the time mentioned."

[3] In regard to the second question, we do not see that a judgment is none the less effective as a bar, because its merits were determined, in whole or in part, by the agreement of the parties. It seems to us that it is immaterial whether it was obtained by consent or by a decision of the court upon the points in controversy, so far as its conclusiveness and binding force is concerned, which do not depend upon its form or upon the fact that the court investigated or decided the legal principles involved, and there is no substantial reason why it should not be just as effective to finally determine and settle the rights of the parties as if it had been rendered upon demurrer or verdict, nor why it should not be as complete a bar between the parties to it as any judgment in invitum. It has been conceded by the highest authority to have just that effect, and the courts have held that a judgment entered upon a stipulation of the parties after issue joined has the same binding force and oper-

ation as an estoppel has if the action had been tried on the merits, and the judgment was a perfect bar. The above principle is fully stated in the text of 2 Black on Judgments, § 705, and well supported by the cases in the notes. "A decree in equity, by consent of parties and upon a compromise between them, is a bar to any subsequent suit upon a claim therein set forth as among the matters compromised and settled, although not in fact litigated in the suit in which the decree was rendered." *Nashville R. Co. v. U. S.*, 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971; *Bigley v. Watson*, 98 Tenn. 357, 39 S. W. 525, 38 L. R. A. 679; *Adler v. Van Kirk L. Co.*, 114 Ala. 561, 21 South. 490, 62 Am. St. Rep. 133. "There can be no doubt that a judgment entered up by the court, upon the agreement of parties, is, to say the least, as conclusive upon them as if judgment were rendered in the ordinary course of proceeding." *Pelton v. Mott*, 11 Vt. 143, 34 Am. Dec. (Extra Anno.) 678. The same doctrine, we think, has been expressly approved by this court. In *Stump v. Long*, 84 N. C. 616, it was held that an agreed judgment or order is binding and conclusive, and cannot be set aside or modified, without the consent of both parties, except upon the ground of mutual mistake or fraud. See *Edney v. Edney*, 81 N. C. 1; *McEachern v. Kerchner*, 90 N. C. 179, and 93 N. C. 455; *Vaughan v. Gooch*, 92 N. C. 527. It is said in *Kerchner v. McEachern*, 90 N. C. 179, that, while the terms are settled by the parties, the judgment has the same force and effect as if it had been entered by the court in regular course, and in that sense, it becomes the judgment of the court by virtue of its sanction. *Lamb v. Gatlin*, 22 N. C. 37, was decided on special grounds, and is not like this case, and the same may be said of *Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966. The matters there involved, it was held, were not the subject of agreement; but here the defendant is sui juris, and can convey, release, or otherwise dispose of his property by deed duly executed, or contract, or judgment regularly entered, and may sometimes even lose his constitutional rights by not asserting them at the proper time and in the proper way. A regular judgment against him, disposing of his homestead, would not be void or even irregular, but at most only erroneous, and to be corrected, if wrong, by appeal. *McLeod v. Graham*, 132 N. C. 473, 43 S. E. 935; *Henderson v. Moore*, 125 N. C. 383, 34 S. E. 446. The case of *Beavan v. Speed*, 74 N. C. 544, does not apply, as there was no direction to sell the land, but simply a judgment for the amount of the note. As the joinder of the wife is not required, we do not see why the husband cannot part with his right of exemption by judgment that the land should be sold to pay the sum recovered as well as he can by mortgage or deed for the same purpose. *Hughes v. Hodges*, supra. Defend-

ant alleges, in his application for the injunction against the sale, that the land is not more than sufficient in value to pay the claim. How, then, can the latter be "satisfied" without selling the land as an entirety and without regard to the homestead?

In the view we have taken of the case, it is not necessary to discuss the correctness of the decision in *Dellinger v. Tweed*, 66 N. C. 206, which we were asked to re-examine. The court's ruling as to the personal property is covered by what we have said in regard to the homestead exemption.

There was error in the judgment, and it will be modified by dissolving the injunction and requiring the land to be sold for the payment of the amount due and costs, without allotting any homestead or personal property exemption. Appellant will recover the costs of this court.

Error.

Defendants' Appeal.

The decision in the plaintiff's appeal requires us to declare that there was no error in this appeal. There are other reasons that might be assigned for this conclusion; but it is unnecessary to state them.

No error.

RAEFORD LUMBER CO. v. ROCKFISH TRADING CO.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. MECHANICS' LIENS (§ 132*) — NOTICE OF LIEN—TIME OF FILING.

Revisal 1905, § 2028, as amended by Pub. Laws 1909, c. 32, providing that notice of liens shall be filed within 12 months after the final furnishing of materials, provided that, as to the rights of a purchaser for value without notice, the notice of lien must be filed within 6 months, contemplates that the materialman to protect himself against a purchaser for value without notice must file his notice of lien within 6 months, but that he may file it within 12 months to protect himself against purchasers with notice.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. § 132.*]

2. STATUTES (§ 185*) — PRESUMPTIONS — KNOWLEDGE OF EXISTING LAW.

The Legislature is presumed to know the existing law, including the judicial construction given to existing statutes, and to legislate with reference thereto.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 264; Dec. Dig. § 185.*]

3. VENDOR AND PURCHASER (§ 228*)—BONA FIDE PURCHASER — NOTICE — PUTTING ON INQUIRY.

A purchaser having notice of an opposing claim is thereby placed upon inquiry, and charged with notice of every fact which a proper inquiry would have discovered.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 495-501; Dec. Dig. § 228.*]

4. MECHANICS' LIENS (§ 210*) — WAIVER OF LIEN—EXTENDING TIME OF PAYMENT.

Extending the time of payment to the owner does not waive a mechanic's lien, unless

the time is extended by agreement beyond that allowed for enforcing liens.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 384; Dec. Dig. § 210.*]

5. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Any error, in mechanics' liens proceedings in which defendant claimed as a purchaser without notice of the lien, in charging on the burden of proof as to notice of the lien was harmless, where notice was shown by the evidence without dispute.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

6. MECHANICS' LIENS (§ 279*)—BONA FIDE PURCHASERS—BURDEN OF PROOF.

One claiming to have purchased land charged with a mechanic's lien without notice thereof has the burden of proof that he is within the proviso of Revisal 1905, § 2028, as amended by Pub. Laws 1909, c. 32, requiring notice of lien to be filed within 12 months after furnishing the materials, provided that as to the rights of a purchaser without notice the notice of lien must be filed within 6 months.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 555, 556; Dec. Dig. § 279.*]

Appeal from Superior Court, Hoke County; Lyon, Judge.

Action by the Raeford Lumber Company against the Rockfish Trading Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to enforce a material lien against real property. During the spring and summer of 1911 W. N. Campbell bought of the plaintiff material with which to build his house at Rockfish, N. C. The last item of material, as indicated in the notice of lien, was furnished July 13, 1911. The defendant Campbell gave plaintiff his promissory note for 90 days, which was not paid, and then a renewal note for the same amount for another 90 days, which was not paid, and which was due about the 1st day of March, 1912. The notice of lien was duly filed on the 13th day of March, 1912, more than 6 and less than 12 months after the last of the material was furnished, and after the registration of the deed from W. N. Campbell to the Rockfish Trading Company. The defendants filed answers, denying any liability, and the defendant Rockfish Trading Company further pleaded that it was a purchaser of said property for value and without notice of the alleged claim of plaintiff, and that more than 6 months had elapsed since plaintiff furnished said material and its notice of lien.

At the trial A. A. Williford, president of plaintiff corporation, testified that the last of the material was furnished July 10, 1912, and July 19th thereafter he took defendant's note for said amount, and discounted it at the Bank of Raeford. When this note matured, it was renewed for another 90 days, and again discounted. He further testified that probably about the 1st of January he told J. W. McLaughlin, an officer of the Rockfish Trading Company, that Campbell had not paid them for the material used for

building his house at Rockfish. J. W. McLaughlin testified in behalf of the Trading Company that it bought the house in which Campbell lived, and paid value and probably more for it, and that some considerable time before the purchase Williford had said something about plaintiff's claim against Campbell, and that there was no incumbrance on the record against the property. The deed from Campbell to the Rockfish Trading Company, reciting a consideration of \$2,000, was introduced. There was no dispute as to the amount due the plaintiff. The jury returned the following verdict: "(1) Is the defendant W. N. Campbell indebted to plaintiff on account for material furnished? If so, in what amount? Answer: Yes; \$290, with interest. (2) Did defendant Rockfish Trading Company purchase the land for value and without notice of lien for material furnished by plaintiff? Answer: No." There was a motion for judgment of nonsuit by the Trading Company, which was overruled, and it excepted. His honor charged the jury that the burden of proof was on the defendant Trading Company on the second issue, and it excepted. Judgment on the verdict for the plaintiff, and the Trading Company excepted and appealed.

J. W. Currie, of Raeford, and J. G. McCormick, of Wilmington, for appellant. Thomas & Whitley, of Raeford, for appellee.

ALLEN, J. (after stating the facts as above). The motion to nonsuit rests on two grounds: (1) That it is admitted that the defendant is a purchaser for value, and there is no evidence that it had notice of the lien. (2) That the acceptance of a note for the amount due for material and its renewal is a waiver of the right to a lien. The correct settlement of these questions requires a consideration of section 2028 of the Revisal, which, as amended by chapter 32, Public Laws of 1909, reads as follows: "Notice of lien shall be filed, as hereinbefore provided, at any time within twelve months after the completion of the labor, or the final furnishing the materials, or the gathering of the crops: Provided, that as to the rights of a purchaser for value and without notice the notice of lien must be filed within six months."

[1] The statute evidently means that, if the materialman wishes to protect himself against a purchaser for value without notice, he must file his notice of lien within 6 months, and that as against purchasers for value with notice he may do so within 12 months. It also marks the distinction between "notice to the purchaser" and "notice of lien," using the language, "as to the rights of a purchaser for value without notice, the notice of lien must be filed within 6 months."

[2, 3] "The Legislature is presumed to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

know the existing law, and to legislate with reference to it" (State v. Railway, 145 N. C. 542, 59 S. E. 570, 13 L. B. A. [N. S.] 966), and we must therefore assume that at the time of the enactment of the statute it had in mind the particularity required in filing notice of lien, as illustrated in several cases in our reports (Wray v. Harris, 77 N. C. 77; Cook v. Cobb, 101 N. C. 68, 7 S. E. 700; Jefferson v. Bryant, 161 N. C. 405, 77 S. E. 341), and the principle, well established as to purchasers, that, "where one has notice of an opposing claim, he is put 'upon inquiry,' and is presumed to have notice of every fact which a proper inquiry would have enabled him to find out" (Blackwood v. Jones, 57 N. C. 57; James v. Gaither, 93 N. C. 362; Whitted v. Fuquay, 127 N. C. 72, 37 S. E. 141).

If this is a correct position, and the term used, "purchaser for value without notice," is construed in accordance with its accepted meaning, there is not only evidence of notice to the defendant, but it is substantially beyond dispute, as one of the officers of the plaintiff testified that he told an officer of the defendant that Campbell had not paid the plaintiff for the material used in building his house at Rockfish, and the officer of the defendant admitted that before the purchase the officer of the plaintiff said something to him about Campbell owing the Raeford Lumber Company for material used in the house.

[4] The second reason assigned by the defendant in support of his motion for judgment of nonsuit—that the acceptance of a note, and its extension, for the amount due for materials constitute a waiver of the right to a lien—might avail the defendant, if it did not appear that the note became due and was unpaid by Campbell before the time for filing the lien expired.

In 27 Cyc. p. 265, in the article on mechanics' liens, the author says: "An extension of the time of payment is not a waiver of the lien, although the lien is lost, if the time for payment is extended by agreement beyond the time allowed for enforcing the lien," and the text is sustained by the decided cases. Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84; Chisholm v. Williams, 128 Ill. 115, 21 N. E. 215; Woolf v. Schaefer, 103 App. Div. 567, 93 N. Y. Supp. 184; Hoagland v. Lusk, 33 Neb. 376, 50 N. W. 162, 29 Am. St. Rep. 485; Cushwa v. Improvement Co., 45 W. Va. 490, 32 S. E. 259; Wisconsin Trust Co. v. Robinson, 68 Fed. 778, 15 C. C. A. 668; Goble v. Gale, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219. There is a very full note to the last case, in which many authorities are collected to sustain the position that "the acceptance of the debtor's promissory note is not alone sufficient to effect a waiver of the lien, in the absence of any express agreement that it shall so operate." We are therefore of opinion that there is no error in denying the motion to nonsuit.

[5] The exception to the charge on the burden of proof on the second issue is immaterial, as there is no real controversy as to notice; but, if there had been a conflict in the evidence, the burden of the issue is on the defendant.

[6] The defendant does not rely for its protection upon an exception in the enacting clause of the statute, but upon the proviso, which withdraws from its operation after 6 months, purchasers for value without notice, and it devolves upon the defendant to bring itself within the proviso. In Black on Interpretation of Statutes, p. 275, the author says: "Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof." The question is fully discussed and the authorities collected in State v. Goulden, 134 N. C. 746, 47 S. E. 450. We are therefore of opinion there is no error. No error.

BREWER v. WYNNE, Mayor, et al.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. THEATERS AND SHOWS (§ 1*)—IMMORAL SHOW—RIGHT TO SUPPRESS—AUTHORITY OF POLICE.

Under Revisal 1908, § 3781, making it a misdemeanor for any person to give or take part in any immoral show, exhibition, or performance, and Priv. Laws 1907, c. 1, §§ 28, 32, 34, giving the chief of police of Raleigh general supervision of nuisances and the abatement thereof, and charging him with preservation of the peace, the detection of crime, the arrest of offenders, and the inspection of all places of public amusement, the police are entitled to prevent or suppress an indecent or immoral show given in a public place, or in any place to which the public are invited.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. ARREST (§ 63*)—AUTHORITY—POLICE OFFICERS.

The police of the city of Raleigh being authorized to suppress immoral shows held in a public place within the city, they are entitled to act immediately whenever an unlawful exhibition is taking place in their presence, or where its performance is imminent and their present interference is required to accomplish the purpose; and in such case they may arrest without a warrant any and all persons aiding or assisting in such shows, whenever it reasonably appears that such course is necessary for the proper performance of their official duty.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

3. TRIAL (§ 165*)—APPLICATION—EVIDENCE—REVIEW.

In determining a motion for a nonsuit, the evidence which makes for plaintiff's right to re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cover must be taken as true, and interpreted in the light most favorable to him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

4. FALSE IMPRISONMENT (§ 39*)—ACTION—QUESTION FOR JURY.

In an action for alleged wrongful arrest of plaintiff, while in a theater in performance of his contract to attend to the heating of the building, as a person aiding in the proposed production of an alleged immoral show, evidence held to require submission to the jury of the question whether plaintiff's arrest without a warrant was justifiable.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 116-118; Dec. Dig. § 39.*]

5. ARREST (§ 63*)—NECESSITY OF WARRANT—ORAL DIRECTION FROM MAYOR.

Though the mayor of the city of Raleigh has some judicial functions of a justice of the peace, his oral direction to his chief of police to prevent the exhibition of an alleged immoral show at a theater was ministerial in character, and did not authorize an arrest of plaintiff, who was engaged in looking after the heating appliances of the theater before it was open to the public, without a warrant.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

Appeal from Superior Court, Wake County; Carter, Judge.

Action by W. H. Brewer against J. S. Wynne, mayor and another. Judgment for defendants, and plaintiff appeals. Reversed.

There was evidence to show that on the night of February 16th, about 7:30 p. m., plaintiff was arrested without warrant, in the city of Raleigh, by defendant J. P. Stell, chief of police, and confined in the city guardhouse. And it was insisted for plaintiff that the evidence tended to show that the said chief of police was acting at the time under direct instructions of his codefendant, J. S. Wynne, then mayor, and that there was no legal excuse or justification for such arrest, and the same amounted to an actionable wrong. It was contended for defendants that on the facts in evidence, it appeared that plaintiff at the time was engaged in an unlawful act, to wit, the effort to bring on an immoral and indecent show or play at the Academy of Music in the city of Raleigh, and that defendant Stell, being present for the purpose and in the proper performance of official duty, was endeavoring to prevent and suppress the unlawful exhibition, and the arrest of defendant was justifiable and necessary to effect this purpose, and, further, that plaintiff was at the time engaged in resisting effort of defendant to perform his duty, contrary to the statute. At the close of plaintiff's testimony, and again at the close of the entire evidence, there was motion to nonsuit. The latter motion allowed, and plaintiff excepted and appealed.

Armistead Jones & Son, W. B. Snow, W. H. Lyon, Jr., J. W. Bunn, and Douglass & Douglass, all of Raleigh, for appellant. Jones & Bailey and B. M. Gatling, both of Raleigh, for appellee Wynne. Walter L. Watson, of Raleigh, for appellee Stell.

HOKE, J. (after stating the facts as above). [1] Under the general law and the statutes more directly applicable to the city of Raleigh, the chief of police and his officers have the right to prevent or suppress an indecent or immoral show, given in a public place, or in any place to which the public are invited. Revisal 1908, § 3731; Priv. Laws 1907, c. 1.

In section 3731 it is made a misdemeanor for "any person * * * to give or take part in any immoral show, exhibition, or performance where indecent, immoral, or lewd dances or plays are conducted in any booth, tent, room, or other place to which the public is invited, or if any one permit such exhibitions or immoral performances to be conducted in any tent, booth, or other place owned or controlled by him."

By section 28, Priv. Laws 1907, c. 1, being the Revised Charter of the city of Raleigh, the chief of police is given general supervision over "nuisances and the abatement of same," etc. In section 32 he is charged with the duty of preserving the peace and under order of the city of suppressing disturbance, etc. Section 34 makes provision in part as follows: "It is hereby made the duty of the police department and force, at all times of day or night, and the members of such force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots and unlawful gatherings which obstruct the free passage of public streets, sidewalks, parks and places; * * * carefully observe and inspect all places of public amusements, all places of business having license to carry on any business, and to repress and restrain all unlawful disorderly conduct or practices therein."

[2] In the proper discharge of these important duties the chief of police or his lawful officers and subordinates may act immediately whenever one of these unlawful exhibitions is taking place in their presence, or where its performance is imminent and their present interference is required to accomplish the purpose and in such case they may arrest without warrant any and all persons who aid and assist in such plays and shows whenever, under all the facts as they reasonably appear to them, such course is necessary for the proper and effective performance of their official duty. This, we think, presents the correct interpretation of the statutory provisions controlling the matter and the position is in accord with our

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cases dealing generally with this subject as in *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291, 7 L. R. A. (N. S.) 576; *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757; *State v. Campbell*, 107 N. C. 948, 953, 12 S. E. 441; *State v. Sigman*, 106 N. C. 728, 11 S. E. 520; *State v. McNinch*, 90 N. C. 695; *Neal v. Joyner*, 89 N. C. 287.

[3] While we uphold the right of the police officials to arrest without warrant in proper instances, and do what is reasonably required to prevent or suppress an illegal exhibition, we do not take the view of this case as it now appears, which seems to have impressed the court below. It is fully understood that when a nonsuit is ordered the evidence which makes for plaintiff's right to recover must be taken as true and interpreted in the light most favorable to him; and, considering the case under that well-established rule, we are of opinion that the cause should have been submitted to the jury.

[4] From the facts in evidence it appears that on the night in question the plaintiff was arrested without a warrant and imprisoned for a time in the city guardhouse. That this was done by defendant Stell, the chief of police, acting under written instructions from his codefendant, J. S. Wynne, then mayor, to prevent or suppress the exhibition of the play called "The Girl from Rectors." This of itself is an act which calls for explanation, and would constitute an actionable wrong unless, as heretofore stated, it is sufficiently established that the play in question was indecent or immoral, and that the action of the officer was necessary to prevent or suppress the exhibition under all of the facts as they reasonably appeared to him. Speaking more directly to this question, the plaintiff, a witness in his own behalf, testified: "That he had recovered recently from a long typhoid spell, and not very strong. That he was at the theater on the night in question, being under contract to supply heat for the building; and, while standing near the door, he was requested by J. S. Upchurch, the local manager of the theater to lock the doors, and not to let any one in until he said so." That the witness turned to comply with the request. That defendant Stell, coming up at the time, seized the witness' hands, took the keys away from him, and said to Mr. Denning, a policeman, "Arrest this man and lock him up." That this was done, and the plaintiff, the officer holding him, was taken down the stairway and through a crowd of a thousand people, and confined in the city guardhouse at or near the market. That witness had not locked the door, but same was still swinging when defendant came up and that witness did not strike Mr. Stell, or in any way try to resist the arrest. That witness had no personal knowledge of the character of the play, and was there only to heat the building in compliance with his contract to do so

whenever a play was put on. That next morning he was taken before the police justice, and they said they had no charge against him, etc.

J. S. Upchurch, a witness for plaintiff, among other things, testified that: "Plaintiff was there under his contract to heat the house. That witness had gone to the mayor that day or the day before, and offered to put up bond as to the character of the show, and was told by the mayor, that he had made up his mind to stop it, and witness replied 'All right'; and, further, on the night in question, it was not the purpose to put on the show that night unless there was an order permitting it from the superior court judge before whom proceedings were pending to test the question. That the doors had not been opened that night, and no audience had been admitted, and the witness had directed the doors to be locked with the purpose of keeping every one out until the action of the judge could be ascertained. That plaintiff was just out of bed, and was very weak that night," etc.

There is much evidence in the record to the effect that "The Girl from Rectors" was an immoral and indecent play; that plaintiff was there to assist in having the same performed, and was engaged at the time in active resistance to the officer, and tending to show, further, that it was necessary to presently arrest the plaintiff in order to prevent the exhibition, but this comes from the testimony of defendants, or from the cross-examinations of plaintiff's witnesses, and may not be considered in the case as now presented. Under the principle as heretofore stated we are allowed to consider only the facts making for plaintiff's right, and it does not follow as a legal conclusion from his version of the occurrence that his arrest without warrant was justifiable.

[5] It is urged for defendant that the act complained of was done under written orders of the mayor, and, being a judicial act, no responsibility should attach unless he was shown to have acted corruptly or without power in the premises. It may be that under the statutes applicable to the city of Raleigh some portion of the judicial functions of a justice of the peace are still left with the mayor, but if this be conceded, we do not think the principle relied upon can avail in the present instance. These judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence, and for conduct not committed in the immediate presence of the magistrate, are not recognized in the laws of this country. They are forbidden by the Constitutions of both state and nation. North Carolina Constitution, art. 1, § 15; Constitution of the United States, amend. 4. The order in question here, however, is not and does not purport to be a judicial warrant. It is clearly ministerial in character, and must be so considered and

dealt with in determining whether the defendant, J. S. Wynne authorized the act of his codefendant Stell, and how and to what extent he may be responsible for it.

There is error in the order of nonsuit, and the same must be set aside.

Reversed.

SMITH v. CUMBERLAND COUNTY AGR. SOCIETY.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. APPEAL AND ERROR (§ 866*)—SCOPE OF REVIEW—NONSUIT.

On appeal from a judgment as of nonsuit, granted at the close of all the evidence, evidence for defendant in support of the defenses of independent contractor's negligence, contributory negligence of plaintiff, and negating defendant's negligence, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.*]

2. AGRICULTURE (§ 4*)—AGRICULTURAL SOCIETIES—LIABILITIES.

A county agricultural association which gives a fair cannot exonerate itself from liability for damages to one injured by its negligence, on the theory that it is a public service company.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

3. TRIAL (§ 165*)—MOTION FOR NONSUIT—MATTERS TO BE CONSIDERED.

On nonsuit the court will consider only the evidence most favorable to the plaintiff and in the most favorable aspect to him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

4. AGRICULTURE (§ 4*)—AGRICULTURAL SOCIETIES—LIABILITY FOR NEGLIGENCE.

The owner of a place of entertainment, such as a fair association, is charged with the obligation of knowing that the premises are safe for public use, and of furnishing adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, but he is not an insurer of the safety of those attending the exhibition, though he must warn the public against dangers that can readily be foreseen.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

5. AGRICULTURE (§ 4*)—AGRICULTURAL SOCIETIES—NEGLIGENCE—EVIDENCE.

In an action by a spectator at a fair, who was carried up by a hot-air balloon, a rope catching around his foot, evidence of the negligence of the fair association held sufficient to go to the jury.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

Appeal from Superior Court, Bladen County; Lyon, Judge.

Action by J. W. Smith against the Cumberland County Agricultural Society. From a judgment as of nonsuit at the close of all the evidence, plaintiff appeals. Reversed and remanded.

R. S. Hall, Shaw & MacLean, of Fayetteville, and McIntyre, Lawrence & Proctor, of Lumberton, for appellant. Rose & Rose, of Fayetteville, for appellee.

CLARK, C. J. This is an action for injuries sustained by the plaintiff, who was caught by his foot in the trail rope of a balloon which ascended from the fair grounds of defendant at Fayetteville, N. C., and was carried in the air for some distance. The appeal is from a nonsuit, and the testimony of the plaintiff, somewhat condensed, is as follows: "The plaintiff, who is 53 years old, attended the fair held by the defendant at Fayetteville, and paid his fare for entrance. A 'free balloon ascension' had been advertised as one of the attractions for that day, and he went over to the place where they were making arrangements for the balloon to ascend; he walked up to within 15 or 20 steps of the balloon; there was some difficulty in launching it. It was swaying to and fro, though there was not much breeze. The man in charge, who was unknown to the plaintiff, called for help; he was trying to hold the balloon down until he could get it loaded. He said, 'Everybody get a hold.' The witness and several others went up and took hold; the witness held on for a few minutes, and then left and walked off eight or ten steps; this man then beckoned him back, and said, 'Come back and hold this,' and the witness went back and took hold, but only for a minute or two before he turned loose again because the balloon seemed uncontrollable, and he thought it best to leave. He had gotten only three or four steps, when some ropes caught him around his leg. He threw those ropes off with his hands, and just at that time his left foot was caught by a noose in the rope around his instep; he had on a button slipper, and the noose caught him around that and jerked his left foot up so quick that his head never struck the ground; the balloon went off like a rifle ball, and he went with it. He was a couple of hundred yards in the air before he got righted up; he was hanging by his foot, head down, and he was way up; he could not tell how far; he managed to get up somehow, and got hold of the rope and climbed it, and when he got up some distance he managed to get his arm over something, and held on with that arm and hand to the rope until the balloon came down. He could not tell how high the balloon went; he was sure a long way from the earth. He said he did not have language to explain his feelings; he said he thought he was gone, and that was the last of him; he imagines he felt like a man on the gallows with the black cap over his face to be hung. He could not say how long that state of feeling continued, but it was a long time; he thinks he was a couple of hundred yards in the air before he managed to rise up somehow and get hold of this rope and climb up it; he does not know how long he was about it; he recollects that he first got hold of his leg and tried to pull up, but his pants slipped and he fell back, and his head again swung down; he managed to recover, and somehow pulled up by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his leg, and reached the rope and managed to get his right arm around it and held by that arm and his left hand to the rope until the balloon came down. When he managed to get his arm over the swing and to hold it there, he looked down into space, and was 1,500 or 1,600 feet from the ground. He went about $1\frac{1}{2}$ miles, he thinks. When he came down he was still holding by his right arm, and his left hand until he struck the ground. He then got the noose off his foot, the balloon rose again, and went off, he does not know where, but supposes it must have come down again. The searching party, in an automobile, met him coming back, bare-headed, on a bicycle." The witness then stated at length the impairment of his physical and nervous system and his mental suffering, which of course were serious. On cross-examination the witness says: That "the balloon ascension took place in the race track; is not certain that there was a fence around it, but thinks there was. That he got inside of the race track by going through the gate; did not see any policeman. A crowd of people were going, and he went along with them. He does not recollect seeing any one telling the people to keep off. That he took hold and helped to hold the balloon because the man in charge called for help, and that he went back the second time because after he started off the man in charge of the balloon said to him, 'Come back and help hold this balloon.' He says many other men were there helping to hold the balloon down. No one told him not to go into the inclosure, and no one warned the crowd to get back from the balloon. If this was done, he did not hear it. He did not hear the man in charge of the exhibition make public outcry that the wind was blowing hard and it was dangerous, and for everybody to keep back. When he went to the race track he was not warned by any policeman or marshal, or any one else, to keep away after the gate was opened. That if he had not crossed the race track and had not gone near the balloon he, of course, would not have been hurt. He says that a crowd of people were around the balloon within 15 or 20 feet, and he heard no warning given. That he did not know the balloon was going up, or that it was dangerous to be around where the ropes were."

[1,2] There was evidence on the part of the defendant that the crowd broke down the fence and crowded around the balloon; that there was public warning given that it was dangerous to be there. There was also evidence tending to sustain the defense that the manager of the balloon was an independent contractor. We cannot consider this, as this is an appeal from a nonsuit, and the

plaintiff did not offer evidence on this point, which, being an affirmative defense, was a matter for the jury. The defense that the defendant was not liable because it was a public service company was properly abandoned in this court. *Hallyburton v. Fair Ass'n*, 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156.

Neither can we consider the evidence tending to show that the plaintiff was guilty of contributory negligence, nor to negative negligence on the part of the defendant. These matters in defense were for the jury to determine, not for the court.

[3] Nothing is better settled than that on a nonsuit the court will consider only the evidence most favorable to the plaintiff and in the most favorable aspect to him, since the jury might have taken that view, and the plaintiff cannot be deprived of his right to ask a jury to find that his contention was the true state of the facts. The decisions to this effect are numerous and uniform. *Brewer v. Wynne*, 79 S. E. 629, at this term.

[4] The rule of liability of fairs, shows, and theaters is summed up (38 Cyc. 268, with full citation of authorities) as follows: "The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe for the public use and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed." He is not an insurer of the safety of those attending the exhibition, but he must use care and diligence to prevent injury, and by policeman or other guards warn the public against dangers that can reasonably be foreseen. While the defense of "independent contractor" is not before us upon a nonsuit, we may call attention to the fact that the same citation cites *Thompson v. Railroad*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323, for the proposition that the owner "is not exonerated because the exhibition where the injury was received was provided and conducted by an independent contractor." Nor do we now pass upon the question whether the manager of the balloon was an independent contractor.

[5] Taking the evidence in the aspect most favorable to the plaintiff, and with the inferences which a jury would be authorized to draw therefrom, they would have been justified in finding a verdict in favor of the plaintiff, and that the defendant was guilty of negligence. The matters of defense could not be considered by the judge on a motion for nonsuit. The nonsuit is reversed.

MULLALY v. SMYTH et al.

(Supreme Court of South Carolina. Oct. 8, 1913.)

1. TRIAL (§ 295*)—INSTRUCTIONS AS A WHOLE—DEGREE OF PROOF.

Where the charge as a whole instructed the jury that plaintiff must make out his case by the greater weight of the evidence, the fact that the court at times required plaintiff to prove his case to the satisfaction of the jury by a clear preponderance of the evidence, did not render the charge erroneous as requiring of him too high a degree of proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

2. TRIAL (§ 193*)—INSTRUCTIONS—FACTS.

The trial judge is entitled to charge the law applicable to any facts proven, and a statement of facts admitted or not contested is not a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

3. TRIAL (§ 373*)—TRIAL BY COURT—SPECIAL ISSUES—SUBMISSION TO JURY—CHARGE.

Under Code Civ. Proc. 1912, § 312, providing that the findings of fact on the issues submitted to a jury in an equity suit shall be conclusive, except that the presiding judge may grant new trials therein according to the practice in other jury trials, it is not error for the court, in submitting special issues to a jury in a suit for specific performance, to charge that the jury's findings are not binding on the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 883; Dec. Dig. § 373.*]

4. APPEAL AND ERROR (§ 502*)—MOTION FOR NEW TRIAL—GROUNDS.

Where the case on appeal stated that a motion for new trial was made on various grounds, without stating the grounds, exceptions to the overruling of the motion, specifying the grounds, could not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2306-2309; Dec. Dig. § 502.*]

Appeal from Common Pleas Circuit Court of Anderson County; S. W. G. Shipp, Judge.

Suit by J. B. Adger Mullaly against Ellison A. Smyth and another, as executors, etc. Judgment for defendants, and plaintiff appeals. Affirmed.

A. H. Dagnall, of Anderson, for appellant.
T. F. Watkins, of Anderson, for respondents.

WATTS, J. This was an action for specific performance of a contract. The plaintiff alleged in his complaint that his aunt had promised to will and devise all of her property to him, provided he lived with her and managed her property during her lifetime, and that she endeavored to carry out her agreement by making a codicil, but that the codicil was not legally executed, and she died without carrying out her agreement, although plaintiff performed his part of the agreement. Defendants, by answer, denied the material allegations of the complaint, and interposed as a defense the statute of frauds, and that if there was any such contract, as alleged, it was obtained by fraud and undue influence. After issue joined, the cause came on for a hearing before his honor, Judge Prince, and

four issues were framed to be submitted to the jury under rule 28 of the circuit court. Upon the issues the jury found in favor of the defendants, and a motion for new trial was made and refused, and his honor, Judge Prince, passed a decree approving and confirming the verdict of the jury, and upon consideration of the whole case, in the light of the findings of fact, dismissed the complaint. After entry of judgment plaintiff appeals, and asks reversal of the same.

[1] Exceptions 1, 2, 4, 5, 6, 7, 8, and 11 complain of error on the part of the circuit judge in his charge to the jury, in that by his charge he required too high a degree of proof on the plaintiff, by requiring the plaintiff to prove his case to the satisfaction of the jury by a clear preponderance of the evidence. An inspection of the judge's charge as a whole clearly shows that the jury were informed that the plaintiff must make out his case, and establish it by the greater weight of the evidence. It is true that at times he told them that it was to be proven by a clear preponderance of the evidence, but his charge as a whole could not have conveyed to the jury any other inference than that the plaintiff should make out his case by the greater weight of the evidence, and his charge sufficiently explained and defined to the jury what he meant by "a clear preponderance" of the evidence to the satisfaction of the jury. This charge was not obnoxious to the cases decided by this court, but is in accordance with the law, as decided in *McKeegan v. O'Neill*, 22 S. C. 454; *McMillan v. McMillan*, 77 S. C. 511, 58 S. E. 431; *Folk v. Brooks*, 91 S. C. 7, 74 S. E. 46; *Lawson v. Southern Railway Company*, 91 S. C. 210, 74 S. E. 473; *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497. These exceptions are overruled.

[2] Exception 3 imputes error on the part of his honor in charging on the facts. We fail, after a careful examination of the judge's charge, to find that he in any manner invaded the province of the jury and charged on the facts as complained of. The judge has a right to charge the jury what the law is applicable to any facts proven, and, further, a statement by him of what facts are admitted or not contested is not a charge on the facts. *Trapp v. Western Union Tel. Co.*, 92 S. C. 214, 75 S. E. 210. The judge did not violate the provision of the Constitution and invade the province of the jury by charging on the facts, and this exception is overruled.

[3] The ninth, tenth, and twelfth exceptions impute error in the judge in charging the jury that their findings in the case were not binding on the court, and in not granting a new trial. These exceptions are overruled. Section 312, vol. 11, Code of Laws 1912, says: "The findings of fact upon such issues by the jury shall be conclusive of the same: Provided, that the presiding judge may grant new trials therein, according to the practice

in other jury trials." This clearly shows that his honor was not bound by these findings to such an extent that he was compelled to accept them and make up his decree upon these findings. He could set the verdict aside and order a new trial, if he saw fit, or accept them, as he did here, and confirm and approve them. While it is the better practice for the judge, when any issue is submitted to a jury, to determine not to tell them, he is not bound by their verdict, yet it is not reversible error to do so, as in most cases he is clothed with the power of setting their verdict aside and granting a new trial. We do not think the plaintiff was in any manner prejudiced by this statement of his honor.

[4] The eleventh and twelfth exceptions alleged error in refusing motion for a new trial, on the grounds which appear for the first time in these exceptions. The case says: "A motion was made for a new trial upon various grounds"; none of the grounds were made or stated before the circuit judge. These exceptions are too indefinite to be considered. *Fowler v. Harrison*, 64 S. C. 311, 42 S. E. 159; *Glover v. Telegraph Co.*, 78 S. C. 505, 59 S. E. 526; *Lorick & Lowrance v. Caldwell*, 85 S. C. 94, 67 S. E. 143.

But we have examined the whole record and considered all of the exceptions and alleged errors on the part of his honor, and we nowhere find any errors that would justify us in sustaining the appeal. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

PARRISH v. TOWN OF YORKVILLE.

(Supreme Court of South Carolina. Oct. 9, 1913.)

1. MUNICIPAL CORPORATIONS (§ 723*)—ACTIONS—TORTS.

An action for tort will not lie against a municipal corporation, unless it is made liable by statute; such a corporation being merely an arm of the state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1545; Dec. Dig. § 723.*]

2. EMINENT DOMAIN (§ 2*)—"TAKING OF PRIVATE PROPERTY"—WHAT CONSTITUTES.

Where a municipal corporation emptied sewage into a stream flowing through plaintiff's land, thus injuring her property, there was "a taking of private property" for public use within the purview of the Constitution, guaranteeing that private property shall not be taken for public use without just compensation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6852-6860; vol. 8, p. 7813.]

3. EMINENT DOMAIN (§ 69*)—RIGHT OF CONDEMNATION.

As the Constitution prohibits the taking of private property for a public use without just compensation, the granting by the Legislature of the right to condemn private property imposes

upon the condemning corporation the correlative duty of making just compensation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 171-179; Dec. Dig. § 69.*]

4. EMINENT DOMAIN (§ 167*)—CONDEMNATION—ASSESSMENT OF DAMAGES.

As condemnation of land by a municipality is of statutory origin, the method prescribed by Civ. Code 1912, § 3023, by which the amount of compensation is to be determined by arbitrators appointed by the corporation and the landowner, is exclusive; there being no common-law action.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 451-456; Dec. Dig. § 167.*]

5. EMINENT DOMAIN (§ 269*)—INSTITUTION OF CONDEMNATION PROCEEDINGS.

As the remedy of condemnation is for the benefit, not only of the condemning corporation, but of the owner, a landowner whose property is taken by a municipality as a dumping place for sewage may, if the right to compensation is not denied, institute condemnation proceedings, for the assessment of his damage, by mandamus for the appointment of arbitrators to assess the same.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 698, 699; Dec. Dig. § 269.*]

6. MANDAMUS (§ 73*)—SCOPE OF MANDAMUS.

The institution by a municipality of proceedings to ascertain the amount of compensation due in a condemnation case is a plain ministerial duty, and can be enforced by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 115, 135, 144-149; Dec. Dig. § 73.*]

7. EMINENT DOMAIN (§ 266*)—TAKING OF PROPERTY—DENIAL OF RIGHT TO COMPENSATION—REMEDY OF OWNER.

Where a municipality which has taken private property for public use, denies the owner's right to compensation, the owner may bring an action in equity to ascertain his right to compensation, because Civ. Code 1912, § 3023, which provides that the amount of compensation in condemnation proceedings is to be determined by arbitrators appointed by the municipality and the landowner, does not provide any method for determining the right to compensation when it is contested.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 694-696, 702, 703, 705; Dec. Dig. § 266.*]

Appeal from Common Pleas Circuit Court of York County; Thos. S. Sease, Judge.

"To be officially reported."

Action by Laura E. Parrish against the Town of Yorkville. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Marion & Marion, of Chester, and Thos. F. McDow, of Yorkville, for appellant. W. W. Lewis, of Yorkville, for respondent.

HYDRICK, J. Plaintiff attempted to set up two causes of action in her complaint. Divested of unnecessary verbiage, the material allegations of the first cause of action are: That since the year 1908 the defendant has emptied the sewerage of the town of Yorkville into a stream which flows through plaintiff's land, thereby polluting the waters thereof to her injury and damage; that said use of her property was be-

gun without notice to her, and without her consent, and without acquiring the right thereto, or making compensation therefor, in the manner prescribed by law, and that it has been continued against her protest; that defendant has refused her demand for compensation, and denies her right thereto; that such use of her property is a taking thereof for a public purpose, without compensation, and without due process of law, and she is thereby denied the equal protection of the law, contrary to the guaranties of both the state and federal Constitutions. The allegations of the second cause of action are such as are usual and appropriate to an action against a municipal corporation for damages for tort under the statute. Civil Code 1912, § 3053.

The grounds of demurrer to the first cause of action are: (1) That an action for damages for tort cannot be maintained against a municipal corporation, in the absence of legislative authority, and there is no such authority to bring this action; (2) that plaintiff has a remedy by condemnation, which is exclusive. The first ground was also interposed to the second cause of action. The court sustained the demurrer to both causes of action and dismissed the complaint.

[1] It has been settled by a long line of decisions in this court that an action for damages for tort will not lie against a municipal corporation, unless the corporation is made liable by statute, because such corporation is merely an agent of the state for governmental purposes. *Young v. Commissioners*, 2 Nott & McC. 537; *White v. Charleston*, 2 Hill, 575; *Coleman v. Chester*, 14 S. C. 291; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Young v. Charleston*, 20 S. C. 118, 47 Am. Rep. 827; *Acker v. Anderson County*, 20 S. C. 498; *Chick v. Newberry*, 27 S. C. 419, 3 S. E. 787; *Hill v. Laurens County*, 34 S. C. 145, 13 S. E. 318; *Dunn v. Barnwell*, 43 S. C. 401, 21 S. E. 315, 49 Am. St. Rep. 843; *Parks v. Greenville*, 44 S. C. 170, 21 S. E. 540; *Matheny v. Aiken*, 68 S. C. 163, 47 S. E. 56; *Bramlett v. Laurens*, 58 S. C. 60, 36 S. E. 444; *Bryant v. City Council*, 70 S. C. 140, 49 S. E. 229; *Irvine v. Greenwood*, 89 S. C. 515, 72 S. E. 228, 36 L. R. A. (N. S.) 363.

[2, 3] It is not, and cannot be, disputed that plaintiff has been deprived of her property; that it has been taken by defendant for a public purpose within the meaning of the constitutional guaranty that private property shall not be taken for a public purpose without just compensation. *Matheny v. Aiken*, 68 S. C. 179, 47 S. E. 56, and cases cited. The question of vital interest to the plaintiff, then, is, Has she any remedy for the injury which she has admittedly sustained? We think she has. As the Constitution forbids the taking of private property for a public use without just compensation, the grant by the Legislature of the right to condemn private property for such pur-

poses imposes upon the condemning corporation the correlative duty to make just compensation for property so taken. *Bramlett v. Laurens*, 58 S. C. 60, 36 S. E. 444.

[4] As condemnation of lands for such purposes is statutory in its origin, and was unknown to the common law, there is no common-law action appropriate to the assessment of compensation in such cases. Hence the statutes which confer the right to condemn usually provide a method of ascertaining the compensation, and this court has uniformly held that, when the statute provides a method, it is exclusive; the intention being that the remedy shall be simple, inexpensive, and expeditious. See cases cited below.

Turning to the statutes (Acts of 1902, 23 Stat. 1040; Civil Code 1912, § 3023), we find that the act which conferred upon municipal corporations the power to condemn lands and streams for the purpose of discharging sewerage provides that the compensation therefor shall be ascertained as follows: The corporation shall appoint one arbitrator, the landowner one, and these two a third, and the three shall constitute a board which shall ascertain the compensation and render its decision in writing, which shall be filed in the office of the clerk of the circuit court. From the award either party may appeal to the circuit court, where the question of compensation shall be submitted to a jury in open court.

[5, 6] Appellant contends, however, that the statute authorizes the corporation only to institute condemnation proceedings. We do not concede the correctness of that proposition. The rights and duties of the municipality and of the landowner are reciprocal and correlative under the statute. It was intended for the benefit of both. We see no reason why either may not invoke the rights and remedies provided by it. There is no material difference between this statute and section 30 of the charter of the city of Greenville (which is quoted in full in *Water Co. v. Greenville*, 53 S. C. 86, 30 S. E. 699), under which it was held that the landowner sustaining damages could, by mandamus, compel the appointment of an arbitrator, who should be one of a board of three to assess damages, as in section 3023, supra, under which the appointment of the arbitrator is the initial step in the proceedings. If the court can compel the appointment of an arbitrator, we see no reason why it may not compel the institution of condemnation proceedings, because, if the right to compensation is conceded or has been determined, the institution of proceedings to ascertain the amount of compensation is a plain ministerial duty. *Garraux v. Greenville*, 53 S. C. 575, 31 S. E. 597; *Gibson v. Greenville*, 64 S. C. 455, 42 S. E. 206. We conclude, therefore, that plaintiff has a remedy by condemnation under the statute. It, therefore, becomes unnecessary to

consider the question whether, in the absence of a remedy by condemnation, plaintiff would have a cause of action under section 3053, *supra*.

[7] But the statute provides only for ascertaining the amount of compensation. It does not provide a method for determining the right to compensation, when the right thereto is denied. In *Water Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996, the court said: "When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the court of common pleas in order that the court may, in the exercise of its chancery powers, determine such right. *Railway v. Riddlehuber*, 38 S. C. 308, 17 S. E. 24; *Cureton v. Railway*, 59 S. C. 371 [37 S. E. 914]; *Glover v. Remley*, 62 S. C. 52, 39 S. E. 780; *Railroad v. Burton*, 63 S. C. 348, 41 S. E. 451; *Riley v. Union Station Co.*, 67 S. C. 84 [45 S. E. 149]; *Railway v. Reynolds*, 69 S. C. 481, 48 S. E. 476." To these may be added *Leitzsey v. Water Co.*, 47 S. C. 484, 25 S. E. 744, 34 L. R. A. 215; *Garraux v. Greenville*, 53 S. C. 575, 31 S. E. 597; *South Carolina & W. Ry. v. Ellen*, 95 S. C. 68, 78 S. E. 963; *Groce v. Greenville, etc., Ry. Co.*, 94 S. C. 199, 78 S. E. 888.

The plaintiff alleges, in her first cause of action, that her right to compensation is denied, and that allegation is admitted by the demurrer. Therefore, under the authorities above cited, she stated a cause of action to have her right to compensation determined by the court, and the court erred, therefore, in sustaining the demurrer to that cause of action.

This case differs from the case of *Matheny v. Aiken*, *supra*. The complaint in that case, which was held insufficient on demurrer, did not allege that plaintiff's right to compensation was denied, and the omission of that allegation was made a ground of the decision, as it was in *Glover v. Remley*, 62 S. C. 52, 39 S. E. 780.

Reversed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

CITIZENS' SAVINGS BANK v. EFIRD et al.

(Supreme Court of South Carolina. Oct. 10, 1913.)

PLEADING (§ 95*)—AMENDMENT OF DEFECTS.

Under Code Civ. Proc. 1912, § 220, providing that no variance between the pleading and the proof shall be deemed material unless it shall have actually misled the adverse party, that if a party has been so misled that fact shall be proved, and that the court may order the pleading to be amended upon such terms as shall be just, section 221 providing that where the variance is not material, the court may direct the fact to be found according to the evidence, or order an immediate amendment, section 222 providing that where the allegation of

the cause of action or defense is not proved in its entire scope, this shall be deemed a failure of proof, section 224 providing that the court before or after judgment may amend any pleading, process, or proceeding by adding or striking out the name of any party, by correcting a mistake in the name of a party, etc., and section 227 providing that the court shall disregard any error in the pleadings or proceedings not affecting the substantial rights of the adverse party, where an action on a note formerly held by the C. Savings Bank, all of whose assets were taken over by a trust company, which then changed its name to the C. Trust & Savings Bank, was brought in the name of the C. Savings Bank, plaintiff, on defendants' motion for a nonsuit because of the variance, should have been permitted to amend by changing the name of the plaintiff to the C. Trust & Savings Bank, especially where, instead of proving that they had been misled, defendants did not even allege that they were misled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 195; Dec. Dig. § 95.*]

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Lexington County; I. W. Bowman, Judge.
"To be officially reported."

Action by the Citizens' Savings Bank against D. F. Efird and others. From a judgment of nonsuit, plaintiff appeals. Reversed.

J. B. Wingard, of Lexington, for appellant. Efird & Dreher and Thurmond, Timmerman & Callison, all of Lexington, for respondents.

HYDRICK, J. Under date of February 6, 1907, the defendants made and delivered to McLaughlin Bros. their joint and several note, payable to their order one year after date. On December 6, 1907, the payees discounted said note at the Citizens' Savings Bank, of Columbus, Ohio. Thereafter, on October 30, 1909, the Ohio Trust Company, being the owner of the entire capital stock of the Citizens' Savings Bank, took over all the assets of the bank, including said note, and on that day the stockholders of the Ohio Trust Company changed its corporate name to the Citizens' Trust & Savings Bank. Thereafter this action was brought on said note in the name of Citizens' Savings Bank, and it is alleged in the complaint that said bank is the owner and holder of said note. That allegation is, among others, denied by the defendants. When the facts above stated came out in the evidence introduced by plaintiff at the trial, the defendants moved for a nonsuit, on the ground that there was a fatal variance between the allegation and proof as to the ownership of the note sued on. The plaintiff's attorney moved for leave to amend by changing the name of the plaintiff from Citizens' Savings Bank to the Citizens' Trust & Savings Bank, so as to make the allegation conform to the evidence. The court refused the motion and granted a nonsuit.

The Code of Procedure was adopted for the purpose of getting the courts away from the technicalities of common-law pleading

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'l Indexes

and practice, under the rules of which the utmost precision was required, and the most intricate distinctions were drawn, which too frequently sacrificed substance to form and defeated substantial justice. Hence the Code has made liberal provisions with respect to allowing amendments, and the Legislature has declared that the Code must be liberally construed, with the view to the doing of substantial justice. In the chapter which deals with "Mistakes in Pleadings and Amendments," we find section 220, which reads: "No variance between the allegation in a pleading and the proof shall be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense, upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just."

Section 221 provides that, where the variance is not material, the court may direct the fact to be found according to the evidence, or order an immediate amendment.

Section 222 provides that, where the allegation of the cause of action or defense is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within sections 220 and 221, but a failure of proof.

Section 224 provides: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

Section 227 reads: "The court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The facts and circumstances warrant no other conclusion than that the action was brought in the name of Citizens' Savings Bank through mistake. It is equally clear that defendants have not been misled thereby to their prejudice in maintaining their defense on the merits. At any rate, they have not even alleged that they have been so misled, to say nothing of their failure to even attempt to comply with the requirement of section 220 by *proving* to the satisfaction of the court wherein they have been misled.

In *Roundtree v. Railway*, 72 S. C. 477, 52

S. E. 231, Mr. Chief Justice Gary, delivering the opinion of the court, quotes with approval from *Ahrens v. Bank*, 3 S. C. 410, as follows (the section numbers in the quotation being changed to correspond with the numbers of the same sections in the Code of 1912): "Under section 220, no variance is to be regarded as material unless it has actually misled the party, and in that case his remedy is to satisfy the court immediately, by proof by affidavit, that he has been so misled. The effect of such proof is not to prevent the court from allowing an amendment to such case, but to entitle the party prejudiced by such amendment either time, or such other compensatory terms and conditions as may be reasonable. The object of the Code is to secure to parties, acting in good faith, the fullest right to rectify, by amendment, any defect in pleading the result of misapprehension, inadvertence, or accident, but at the same time to protect, as far as possible, the substantial rights of the party prejudiced by such amendment. If the party prejudiced by such variance does not take advantage of the remedy afforded by section 220, then, under section 221, it is the duty of the court to disregard the variance as immaterial, and either to order an immediate amendment, or to direct the fact to be found according to the evidence. Section 222 was intended to guard against the application of sections 220 and 221 to cases which are not, properly speaking, cases of variance, but where the party has proved, on the trial, a state of facts foreign to the allegations of the pleadings, and having the effect to leave the facts alleged in the pleadings unproved in their 'entire scope and meaning.' It is obvious that variances, involving nothing more than technical differences between the allegations and proofs, can only be made material in the mode pointed out in section 220. * * * Under the foregoing provisions of the Code (220 and 221), a motion for a nonsuit is not the proper mode of taking advantage of any variance that might have occurred; nor can this court set aside the judgment, if sustained by the proofs, on the ground of any such variance, in view of the provisions of the Code in question."

In *Bull v. Lambson*, 5 S. C. 288, the syllabus reads: "In an action against two as copartners, the court may, at the close of plaintiff's case, and after motion for nonsuit, on the ground that neither a copartnership nor other joint liability had been shown, allow the plaintiff, under section 296 (224, supra) of the Code, to amend by striking out the name of one defendant and proceeding against the other individually."

In *Coleman v. Heller*, 13 S. C. 491, the action was brought in the name of Geo. H. Coleman on certain school certificates, and it was alleged that he was the owner of them. At the trial it appeared from the plaintiff's own testimony that the certificates belonged

to his wife, S. A. Coleman. Thereupon the defendant moved for a nonsuit, as was done in the present case. The court refused the motion, and granted an order, moved for by the plaintiff, to substitute his wife, S. A. Coleman, in his place on the record as plaintiff. The defendant's attorneys then moved for time to prepare their defense to the action of S. A. Coleman, alleging that they could not make their defense to that action without an opportunity for preparation. The court refused their motion, and held that they could set up the same defense to the action of S. A. Coleman which they had proposed to set up against that of Geo. H. Coleman. On appeal from judgment for S. A. Coleman, this court, in construing the sections of the Code above cited, held: "It was in the discretion of the trial judge, at the trial in furtherance of justice, to grant an order striking out the name of one person and inserting that of another as plaintiff." On page 496 of 13 S. C., the court said: "In the case of Jennings v. Springs, Bailey, Eq. 181, Chancellor De Saussure had granted an order permitting the complainant, Jennings, to amend his bill by substituting the names of the executors of Pressly for his own; the bill having been filed by him as their agent, and his own name erroneously inserted. Appeal was taken, and the Court of Appeals held that it was within the discretion of the court to permit a bill to be amended by substituting the name of a new for an original complainant, even after answer filed, but upon reasonable terms." But it was held, in Coleman v. Heller, that it was error to refuse the motion of defendant's attorneys for time to prepare their defense to the action of S. A. Coleman, the substituted plaintiff, and, on that ground, a new trial was granted.

In Tarrant v. Gittelson, 16 S. C. 231, the second and third syllabi read: "(2) The complaint alleged that the defendant was 'indebted to plaintiff in the sum of \$100 for work, labor, and services done,' etc. Upon objection made by defendant to the introduction of evidence to prove a special contract, the trial judge permitted the plaintiff to amend his complaint so as to allege a special contract, and then received the evidence. Held, that the amendment was permissible under section 196 (224, supra) of the Code. (3) The amendment was opposed by defendant, but time to answer was not asked for. It was within the discretion of the circuit judge to allow the trial to proceed on the amended complaint."

The foregoing cases show clearly that the court erred in refusing plaintiff's motion to amend. See, also, Sibley v. Young, 26 S. C. 415, 2 S. E. 314; Moore v. Christian, 31 S. C. 338, 9 S. E. 981; State v. Scheper, 33 S. C. 576, 11 S. E. 623, 12 S. E. 564, 816; Booth v. Langley, 51 S. C. 412, 29 S. E. 204; Mew v. R. Co., 55 S. C. 90, 32 S. E. 828; Adams

v. R. Co., 68 S. C. 409, 47 S. E. 693; Sevier v. R. Co., 82 S. C. 311, 64 S. E. 390; Taylor v. R. Co., 81 S. C. 574, 62 S. E. 1113; Brown v. R. Co., 83 S. C. 557, 65 S. E. 1102; Seigler v. R. Co., 85 S. C. 345, 67 S. E. 296.

Reversed.

GARY, C. J., concurs.

WATTS, J. I dissent, as I think judgment should be affirmed.

FRASER, J. I concur, in result, in the opinion of Mr. Justice HYDRICK.

BETHEA et al. v. ALLEN.†

(Supreme Court of South Carolina. Sept. 30, 1913.)

1. EVIDENCE (§ 35*)—FOREIGN LAWS—PROOF.

Where the law of another state is germane to the issue, it must be proved as a fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.*]

2. QUIETING TITLE (§ 15*)—COMMON SOURCE—ESTOPPEL.

Where defendant in a suit to quiet title claimed under a deed to the common source, defendant could not take advantage of any defect in the execution of such deed.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 47; Dec. Dig. § 15.*]

3. APPEAL AND ERROR (§ 1033*)—INSTRUCTIONS—RIGHT TO ALLEGE ERROR.

Appellant may not allege error in instructions favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

4. EJECTMENT (§ 15*)—PROOF OF TITLE—COMMON SOURCE.

The rule that plaintiff in ejectment must show a complete and perfect title in himself, going back to a grant either actual or presumed, is subject to the exception that, where both parties claim from a common source, plaintiff need go back no further than such source, and, having done so, the question then is which of the two has the superior title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.*]

5. LIFE ESTATES (§ 24*)—PAYMENT—ASSIGNMENT TO MORTGAGEES.

Where life tenants mortgaged the land and on paying the mortgage had it assigned to them, the court, in an action by the remainderman against the grantee in fee of the life tenants, properly refused to charge that by such assignment the life tenants became mortgagees in possession for the sole purpose of applying the rents and profits of the land to the payment of the mortgage, and that such possession could never ripen into title as against the claim of the plaintiff.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 46, 52; Dec. Dig. § 24.*]

Appeal from Common Pleas Circuit Court of Dillon County; C. J. Ramage, Special Judge.

Action by B. P. Bethea and others against J. Furman Allen. Judgment for defendant, and plaintiff Bethea alone appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied October 20, 1913.

Sellers & Moore, of Dillon, for appellant.
W. F. Stevenson, of Cheraw, for respondent.

FRASER, J. Parker Bethea and his wife died, leaving a large tract of land. In the division among their children, lot No. 4 was set aside to Elizabeth Henderson, a daughter. Elizabeth had no children and lived with her two sisters, Laura Jane Bethea and Maria L. Bethea, in the family home on lot No. 4. On the 6th day of January, 1871, Elizabeth signed the following paper: "State of South Carolina, County of Marion. Know all men by these presents that I, Elizabeth E. Henderson, for and in consideration of the natural love (sic) and affection I bear to my two sisters, Laura Jane Bethea and Maria L. Bethea, I give at my decease all the real and personal property that came to me from the estate of the late Parker Bethea and Elizabeth Bethea, his wife, and in case the said Laura Jane Bethea and Maria L. Bethea die leaving no children; then after paying for a set of tombstones to be put to my grave and all other debts and funeral expenses, I give the above described property to Benjamin P. Bethea, and to his children at his decease to have and to hold, and I bind each and every one of my heirs and administrators and assigns to warrant and defend the same with the above described parties. Given under my hand and seal this the 6th day of January, 1871. Elizabeth E. Henderson. [Seal.] Witness: Elmore Allen. G. W. Miles."

On June 28, 1872, the paper was probated, and on June 29, 1872, it was recorded. On the 19th of June, 1872, Elizabeth died leaving her sisters in possession. The grantees conveyed this land by deeds that purported to carry a fee, and it was bought by the respondent. Both of these sisters are now dead, and Benjamin P. Bethea and others bring this suit to recover the possession of the land as remaindermen. On the 10th of April, 1872, Elizabeth executed another paper which was construed to have been a mortgage of "all her right, title, and interest" in this land. Upon this mortgage there appears the following indorsement: "The within mortgage paid in full by Laura J. Bethea and Maria L. Bethea and turned over to them for their benefit this June 3, 1873." Laura married Allen; Maria married Harris.

The defendant denied plaintiff's title and claimed title in himself, set up the bar of the statute (10 years) and a presumption of a grant (20 years), and claimed to be entitled to be subrogated to the rights of the mortgagee and claimed betterments. The jury found for the defendant, and, from the judgment entered thereon, the plaintiff appealed upon six exceptions.

[1] "(1) This (sic) his honor erred in refusing plaintiff's fourth request to charge as follows: Under the statute of many jurisdictions superiority of title between con-

flicting conveyances is made to depend upon priority of record. Between two deeds standing on the same footing as to recording the older will have the preference. It being respectfully submitted that the foregoing request embodies a correct proposition of law and that under the testimony same was applicable to this case." This exception is overruled. There was nothing in this case which called for the charge as to the law in other jurisdictions, and, if there had been, there was nothing in the case upon which the charge could be based. If the law in other states is germane to the issue, then these laws must be proved, and there was no proof of them.

[2] Exception 2: "That his honor erred in charging the jury that the plaintiff must prove the delivery of the deed under which plaintiffs claim by the preponderance of the testimony. Whereas, under all the admitted facts in the case, he should have charged that there was a prima facie showing of delivery and that it was incumbent on defendant to prove nondelivery of said deed by a preponderance of testimony."

Exception 3: "That his honor erred in charging the jury that plaintiffs must prove delivery of the deed under which they claimed by a preponderance of the testimony in that he should have held under all the admitted facts and circumstances of the case that defendant was estopped from claiming that there had been no delivery of said deed for the reason that plaintiff and defendant claimed the lands in dispute from a common source, to wit, from Elizabeth Henderson."

These exceptions are sustained for the reason that Elizabeth Henderson was the common source, as will be seen under exception 5; and, as the defendant claimed under this deed, he could not take advantage of a defect in the execution of it.

[3] Exception 4: "That his honor erred in charging the jury the law as to adverse possessions when in fact there was, and could be under all the admitted facts and circumstances in the case, no question of adverse possession, and that such a charge could only have confused the minds of the jurors to the prejudice of the plaintiff."

His honor charged as follows: "I charge you that there could be no adverse holding or possession sufficient to ripen into title by the heirs at law or grantees of Laura Allen and Maria Harris, if they died without children, even if they undertook to convey the premises in fee simple with general warranty against Benjamin P. Bethea and his children until both Maria and Laura had been dead for ten years or more." It was undisputed that they had no children and the survivor had not been dead ten years. The charge was wholly in favor of appellant and he cannot complain. This exception is overruled.

Exception 5: "That his honor erred in

refusing plaintiff's motion for a new trial, based upon the ground that the verdict of the jury was capricious and unsupported by the evidence in that it appeared from the testimony and evidence that both parties claimed from a common source, to wit, Elizabeth Henderson, and that defendant's predecessors in title had only a life estate, with remainder over to the plaintiffs, and that such life estate had terminated, thus terminating the right of defendant to the possession of the premises in question."

[4] This exception must be sustained. In the case of *Kilgore v. Kirkland*, 69 S. O. page 84, 48 S. E. page 46, we find the following: "In *Smythe v. Tolbert*, 22 S. O. 133, the court says: 'There is no doubt that, as a general rule, the plaintiff, in an action to recover possession of real estate, on the ground of title, must show a complete and perfect title in himself, going back to a grant either actual or presumed.' To this rule, however, there are several exceptions, one of which is that, where both parties claim from a common source, the plaintiff need go no further back than this source; and, having done so, the question then is: Which of the two has the superior title? * * * Whether, then, the general rule or the exceptions is to govern, in any special case, must depend upon the fact whether or not the parties claim through a common source. If they do not, then the plaintiff must recover upon the strength of his own title and not upon the weakness of that of his adversary and must trace back to a grant; if they do, then the plaintiff may stop, in the first instance, at the title of the common grantor; and whether they thus claim or not is a question of fact (unless admitted in the pleadings) for the jury upon the evidence."

In this case the plaintiff claimed directly under the Elizabeth Henderson deed. He procured successive conveyances from the grantees under that and to the defendant. Plaintiff had thereby made out a prima facie case. The defendant had the right to show that he did not claim under the Henderson deed or that he had an independent source of title. He made no such proof, but, on the contrary, the following appears in the case: "Q. Since the death of Mrs. Henderson, those under whom you claim and you have used it and claimed the whole of that land as your own land? A. Yes, sir." There was undisputed evidence that the successive grantors in defendant's chain of title had been in possession. There was therefore no evidence from which the jury could infer that the defendant did not claim under the Henderson deed. Inasmuch as the defendant did claim under the Henderson deed, there could be no adverse holding until the death of Mrs. Laura Allen and Mrs. Maria Harris, and the survivor died in 1909. The limitations were therefore unavailing.

[5] Exception 6: "Because his honor erred in not charging the jury as requested by plaintiff that the only effect of the mortgage on the land in dispute admittedly given by Laura Bethea and Maria Bethea to Joel Allen soon after the death of Elizabeth Henderson, and its so-called assignment to them by Joel Allen when paid, was to make them mortgagees in possession for the purpose of applying the rents and profits of the land to the payment of the mortgage, and that such possession could never ripen into title as against the claim of title by the plaintiff and his children under the deed of Elizabeth Henderson in question in this case." The mortgage was marked paid, and there is no evidence that it was not paid. This exception is overruled.

The judgment appealed from is reversed as to Benjamin F. Bethea, who alone appeals, and the case remanded for a new trial.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

CITY OF ANDERSON v. FANT.

(Supreme Court of South Carolina. Oct. 8, 1913.)

1. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—CONSTRUCTION.

In construing a municipal ordinance the court must bear in mind the law and policy of the state upon the same subject and if possible construe them so that there will be no conflict, because the ordinance will be void to the extent of the conflict.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. § 120.*]

2. INTOXICATING LIQUORS (§ 132*) — PUBLIC POLICY—HOW DETERMINED.

In determining the public policy of a state with reference to guilt in questions of the sale and purchase of intoxicating liquor, the court must accept the statutes as fixing the public policy.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 141; Dec. Dig. § 132.*]

3. INTOXICATING LIQUORS (§ 132*) — DIVISION OF POWER—JUDICIAL FUNCTIONS.

In determining the public policy of the state with reference to the sale and purchase of intoxicating liquor, the courts have no concern with the reasons of the lawmakers in failing to condemn the buyer.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 141; Dec. Dig. § 132.*]

4. STATUTES (§ 241*)—CONSTRUCTION IN FAVOR OF DEFENDANT.

In a criminal prosecution there should be a strict construction of the law in favor of the defendant, but it should not be one which would thwart the clear intention of the lawmakers as gathered from a reasonable interpretation of the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

5. STATUTES (§ 241*)—CONSTRUCTION—RIGHTS OF DEFENDANT.

In a criminal prosecution under a statute it must appear, not only that the accused is

within the letter of the law, but that he is within its spirit.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

6. COURTS (§ 107*)—DECISIONS — CONSTRUCTION.

In construing a judicial opinion the language must always be read and considered in the light of the facts in the case under consideration.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 360; Dec. Dig. § 107.*]

7. INTOXICATING LIQUORS (§ 138*)—OFFENSES.

Cr. Code 1912, § 794, provides that all intoxicating liquors are detrimental and contraband, and that it shall be unlawful for any person, firm, corporation, or association to sell, * * * receive, accept, * * * keep in possession, or furnish, or otherwise dispose of intoxicating liquors, while section 825 makes it a misdemeanor to transport liquors into the state or from place to place within it. A municipal ordinance made it a misdemeanor for any person to transport, handle, etc., any illicit or contraband alcoholic liquors. Defendant, as agent for two other men, purchased intoxicating liquor from one not authorized to sell and transported it to his principals. *Held* that, as it is the policy of the law not to punish the buyer of intoxicating liquors, defendant, even though he obtained the liquors from an illegal source, cannot be convicted of a violation of the ordinance against carrying contraband liquors, because he does not come within its spirit as defined by the public policy of the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.*]

8. WITNESSES (§ 297*)—PRIVILEGE—LOSS OF PRIVILEGE.

One liable to a prosecution for a criminal offense cannot be compelled to testify merely because the prosecuting officer may agree not to prosecute him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1011, 1026-1037; Dec. Dig. § 297.*]

9. INTOXICATING LIQUORS (§ 169*)—OFFENSES —PURCHASES BY AGENT.

One who acts in good faith solely as the agent or messenger of a purchaser of intoxicating liquors is not himself guilty of violating the law against the illegal sale of intoxicants.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

Fraser, J., dissenting.

Appeal from General Sessions Circuit Court of Anderson County; S. W. G. Shipp, Judge. "To be officially reported."

Proceeding by the City of Anderson against Milton Fant for the violation of a municipal ordinance. From a judgment of conviction, defendant appeals. Reversed.

A. H. Dagnall and Leon L. Rice, both of Anderson, for appellant. Proctor Bonham, of Greenville, and Hood & Sullivan, of Anderson, for respondent.

HYDRICK, J. Defendant was convicted and sentenced for violating an ordinance of the city of Anderson against transporting contraband liquors. The facts stated in the record as the basis of his conviction are: "The defendant, at the request of two white men, purchased and obtained from a person

within the city of Anderson, whom he knew was not authorized to sell, two pints of whisky and carried and delivered the whisky to the said white men." In the order dismissing his appeal, the circuit court found that defendant, either as agent or principal, purchased the liquor from one whom he knew was not authorized to sell it and held that, having obtained it through an unlawful sale, it was contraband, and the subsequent transportation of it was a violation of the ordinance.

From this statement of the facts and finding of the court, we assume (In fact, it was conceded) that defendant's conviction was not based upon the finding that he was, in any degree whatever, a participant in the sale or the agent of the seller, but solely upon the ground that, notwithstanding he was only the agent of the purchasers, he was nevertheless subject to punishment under the ordinance. It necessarily follows, from this construction of the statute and ordinances, that if the white men, for whom he purchased the liquor, had themselves purchased it directly from the seller and had carried it to their homes, they too would have been subject to the penalty of the law.

[1] In construing the ordinance, we must bear in mind the law and policy of the state upon the same subject and construe them so that there will be no conflict, because to that extent the ordinance would be void.

[2-7] Section 794 of the Criminal Code of 1912 reads: "All alcoholic liquors and beverages, whether manufactured within this state or elsewhere, or any mixture by whatsoever name called, which if drunk to excess will produce intoxication, are hereby declared to be detrimental, and their use and consumption to be against the morals, good health and safety of the state, and contraband. It shall be unlawful for any person, firm, corporation or association within this state to manufacture, sell, barter, exchange, receive, accept, give away to induce trade, deliver, store, keep in possession in this state, furnish at public places or otherwise dispose of any spirituous, malt, vinous, fermented, brewed or other liquors and beverages, or any compound or mixture thereof which contains alcohol and is used as a beverage, and which if drunk to excess will produce intoxication, except as hereinafter provided."

Section 825 makes it a misdemeanor to transport liquors into the state or from place to place within the state, except as therein permitted, and none of the exceptions include defendant's case.

The ordinances of the city upon the same subjects are as follows:

"Sec. 49. It shall be deemed a misdemeanor for any person to sell, barter, exchange or give away in connection with business or trade, any distilled, malt, vinous or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other alcoholic liquors or any intoxicating liquor or whisky or spirits of any kind, in the city of Anderson."

"Sec. 51. It shall be deemed a misdemeanor for any person to transport, handle, store or conceal within the city of Anderson, any illicit or contraband alcoholic liquors."

It will be observed that neither the state statute nor the city ordinance penalizes the purchase of liquors. It has never been the policy of this state to punish the buyer of liquors. There is therefore no inhibition in the statutes or ordinances against buying, except as it is the counterpart of selling, which is prohibited; but, as between the two, the seller alone is subjected to punishment. It may be that, from a moral standpoint, the buyer is equally culpable with the seller, and doubtless there are circumstances under which, viewed from that standpoint, he is the more worthy of blame. But the courts must accept, as the policy of the state, that which is written in the statutes. The reasons why the lawmakers have not seen fit to condemn the buyer as well as the seller are not material, because that is a matter for legislative rather than judicial consideration. But it may not be amiss to say that one of the reasons usually assigned (and a very cogent one) is that, if both were subject to punishment, neither could be compelled to testify against the other upon the ground that no man can be compelled to furnish evidence against himself, and for that reason both would escape punishment.

The rule that statutes which prohibit the sale of intoxicating liquors are not to be construed so as to bring the purchaser, or those who act solely for him in making the purchase, within their condemnation is thus stated in the case of *Lott v. United States* (C. C. A.) 205 Fed. 28: "It is uniformly held that statutes prohibiting the sale of intoxicating liquors are directed against the act of selling only, and that the offense is committed only by the vendor or some one who aids him in selling, and that the purchaser and those who aid him in the purchase are not guilty of aiding or abetting in the commission of the offense." Numerous authorities are cited which fully sustain the principle stated.

In the light of the established policy of the state and of the universally recognized principle that penal statutes must be strictly construed, we cannot, without doing violence to both, sustain defendant's conviction. We cannot do so without reading into the statute and ordinances that which the lawmakers have purposely refrained from writing into them. They do not condemn the buyer. We must assume that the lawmakers understood the use of the word "buy" quite as well as the word "sell," and that, if they had intended to condemn the buyer, they would have done so in language as plain as that used against the seller. We have no authority

to extend the statute or ordinances by construction to include the buyer. To say that they may not be construed so as to penalize the buyer for the act of buying, but that they may be construed so as to penalize him for the acts which must almost inevitably follow the buying, to wit, transporting and keeping in possession the liquor which he buys, would not only be an extremely technical construction but it would be one so highly technical that it would not be warranted, even if it were invoked in favor of the defendant instead of against him, for, while the rule requires a strict construction in favor of defendant, it should not be strained or unnatural or one which would thwart the clear intention of the lawmakers to be gathered from a reasonable interpretation of the language used.

It must appear, however, that the accused is within the spirit as well as the letter of the law. That he may be within the strict letter of the law is not enough, as was held in *State v. Rookard*, 87 S. C. 444, 69 S. E. 1076, where section 794, supra, was construed by the circuit court to make it a crime to keep liquor in one's possession, though it had been obtained lawfully and was kept for a lawful purpose. The defendant was clearly within the letter of the statute. But this court reversed the ruling and held that the statute must be construed to mean "liquor which had been unlawfully obtained (that is, obtained in a manner not recognized as lawful by that act or the un-repealed provision of the act of 1907), or to keep in possession for sale or some other use forbidden by the statute liquor lawfully obtained." It is now contended that the language of the court above quoted warrants the holding that, as the defendant in this case obtained the liquor unlawfully or in a manner not recognized as lawful by the act, he falls within its spirit as well as its letter. Strictly construed, the language used may possibly bear that construction. But that was not intended. The language of an opinion must always be read and construed in the light of the facts of the case under consideration, and, when so read, that above quoted does not bear the interpretation placed upon it. In that case the sole question was whether a citizen could lawfully keep liquor in his possession which he had obtained for a lawful purpose. The circuit court had ruled that he could not, without regard to the manner of his acquiring possession or the purpose for which he kept it. This court held that he could, if he kept it for a lawful purpose.

In *State v. Nickels*, 65 S. C. 169, 43 S. E. 521, the court, speaking through Mr. Chief Justice Gary, expressly held that the character of the liquor found in the possession of a citizen (that is, as to whether it was contraband or not) was to be determined by the purpose for which he had it, and said: "The question whether the liquor was contraband

depended upon the purpose with which the defendant took it into his possession." In the Rookard Case the question as to how or in what manner the defendant obtained possession of the liquor was not involved, nor was it made an element of the decision, except in so far as the manner of obtaining possession was considered as throwing light on the purpose of it; as, for instance, if it should appear that one had obtained possession by manufacturing it (an act which is not only not recognized as lawful but one which is positively prohibited under penalty), or for the purpose of selling, or other unlawful purpose.

But the question now before us, whether a citizen can lawfully transport and keep in possession for his own personal use liquor which he purchased from one who had no authority to sell it, was not considered or decided in that case. While obtaining it in that manner is unlawful in one sense, it is not unlawful in the sense that it is a crime, at least so far as the buyer is concerned; and to say that the buyer cannot be punished for buying, but that he may be for acts which must necessarily immediately follow the purchase, to wit, the transportation and keeping in possession, is contradictory in terms. In speaking of obtaining possession unlawfully, in the Rookard Case, the court evidently did not use the word in the sense which it is now sought to give it. Suppose one should steal a pint of liquor from a dispensary and carry it home and keep it there for his own personal use. Would it be contraband simply because he had obtained it in an unlawful manner? And could the thief be convicted of transporting and storing and keeping in possession contraband liquor? Yet without doubt he obtained it unlawfully.

[8] The construction put upon the statute and ordinance by the circuit court makes them conflict with the policy of the state in that it brings the buyer as well as the seller under the condemnation of the law and deprives the state of the right to compel the buyer to testify against the seller, thereby frustrating one of the purposes of penalizing only the seller. If that construction is sustained, the buyer can refuse to testify, because the purchase almost necessarily implies transporting and keeping in possession. It is no answer to say that the prosecuting officer may agree not to prosecute him. The privilege of refusing to testify would still be his, and he could not be compelled to waive it.

If defendant had been convicted upon the finding, even by inference from the facts stated, that he was a participant in the sale or the agent of the seller as well as the buyer, I should be satisfied to sustain the conviction. But the agreed facts and the finding of the court exclude that hypothesis.

[9] The greater weight of authority sus-

tains the proposition that one who acts in good faith solely as the agent or messenger of the purchaser of liquors is not himself guilty of violating the law against selling thereof. But of course this rule will not be allowed to shield a guilty participation in the sale; nor will the courts tolerate an evasion of the law by any device, pretense, or subterfuge. See *State v. Ito*, 114 Minn. 426, 131 N. W. 469, 35 L. R. A. (N. S.) 619, Ann. Cas. 1912C, 681, where the authorities are collated.

Judgment reversed.

GARY, C. J., and WATTS, J., concur.

FRASER, J. I cannot concur in the opinion of the majority in this case. I know we are construing an ordinance of the city of Anderson and not a statute of the state. An ordinance of a city, however, should not be construed with a total disregard of the public policy of the state from whose laws it derives its powers. It is the public policy of this state that "all alcoholic liquors and beverages, whether manufactured within this state or elsewhere, or any mixture by whatever name called, which if drunk to excess will produce intoxication, are hereby declared to be detrimental, and their use and consumption to be against the morals, good health, and safety of the state and contraband." With this preliminary statement, the statutes go on to allow the sale under certain conditions, the main object of which is to protect the health and good morals of her citizens. In its dealings with this most difficult question, there appears the recognition of this fact that there are liquors that are pure and liquors that are impure. The use of impure liquors is deemed peculiarly harmful. In order to prevent the use of that which is impure and most deadly, it provided that its own officers shall purchase with careful analysis, and in order to prevent subsequent adulteration its own officers shall have the exclusive right to sell to the citizens. The statute does not forbid the buying of liquor. The right to buy, however, is not a constitutional or inalienable right. The state may pass any law that is not forbidden by its Constitution. Those rights, therefore, that are not reserved by the Constitution may not only be infringed upon, to the point of uselessness, but destroyed altogether. Buying had not been forbidden. The defendant was not charged with buying. The right to buy may be rendered useless by forbidding the buyer to transport.

It will be observed that it is the policy of the state to prohibit the use of contraband liquor. If the Legislature sees fit to hamper the unlawful sale by forbidding the transportation and not the purchase, it does not lie with the courts to say the thing is illogical and therefore is not the law.

Section 825, Crim. Code 1912, prohibits the

transportation of contraband liquors. The city of Anderson has the same policy, within its limited sphere, and by its ordinance provides: "Sec. 51. It shall be deemed a misdemeanor for any person to transport, handle, store or conceal within the city of Anderson any illicit or contraband alcoholic liquors." The appellant was found guilty of transporting contraband alcoholic liquors in the city of Anderson.

The case shows the following: "The defendant at the request of two white men purchased and obtained from a person within the city of Anderson, whom he knew was not authorized to sell, two pints of whisky and carried and delivered the whisky to the said white men." The case further shows: "The defendant, Milton Fant, a negro, was tried and found guilty by the recorder of the city of Anderson of transporting alcoholic liquors in the city of Anderson." The defendant was not charged with buying and not convicted of it. He was convicted of transporting the liquor that certainly up to the time of sale was contraband.

Crim. Code, § 794, says: "It shall be unlawful for any person, etc., to * * * receive, accept * * * any compound or mixture thereof which contains alcohol * * * except as hereinafter provided." This was not within the exception. So we have liquor contraband in the hands of the seller, contraband in the hands of the principal, and not contraband in the hands of the go-between. I fail to see that this view is technical. The state has the right to prevent the sale of contraband liquor or to hamper the sale by any means allowed by the Constitution. The city of Anderson has the right to promote the public policy of this state as declared by the Legislature. If it be true that the consumption of contraband liquors is fraught with peculiar danger to health and morals, then the state and city has the right to hamper the sale of it. It has the right to forbid the sale, the purchase, the storing, or even the possession and transportation. It may forbid them all. It may forbid one and not the other. The fault may be in the writer of this opinion, but I cannot see it and cannot concur.

MILLER v. ATLANTIC COAST LINE R. CO.
(Supreme Court of South Carolina. Sept. 29, 1913.)

1. APPEAL AND ERROR (§ 110*)—ORDERS APPEALABLE—ORDER GRANTING OR REFUSING NEW TRIAL.

An order granting or refusing a new trial is expressly made appealable by Code Civ. Proc. 1912, § 11 (d), subd. 2; but the right of appeal is necessarily limited to such orders as the Supreme Court has jurisdiction to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740-748; Dec. Dig. § 110.*]

2. APPEAL AND ERROR (§ 979*)—ORDER DENYING NEW TRIAL—REVIEW.

The Supreme Court in actions at law has no jurisdiction to review orders granting or refusing new trials when involving the decision of questions of fact, unless the finding is wholly unsupported by evidence, or the conclusion reached was controlled by some error of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

3. APPEAL AND ERROR (§ 933*)—MOTION FOR NEW TRIAL—DENIAL—REVIEW.

Where an order denying a motion for a new trial did not specify the grounds on which it was decided, it must be affirmed on appeal, if the record presented any grounds on which the motion could have been properly refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.*]

4. NEW TRIAL (§ 108*) — DENIAL — NEWLY DISCOVERED EVIDENCE—ISSUE OF FACT.

Where, in an action for injuries, defendant after verdict caused plaintiff to be followed, and sought a new trial for alleged newly discovered evidence with reference to plaintiff's conduct incompatible with the injury claimed, but the affidavits in support thereof were conflicting, presenting a sharp issue of fact, and insufficient to show that the newly discovered evidence would probably change the result, there was no abuse of the trial court's discretion in denying the motion, and hence such order was not reviewable.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Appeal from Common Pleas Circuit Court of Sumter County; Hayne F. Rice, Judge.

Action by J. A. Miller against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Dismissed.

P. A. Willcox, of Florence, and Purdy & Bland, Mark Reynolds, and L. W. McLemore, all of Sumter, for appellant. Best & Cunningham, of Columbia, and L. D. Jennings and John H. Clifton, both of Sumter, for respondent.

HYDRICK, J. This is the third appeal in this case. The action was begun in September, 1910, to recover damages for personal injuries sustained by plaintiff on October 18, 1909, while in defendant's service as a locomotive engineer. The first trial was had at the November term, 1910, of the circuit court for Sumter, and resulted in a judgment for defendant by direction of the court. The opinion of this court reversing that judgment was handed down on December 21, 1911. 90 S. C. 249, 73 S. E. 71. The second trial was had at the March term, 1912, and plaintiff obtained a verdict and judgment for \$35,000, which was affirmed by this court in an opinion filed April 30, 1913. 94 S. C. 388, 77 S. E. 1111. While the last appeal was pending in this court, the defendant moved the circuit court, at the March term, 1913, for a new trial, on the ground of after-discovered evidence. The court refused the motion in a short order, without assigning any reasons

therefor. This appeal is from that order.

After the return had been filed in this court, plaintiff moved to dismiss the appeal on the grounds that the order is not appealable: (1) Because the refusal of the motion was discretionary; and (2) because the appeal was taken merely for delay. While it is true that motions for new trials are addressed to the discretion of the court, yet the discretion is not absolute or arbitrary, but judicial. Its exercise must, therefore, be predicated upon legal grounds. And, while this court will not substitute its discretion for that of the circuit court, it will correct any manifest error in the exercise of the discretion vested in that court.

[1] An order granting or refusing a new trial is expressly made appealable in section 11 (d), subd. 2, of the Code of Procedure. But the right of appeal must necessarily be limited to such orders as this court has jurisdiction to review.

[2] We have held in cases too numerous to mention that, under the constitutional limitation of the power of this court to the correction of errors of law, in law cases, such as this is, we have no jurisdiction to review orders granting or refusing new trials, when they are based upon or involve the decision of questions of fact, unless it appears that the finding is wholly unsupported by evidence, or the conclusion reached was influenced or controlled by some error of law.

[3] The order of the circuit court in this case does not disclose the grounds upon which it was decided. We have no way of ascertaining, therefore, whether it was based solely upon findings of fact, or whether any error of law influenced or controlled the decision. However, it must be presumed to be correct, and therefore, if the record presents any grounds upon which the motion could have been properly refused, we must assume that the court rested its decision upon those grounds. *Stanford v. Cudd*, 93 S. C. 367, 76 S. E. 986. And, if those grounds necessarily involve the decision of disputed questions of fact, it follows that we are without power to review the order.

It becomes necessary, therefore, to state briefly the facts and circumstances upon which the motion was decided. On both trials in the circuit court the plaintiff's physical condition and the cause of it were contested issues of fact, upon which a great deal of expert medical testimony was taken. Plaintiff's testimony tended to prove that his nervous system was seriously and permanently impaired as the result of his injury. Defendant's testimony tended to show that his condition was not so serious as he contended; but, if it was, that it was due to constitutional causes, and not to his injury. After the second trial, defendant employed two men, named Stender and Primrose, to watch plaintiff's movements to see whether they were compatible with the existence of the condition of himself which he and his

witnesses had testified to. These men had plaintiff under observation from December 29, 1912, until a short time before the hearing of the motion for a new trial, some time in March, 1913. They testified that during that time he walked normally and naturally, and went about the streets as other men; that on several occasions he got on and off street cars while in motion, with the apparent agility of the ordinary man. Some of the medical experts who had testified for the defendant at the trial testified on this motion that, after careful review and consideration of all the evidence introduced at the trial, the plaintiff's activity, as testified to by Stender and Primrose, was incompatible with the physical condition attributed to him at the time of the trial by plaintiff himself and his witnesses, and that such condition either did not then exist, or, if it did, that he had had a complete recovery, which his experts thought would be impossible. This is the substance of the testimony relied on in support of the motion. On the other hand, plaintiff reaffirmed the truth of his former testimony, and said that he was as bad off as ever, and denied the truth of the testimony of Stender and Primrose, and introduced testimony impeaching their credibility. A number of the medical experts who had testified in his favor at the trial testified, on the hearing of this motion, that they had examined him only a short while before the hearing, and that his condition had not improved since the trial. Some of them said that his condition then and at the time of the trial, as testified to by him and them, was not incompatible with the activity on his part testified to by Stender and Primrose, because, they said, he could have acted as stated by them by overtaxing his strength and nervous energy, but that he would have suffered the consequences.

[4] The foregoing history of the case and statement of the evidence adduced at the trial and upon the hearing of the motion show that there was ample ground for dispute in the testimony upon at least two vital questions which involved the decision of questions of fact: (1) Whether the evidence relied upon by defendant, in support of the motion, was "after-discovered," in the legal sense of that word, or was only such as might be more correctly designated "after-thought-of" or "after-procured," and whether, by the exercise of reasonable diligence, evidence of the same kind (except, of course, the element of plaintiff's conduct after the trial, and after he had won his case, and the effect which that might have had upon his mind and conduct) could not have been procured before and in time for the trial. (2) Whether the evidence was of such character that it must necessarily have led any reasonable mind to the conclusion that, if it had been adduced at the trial, the result would probably have been different. The decision of either of those questions adverse-

ly to appellant would have been fatal to the motion. Both involved questions of fact, as the court has decided in several cases. See *State v. Jones*, 89 S. C. 52, 71 S. E. 291, and cases cited.

In *State v. Bradford*, 87 S. C. 548, 70 S. E. 308, the defendant, having been sentenced to life imprisonment, moved for a new trial on after-discovered evidence, and his motion was refused. On appeal, this court said: "We are deeply impressed with the force of the affidavits made on these and other points on behalf of the defendant. Yet it cannot be doubted that some of the affidavits are cumulative, and that, if the statements contained in all of them had been admitted in evidence at the trial, there would have remained a sharp issue of fact, which might have been decided for or against the defendant according to the view taken by the jury of the credibility of the witnesses. It cannot be said, therefore, that the affidavits must necessarily lead any reasonable mind to the inference that the newly discovered evidence would probably change the result. Nothing short of this would justify the conclusion that the circuit court abused its discretion in refusing the motion. This being so, the law does not allow this court to reverse the decision of the circuit court that a new trial should not be granted. In the recent case of *Mills v. A. C. L. R. Co.*, 87 S. C. 152, 69 S. E. 97, it is said: 'The rule is well settled that a motion for a new trial on after-discovered evidence is addressed to the discretion of the circuit court, and the refusal of such motion will not be reviewed, unless it appears that there was abuse of discretion, or that the exercise of discretion was controlled by some error of law. *State v. David*, 14 S. C. 432; *State v. Workman*, 15 S. C. 547; *Sams v. Hoover*, 33 S. C. 404, 12 S. E. 8; *Seegers v. McCreery*, 41 S. C. 549, 19 S. E. 696; *Peeples v. Werner & Co.*, 51 S. C. 405, 29 S. E. 2. Such a motion must generally depend on matters of fact, over which this court has no jurisdiction in actions at law.'"

From what we have said, it follows that this court has no jurisdiction to review the order appealed from. This conclusion makes unnecessary the consideration of the second ground of the motion to dismiss the appeal. Appeal dismissed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

ATKINSON v. VIRGINIA OIL & GAS CO.
(Supreme Court of Appeals of West Virginia.
Sept. 23, 1913.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 81*) — OIL AND GAS—DAMAGES—PERCOLATING WATERS.

The lessor in an oil and gas lease, guaranteeing to him the payment of rental for gas

wells and a supply of gas for his mansion house from the same, has a right of action at common law, and also by virtue of the provisions of chapter 62d of the Code of 1906, for injury to a producing and paying gas well on his premises by the percolation of water into the gas-bearing sand from an abandoned well on adjacent land, consequent upon the failure of the owner of such abandoned well to plug it or adopt any means or measures for the prevention of such injury to the neighboring well of the lessor.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 211; Dec. Dig. § 81.*]

2. ACTION (§ 35*) — STATUTORY REMEDY—EXCLUSIVENESS—OIL AND GAS — FAILURE TO PLUG WELL.

The remedies given to an adjacent or neighboring landowner by chapter 62d of the Code of 1906 are not exclusive.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 273-294; Dec. Dig. § 35.*]

3. MINES AND MINERALS (§ 81*) — OIL AND GAS—FAILURE TO PLUG WELL—ACTION FOR DAMAGES.

In a declaration for such injury, it is not essential to aver that, at the time thereof, the plaintiff was in receipt of the gas rentals for the injured well, or supplied with gas therefrom for use in his mansion house, under the stipulations therefor in the lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 211; Dec. Dig. § 81.*]

Error to Circuit Court, Marshall County.

Action by R. M. Atkinson against the Virginia Oil & Gas Company, a corporation. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Noyes & Ritz, of Wheeling, for plaintiff in error. S. G. Smith and J. B. Sommersville, both of Wheeling, for defendant in error.

POFFENBARGER, P. The plaintiff's declaration in this action of trespass on the case, held insufficient on a demurrer thereto and to each of its four counts, claims a right of action for damages arising out of the following facts set forth in the declaration: Owning a small tract of land, containing an acre and a half, the plaintiff, on the 24th day of May, 1905, executed an oil and gas lease thereon in favor of John T. Scott, containing, among other things, an agreement on the part of the lessee to pay to the lessor \$75 quarterly, in case a well should be found on the premises producing gas in sufficient quantities to justify the marketing of the same, the first payment to mature 30 days after the well should be turned into the pipe line for marketing. This lease was assigned by Scott to the Ohio Valley Gas Company which company completed a well on the property about the 1st of April, 1906, finding gas in paying quantities in the "Big Injun Sand," and connected it with the main line, and the gas therefrom was marketed off of the premises. A large adjoining tract was owned by one S. T. Alley, who gave a lease thereon for oil and gas purposes to the Virginia Oil & Gas Company, or to some one who assigned it to that company. In the

spring of 1907, the Virginia Oil & Gas Company drilled a well on the Alley land into the "Big Injun Sand," at a point about 100 feet distant from the gas well on plaintiff's land, and found oil, but pulled the casing from said well about the last of September, 1910, and abandoned it, without having plugged it or taken any other precaution against the escape of gas or oil or surface water or damage to the adjacent property or the well thereon. In consequence of this action on the part of the Virginia Oil & Gas Company, water entered through the abandoned well into the strata of gas-bearing sand, and percolated to such an extent therein and so far permeated it as to obstruct, impede, and destroy the flow of gas into the plaintiff's well, so that it became worthless, and was wholly lost to him as a producing well.

The first count charges a common-law right of recovery on the wrongful failure of the defendant to plug the well, that being one recognized method of avoiding injury likely to ensue upon the abandonment thereof. The second count claims such right on the ground of failure on the part of the lessee to take any precautions against injury by such means. The third count is based upon the violation of a statute, requiring owners of wells intending to abandon them to plug them, and the fourth upon violation of the statute by failure to use any other method of preventing injury. The first two counts stand upon an alleged common-law right of action, and the other two upon a statutory right of action.

[1] The lack of a precedent or line of authorities, asserting a right of action for injury of the kind described in the declaration, necessitates resort to general legal principles and the analogies of the law for disposition of the question presented. As against any person except the owner of the land, the lessee could make such use of it, without liability to strangers, as the owner himself could without such liability. The owner was bound to use his property in such manner as not to injure the property of the adjacent owner, provided he could avoid such injury by the exercise of care and abstention from negligence. In other words, having the right as owner to the full enjoyment of his property and to do thereon what he pleased, he was nevertheless bound to exercise care in such use to avoid injury to his neighbor, if such injury could be avoided by the adoption and observance of reasonable precautions. *Walker v. Strosnider*, 67 W. Va. 39, 46, 67 S. E. 1087, 21 Ann. Cas. 1; *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410. An owner may improve his real property in such manner as he may see fit, and if, in consequence thereof, the surface water flows from his premises onto the grounds of his neighbor, he is not liable for any resulting injury. But, if, through negligence or design, he collects the surface water on his premises and

casts it in a body onto the lands of his neighbor, he is liable for such injury as may result. In the exercise of his riparian right, he may consume, for domestic and ordinary purposes, all of the water of a stream passing over his land, and thus deprive the adjacent owner below him on the same stream of the use of water therefrom. The same rule is applicable to the enjoyment of percolating or subterranean water by adjacent owners. *Pence v. Carney*, 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. (N. S.) 206, 112 Am. St. Rep. 963. But an owner is liable for injury resulting from the diversion of a stream or the waste of water from subterranean streams supplying springs on adjacent property. *Pence v. Carney*. Similarly, it is now almost universally held that an owner of land cannot rightfully pollute or poison percolating water in his premises so as to injure or destroy streams or wells supplied therefrom on adjacent property. *Gilmore v. Royal Salt Co.*, 84 Kan. 729, 115 Pac. 541, 34 L. R. A. (N. S.) 48; *Gaslight & Coke Co. v. Howell*, 92 Ill. 19; *Gas Co. v. Murphy*, 39 Pa. 258; *Sherman v. Iron Works*, 5 Allen (Mass.) 213; *Haugh's Appeal*, 102 Pa. 42, 48 Am. Rep. 193; *Brewing Ass'n v. Peterson*, 41 Neb. 897, 60 N. W. 373; *Gaslight & Coke Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263; *Gas Co. v. Pebley*, 25 Fla. 381, 5 South. 593; *Lowe v. Cemetery Ass'n*, 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237.

The declaration charges no pollution or contamination in the ordinary sense of the term, but it nevertheless avers and charges a very substantial injury. It sets up as a fact generally known to oil and gas men that the admission of water into the oil or gas bearing stratum or sand retards or impedes, and often completely stops, the flow of oil and gas in such sand, and charges that the open and unplugged well on the Alley land collected water, which entered the sand from which gas was extracted on the plaintiff's land in such quantities and in such manner as to destroy his well. The injury thus shown is, in its general nature, the same as that inflicted by the pollution of a water well so as to render the water therein unfit for use. In each case, there is injury which could have been avoided by the exercise of care and caution. Though a gas well is not so essential to the enjoyment of premises as a water well, it is nevertheless valuable, and necessary, in the legal sense of the term, to the full enjoyment of the premises. Hence wanton or negligent injury to it ought, upon principle, to call for redress in the courts as in the case of such injury to wells supplying water for domestic purposes. In our opinion, therefore, the declaration sets forth a good cause of action at common law.

[2] The statute, section 2 of chapter 62d of the Code of 1906, makes it the duty of an owner of a well, before abandoning or ceasing to operate it and before drawing the cas-

ing therefrom, to plug it in the manner described by that section; and section 5 of that chapter makes the lessee or any person managing, operating, controlling, or possessing any well an owner for the purposes of the act. The statute has for one of its purposes the prevention of the result complained of here. It requires the well to be filled with sand or rock sediment to a depth of at least 50 feet from the top of the oil or gas bearing sand or rock, and a wooden plug, equal in diameter to the diameter of the well below the casing, to be driven at least five feet below the casing. After the withdrawal of the casing, another plug is required to be put in and the well to be filled on top of that plug to a depth at least 50 feet above the top of the oil or gas bearing sand or rock. From all this it is apparent that the injury complained of is the direct and immediate result of a violation of the statute, wherefore, on well-settled principles, there is a right of action under the statute, as well as upon the common law. Bishop on Non Contract Law, § 141; Norman v. Coal Co., 68 W. Va. 405, 69 S. E. 857, 31 L. R. A. (N. S.) 504. "As a general rule, where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty." Parker v. Barnard & Others, 135 Mass. 116, 120 (46 Am. Rep. 450).

As the act prescribes a penalty for non-compliance with its requirements, recoverable in the name of the state at the instance and upon the relation of any citizen of the state, and authorizes a neighboring landowner or lessee or owner of oil or gas rights in neighboring land to enter upon the land on which the abandoned well is and plug the same and charge the owner thereof with the reasonable cost and expense of the work, and also to proceed by bill in equity to compel the owner to comply with the statute, it is contended that these remedies were intended by the Legislature to be exclusive, and to take away such remedies as the common law gives. We are unable to concur in this view. As to a right of action for damages, the statute is silent. It fails to deal with that subject at all. Failing to cover this feature of the subject-matter, it lacks comprehensiveness, one of the essentials of the application of the rule of construction invoked. State v. Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; State v. Mines, 38 W. Va. 125, 18 S. E. 470; Herron v. Carson, 26 W. Va. 62; Grant v. Railroad Co., 66 W. Va. 175, 66 S. E. 709. Failure on the part of the adjacent owner to avail himself of the statutory remedies may be a mitigating circumstance, but as to this we express no opinion.

[3] As owner of the property on which the

injured well was, the plaintiff had sufficient interest to confer a right of action, even though the rental stipulated for in the lease had not been paid or he was not in receipt of the same at the time the well was injured, or was not in receipt of gas from the well for the purposes of his mansion house. He would be entitled to damages, as owner of the premises on which the well was; for, although he may not have received any rentals nor any gas, he had the right to demand them, upon the facts stated in the declaration, for a producing well had been drilled and connected with the pipe line, and the gas therefrom had been marketed off of the premises.

The court having erred in sustaining the demurrer to the declaration and the several counts thereof, the judgment will be reversed, the demurrer overruled, and the case remanded for further proceedings.

FIRST NAT. BANK v. BANK OF KEYSTONE.

(Supreme Court of Appeals of West Virginia. Sept. 23, 1913.)

(Syllabus by the Court.)

ACCOUNT STATED (§ 19*)—SUFFICIENCY OF EVIDENCE.

The judgment below is supported by the facts proven, and is therefore affirmed.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.*]

Error to Circuit Court, McDowell County.

Action by the First National Bank against the Bank of Keystone. Judgment for defendant, and plaintiff brings error. Affirmed.

Anderson, Strother & Hughes, of Welch, for plaintiff in error. French & Easley, of Bluefield, and Ira J. Partlow, of Keystone, for defendant in error.

MILLER, J. Plaintiff, successor of the Citizens Bank of Welch, sued defendant in assumpsit, a state bank organized for the purpose and which in 1905, purchased and took over the business, property and assets of a branch of the Citizens Bank of Welch, theretofore conducted at Keystone, to recover an alleged balance due it under the contract of sale and purchase made and executed by and on behalf of the respective parties thereto.

The declaration contained the common counts, also a special count on the contract, the latter alleging a breach thereof by defendant. Besides the general issue, two special pleas in writing were filed by defendant over the objection of plaintiff, pleading in abatement of the suit an alleged judgment or award of arbitrators, pending the suit, to whom it is alleged all matters in difference in the suit had been submitted by a parol contract between the parties. The

demurrer of plaintiff to the special pleas was overruled, and issue was joined on the plea of non assumpsit and on the special pleas with general replication thereto, and the case submitted to the court in lieu of a jury, and for final judgment.

On the special pleas the court found for plaintiff; but on the merits, and on the general issue, the court found for defendant, and the judgment of nil capiat has been brought here by plaintiff for review.

By the contract pleaded in the special count the Citizens Bank of Welch agreed to turn over and sell to defendant as of April 1, 1905, said branch, its safe, stationery, discount accounts, deposit accounts, and all other property of its branch bank, and the defendant thereby agreed to purchase the same, and to pay plaintiff's predecessor therefor the original cost price; also to reimburse and pay it any and all sums lost in excess of all earnings of the branch bank, in the payment of salary, rent, traveling expenses, and all other outlays in the conduct of said branch bank, from its establishment up to April 1, 1905.

The original bill of particulars filed with the declaration contained two items, as follows: To account stated, May 21, 1908, \$562.37. Proceeds note for \$300.00, dated Jan. 11, 1905, due 90 days after date, made by Ira P. Quesenbery, endorsed &c., and payable to Citizens Bank of Welch, \$300.00. Total \$862.37. Pending the suit, and before pleas filed plaintiff was permitted, over objection, to amend the bill of particulars, by adding the item: To account stated, \$816.44.

It appears from the record that after the purchase of the business of this branch bank by defendant, the old account between the parent and the branch bank was continued on the books of the plaintiff, and that the \$816.44, was the balance shown by the books of the plaintiff bank to be due from the defendant to it, as of October 2, 1908, when all business relations ceased, and this suit, after some efforts to adjust differences failed, was brought in December following.

The view we take of the case renders it unnecessary for us to deal with the cross-assignments of error relating to the special pleas in writing. In our opinion the findings of fact and the judgment of the court below thereon for defendant on the general issue must be sustained.

On the trial the two items of the original bill of particulars were practically abandoned, and reliance was placed solely on the item added by the amendment: "To account stated, \$816.44." There is no evidence of an account stated covering this item. The only evidence relating to it is that plaintiff's books show this balance. The evidence is not as clear, it seems to us, as it might have been on the matters of account to which the contract relates. It is quite clear, however, that after the sale and purchase

by defendant of the branch bank, the parent bank rendered defendant an account of items of expenses disbursed by it on account of the business of the branch bank, including the item, safe \$800.00, and aggregating about \$1,208.21, and with which defendant credited it. Included in this statement were items of expenses disbursed by the parent bank, aggregating \$312.72, which the cashier of defendant, who was also cashier of the branch bank, and kept its books, swears were credited to the parent bank, and charged to expenses. The balance, \$629.23, he swears "was the amount of our loss," and was the amount paid out by the branch bank, and carried there in expense account, and which with the \$312.72, charged to that account, on the rendition of the account for \$1,208.21, by the parent bank, made up the sum \$941.95, net loss, of the branch bank, after deducting earnings on the business done for the year, the total expenses according to this witness amounting to \$1,756.20. On the trial this witness was pressed hard by the court and opposing counsel, to explain how and in what manner, if at all, defendant had reimbursed the plaintiff the amount of this net loss. He admitted that defendant had never paid this money, but answered that it had given the parent bank credit for \$312.72, expenses paid by it, and as to the item \$941.95, representing the net loss of the branch bank after deducting earnings, the new bank had carried that amount to expense account and carried it there until the earnings were sufficient to charge it off. On cross-examination this witness testified as follows: "Q. When he rendered that statement showing what expenditures had been made or what furniture had been furnished to the branch bank, what course was pursued then? A. Do you mean after the branch was opened up? Q. From the first. A. That was kept here. We didn't have any statement of that until we bought the branch bank out, then Mr. Woodward rendered a statement showing the furniture and fixtures and the expenses they had borne, such as stationery. He rendered us a statement and we charged that to their respective accounts and gave them credit for these things." Further on in his cross-examination this witness further explains that the \$312.72, was the entire amount of expenses paid out by the parent bank, according to the statement rendered, and for which it had credit, and that the balance of the total loss of \$941.95, namely \$629.23, was the amount of the loss shown on the books of the branch bank. As we interpret the whole evidence, and the testimony of the bookkeepers given in technical terms, the facts are: That certain of the expenses and disbursements for furniture, etc., for the branch bank were paid by the parent bank, and the record thereof kept there while other expenses were paid out of the funds at

the branch bank, and the record thereof kept there. And when the sale of the branch was made to defendant, such of the disbursements for furniture and expenses as had been made by the parent bank were covered by the statement then rendered aggregating \$1,208.21, and with which the old bank was given credit on the books of the new, the account, furniture and fixtures, being charged with part of the account, and expenses with the residue. Then after an invoice of the accounts of discounts and deposits at the branch bank, purchased by the defendant, the result was a showing of a loss of \$941.95, which was carried on the books of the defendant, in expense account, until the earnings enabled it to charge that amount off, and in this way the old bank got paid the loss, for the loss was in this way assumed by defendant, otherwise the old bank would have been obliged under its contract with defendant to make good the deficiency of discounts and other assets to cover the deposit accounts taken over by the defendant bank in the purchase. As noted, the evidence is not clear. It seems to us it might easily have been made so. But we think the court below fairly concluded, that defendant was not indebted to plaintiff on an account stated, or on any account, and our opinion is to affirm the judgment.

INDIANA & OHIO LIVE STOCK INS. CO.
v. BOWMAN.

(Supreme Court of Appeals of West Virginia.
Sept. 23, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 190*)—VERDICT — JUDGMENT
NON OBSTANTE VEREDICTO.

The plaintiff in an action, claiming more than the defendant admits to be due from him and having a verdict for the amount so admitted, is not entitled to a judgment non obstante veredicto for a sum larger than the verdict, when sufficient pleadings have put in issue his right to have more than the sum so admitted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

2. PRINCIPAL AND AGENT (§ 78*) — APPEAL
AND ERROR (§ 1003*)—ACTION BY PRINCIPAL
—EVIDENCE.

Acquiescence by an agent in statements of the account between them rendered by his principal, and his failure to object to the same in any manner, supplemented by evidence showing the relation of principal and agent and a course of business between them, are sufficient evidence of liability, in the absence of opposing evidence, to call for a verdict against him, and the verdict of a jury ignoring such evidence should be set aside.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162-177; Dec. Dig. § 78.*
Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Error to Circuit Court, Barbour County.
Action by the Indiana & Ohio Live Stock Insurance Company against Thomas B. Bowman. Judgment for plaintiff for less than

claimed, and it brings error. Reversed and remanded.

Blue & Dayton, of Philippi, for plaintiff in error. W. T. George, of Philippi, for defendant in error.

POFFENBARGER, P. The overruling of a motion to set aside the verdict and to render judgment notwithstanding the verdict are the principal matters of complaint on this writ of error. The action is in assumpsit, the declaration claiming \$2,000, and contains only the common counts. The bill of particulars filed with it amounts to \$1,493.02. To get rid of the office judgment, the defendant filed an affidavit, admitting indebtedness in the sum of \$300, and denying indebtedness in any large amount. He also entered a plea of non assumpsit and one of sets-off, claiming credits by way of set-off, amounting to \$1,184.65. Issue having been joined on these pleadings, the case went to the jury upon the oral testimony of the assistant secretary of the plaintiff company and documentary evidence in the form of letters, statements and the books of the company. The verdict was for \$300, the amount admitted by the defendant, and the court refused to set aside the verdict and also to enter judgment non obstante veredicto.

[1] As the plea of non assumpsit was sufficient in substance and form and went to the whole demand set up in the declaration, and sets-off, going to a large portion thereof, were sufficiently pleaded, and issues were taken on these pleas, the court properly refused to render judgment notwithstanding the verdict. To sustain this conclusion, it suffices to refer to the authorities, without any discussion of the principles involved. *Mason v. Bridge Co.*, 28 W. Va. 639; *Boyles v. Overby*, 11 Grat. 202; *Beale v. Justices*, 10 Grat. 278; 11 Enc. Pl. & Pr. 912 et seq.; *Bouv. L. Dic.*, title Non Obstante Veredicto.

[2] But the court should have set aside the verdict. Offering no testimony whatever, the defendant contented himself with cross-examination of plaintiff's witness who admitted credits amounting to about \$1,710. These credits, however, had all been allowed by the plaintiff in the statements rendered to the defendant, showing balances amounting to about \$1,478.24, exclusive of interest. About \$800 of it was credited on the account for the year 1908, leaving a balance of \$520, and the remaining items were all credited to the account for the year 1909, showing a balance of \$968.74. These statements were rendered a considerable period of time before the action was brought and the defendant made no objection whatever to them. This evidence of his acquiescence in the claims made against him was supplemented by the testimony of the witness and plaintiff's own letters put in evidence, showing

the relation of principal and agent subsisting between the parties. The testimony also indicates an established course of business between them as principal and agent. The defendant was an insurance agent, having charge of a large territory and employing subagents. When applications for policies were made, the policies were sent to the defendant or his subagent and he was charged with the premiums. Policies not accepted by the applicants were returned by the agent and the premiums thereon credited as not having been collected and as being uncollectible. There was no proof of the exact and full terms of the contract between them nor of the actual collection of money, but the oral testimony and letters show the relation of principal and agent and indicate a course of business. These important elements or circumstances having been thus shown, the failure of the defendant to make any objection to the statements is evidence of an admission on his part of the correctness thereof. This evidence is not opposed nor rebutted in any manner whatever and was utterly ignored by the jury. It made a prima facie case and called for a verdict in the absence of opposing evidence. *Harmon & Crockett v. Maddy Bros.*, 57 W. Va. 66, 49 S. E. 1009; *Ruffner v. Hewitt*, 7 W. Va. 585; 1 *Greenleaf, Ev.* § 209; *Chapman v. Liverpool, etc., Co.*, 57 W. Va. 395, 50 S. E. 601; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692.

In our opinion, the evidence entitled the plaintiffs to a verdict for much more than the \$300 admitted by the defendant to be due, and the court erred in refusing to set aside the verdict. Hence we will reverse the judgment, set aside the verdict, and remand the case for a new trial.

DAVIS et al. v. SPRAGG.

(Supreme Court of Appeals of West Virginia.
Sept. 23, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 667*) — OBSTRUCTION OF STREET—AWNING — "PUBLIC NUISANCE."

A private awning erected over a public street without lawful authority is a public nuisance whether it materially interferes with public travel or not.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1443, 1494-1496; Dec. Dig. § 667.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5799-5804.]

2. NUISANCE (§ 72*)—RIGHT TO ENJOIN—PARTIES.

A private individual may maintain a suit to enjoin a public nuisance only when his rights are injuriously affected in a special manner different from the public in general.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

3. MUNICIPAL CORPORATIONS (§ 669*) — STREETS—RIGHT OF ABUTTING OWNERS.

In addition to his right to use the highway in common with the general public, an abutting owner has also a special right of access thereto and to light, air, and view therefrom. These are property rights and exist regardless of the ownership of the fee in the highway.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1445; Dec. Dig. § 669.*]

4. MUNICIPAL CORPORATIONS (§§ 680, 681*)—POWERS—CONTROL OF STREETS.

The council of a city, unauthorized by its charter to do so, acts ultra vires when it attempts to permit the permanent occupation of any portion of its public streets for private purposes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.*]

5. ACTION (§ 7*)—NUISANCE (§ 75*)—ACTION TO ENJOIN—DEFENSES — MAINTENANCE OF SIMILAR NUISANCE.

In a suit to abate a nuisance, it is no defense that plaintiff maintains a similar nuisance or that he was actuated by spite or ill will to bring his suit. The court cannot inquire into plaintiff's motives for suing.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 8; Dec. Dig. § 7; *Nuisance*, Cent. Dig. §§ 176-184; Dec. Dig. § 75.*]

6. NUISANCE (§ 72*) — PUBLIC NUISANCE — RIGHT TO ENJOIN.

Before equity will abate a public nuisance at the suit of a private individual, it must appear, not only that plaintiff is specially damaged by it in a manner different from the general public, but also that his injury is serious, affecting the substance and value of his property.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

7. MUNICIPAL CORPORATIONS (§ 697*) — OBSTRUCTION OF STREET—ACTION TO ENJOIN—INJURY—SUFFICIENCY OF EVIDENCE.

A case in which relief is denied because of failure to prove injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

Error to Circuit Court, Marshall County. Bill by E. S. Davis and others against J. I. Spragg. Decree for defendant, and plaintiffs bring error. Affirmed.

D. B. Evans, of Moundsville, and Caldwell & Caldwell and McCamie & Clarke, all of Wheeling, for appellants. T. H. Shanon, of Waynesburg, Pa., and Noyes & Ritz, of Wheeling, for appellee.

WILLIAMS, J. The plaintiffs E. S. Davis and E. S. Romine and the defendant, J. I. Spragg, are the several owners of three adjoining buildings fronting on Main street in the town of Cameron. The fronts of the buildings are flush with the street. Defendant erected a porch or wooden awning in front of his building 22 feet long and 15 feet above the street, extending to the outer edge of the sidewalk, a distance of about 9 feet, and supported by two iron posts about 4 inches in diameter, resting on the sidewalk near the curb line. Plaintiffs brought this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

suit to enjoin its maintenance, averring that it is a public nuisance and that they are specially damaged by it. On a full hearing of the case on bill, answer, general replication, and numerous depositions, the chancellor dissolved the preliminary injunction and dismissed plaintiffs' bill, and they have appealed.

[1] It is alleged in the bill that, if the porch is permitted to remain, it will not only obstruct public travel on the street and constitute a public nuisance but that it will cause irreparable injury to plaintiffs; that it will obstruct the light and air to their buildings and will greatly depreciate their rental and actual value; that it will cut off the prospect or view from the buildings out upon the street; also that the posts or pillars supporting the porch will materially interfere with the right of access to the Romine property from the public street. All these averments are denied, and much evidence was taken on the question whether or not the structure is in fact a public nuisance. But it is admitted that the porch extends out over the street line about nine feet and is supported by four-inch iron posts resting on the sidewalk. This of itself is enough to show that it is a public nuisance. Any unlawful encroachment upon or over a public highway, whether actually interfering with travel by the public or not, is a preposterous and a nuisance per se, and the jury are not at liberty to determine whether such encroachment amounts to a public nuisance by the measure of inconvenience the public may suffer from it. 2 Elliott on Roads and Streets, § 828. This rule is abundantly supported by adjudicated cases. For instance, an awning over the sidewalk (*Hibbard & Co. v. Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621), a bay window extending 18 inches into the street (*People v. Harris*, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304), a bay window 16 feet above the sidewalk extending 3 feet and 4 inches over the street line (*Reimer's Appeal*, 100 Pa. 183, 45 Am. Rep. 373), pillars in front of a building, extending 22 inches onto the sidewalk (*Bank v. Tyson*, 133 Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46, and *Bischof v. Bank*, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. [N. S.] 486) have all been held to be public nuisances. But neither the public, nor its trustees, the municipal officers, are complaining here; they are not before the court.

[2] What, then, are the rights of these plaintiffs in the premises? Before a private individual can enjoin a public nuisance, it must appear that his rights are injuriously affected in a manner different from the public in general. "In order to secure an efficient administration of the law for the benefit of the public and to avoid multiplicity of suits to accomplish one purpose, public wrongs are redressed at the suit of proper officials, and individuals are not permitted to maintain

separate actions or suits to redress a wrong that is public in its nature unless the individual suffers or is threatened with some special, particular, or peculiar injury growing out of the public wrong. If the nuisance causes special or peculiar injury to an individual different in kind and not merely in degree from the injury to the public at large, and the injury is substantial in its nature, the individual may have his civil remedy." 2 Elliott on Roads and Streets, § 850a; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48.

[3] Plaintiffs, being the owners of property abutting on the highway, have an easement therein not possessed by the public in common. In addition to their right of passage over the highway, which they hold in common with all other citizens, they have a special right of access to their property from the highway and the right to the light and air from it. These rights exist independent of the ownership of the fee in the highway. *Barnett v. Johnson*, 15 N. J. Eq. 481; *Dill v. Board of Ed. Camden*, 47 N. J. Eq. 422, 20 Atl. 739, 10 L. R. A. 276.

"Owners of land abutting upon public streets, even in case the fee of the street is in the municipality, have an easement in the streets, not only for ingress and egress, but also for the uninterrupted passage of light and air." *Jones on Easements*, § 489.

The unlawful occupation of any portion of the public highway in such manner as to materially interfere with the access of an abutting owner to his property or his easement of light and air from the highway is an unwarranted invasion of his property right and constitutes a private, as well as a public, nuisance. 2 Elliott (3d Ed.) § 896.

"A structure connecting two buildings on opposite sides of a street, built so far above the street as not to interfere with traffic thereon, is a nuisance as to adjacent property owners, whose light it obstructs." *Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441, and *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311, a similar case.

[4] The council of the town of Cameron acted ultra vires when it passed an ordinance permitting defendant to erect his porch over the sidewalk. Chapter 47 of the Code is the town's charter, and it vests no authority in the council to authorize the erection of anything on or over its streets for even a public purpose. Having paramount control of the public highway, the Legislature could no doubt confer such authority upon a municipality (*Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524); but in the present case it has not seen fit to do so. Moreover, the occupation of the highway in this instance is for a purely private purpose. "Even where a city is given exclusive power over its streets, such power must be exercised for the good of

the general public, and a city cannot authorize obstructions in its streets for merely private purposes." 2 Elliott, § 836; *Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; *Pettis v. Johnson*, 56 Ind. 139; *People v. Harris*, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304; *Reimer's Appeal*, 100 Pa. 182, 45 Am. Rep. 373.

But the right of easement of access and of light and air from the public street is so far regarded as the private property of an abutting owner that the Legislature itself has not the right to deprive the owner of it without just compensation, even when taken or injured for the public good; and certainly it would not have the right to so deprive him of it for purely private purposes. 2 Elliott, § 882, and numerous cases cited in note; *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268, 10 N. E. 528; *Story v. N. Y., etc., R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146.

[5] It was no defense to plaintiffs' suit that they were, at the time of bringing it, maintaining awnings or verandas overhanging the street in front of their properties. Defendant, of course, could not plead plaintiffs' wrong in justification of his own. Each alleged wrong must stand and be tried by itself. *Bowman v. Humphrey*, 132 Iowa, 234, 109 N. W. 714, 6 L. R. A. (N. S.) 1111, 11 Ann. Cas. 131; *Robinson v. Baugh*, 81 Mich. 290; *Schmidt v. Blaul*, 66 Md. 141, 6 Atl. 609; *Bank v. Tyson*, 133 Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46. That plaintiffs may have been influenced by motives of personal spite and ill will to bring their suit is no defense. The result of the suit must depend upon plaintiffs' legal right, which is not affected by their motives. The court has no right to inquire into their motives in bringing the suit. *Koblegard v. Hale*, 60 W. Va. 37, 53 S. E. 793, 116 Am. St. Rep. 868, 9 Ann. Cas. 732.

[6] Defendant's porch being a public nuisance, plaintiffs have a right to its abatement if they have sustained special and material damages. But, to entitle them to relief in equity, the damages must be substantial; they "must be serious, affecting the substance and value of the plaintiffs' estate." *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Hahn v. Thornberry*, 7 Bush (Ky.) 403; and *Jenks v. Williams*, 115 Mass. 217.

[7] It appears from the written opinion of the chancellor, copied into the brief of counsel for defendant, that he dismissed the bill for the reason "that no serious damage affecting the substance and value of the plaintiffs' estate had been proven." The evidence is voluminous on the question of plaintiffs' alleged injury, and no useful purpose would be accomplished in reciting even the material portions of it in this opinion. It is mostly matter of the opinions of different wit-

nesses. The testimony of about 20 witnesses was taken by plaintiffs and of about 25 by defendant. The two plaintiffs and one other are the only witnesses who attempted to fix any certain amount as the diminution in value of their property on account of the maintenance of the porch. Mr. Davis says his property is damaged to the extent of \$2,000 and Mr. Romine's \$1,000. Mr. Romine says he considers his property damaged as much as \$1,000 and Mr. Davis' about as much, or perhaps a little more than his, because it is a more valuable property. But a vast majority of witnesses say that in their opinion no damage has been suffered. A number of photographs of the buildings were taken from different angles in the street and were filed as evidence. We get a better knowledge from them of the physical surroundings and of the effect on plaintiffs' property produced by the defendant's porch than we can possibly obtain from the description of the situation by the witnesses. Neither of the posts, supporting the porch, stands in front of Romine's building, which is the building next to defendant's; but the nearest post is nine or ten feet on Spragg's side of the dividing line of the lots, extended into the street. It is therefore evident that the only injurious effect produced by the posts is their interference with travel on the street. They do not interfere with plaintiffs' right of access to their respective buildings. Consequently neither one of them is affected by the posts in a manner different from the public in general. Neither is it proven that the porch itself obstructs plaintiffs' light or air from the street. It does not extend the full distance across the front of defendant's property; it is about the same distance from the dividing line between his and Romine's properties as the iron post is. It, of course, could not shut out the light and air from the upper floors of plaintiffs' buildings. The first floors of all three of the buildings are used as mercantile rooms. Mr. Grossman, a retail merchant and tenant of Mr. Romine occupying the lower floor, says the porch does not obstruct the light or air. He says, "It is the same as it always was." He asked for no reduction in his rent and expected none on account of defendant's porch. The Davis storeroom is less likely to be injuriously affected than Romine's, because it is farther from the porch.

We therefore think it is clear, from the evidence, that plaintiffs' access to their respective buildings, and their light and air from the street to the lower part of their buildings, has not been injuriously affected. It does appear, however, that their view from the second-story window, looking out upon the street toward the west, is obstructed for some distance along the sidewalk in front of and to the west of the Spragg building; and much stress is laid by counsel for

appellants in their brief upon the proposition that an obstruction of plaintiffs' prospect or view out upon any portion of the highway constitutes a special injury to their property, entitling them to relief, whether their light and air has been interfered with or not, and in support of this proposition they rely upon *Bank v. Tyson*, 133 Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46, and *Bischof v. Bank*, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. (N. S.) 486, in both of which cases it was held that: "An owner of land abutting on a public street has an easement of view from every part of the street, of which he cannot be deprived by encroachments placed on it by an adjacent proprietor." Those suits were by abutting owners to abate a nuisance by injunction, as in the present case, on the ground that plaintiffs suffered special damages; and in each case the thing sought to be enjoined was the maintenance of pillars erected in front of defendant's building, extending from the sidewalk to the second story and projecting outward beyond the street line, in the *Tyson Case* 22 inches and in the *Bischof Case* about 24 inches, thus cutting off the view of pedestrians on the sidewalk from the front windows of plaintiffs' buildings, which were used for the display of wares and merchandise. The *Tyson Case* was not heard upon full proof. It was an appeal from an order of the court overruling a motion to dissolve the preliminary injunction which had been awarded and was heard upon the pleadings and *ex parte* affidavits only. Says the court in its opinion: "We try the case on this appeal, on the pleadings as they are presented, in advance of any evidence taken in the cause. Whether the evidence when taken will, on submission of the case for final disposition, sustain the averments for relief or not, we are not given to know." This indicates clearly that plaintiff's right to ultimate relief in that case would depend upon his proving that his property was actually damaged by the obstruction of his view.

In the *Bischof Case* there seems to have been a final decree by the lower court dismissing plaintiff's bill on the ground that his damages could be ascertained with reasonable certainty in an action at law. The Supreme Court reversed the decree and remanded the cause, with direction to enter a decree abating the nuisance. In discussing the question whether or not plaintiff had sustained any special injury peculiar to himself, aside from and independent of the injury to the general public, the court says: "On this point we derive but little aid from the opinions of different witnesses. That the obstruction in question obstructs the view to the front windows of the plaintiff's building, which is kept for mercantile purposes is self-evident. The value of the front windows of a mercantile house for the dis-

play of goods and wares for advertising purposes and of an unobstructed view there-to are matters of common knowledge. The value of a conspicuous business front was not lost sight of by the defendant bank when it planned an ornamental entrance, which extended outwards beyond the sidewalk line and beyond the front line of adjacent buildings. It requires no evidence to show that any unlawful obstruction that cuts off, to a substantial degree, the view to the front of a business house, or renders it less valuable for the display of goods and advertising purposes, is a damage to the owner of such building and a damage which is special and peculiar to him and independent of any damage sustained by the public at large."

We are inclined to think that these cases determine the law correctly, and that, if plaintiffs in this case had proven that the obstruction of the view from the street to the front of their buildings seriously and injuriously affected their actual or rental value, they would have been entitled to relief. But, upon careful reading of the evidence, we think the chancellor correctly decided that they had failed to prove any such damages. In view of the character of the nuisance complained of and the nature of the view interfered with, it being only a view from the upper window upon a portion of the sidewalk, it is an injury which we think is more fanciful than real. The maintenance by plaintiffs themselves of a similar porch over the front of their buildings, though extending not so far over the sidewalk as defendant's porch, is a circumstance clearly indicating that their alleged injury is without real foundation. They have no right to a view which can be enjoyed only from their own verandas, because they are unlawfully maintained and constitute a public nuisance as well as defendant's porch. If the obstruction of the upper windows from the view of a pedestrian in the street below is the ground of complaint, it would seem that plaintiffs are more injured by the maintenance of their own porticoes than they are by that of defendant, because a pedestrian on the sidewalk, standing in front of the Spragg building, could not read a sign in the upper windows of either of plaintiffs' buildings even if Spragg's porch were not there. He would be viewing it at too great an angle; and the view from the sidewalk, immediately in front of plaintiffs' buildings, is obstructed by their own verandas. The Spragg porch, in our opinion, does not obstruct the view of a person in the street from any point therein, from which a sign so placed could be read, and it therefore clearly appears that the upper windows in plaintiffs' buildings, so far as it relates to their value for the purpose of advertising signs or for displaying goods and wares, are in no wise interfered with by defendant's porch.

We affirm the decree.

SELVEY et al. v. GRAFTON COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Sept. 23, 1913.)

(*Syllabus by the Court.*)

1. ACTION (§ 50*)—JOINDER OF CAUSES OF ACTION—DIVERSITY OF INTERESTS.

Two or more plaintiffs may join in an action to recover the penalty provided by section 7, c. 79, Code 1906, for the unlawful mining and removal of coal within five feet of their property line, provided they have some interest in either the surface of the land or the vein of coal or in both; and it makes no difference that some of them are interested in the coal and others in the surface only; or any such interested person may sue alone. But there can be but one recovery for such wrong.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

2. MINES AND MINERALS (§ 94*)—UNLAWFUL MINING—ACTION FOR PENALTY—DECLARATION.

The declaration in such action is sufficient if it avers the wrong in language the legal equivalent of the terms of the statute; it need not be in the exact words of the statute.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 220, 221; Dec. Dig. § 94.*]

3. MINES AND MINERALS (§ 94*)—UNLAWFUL MINING—ACTION FOR PENALTY—VARIANCE—"LAND."

Under an averment that plaintiff owns "land," he may prove that he owns coal under the land; such proof is not a material variance from the allegation.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 220, 221; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3975-3984; vol. 8, pp. 7700, 7701.]

4. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR—JUDGMENT.

In such joint action by several, the contradicted testimony of any one of them that he did not consent in writing to the removal of the coal will warrant a judgment against defendant for the full penalty, the proof in other respects being complete; and it is not material to defendant whether judgment be rendered in favor of all the plaintiffs or only in favor of the one who so testified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

5. MINES AND MINERALS (§ 94*)—UNLAWFUL MINING—ACTION FOR PENALTY—PROOF OF DAMAGES.

In such action it is not necessary to prove damages or special injury. The statute fixes the amount of recovery for its violation, without regard to the amount of damages actually suffered.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 220, 221; Dec. Dig. § 94.*]

(*Additional Syllabus by Editorial Staff.*)

6. PLEADING (§ 204*)—DECLARATION—SUFFICIENCY AGAINST GENERAL DEMURRER.

A general demurrer to a declaration containing more than one count is properly overruled where one of the counts is good, though the others are bad.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

7. MINES AND MINERALS (§ 94*)—UNLAWFUL MINING—ACTION FOR PENALTY—PLEADING.

Where the declaration, in an action for the penalty provided by Code 1906, c. 79, § 7, for unlawful mining, alleged the taking and removing of coal within five feet of the land without written permission, it was not defective for failing to allege whether defendant encroached within five feet of the land by sinking a shaft or by following and removing the vein of coal from its outcrop on the hillside.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 220, 221; Dec. Dig. § 94.*]

8. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—EVIDENCE.

The erroneous admission in evidence of an excerpt from a deed was harmless where the deed itself was in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Error to Circuit Court, Taylor County.

Action by John W. Selvey and others against the Grafton Coal & Coke Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Warder & Robinson, of Grafton, for plaintiff in error. J. L. Hechmer and J. H. S. Barlow, both of Grafton, for defendants in error.

WILLIAMS, J. Plaintiffs recovered a judgment for \$500, the forfeiture provided by section 7, c. 79, Code 1906, to be paid to the party injured, for mining and removing coal within five feet of his property line without his consent in writing, and defendant was awarded this writ of error.

[1] The first error assigned is that the court improperly overruled the demurrer to the declaration. It is urged that there is a misjoinder of plaintiffs; that only one could sue. This question was recently decided otherwise in *Shinn v. O'Garra Coal Mining Co.*, 78 S. E. 104. We there held that the life tenant and remainderman, or reverser, could unite as plaintiffs in one action. The words of the statute, "any person injured thereby," include all persons whose property is injured by a violation of the statute. But of course there can be but one recovery; and, if more than one is injured by the same violation of the statute, there is no reason why they should not all join.

[6] The declaration is in three counts in debt. It is not necessary for us to decide whether or not the first count is bad for failure to aver that the defendant was "the owner or tenant of any land containing coal." For even if this count is bad, and either one of the other two is good, the demurrer, being general and not to each count, was properly overruled. The statute does not prescribe the form of action, and therefore an action of debt lies. *Maple v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839, decides that either debt or trespass on the case lies to recover the forfeiture.

[7] The second count is good; it avers that plaintiffs are the owners of a certain tract of land containing coal, and that defendant is the lessee of an adjoining tract containing the same vein of coal, and also avers that the defendant "unlawfully and contrary to the statute in such cases made and provided did dig, excavate, work, mine, and remove the said vein of coal within five feet of the said boundary and division line between said tracts of coal land, without the consent of the plaintiffs in writing or otherwise." This is a sufficient averment that the statute has been violated, and that the defendant is liable for the forfeiture thereby imposed. It is immaterial that the declaration does not allege how the defendant encroached within five feet of the line, whether by sinking a shaft or by following and removing the vein of coal from its outcrop on the hillside. Digging and removing the coal within five feet of the line, without written permission, constituted the wrong; the manner of doing it was not material.

[2] It is further urged that the declaration is defective because it does not state the cause of action in the exact language of the statute. But the pleader has employed language which is the legal equivalent, and that is sufficient. Even in case of an indictment for a statutory offense, where the rules of pleading are, if any difference, more rigid than in civil cases, it has been held that, although it is the safer method to pursue the exact language of the statute in describing the offense, still it is sufficient to do so in legally equivalent language. *State v. Riffe*, 10 W. Va. 794. True, the statute is penal in nature and is therefore subject to strict construction. But that rule is applied only for the purpose of ascertaining the actual wrong intended to be prohibited. *Gawthrop v. Fairmont Coal Co.*, 68 W. Va. 650, 70 S. E. 556. It does not apply to the form and manner of pleading. The defendant offered no evidence but submitted its case upon a demurrer to plaintiffs' evidence; and it is insisted that its demurrer was improperly overruled. But we do not think so.

[3] The court properly overruled defendant's objection to the introduction of the deed from Thomas Selvey to John W. Selvey, dated May 14, 1890. There is no material variance between that deed and the averment in the declaration that plaintiffs are the owners of the land. That averment is substantially proven by the deed, notwithstanding it purports to convey only coal and mining rights. Coal in place is land. The word "land" includes "tenements and hereditaments and all rights thereto and interests therein, except chattel interests." Section 17, ch. 15, c. 13, Code. Proof that plaintiffs were owners of coal in place was not a material variance from the averment that they were the owners of land which contained a valuable vein of coal. The statute author-

izing this action was designed to protect the owner of the seam of coal as well as the owner of the surface of the land above it. *Gawthrop v. Fairmont Coal Co.*, supra.

[4] It is contended that the evidence does not prove that defendant did not have plaintiffs' consent in writing. John W. Selvey testified that he did not give his consent; this proves that he, at least, was entitled to recover; and, even if he was the only one entitled to recover anything, he would be entitled to the full penalty of the statute. Therefore the question whether or not some of the other plaintiffs gave their consent could not affect the rights of defendant. It was immaterial to the Grafton Coal Company whether it pays the penalty to one of plaintiffs or to all of them jointly, as one payment discharges it as to all.

Defendant claims that it is not proven that it was the owner or tenant of the adjoining land. Plaintiffs introduced in evidence the coal lease from Adolphus Armstrong to defendant for the coal under a number of contiguous tracts of land, one of which is described in the lease as "the Thomas Selvey parcel of 32¼ acres." The lease refers to the deed from Selvey to Armstrong by date, deed book, and page where recorded. That deed is also in evidence. It conveyed coal and described the tract of land containing it by metes and bounds, and also as containing 37 acres and 3 roods, and excepts 5 acres of coal which is also described by metes and bounds. Five acres deducted leaves the exact quantity conveyed to defendant. This evidence, together with the testimony of witnesses who surveyed the lines of the five acres and also the mine, and who viewed the mine, and the testimony of other witnesses that defendant was then, and had been, operating the mine, established the facts that defendant is the lessee; that its coal is in a tract contiguous to the plaintiffs'; and that defendant had removed the coal within five feet of the dividing line of the properties. The testimony of the county surveyor, R. A. Morrow, and of George Brackett, the mining engineer, who surveyed the lines of the five acres, proves the location of the line encroached upon with sufficient definiteness.

[8] Defendant is not prejudiced by the introduction in evidence of the excerpt from the deed of Thomas Selvey and wife to Adolphus Armstrong, containing the metes and bounds of the five acres reserved in that deed. It was the data upon which the surveyor had made his survey of those lines. The deed itself is in evidence, and the metes and bounds of the five acres are therein given and are identical with those given in the paper objected to.

[5] It was not necessary for plaintiffs to prove injury. The injury is inferred from the doing of the wrongful act. The statute fixes the penalty, and the question of damages does not enter into the case. However

much plaintiffs might have been actually injured, they could not have recovered more, in this action, than \$500, the amount fixed by statute. *Maple v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839. Inasmuch as the statute protects the owners of coal in place as well as owners of the surface lands, it is immaterial that one of plaintiffs is a joint owner only of the coal, while the others are joint owners of both coal and surface. All, nevertheless, have the right to join in this action to recover the forfeiture.

The judgment is affirmed.

ROBINSON, J., absent.

WOODS et al. v. TETER.

(Supreme Court of Appeals of West Virginia.
Sept. 23, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 155*) — VERIFIED DENIAL — SUFFICIENCY.

The form for verification of pleadings, prescribed by section 42, c. 125, Code 1906, is insufficient as an affidavit by defendant under section 46 of the same chapter, unless when read with the pleading thus verified, a denial of liability in whole or in part substantially appears therefrom.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 309-311, 313, 314; Dec. Dig. § 155.*]

2. PLEADING (§ 155*) — VERIFIED DENIAL — SUFFICIENCY.

A case wherein the plea and verification are held insufficient.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 309-311, 313, 314; Dec. Dig. § 155.*]

(Additional Syllabus by Editorial Staff.)

3. PLEADING (§ 268*)—AMENDMENT—AFTER TERM.

Where the verification of a special plea in the form prescribed by Code 1906, c. 125, § 42, when considered together with the plea, was wholly inadequate to constitute the affidavit of defense prescribed by section 46, the court properly refused, after an adjournment of term, to permit it to be amended to conform to the requirements of such affidavit.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 809, 810; Dec. Dig. § 268.*]

Error to Circuit Court, Barbour County.

Action by J. Hop Woods and another against Floyd Teter. Judgment for plaintiffs, and defendant brings error. Affirmed.

Wilcox & Musgrave, of Belington, for plaintiff in error. J. Hop Woods and J. Blackburn Ware, both of Phillippi, for defendants in error.

LYNCH, J. By the action of debt, Woods and Ware seek recovery from defendant Teter of the amount due on a note. The terms and provisions, as stated therein, are: "Twelve months after date, with interest, I promise to pay J. Hop Woods and J. Black-

burn Ware the sum of one thousand dollars, as and for agreed attorney's fees as my counsel in the pending cause in the circuit court of Barbour county styled Geo. M. Whitescarver et al. v. Floyd Teter, and which fee is for professional services of said attorneys to be rendered in said cause in said court and in the Supreme Court of Appeals of the state in case of the appeal thereof thereto. Witness my hand and seal this 2d day of February, 1908. Floyd Teter [L. S.]."

Process issued June 18th, returnable to July rules, 1908, more than one year after the date of the note. Plaintiffs then filed their declaration, accompanied by the affidavit provided by section 46, c. 125, Code 1906. The clerk, at the same time, entered the common order. At August rules he also confirmed the common order. The defendant, for the first time, appeared to the action at September rules, when he tendered a plea of nil debet, without the counter affidavit required by said section. But at the same rules, and prior to the first day of the September term, he tendered and the clerk filed a special plea and affidavit, the substance of both of which is that the plaintiffs ought not to have or maintain their aforesaid action, because he says that the note mentioned in the declaration "was for professional services of the said plaintiffs to be rendered" in the chancery cause stated in the note, pending in said court at the date of the note, "and for no other or further or different consideration or purpose, and that the said plaintiffs in consideration thereof were to render their professional services in the said chancery cause in the circuit court of Barbour county and in the Supreme Court of Appeals of this state; and the defendant avers that the said plaintiffs have failed to render said professional services in the chancery cause above mentioned in the said circuit court of Barbour county, and that the said chancery cause is still pending in the circuit court of said county, and the same is wholly undetermined and undecided; and so this defendant says that the consideration for the said writing obligatory mentioned in the plaintiffs' declaration in this action sued on has wholly failed, and the defendant is entitled to his costs herein. And this the defendant is ready to verify." "State of West Virginia, County of Barbour, to wit: Floyd Teter, being by me first duly sworn, says that the allegations contained in the said plea are true, except so far as they are therein stated to be upon information, and that so far as they are stated to be upon information he believes them to be true. Taken, signed, and sworn to before me this the 1st day of September, 1908. F. M. Right, N. P." At the first term of court thereafter, being the term next succeeding the date of the writ, the trial of the action was, on the defendant's motion

and affidavit tendered for the purpose, continued for cause until the following term, at which defendant moved for leave to amend the affidavit verifying his special plea. The court refused leave to amend, and, on plaintiffs' motion, entered judgment against the defendant for the full amount of the note, interest, and costs. The errors assigned by the defendant are the refusal to grant leave to amend the affidavit, and the action of the court in entering judgment against him; in neither of which respects do we think the court erred.

[1, 2] The affidavit tendered and filed with the special plea did not sufficiently comply or attempt to comply with the requirements of section 46. It did not state or attempt to state that "there is not, as he (affiant) verily believes, any sum due from him to the plaintiffs upon the demand or demands stated in the plaintiffs' declaration," or "a sum certain less than that stated in the affidavit of the plaintiffs, which, as he verily believes, is all that is due from him to the plaintiffs" upon such demand or demands. The final determination of the suit, the services in which constitute the consideration for the obligation, is not made a condition precedent to the payment of the amount due plaintiffs. The payment thereof is not upon any condition. The note is an absolute promise to pay after the expiration of one year. At maturity plaintiffs were entitled to payment. If not then paid, they could sue and recover, notwithstanding the pendency of the Whitescarver suit, unless by proper plea the defendant asserted and established a good and sufficient defense to the action. The special plea states the facts appearing in the note, and that the suit is still pending. It does not assign any cause for delay in the Whitescarver suit, or charge such delay to the failure of the plaintiffs faithfully to serve defendant, or even suggest that nothing is due from him to them on the note, except by the general averment that they "have failed to render said professional services," that the suit is pending and wholly undetermined, and that therefore the consideration for the note has wholly failed. Defendant's affidavit that these general averments are true is not a substantial statement that "there is not, as he verily believes, any sum due from him to the plaintiffs" upon the note. In fact, it does not indicate any purpose or intention on his part to make any statement of that character. The nearest approach thereto is the general conclusion of the plea, based on the facts stated therein, that the consideration for the note "has wholly failed, and said defendant is entitled to his costs herein." So that the special plea and affidavit, when read together, as properly they may be, do not substantially deny the liability of the defendant, and therefore in that re-

spect fail to comply with section 46. They do not fall within the rule announced in *Walls v. Zufall*, 61 W. Va. 166, 56 S. E. 179, and *Ceranto v. Trimboli*, 63 W. Va. 340, 60 S. E. 138. In fact, it may with propriety be inferred that neither the draftsman of the plea and affidavit, nor the defendant himself, had in mind, at the date thereof, any purpose other than the making of the affidavit deemed necessary to the verification of the special plea under section 5, c. 126, Code 1906.

[3] The affidavit being clearly unavailing under section 46, c. 125, it was not amendable after the adjournment of the first term. The circuit court, therefore, did not err either in refusing leave to amend or in entering judgment for plaintiffs.

Judgment affirmed.

WILEY et al. v. BALL et al.

(Supreme Court of Appeals of West Virginia.
Sept. 23, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 781*)—RIGHTS OF DEVISEE.

A devisee cannot take under one provision of a will and deny the validity of another provision thereof.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2013-2017; Dec. Dig. § 781.*]

2. EASEMENTS (§ 44*)—CONSTRUCTION—EXTENT OF RIGHT.

The mere reservation of a right of way, by a testator, over land given one devisee, for ingress to and egress from land given another, confers no right to the exclusive use of the soil over which the way may be located, but creates only an easement, and the way cannot be enclosed by fences against the wishes of the servient tenant.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

3. FENCES (§ 1*)—DUTY TO FENCE—EASEMENT.

No obligation rests upon the land owner to fence the way in which another has simply an easement.

[Ed. Note.—For other cases, see *Fences*, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. EASEMENTS (§ 44*)—EXTENT OF RIGHT.

The servient tenement cannot be burdened with the occupancy of a greater width than is reasonably necessary for the uses for which a right of way thereover is reserved as an easement, where no width is defined in the reservation.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

Appeal from Circuit Court, Mason County.

Action by Millie C. Wiley and others against J. Robert Ball and others. From judgment for defendants, plaintiffs appeal. Modified and affirmed.

Rankin Wiley, of Point Pleasant, for appellants. Elmer L. Stone, of Ripley, and John E. Beller, of Point Pleasant, for appellees.

ROBINSON, J. Plaintiff by this suit sought a partition of land in conformity with the provisions of the will of her father, devising the land to her and the children of her brother. By that will plaintiff was given the "front part" of the land and the other devisees, defendants herein, were given the "back or east part." The will definitely stated just where the division line should be run. It also provided that "a right of way is reserved through the front tract to the public road." Plainly from the terms of the instrument this reservation of a right of way was for the use of the back part of the land. It was clearly devised in connection with the devise of that portion. Plaintiff not only prayed for a partition under the will but also for a marking out and establishing of the right of way. By a decree in the cause the lands were partitioned, and plaintiff in her petition for an appeal and in her brief expresses entire satisfaction with the division which has been made. A subsequent decree established a way fifteen feet wide through the front part which was given plaintiff, and imposed conditions on her in regard thereto. It is of this decree alone that she complains. By the decree plaintiff is required to build and maintain a fence along one side of the way, and defendants are required to build and maintain the way and a fence along the other side. Further, the decree allows plaintiff, at her own expense, to build and maintain gates or bars at such points in the fences as she may desire.

[1] The testator in fact only owned an undivided one-half interest in the land though he dealt with it in making the devise as if he owned the whole. He had only the curtesy in the other undivided one-half interest through right of his deceased wife. So plaintiff submits that he had no power to make the devise of a reservation of right of way through land not wholly owned by him. Plaintiff urges this as a ground against the validity of the devise for the right of way. She proposes to hold the front part of the land under the will, but to deny the will as to the reservation of way. This she can not do. The rule is well known. "One entitled to any benefit under a will or other instrument must, if he claims that benefit, abandon every right and interest the assertion of which would defeat even partially any of the provisions of that instrument." *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811. Plaintiff claims and has accepted the front part of the land under the will. She can not therefore deny the validity of the will as to the reservation of a way over that part of the land.

[2] But we find error in the decree. While under all the facts and circumstances presented by the cause it seems to be a proper one for judicial determination of the location of the way, yet the decree goes further

than simply to fix the location. It puts upon the servient tenement more than the granting of a mere right of way over it will justify and legally allow. It splits the servient tenant's land by a fencing of the way which the will does not call for. The reservation in the will does not give right to an exclusive use of the soil over which the way may be located, so that the same may be enclosed by fences. It gives only an easement, leaving title to the soil in the servient tenant, together with dominion over the soil covered by the way except so far as the necessary and reasonable use of the way takes from him that dominion. By no means does the reservation in the will mean that the land devised plaintiff is to be divided by fences without her consent, the use of the land thus encumbered, and its value thus perchance lessened. A fencing of the way is not necessary to a reasonable use of the easement, and nothing but a reasonable use was ever granted. "The owner of the right of way is not entitled to fence in the way against the wishes of the owner of the soil." *Jones on Easements*, sec. 410.

[3] Then, the decree puts upon plaintiff, the servient tenant, the obligation to build and maintain a fence on one side of the way. The mere reservation of the way puts no such burden on her and the decree can not rightly do so. "No obligation rests upon the land owner to fence the way in which another has an easement." *Jones on Easements*, sec. 409.

[4] Nor can the decree be sustained wherein it fixes the width of the way at fifteen feet. That particular width, for all that appears in the record, may be more than is necessary for the reasonable use of a right of way for ingress to and egress from defendant's land. No width is defined in the reservation.

We find no reason to disturb the finding and decree as to the location of the way. The decree will be modified by striking from it all provisions as to fencing and width, and by providing simply for such use of a way on the location fixed as is reasonably necessary for the ordinary purposes of defendants in going to and from the land devised them. And as so modified the decree will be affirmed.

PARKER v. CITY OF FAIRMONT.

(Supreme Court of Appeals of West Virginia.
Sept. 23, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 623*)—POWERS—ABATEMENT OF NUISANCE.

Under the provision of the charter of the city of Fairmont, same as Code 1906, ch. 47, sec. 28, that "the council shall have power to abate or cause to be abated anything which, in the opinion of a majority of the whole coun-

cil, shall be a nuisance," the council may abate only that as a nuisance which is recognized as such per se, or branded as such by lawful statute or ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1371-1374, 1383, 1384; Dec. Dig. § 623.*]

2. MUNICIPAL CORPORATIONS (§ 623*)—POWER—ABATEMENT OF NUISANCE.

The production and emission of smoke from the plant of a lawful business cannot be abated by the city of Fairmont under its mere charter powers to abate nuisances and to prevent injury and annoyance, in the absence of a reasonable ordinance, applicable alike to all of a class, making such production and emission unlawful.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1371-1374, 1383, 1384; Dec. Dig. § 623.*]

3. INJUNCTION (§ 77*)—GROUNDS—MUNICIPAL CORPORATIONS—ABATEMENT OF NUISANCE.

Equity will restrain a municipal corporation from proceeding under illegal and invalid order or resolution to remove an alleged nuisance, where private rights are unlawfully encroached upon and irreparable injury will ensue.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 146, 147; Dec. Dig. § 77.*]

Appeal from Circuit Court, Marion County.

Action by Richard F. Parker against the City of Fairmont. From judgment for defendant, plaintiff appeals. Reversed.

Harry Shaw and French McCray, both of Fairmont, and Chas. E. Hogg, of Morgantown, for appellant. Walter R. Haggerty and Tusca Morris, both of Fairmont, for appellee.

ROBINSON, J. Parker was summoned before the municipal council of the city of Fairmont to show cause why his dye works, located in a residence section of that city, should not be declared a nuisance by reason of the coal smoke and soot produced and emitted therefrom. Upon a hearing of the matter the dye works was declared to be such a nuisance and the mayor was ordered to proceed to abate the same. Thereupon Parker by this suit sought to enjoin the city authorities from proceeding further toward interfering with his business, on the ground that the proposed interference was without warrant of law and would irreparably damage him. He obtained a preliminary injunction, but upon a hearing the same was dissolved and his bill dismissed. From the decree in the premises he has appealed.

[1, 2] The city authorities claim power to make the order which they did under provisions of the city charter and an ordinance of the city, which are as follows: "The council shall have power within the said city * * * to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome; * * * to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance." Acts 1899, ch. 11. "Whenever any out-house,

privy, hog-pen, stable or other building within said city shall be by a majority of the whole council declared a nuisance or injurious to the health or comfort of any person or persons, the owner, agent, or lessee of the property shall be notified by the mayor to abate the nuisance by removal or keeping in proper order such building and in case of refusal or neglect to comply with such notice, the mayor shall direct the proper officer of the city to have the same put in order or removed and report his proceeding and costs incurred by him to the mayor," etc. Municipal Code of the City of Fairmont, ch. 27, sec. 36.

Plaintiff's business—his use of the premises—is not per se a nuisance. It is a lawful one. The provisions which we have quoted do not brand it as unlawful. Those provisions do not forbid smoke and soot from being produced and emitted. It would seem that under the charter power "to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome," the city authorities could make a just and reasonable regulation as to the production and emission of smoke and soot, applicable to all alike of the same class and not merely directed toward the property and business of one person. But we find no power in the city to strike directly at plaintiff alone. Plainly the ordinance quoted as relied upon does not apply to the production and emission of smoke and soot. It is an ordinance most apparently directed wholly against buildings of a very distinct class. Nor can the granted power "to abate or cause to be abated anything which, in the opinion of a majority of the whole council shall be a nuisance," be properly viewed as authorizing the council to single out and condemn as to any sole individual that which is ordinarily lawful. That provision can not rightly be construed to mean that the council may determine that to be a nuisance which is not such by the common law, by statute, or by ordinance. It gives power to abate nuisances, not to determine what shall be considered nuisances. It plainly relates to nuisances per se, those primarily branded as such by the law. Dillon on *Municipal Corporations* (5th Ed.) secs. 690, 694; *St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49. The charter provision grants a police power of abatement; not an arbitrary power of determining that something is a nuisance which by no law is known to be such. It is not reasonable to presume that the Legislature meant to grant such arbitrary power to the municipal authorities. True, the opinion of the majority of the whole council is called for by the provision. But that opinion is to be applied in discerning that the thing complained of comes within the category of nuisances pronounced to be such by law. Clearly the power granted is to abate what the law holds to be a nuisance, not to

enact that any particular thing is a nuisance. In this view we are confirmed by the forceful writing of Judge Dent in *Town of Davis v. Davis*, 40 W. Va. 474, 21 S. E. 906.

Such a power as is claimed by the city herein can not be upheld. The municipal authorities of Fairmont may, by the power in the city charter, abate per se nuisances; or under other powers granted by the charter it may pass reasonable ordinances preventing injury or annoyance to the citizens. All that is quite different from arbitrarily singling out a lawful business of one individual and making a law applicable to him alone, which is the substance of the city's action as to the plaintiff herein. The council must proceed under established law, not under arbitrary rule. It must ordain and publish law which relates to all alike that are similarly situated, and then enforce the same. It can not make the law and enforce it at the same time in individual cases. Such a power, it is said generally, can not be tolerated. *Lake v. City of Aberdeen*, 57 Miss. 260. It may be that the smoke and soot from plaintiff's dye works should be abated; but the city of Fairmont has not power to proceed simply against that smoke and soot. It must proceed uniformly as to that and all other similarly produced and emitted smoke and soot. Recognition and adherence to this rule is worth more indeed than any good that might come to the citizens complaining of plaintiff's dye works in this particular case. Only the even administration of the law produces ultimate public good. It is dangerous ever to ignore the principle, or to open the door for its disregard. Mr. Justice Miller, in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, said: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." It seems unnecessary to cite authorities for this principle. Reason impresses it. The books abound in its justification.

We are firmly of the opinion that, though the city of Fairmont had the power to enact laws regulating the production and emission of smoke and soot, at the time of the procedure against plaintiff's business neither the city charter nor any ordinance passed in pursuance thereof warranted the order to abate that business as a nuisance.

[3] What was plaintiff's remedy to prevent the city's unwarranted interference with his lawful business, or use of the premises? Clearly, that which he chose, injunction. That the threatened invasion of plaintiff's

private rights under the illegal and invalid resolution of the council, if allowed to be carried out, would affect the very substance of plaintiff's estate and produce irreparable damage is boldly apparent from the nature and circumstances of the case. That plaintiff has no adequate remedy at law is equally clear. The case comes plainly within the rule allowing equity cognizance. "Injunction will lie to restrain proceedings of a municipal corporation to remove an alleged nuisance where private rights are encroached upon and irreparable injury will ensue." *Smith on Municipal Corporations*, sec. 1629; *High on Injunctions*, sec. 1243; 118 Am. St. Rep. 376; *Bristol Door & Lumber Co. v. City of Bristol*, 97 Va. 304, 33 S. E. 588, 75 Am. St. Rep. 783.

As to the public, represented by the municipal authorities, plaintiff's use of his premises is not shown to be a nuisance. We repeat, that use is ordinarily lawful, and in behalf of the public it has not been branded as unlawful by an enactment within the power of the city. This being true, the city by its answer in the cause can not justify its act against plaintiff. It can not say merely by its answer that the use is in fact a nuisance. It must first say that by general and uniform ordinance. Of course, plaintiff's use may be a private nuisance of which some individual may complain in equity regardless of city ordinance. But we have only the question of the right of the city to complain.

The decree is erroneous. It will be reversed. The court should not have dissolved the injunction but perpetuated it. That which the circuit court should have done will now be done here.

POMEROY NAT. BANK v. HUNTINGTON NAT. BANK.†

(Supreme Court of Appeals of West Virginia.
May 20, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 151*)—CERTIFICATE OF DEPOSIT—NEGOTIABILITY—"NEGOTIABLE."

A certificate of deposit issued by a bank for a certain sum of money, not subject to check and payable to the order of the depositor in current funds, on the return of the certificate properly indorsed, is negotiable within the meaning of section 7 of chapter 99 of Code 1906.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 380-387; Dec. Dig. § 151.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4766, 4767.]

2. JUDGMENT (§ 720*)—CONCLUSIVENESS—ESTOPPEL—DIFFERENT CAUSES OF ACTION.

If the cause of action in a second suit differs from that of a former one in which the parties participated, though growing out of the same transaction or relating to the same property or fund, the record in such former suit does not estop the parties as to everything that could have been litigated therein but only as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

to such matters as affirmatively appear to have been decided in it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

3. JUDGMENT (§ 720*)—RES JUDICATA—ISSUES—DETERMINATION.

The record of a chancery cause in which a copartner charged a bank with a fund deposited with it as money belonging to the firm and successfully resisted the bank's defense of authorized payment of the funds to a member of the firm, by the issuance to him, in exchange for the firm's check drawn by him, of a certificate of deposit payable to his order, showing no actual adjudication against the indorsee of the certificate, who was made a party to the cause, does not sustain a plea of former adjudication in an action of debt brought against the bank on the certificate of deposit by the indorsee thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

Error to Circuit Court, Cabell County.

Action by the Pomeroy National Bank against the Huntington National Bank. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

J. P. Bradbury, of Pomeroy, Ohio, and Charles E. Hogg, of Morgantown, for plaintiff in error. Enslow, Fitzpatrick, Alderson & Baker, of Huntington, for defendant in error.

POFFENBARGER, P. The subject-matter of this action is somewhat related to that of the equity suit of Grobe v. Roup, in which there were two appeals to this court, one of which was disposed of in 44 W. Va. 197, 28 S. E. 699, and the other in 46 W. Va. 488, 33 S. E. 261. In February, 1898, before the suit of Grobe v. Roup and others ended and before the date of the decision on the last appeal therein, the Pomeroy National Bank instituted this action of debt in the circuit court of Cabell county for the recovery of the amount of the certificate of deposit, issued by the Huntington National Bank to C. W. Roup, and indorsed by him to the Pomeroy National Bank, as shown by the two opinions in the suit just mentioned. Having filed its declaration in said action, the plaintiff awaited final disposition of the chancery cause, and judgment was not rendered until the 13th day of April, 1910. Two defenses were interposed, nonnegotiability of the certificate of deposit and former adjudication. There was a judgment for the defendant upon a finding by the court, trial by jury having been waived, but the order does not indicate upon what ground the court based its conclusion.

[1] The certificate of deposit is in the words and figures following: "\$1,800. The Huntington National Bank, Huntington, West Virginia, May 14, 1896. C. W. Roup has deposited in this bank eighteen hundred dollars, payable to the order of himself in current funds on the return of this certificate properly indorsed. J. K. Oney, Cashier." It

was countersigned by "C. M. Gohen, Teller," and bore the following notice: "Certificate of deposit, not subject to check. No. 14007." To be negotiable, this paper must be within the terms of the statute in force at the date of its issue (section 7 of chapter 99 of the Code), making promissory notes, checks for money, and bills of exchange negotiable. And the paper must be payable at a particular bank or at a particular office thereof for discount or deposit or at the place of business of a savings institution or savings bank. That the paper in question is neither a check nor bill of exchange is admitted, but, by the great weight of authority, it is held to be in legal effect a promissory note, notwithstanding the lack of a promise in express words. It acknowledges indebtedness in a certain amount and declares it to be payable to a certain person or his order, and this necessarily implies a promise. The promise so made is to pay at the issuing bank, because the amount is payable on the return of the certificate properly indorsed. The place of payment is just as certain as the place of return, and as to that the paper is absolutely certain. Nor is the promise a conditional one, for it requires nothing beyond the return of the paper, corresponding with presentation for payment of a formal promissory note. Having these requisites of negotiability, the instrument is not rendered nonnegotiable by the specification of current funds as the medium of payment. A promise to pay in such funds is construed to be one to be paid in lawful money, convertible into specie or circulating at par with it, in the absence of proof of use of the terms in some other sense. Outside of Alabama and Pennsylvania, the courts almost uniformly sustain these conclusions. An intimation of a different view was expressed in Hotchkiss v. Mosher, 48 N. Y. 478, but that case was distinguished in Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176, expressly declaring a certificate of deposit payable in current bank notes to be negotiable. Some of the earlier cases in Wisconsin refused to recognize the negotiability of such certificates, but they were disapproved and overruled in Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773. The following additional authorities sustain the conclusions here announced, but they are not all cited as supporting any one of the several propositions stated nor as each sustaining all of them; some of them declaring certificates of deposit negotiable, while others a promise to pay in current funds, whether in a note or a certificate of deposit, to be a promise to pay in lawful money: Miller v. Austen, 13 How. (U. S.) 218, 14 L. Ed. 119; Welton v. Adams & Co., 4 Cal. 37, 60 Am. Dec. 579; Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; Kilgore v. Bulkley, 14 Conn. 362; Maxwell v. Agnew, 21 Fla. 154; Carey v. McDougald,

7 Ga. 84; Laughlin v. Marshall, 19 Ill. 390; Drake v. Markle, 21 Ind. 433, 83 Am. Dec. 358; Bean v. Briggs, 1 Iowa, 488, 63 Am. Dec. 464; Saving Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603; Tripp v. Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Cassidy v. Bank, 30 Minn. 87, 14 N. W. 363; Fultz v. Walters, 2 Mont. 165; Kirkwood v. Bank, 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444, 42 Am. St. Rep. 683; Johnson v. Henderson, 76 N. C. 227; Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Ann. St. Rep. 526; Smlie v. Stevens, 39 Vt. 315; Curran v. Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827. In two cases decided by this court at the present term and not yet officially reported (Citizens' Bank v. Bryan, 78 S. E. 400, and Benedum v. Citizens' Bank, 78 S. E. 656), negotiability of such certificates of deposit has been declared.

[2] The plea of former adjudication is not sustained by the record of the chancery cause adduced in evidence in support thereof. The two causes of action are different, though they grew out of transactions between some of the parties to the former suit and are related both as to parties and subject-matter. The broad rule of estoppel, relied upon by the defendant in error, applies only in those instances in which the cause of action in the second suit is the same as the cause of action in the first. Hudson v. Land & Mining Co., 76 S. E. 797; Herm. Est. & Res. Adj. pp. 477, 478. When the parties to the second suit and the cause of action therein are identical with the parties to the former suit and its cause of action, everything which fell within the scope of the issues in the first suit, actual or potential, as determined by the nature and limits of its cause of action, is concluded, whether actually adjudicated or not. But, if the cause of action in the second suit, though relating to the same property or the same transaction as that out of which the first grew, is different, the record of the former suit is conclusive of those things or questions only which were actually decided therein. Under such circumstances, it becomes necessary to ascertain what issues were made and how decided; and if it appears that the question, fact, or right involved in the second action was not actually decided in the first, or if a decision thereof does not affirmatively appear, there is no estoppel or adjudication as to it. Hudson v. Land & Mining Co., cited; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956; Blern v. Ray, 49 W. Va. 129, 38 S. E. 530; Western, etc., Co. v. Virginia Coal Co., 10 W. Va. 250; Coville v. Gilman, 13 W. Va. 314.

[3] Grobe's suit against Roup, his partner, the Huntington National Bank, and the Pomeroy National Bank had for its purpose the subjection of partnership funds, alleged

to be in the hands of the Huntington National Bank, to payment of the partnership debts and enforcement of the plaintiff's right, as against that bank's claim of exoneration from liability therefor, to his share of any surplus that might remain after the payment of such debts. The basis of the bill, according to its allegations and purposes, was the indebtedness of the bank to the plaintiff's firm. Standing upon that, he defended his position by an attack upon the validity of the transaction between the bank and the partner, which he charged to have been a fraudulent attempt on the part of the latter to misappropriate or divert that fund. Roup, with the knowledge of the bank, had drawn the firm's check for \$1,922, out of which he took \$122 in cash and the bank's certificate of deposit for \$1,800 payable to himself. Grobe's amended bill, filed after the decision of this court on the first appeal, charged actual notice to the bank of want of authority in Roup to draw the firm's checks. The original bill attempted to hold it liable upon its payment of the money to Roup with knowledge of his appropriation thereof to his own private or individual use, evidenced by the taking of the certificate of deposit payable to himself or his order. The question between Grobe and the bank was substantially the same as that between Bank v. Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312, not fraud on the part of the bank but reliance by the bank upon an unauthorized act of the partner as agent of the firm. The fraud, if any, was on the part of Roup, but in the perpetration thereof he did an act in excess of his powers as firm agent of which the bank had notice.

The bill also attacked the validity of the certificate of deposit and denied negotiability thereof. The Pomeroy National Bank appeared for the purpose of responding to this allegation of the bill and defending, as against Grobe, its claim as a bona fide holder of the certificate as a negotiable instrument. There were no pleadings between the Pomeroy National Bank and the Huntington National Bank. The latter did not, by any allegation of its answer, deny the negotiability of the certificate of deposit or its validity in any respect. Its answer to the amended bill set up the conflicting claims of Grobe and the Pomeroy National Bank as to the fund, and the latter appeared to the answer, but it did not treat it as a cross-bill or make any response to it by any sort of pleading.

Grobe's cause of action, growing out of the partnership relation between him and Roup, the relation of debtor and creditor between his firm and the bank, and the allegation of the unwarranted and unauthorized action of the bank respecting the firm assets, is clearly not the same as that of the Pomeroy National Bank in this action, founded solely upon a negotiable instrument, issued by the Huntington National Bank and held by the Pom-

eroy National Bank as a purchaser thereof in due course of business and in good faith. This being true, the plaintiff in error, the Pomeroy National Bank, is not precluded from recovery upon the certificate of deposit merely by reason of having been a party to the Grobe suit. Whether it is concluded or not by any adjudication therein depends upon inquiry as to what was actually decided.

On the filing of the amended pleadings to which reference has been made, the court, on motion of the plaintiff, adjudged, ordered, and decreed that the Huntington National Bank pay to J. K. Oney, special receiver, the sum of \$1,800, describing it as the amount of the certificate of deposit. Later the court, being of the opinion that Grobe was entitled to have the fund described in the bill and amended bill, then in the hands of the special receiver, subjected to the payment of the partnership debts of the firm of Grobe and Roup and the balance divided between the partners in proportion to their interests in the partnership, and that the Pomeroy National Bank was entitled to be subrogated to the interest of Roup therein, adjudged, ordered, and decreed accordingly and referred the cause to a commissioner to take, state, and report an account, which was done and the fund afterwards distributed. The effect of this procedure was to compel the Huntington National Bank to pay into the hands of the special receiver the amount of money in controversy, at the suit of John T. Grobe, subject that fund to the payment of partnership debts, and distribute the balance between the partners. As between the Pomeroy National Bank and the Huntington National Bank, there is no express decision of anything. In none of the decrees is there any reference to any controversy between them. Nowhere did the court pass upon the negotiability of the certificate of deposit in express terms or say whether the Pomeroy National Bank had or had not a cause of action against the Huntington National Bank founded upon the certificate of deposit.

On the issues made by the pleadings, the plaintiff introduced the certificate of deposit and proved the following additional facts: C. W. Roup presented the same to the Pomeroy National Bank and received thereon, after having indorsed it, \$100 in cash and a new certificate of deposit for the sum of \$1,700. Afterwards Roup indorsed and transferred the \$1,700 certificate of the Pomeroy National Bank to the Bank of Ravenswood, and, on presentation thereof by the Bank of Ravenswood and demand for payment, the Pomeroy National Bank paid the same. On May 29, 1896, the \$1,800 certificate of the Huntington National Bank, properly indorsed by Roup, was presented at said bank and payment thereof demanded on behalf of the Pomeroy National Bank. There was neither plea nor proof of any payment or set-off by

the Huntington National Bank. In this state of the evidence, the defendant was clearly liable, upon the principles and conclusions already stated, for the full amount of said certificate, with interest thereon from the 29th day of May, 1896, amounting to \$1,498.20, making an aggregate of \$3,298.20, for which the court should have rendered judgment on the 13th day of April, 1910, the date of its finding and judgment for the defendant.

Accordingly the judgment complained of will be reversed, and judgment rendered here for the plaintiff, the Pomeroy National Bank, for the sum of \$3,298.20 as of the 13th day of April, 1910, with interest thereon from said date until paid, together with its costs in the trial court as well as in this court.

MILLIGAN v. ALEXANDER.†

(Supreme Court of Appeals of West Virginia.
June 17, 1913.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 71*)—IMPROVEMENT OF WIFE'S LAND—AGENCY OF HUSBAND.

If a husband contracts, in his own name, with the knowledge of his wife, for the erection of a building on her land, and the work is carried on also with her knowledge and consent, she will be presumed to have constituted her husband her agent, and her property is liable to a mechanic's lien for such improvement.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 85; Dec. Dig. § 71.*]

2. MECHANICS' LIENS (§ 281*)—IMPROVEMENT OF WIFE'S LAND—AGENCY OF HUSBAND.

Proof that the wife was frequently present, in company with her husband, while the building was being erected, and on one occasion gave directions, or made suggestions, as to how a certain part of the building should be constructed, is sufficient evidence that she consented to having the building erected.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

Appeal from Circuit Court, Pocahontas County.

Bill by J. W. Milligan against Eliza Alexander. Decree for plaintiff, and defendant appeals. Affirmed.

L. M. McClintic, of Marlinton, for appellant. Price, Osenton & Horan, of Marlinton, for appellee.

WILLIAMS, J. J. W. Milligan sued Mrs. Eliza Alexander in the circuit court of Pocahontas county to enforce a mechanic's lien against a lot of ground and a building erected thereon by him, situated in the town of Marlinton. From a decree granting relief to plaintiff, defendant has appealed.

The amount of the lien claimed is \$1,050.93. The defense is (1) that defendant did not contract for the erection of the building and did not authorize any one else to do so as her agent, and (2) that the building

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

was not put up in a workmanlike manner. The court scaled plaintiff's account because of imperfect work and bad material used, and decreed a lien upon the property for the sum of \$910.43, and also decreed that it be sold to satisfy the lien, if not paid in 60 days.

The contract for the erection of the building was oral, and was made by said Milligan with John Alexander, husband of defendant. The case turns upon this question: Was her husband defendant's agent in making the contract?

A mechanic's lien is a creature of statute, and in order to obtain such lien the requirements of the statute must be complied with. A builder cannot have a lien simply by erecting a building on the land of another, independent of contract. The work must be done "by virtue of a contract with the owner or his authorized agent." Section 2, c. 75, Code (1906). Defendant and her husband both testified that she did not authorize him to contract for the building. The building was erected for a bowling alley, and is occupied by Dwight Alexander, defendant's son, free of rent. The contract price was \$1,500, but plaintiff claims that he did extra work in putting up an addition to the building, which made his account amount, in all, to \$1,738.03. Partial payments were made in June and July, 1909, amounting to \$736.10.

[1, 2] Milligan testifies that Mrs. Alexander was present a good deal of the time when the contract was being made; that she said to him, on one occasion when the work was going on: "We are having the building put up on Dwight's account; he wants to keep on with the amusement business"—and that she was present, at the building, when the agreement was made to put up an addition to it for a boiler room, and made suggestions in regard to the manner of its construction. Concerning this latter fact Milligan is corroborated by L. W. Herold, who was present and heard the conversation. Mrs. Alexander denies that she was present when the original contract was made, but admits that she was present when the contract for the boiler room was made, and that she was at the building with her husband frequently when the house was being erected. She denies giving instructions, or making suggestions in regard to the building of the boiler room. The chancellor had to determine the facts upon the conflicting testimony of the witnesses, and we cannot say that his finding, which must have been that the facts were as Milligan had testified, is erroneous. Then, do the facts and circumstances prove agency of the husband? We think they do. It is true that agency of the husband will not be presumed from the marital relations alone. *Boisot on Mechanics' Liens*, § 277; *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 82 N. W. 112, 83 Am. Rep. 513. But the agency may be established by

circumstantial evidence, and we think the facts and circumstances are such as to warrant the conclusion that, in making the contract with Milligan, John Alexander acted as agent for his wife. Certainly such view is consistent with justice. Mrs. Alexander knew that her husband had contracted for the erection of the building on her lot, and she did not object to it. The building was going up in sight of her dwelling house, and she was frequently present while the work was going on. In view of what was said and done by her husband and plaintiff, in her presence and with her knowledge, she is presumed to have authorized her husband to act as agent for her in the premises. The property in question is Mrs. Alexander's separate estate, and the statute (section 3, c. 66, Code [1906]) permits her to contract freely with reference to the improvement of it, and it would be inequitable and unjust, under the circumstances shown to exist in this case, if she should be permitted to reap the benefit of plaintiff's labor without consideration. That she derives no revenue from the building is not material. Her son is occupying it free of rent, but he does so with her consent. She has the right to demand rent, and cannot complain because she is getting no revenue from it.

"Proof that the wife knew of the work ordered by her husband while it was being done, and gave direction to the mechanics about it, has usually been considered sufficient to show that the husband acted as the wife's agent." *Boisot on Mechanics' Liens*, § 277. The rule stated in the text is supported by the following cases: *Bradford v. Peterson*, 30 Neb. 96, 46 N. W. 220; *Rand v. Parker*, 73 Iowa, 396, 35 N. W. 493; *Wheaton v. Trimble*, 145 Mass. 345, 14 N. E. 104, 1 Am. St. Rep. 463; *Schmidt & Smith v. Joseph*, 65 Ala. 475; *Collins v. McGraw*, 47 Mo. 495; *Leisse v. Schwartz*, 6 Mo. App. 413; *Bodey v. Thackara*, 143 Pa. 171, 22 Atl. 754, 24 Am. St. Rep. 526.

Under circumstances similar to those disclosed in the case under review, some courts hold that the wife is estopped to deny that a mechanic's lien was thereby created upon her separate estate. *Schwartz v. Saunders*, 46 Ill. 18; *Greenleaf v. Beebe*, 80 Ill. 520. The same result is reached whether the wife is made liable by estoppel or on the score of agency, presumed from her knowledge of and acquiescence in the improvement made on her land by her husband. Inasmuch as the statute gives a married woman the right to contract for the improvement of her property as freely as if she were a feme sole, we think it is more consonant with reason to hold her liable on the ground of her husband's agency. Such view also harmonizes with the great majority of the decisions.

There is a good deal of testimony tending to prove that some of the work on the building was not done in good workmanship style,

and the court was justified in scaling plaintiff's demand on account of it. We find no error in the decree, and will affirm it.

OHIO FUEL OIL CO. v. BURDETT, Judge,
et al.

(Supreme Court of Appeals of West Virginia.
Oct. 7, 1913.)

(Syllabus by the Court.)

PARTITION (§ 53*)—GROUNDS OF RECEIVERSHIP—PRESERVATION OF PROPERTY.

When a tract of land, containing large and valuable deposits of oil and gas, as indicated by operations upon adjacent land, is the subject-matter of a suit in partition, and there is imminent danger of loss to the cotenants by drainage through the operation of wells on adjacent land, and the parties interested therein and owners in fee simple are unable to agree upon some plan for development of the land for its oil and gas, or some of these parties refuse to join in such measures, the court in which the suit is pending may appoint a receiver to produce the oil and gas as a measure of preservation.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 147; Dec. Dig. § 53.*]

Application for writ of prohibition by the Ohio Fuel Oil Company against Samuel C. Burdett, Judge, etc., and others. Prohibition refused.

Brown, Jackson & Knight, Thomas P. Ryan, and E. M. Burdette, all of Charleston, for petitioner. Geo. E. Price, Berkeley Minor, Jr., Cato & Bledsoe, and A. S. Alexander, all of Charleston, for respondents.

POFFENBARGER, P. Questioning the jurisdiction of a court of equity to appoint a receiver to produce oil and gas from a tract of land owned in undivided interests by numerous persons and under lease for oil and gas purposes to parties who are unable to agree upon a plan of operation for their mutual interests, as a means of preserving the oil and gas from loss or waste by drainage, through operations on adjacent premises, the relator filed its petition for a writ of prohibition, upon which a rule was issued, and the case made up for hearing on the merits.

The nature of the cause in which the receiver was appointed and the status thereof at the time of the appointment, together with all the facts involved and the relation of the parties, are very clearly and succinctly stated in the answer of the respondent, as follows: "The said suit was brought for the purpose of compelling a partition of a small tract of land containing about 25 acres, lying in Kanawha county, W. Va., alleged to be owned by a large number of persons in different interests. And by section 1 of chapter 79 of the Code of West Virginia, the circuit court of the county wherein is the estate is given jurisdiction of such suit. This defendant, as judge of the

said circuit court, was convinced from the pleadings and affidavits filed in said cause that said tract of land has within it a large quantity of petroleum oil and gas, and that by reason of wells already drilled by the plaintiff in this cause—the defendant in said chancery cause—on adjacent lands, near the lines of this tract, and by the William Seymour Edwards Oil Company, and by other wells which are being drilled and are located very close to the lines of this tract by the said plaintiff in this cause, the said petroleum oil is being, and will be, very rapidly drained away from said tract, principally by the plaintiff in this cause, the Ohio Fuel Oil Company, which is one of the cotenants of said tract of land involved in said chancery cause, and that a very large amount, if not all, of said oil will have been extracted from said tract of land before a final decree of partition and settlement of the rights of the parties interested can be had in said cause; that the said Ohio Fuel Oil Company and said William Seymour Edwards Oil Company are within their strict legal rights in drilling oil wells on the adjacent lands, near the line of this tract, and cannot be prohibited from doing so by injunction; that by this means the greater part, if not practically all, of the value of the said land will be taken away, exhausted, and lost before partition can be had, and the other tenants in common deprived of their rights therein. And this defendant, as judge of said court, was of opinion that this was a proper case for the appointment of a special receiver on account of the danger of the loss and misappropriation of the subject-matter of the suit, or a material part thereof, under section 28 of chapter 133 of the Code of West Virginia, and under the general powers of a court of equity to preserve from loss or destruction the subject-matter involved in any suit pending before it, and especially in a partition suit. This respondent was of opinion that the said circuit court had the power to prevent, by means of a receiver, one cotenant from appropriating to itself the substance, value, and profits of a tract of land involved in a partition suit by indirect ways and means, when such cotenant had no right to make such appropriation by proceeding directly on the land itself."

The application for the writ raised only a question of jurisdiction in the circuit court, and did not call in question the propriety of the decree or order complained of on any ground other than the alleged want of jurisdiction, or power, to appoint a receiver to produce oil and gas from land held in cotenancy, without the consent of all parties interested therein. Under ordinary circumstances, there would be no such power, but the bill filed in the cause in which the receiver was appointed shows an extraordinary

and unusual situation. The small tract of land, as to which partition was sought, probably contained very large and valuable quantities of oil and gas, as disclosed by operations on adjacent lands, and the wells on the adjacent land were so close and numerous that extensive drainage of the tract would have been the inevitable and direct consequence of the operation of such wells. The only remedy for this situation, as a means of preventing certain and great loss, was the drilling and operation of wells on the tract itself by way of offset to wells on the adjacent land. As the relator had wells of its own on adjacent property, through which it was draining oil from the tract probably largely in excess of its interest therein as cotenant and lessee, development of the tract was against its interest, and, holding interests in the tract, it was in a position to prevent development thereof by refusal to join in any manner with its cotenants, the other lessees in the work of development. What the circuit court did, therefore, by the appointment of a receiver was not to give one person rights in the lands of another, without his consent, but merely to preserve to the owners of the property that which belonged to them. It was a case of loss, without the intervention of the court by its preventive process. It was one of preservation of that which otherwise would have been destroyed. Finding no direct precedent for the action of the court below, this court was of the opinion that its action accords with general legal principles and the analogies of the law, recognizing and admitting drastic and summary remedies for the preservation of property, likely to be lost by any means and under any circumstances. Perishable goods are sold by their custodians, and their value preserved by conversion thereof into money when necessary to prevent loss. Property may be sold and converted into money by court action, pending litigation, when the expense of keeping it is so greatly disproportionate to its value that loss may result.

Upon these general principles, the writ prayed for was refused.

NOLL v. DAILEY, Judge, et al.
(Supreme Court of Appeals of West Virginia.
May 20, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 137*) — RIGHT TO QUASH.

An indictment cannot be quashed because it was found upon illegal evidence.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

2. PROHIBITION (§ 10*)—GROUNDS — PLEA TO INDICTMENT.

Prohibition lies to prevent a trial court from entertaining a plea to an indictment, chal-

lenging the legality or sufficiency of the evidence on which it was found.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

Poppenbarger and Miller, JJ., dissenting.

Application for a writ of prohibition by the State, on the petition of Allen B. Noll, against Honorable R. W. Dailey, Judge, and others. Writ awarded.

Allen B. Noll, of Martinsburg, and Forrest W. Brown, of Charlestown, for petitioner.

WILLIAMS, J. Claude W. Stewart, who was indicted for felony at the January term of the circuit court of Berkeley county, appeared in court and tendered three several pleas in abatement averring that there was no legal evidence before the grand jury on which they could find the indictments. The attorney prosecuting for the state objected to the filing of the pleas and moved the court to require defendant to plead or demur to the indictments. The court overruled the motion and objection, until the matters arising on the pleas in abatement should be determined; and the Attorney General and the attorney appointed to prosecute the case in the court below have applied to this court, on behalf of the state, for a writ of prohibition to prohibit R. W. Dailey, judge of said court, from proceeding to try the matters set up in said pleas.

[1] The law of this state does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency. "An indictment cannot be quashed because it rests, in whole or part, on incompetent evidence," is the rule that was declared in *State v. Woodrow*, 58 W. Va. 527, 52 S. E. 545, 2 L. R. A. (N. S.) 862, 112 Am. St. Rep. 1001, 6 Ann. Cas. 180. That was the first case to come before this court involving the question. Woodrow had filed a plea in abatement alleging that the indictment was found against him on the testimony of his wife, an incompetent witness. The court rejected his plea and refused to quash the indictment, and this court sustained that ruling.

The practice in this respect, however, is not uniform throughout the country; some of the courts holding that, if the indictment is found entirely upon illegal evidence, it may be quashed upon plea in abatement. 22 Cyc. 205; 10 Enc. Pl. & Pr. 395. But a number of states, including Virginia and West Virginia, hold that an indictment returned by a grand jury, properly constituted, cannot be attacked for want of legal evidence before the grand jury to support it. The law in these two states, on this subject, seems to have been so generally and so well understood that their courts of last resort were not called upon to pass upon it, until within very recent years. Woodrow's Case,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

supra, and Wadley's Case, 98 Va. 804, 35 S. E. 452, appear to be the first cases in the Supreme Courts of the two states, respectively. A similar question arose in Massachusetts in 1830, upon a motion by counsel for accused requesting the court to instruct the grand jury in regard to the nature of the evidence proper to be received by them, and the motion was overruled. Says Parker, C. J., in his opinion in that case (Anonymous, 9 Pick. 495): "According to my recollection, this is the first attempt of the kind in this commonwealth. It is to be presumed that only proper evidence will be laid before the jury. * * * If anything improper shall be given in evidence before the grand jury, the error may be corrected subsequently upon the trial before the petit jury."

Of course an indictment ought not to be found upon illegal evidence. But the impracticability of showing that it was found upon such evidence renders a plea in abatement or motion to quash on that ground improper. The testimony of a grand juror will not be received to impeach the indictment. 2 Bishop's New Crim. Proc. § 874. And in case a number of witnesses are examined by the grand jury, it would be impossible to ascertain by what evidence the grand jury were influenced. It is the body entrusted with the power to say when a crime has been committed, and when a prosecution should be begun against the person whom the evidence before them leads them to believe is probably the guilty party. According to our judicial system they are the tribunal representing the people, for the purpose of charging crime and designating the criminal. The evidence that satisfies them that probable cause exists for the prosecution of a certain person for a designated crime might not be enough to satisfy the court or a petit jury; and, to permit the court to inquire into the legality, or sufficiency, of the evidence on which the grand jury acted, would be to substitute, in a measure, the opinion of the court for that of the grand jury, and would ultimately lead to the destruction of the grand jury system. Such proceeding would also furnish opportunity for long and unnecessary delay in the trial of criminal cases and would be a useless incumbrance upon criminal procedure. Because the matter can be inquired into as well upon the trial of the indictment as upon the plea in abatement, and if it is made to appear that the indictment was found either upon illegal evidence, or without any evidence, and the state produces no other evidence at the trial than what was before the grand jury, the prisoner will be vindicated as fully by an acquittal as he would be by quashing the indictment. But the state is entitled to produce at the trial new and additional evidence of guilt. It may not have had all its evidence before the grand jury. But if the indictment is to be quashed for want

of proper evidence before the grand jury, it would cut off this right.

Speaking of proceedings by grand juries, Judge Harrison, in Wadley's Case, supra, says: "It is the policy of the law, in the interest of justice, that this preliminary hearing should be conducted with closed doors. This secrecy is not only consistent with, but essential to, the nature of the institution. The sufficiency of the proof cannot be inquired into to invalidate an indictment found by a lawfully constituted grand jury. The presumption is that every indictment is found upon proper evidence. If anything improper is given in evidence before a grand jury, it can be corrected on the trial before the petit jury."

Quoting from the opinion of Judge Brannon in State v. Woodrow, supra, 58 W. Va. page 533, 52 S. E. page 547, 2 L. R. A. (N. S.) 862, 112 Am. St. Rep. 1001, 6 Ann. Cas. 180: "It would be very bad practice, endless inconvenience, to have a full preliminary trial of competence of evidence before the grand jury in many cases. How far would the practice go? Does the inconvenience to the accused justify the institution of such a practice? Are not his rights fully vindicated by his right to exclude improper evidence on the trial? Therefore we conclude that the plea in abatement was properly rejected."

The following cases are also in accord with the law as we find it in Virginia and West Virginia, viz.: State v. Fasset, 16 Conn. 457; Brobeck v. Superior Court, 152 Cal. 289, 92 Pac. 646; State v. Dayton, 23 N. J. Law (3 Zab.) 49, 53 Am. Dec. 270; State v. Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376; Stewart v. State, 24 Ind. 142; Smith & Cavin v. State, 61 Miss. 754; Cotton v. State, 43 Tex. 169; Clark v. State (Tex. Cr. App.) 43 S. W. 522; State v. Fowler, 52 Iowa, 103, 2 N. W. 983; U. S. v. Cutler, 5 Utah, 608, 19 Pac. 145.

[2] Seeing that the court is without authority of law to make preliminary investigation of the evidence that was before the grand jury, it follows that, in attempting to do so, it is exceeding its legitimate powers, and can be prohibited. Section 1, c. 110, Code of West Virginia (1906), says: "The writ of prohibition shall lie as a matter of right, in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject-matter in controversy, or having such jurisdiction, exceeds its legitimate powers."

By entertaining the pleas, the court is adopting a method of procedure not authorized or recognized by the law of this state. It is therefore exceeding its legitimate powers. It is more than mere error of judgment, because the court has no right to try the question; it does not have jurisdiction for that purpose, notwithstanding its jurisdiction to try the indictment. Where the court,

although having jurisdiction of the cause, during the trial of it, exceeds its powers in some matter pertaining thereto, for which there is no adequate remedy by the ordinary course of proceeding, the writ of prohibition lies, under the general principles of law, as well as under the statute which, in respect to this case, is but declaratory of the common law; the state being given no other remedy.

In *McConiha v. Guthrie*, Judge, 21 W. Va. 134, the circuit court was prohibited from proceeding to condemn land for railroad purposes, which could not be lawfully taken, notwithstanding it had jurisdiction of the cause, and notwithstanding the remedy, in that case, by writ of error.

In the following cases inferior courts were prohibited from exceeding their legitimate powers, in causes of which they had general jurisdiction: *Ensign v. Carroll*, 30 W. Va. 532, 4 S. E. 782; *City of Charleston v. Beller et al.*, 45 W. Va. 44, 30 S. E. 152; *W. Va. Central Gas Co. v. Holt*, Judge, 66 W. Va. 516, 66 S. E. 717; *Supervisors of Culpepper County v. Gorrell et al.*, 20 Grat. (Va.) 484; *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.

We award the writ.

POFFENBARGER and MILLER, JJ., dissent.

SULLIVAN v. HILL, Sheriff.

(Supreme Court of Appeals of West Virginia.
Oct. 21, 1913.)

(Syllabus by the Court.)

1. STATES (§ 34*)—LEGISLATIVE COMMITTEES—WITNESSES.

A summons for a witness before a joint committee of the two houses of the legislature, ordered by the unanimous action of such joint committee, is not invalid, if signed by the chairman of the committee from either house, pursuant to section 7, chapter 12, Code 1906, though such chairman be also the chairman selected by the joint committee to preside at the sessions of the joint committee.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 42; Dec. Dig. § 34.*]

2. STATES (§ 40*)—LEGISLATIVE COMMITTEES—WITNESSES.

If the subject of investigation before such joint committee be within the range of legitimate legislative inquiry and the proposed testimony of the witness called relates to that subject, obedience to its process may be enforced by the committee directing the summons, by attachment, fine or imprisonment, as provided by said section 7, chapter 12, Code 1906.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 46; Dec. Dig. § 40.*]

3. CONSTITUTIONAL LAW (§§ 60, 273*)—STATES (§ 40*)—LEGISLATIVE COMMITTEES—WITNESSES.

Said section 7, chapter 12, Code 1906, authorizing either house of the legislature or a

committee thereof to enforce obedience to its process is constitutional and valid.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 89, 90, 93, 739; Dec. Dig. §§ 60, 273; *States*, Cent. Dig. § 46; Dec. Dig. § 40.*]

4. WITNESSES (§ 203*)—PRIVILEGE.

Knowledge or information acquired by a witness, though at the instance, in connection with and under the direction of a prosecuting attorney to use in the trial of indictments against members of the legislature for bribery, is not privileged, and furnishes a witness lawfully summoned no legal ground for refusing to respond to legitimate questions by the committee.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 758; Dec. Dig. § 203.*]

Petition for writ of habeas corpus by Jesse V. Sullivan against Bonner H. Hill, sheriff, etc. Writ refused.

S. B. Avis and T. C. Townsend, both of Charleston, for petitioner. A. A. Lilly, Atty. Gen., for respondent.

MILLER, J. Petitioner by writ of habeas corpus seeks discharge from the custody of defendant, to whom he was committed by the order of Oliver S. Marshall, chairman of a legislative committee, pursuant to section 7, chapter 12, Code 1906.

At the time of the order of commitment, March 28, 1913, committees of the House and Senate were sitting pursuant to "Senate Joint Resolution No. 22—Raising a joint committee to investigate bribery charges against certain members of the Senate and House of Delegates and persons unknown who are alleged to have offered said bribes," as follows:

"Be it resolved by the Senate, the House of Delegates concurring therein:

"That a committee of five, composed of two members of the Senate, to be appointed by the President of the Senate, and three members of the House of Delegates, to be appointed by the Speaker of the House of Delegates, be appointed, which committee is authorized and instructed to proceed, with all reasonable diligence, to make a thorough investigation of all matters and things concerning certain bribery charges against certain members of the Senate and House of Delegates, and other persons unknown at the present time, who are alleged to have offered bribes to the aforesaid members; and to investigate all matters and things concerning charges that certain members aforesaid have been offered and paid certain sums of money for their votes in the Joint Assembly, for the purpose of electing a United States Senator to the Congress of the United States for the term beginning March 4, 1913, which said committee is authorized and empowered to employ assistance, to summon and compel the attendance of witnesses, to administer oaths, and, generally, to send for persons and papers. Said committee shall have all the authority and power conferred on committees by section seven of chapter twelve of the

Code. Said committee shall have full power and authority to act after the adjournment of the Senate and House of Delegates, to the end that all the charges may be fully investigated, and to report their findings to a future meeting of the Legislature, if unable to complete said investigation before the expiration of the present session."

Pursuant to the resolution Oliver S. Marshall and O. A. Hood were appointed members of the committee from the Senate, and Vernon E. Johnson, C. A. Sutton, and A. G. Swiger, members thereof from the House.

The petitioner on a summons issued by Chairman Marshall appeared before the joint committee, and being sworn, and after responding to some preliminary questions, he was requested by Chairman Marshall to state to the committee what information or knowledge he had concerning the arrest of or bribery charges against certain members of the Senate and House of Delegates of West Virginia, or other persons. He declined to answer, not on the ground that it would in any way incriminate him, but giving as his only reason, that the information he had on the subject had been obtained at the instance, in connection with and under the direction of the prosecuting attorney of Kanawha County, and that the latter had not waived his privilege so as to permit him to testify. He was then asked by the attorney general, present on behalf of the committee: "You mean you were with him, or near him, at the time you saw or heard anything concerning which you now refuse to testify?" To which the witness replied: "Yes, sir."

The several grounds alleged and relied on by petitioner for his discharge are: (1) That neither the committee nor any member thereof had any power or authority to order his arrest and detention, restraining him of his liberty: (2) That said committee had no power or authority to require him to give testimony or respond to the questions propounded to him in relation to the matters and things set forth in said joint resolution: (3) That the information sought by the committee was privileged, he being under the confidential ban of the prosecuting attorney as alleged: (4) That neither said committee nor any member thereof had any power or authority to punish him as for a contempt, and that his commitment was illegal and void and that he should be discharged.

[1] The jurisdiction of the committee under the joint resolution is not rested alone in inherent powers of the legislature, or of one of its committees in the premises. Section 7, chapter 12, provides: "When the senate or house of delegates, or a committee of either house, authorized to examine witnesses, or to send for persons and papers, shall order the attendance of any witness, or the production of any paper as evidence, a summons shall be issued accordingly, signed by the presiding officer or clerk of such house, or the chairman of said committee, directed to the

sheriff or other proper officer of any county, or to the sergeant-at-arms of such house, or any person deputed by him. And when served, obedience thereto may be enforced, by attachment, fine or imprisonment, at the discretion of the house which appointed the committee; and if the committee be authorized to sit during the recess of the legislature or the recess of the house which appointed the committee, then obedience to the summons may be enforced by said committee as aforesaid. And when a committee is appointed by each house under any joint or concurrent resolution, and directed to sit jointly, with authority to examine witnesses or send for persons and papers, the summons aforesaid may be signed by the chairman of the committee on the part of the senate or the chairman of the committee on the part of the house of delegates; and obedience thereto may be enforced as aforesaid by the house which appointed the committee, which directed the summons to be issued; and if such committees be authorized to sit during the recess of the legislature, then obedience to the summons aforesaid may be enforced as aforesaid by the committee which directed the summons to be issued." According to the return, the summons, order of arrest and commitment were the result of the unanimous action of the joint committee, or of both committees sitting together, but the summons and order of arrest and commitment were signed only by Oliver S. Marshall, chairman, who by general parliamentary practices, being the first named, was chairman of the Senate committee, or the Senate branch of the joint committee.

We think the summons and order of arrest, so directed and executed, were valid exercises by the senate committee of the power given by the statute to enforce obedience to its summons, for though joint it was also several, and obedience might have been enforced by either committee. So much for the regularity of the proceedings. Our conclusion, therefore, is that if the matter of inquiry was lawful, there was no want of power in the Senate committee, as a means of enforcing obedience to its writ, to arrest and restrain the petitioner as was done, and to punish him by attachment and imprisonment for his disobedience, and that first and fourth points relied on must be overruled.

[2] The second ground, namely, want of authority to require petitioner to respond to the questions propounded to him, presents a different question. If the subject of investigation covered by the joint resolution was within the range of legitimate legislative inquiry, and the questions were pertinent thereto, and not calling for privileged matter, the authorities generally agree, that either house, if authorized, or a committee of either house, though sitting in recess, may summon witnesses, and compel obedience thereto. *People v. Keeler*, 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 49; *Kilbourn v.*

Thompson, 103 U. S. 168, 26 L. Ed. 377; In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154; In re Falvey, 7 Wis. 630; In re Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; Ex parte Lawrence, 116 Cal. 298, 48 Pac. 124; People v. Learned, 5 Hun (N. Y.) 626; Ex parte Parker, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011, 7 Ann. Cas. 874, and dissenting opinion in In re Davis, 58 Kan. 368, 49 Pac. 160, and cases cited and reviewed. In Kilbourn v. Thompson, discharge was ordered, on the ground that the subject of the inquiry was not within the range of legitimate legislative investigation. Whether, if otherwise, obedience to its process could be enforced as attempted, was reserved and not decided. In In re Chapman, the writ was denied. In that case the resolution directed the committee to inquire "whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." The Court, by Chief Justice Fuller, 166 U. S. at page 669, 17 Sup. Ct. at page 680, 41 L. Ed. 1154, says: "What the Senate might or might not do upon the facts when ascertained, we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as 'offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers." That the resolution of the Senate did not specify the purpose of the investigation was regarded immaterial, the subject of investigation being clearly within the constitutional powers of the Senate.

In the face of these authorities it is hardly necessary to inquire whether the subject of inquiry directed by the joint resolution was proper matter of legislative probe. That subject at once suggests, expulsion of its members, if found to be bribe takers, and further legislation on the subject of punishing the crime, clearly within the powers of the legislature enumerated in the Constitution.

[3] But it is insisted that though either house may punish a contumacious witness for disobedience to its process, or the process of one of its committees, no such power could by statute or resolution be devolved on one of the committees. The diligence of counsel and the investigation of the court have failed to find any case affirming the proposition, other than In re Davis, 58 Kan. 368, 49 Pac. 160. Denying it are People v. Learned, 5 Hun (N. Y.) 626, Ex parte Parker, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011, 7 Ann. Cas. 874, and the dissenting opinion in In re Davis.

To deny the power of the committee to en-

force obedience to its process in the manner provided by the statute, we would have to hold the act unconstitutional. To so hold the act would have to be clearly violative of some constitutional guarantee. There is surely nothing in our constitution expressly prohibiting such delegation of power. The act involved in People v. Learned, supra, was held not in conflict with the constitutional provision declaring that no person shall be deprived of life or liberty or property without due process of law. The conclusion we reach, that the act is valid, and the action of the committee authoritative, though not directly decided, we think supported by the reasoning and some of the authorities cited in Ex parte Caldwell, 61 W. Va. 49, 55 S. E. 910, 10 L. R. A. (N. S.) 172, 11 Ann. Cas. 646.

[4] Lastly, as to the question of privilege relied on. The privilege invoked is not a personal privilege of the witness, but the supposed right or privilege of the prosecuting attorney, because of the circumstances under which witness obtained his information. Witness asks no personal protection. The prosecuting attorney objects that his evidence would disclose the information to the committee in advance of a trial of the accused members on indictments found, and that the jurisdiction of the criminal court is exclusive of any other authority to try and punish the offending members of the legislature. The rule respecting state secrets is also appealed to. We do not think that rule has any application to the case here. While there are instances in which public officers, on grounds of public policy, may not be compelled to disclose information obtained in the course of their employment, such as revenue officers and the like, no principle of public policy is involved here as between witness and the state or the state's officer. There is no public policy of suppressing knowledge or information of the guilt or innocence of persons accused of crime, no matter how obtained, particularly where that knowledge or information is sought by a legislative committee, in the lawful pursuit thereof. There may be instances where the mouth of a prosecutor could be closed by a citizen consulting and giving him information, for the purpose of getting his advice on the propriety of some proposed or contemplated criminal proceeding. There the relationship of attorney and client might be established, and the information become privileged, cutting off the prosecuting officer from disclosing the information so acquired. But no such relationship of attorney and client existed between witness and prosecutor in this case. We think the point is without substantial merit.

For the reasons stated, the writ was properly denied, and the petitioner rightfully remanded to the custody of the defendant.

CAVENAUGH v. JARMAN.

(Supreme Court of North Carolina. Oct. 29, 1913.)

1. APPEAL AND ERROR (§ 959*)—MATTERS OF DISCRETION—MOTION TO AMEND—DENIAL.

Denial of a motion to amend a complaint, in the exercise of the trial court's discretion, will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3831; Dec. Dig. § 959.*]

2. JUDGMENT (§ 720*)—CONCLUSIVENESS—ESTOPPEL.

A deficiency judgment having been rendered against plaintiff in foreclosure, he conveyed certain other land to his son-in-law, who on the same day conveyed the same to plaintiff's wife. Execution was levied on the land, and a homestead allotted thereunder, to which exceptions were filed and a judgment rendered, holding that plaintiff was not entitled to homestead and directing the sale of the land. *Held*, that such judgment constituted an estoppel precluding plaintiff from thereafter maintaining an action to recover the land as homestead.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

3. TRUSTS (§ 366*)—PAROL TRUST—ENFORCEMENT—PARTIES.

Where plaintiff against whom a deficiency judgment in foreclosure was rendered conveyed land to his son-in-law, who immediately conveyed the same to plaintiff's wife, and the land was thereafter sold on execution based on the judgment, plaintiff could not establish a parol trust in the land for his own benefit as against the grantee in his deed, and his wife and children, in a suit to which they were not parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 574-583; Dec. Dig. § 366.*]

4. PLEADING (§ 218*)—DEMURRER—JUDGMENT.

Where, in a suit to enforce a constructive trust in certain land, the complaint was held insufficient on demurrer, and no answer was filed by defendant or any facts admitted, the judgment should have merely determined that the complaint did not state a cause of action, and it was improper to include an adjudication of title to the land in controversy and an order for a writ of possession and for damages.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 549-566; Dec. Dig. § 218.*]

Appeal from Superior Court, Onslow County; Connor, Judge.

Suit by J. E. Cavanaugh against H. A. Jarman. Judgment for defendant, and plaintiff appeals. Modified and affirmed.

The only parties to this action are J. E. Cavanaugh, the plaintiff, and H. A. Jarman, the defendant. The complaint alleges, in substance, that in 1905 the plaintiff and his wife executed a mortgage to one Mills, conveying certain lands, to secure a debt; that upon default in the payment of the debt, an action was instituted against the plaintiff and his wife in the superior court of Onslow county, in which a decree was rendered at July term, 1908, adjudging the amount due, and condemning the land to be sold to pay the same; that the land was sold under the decree and the proceeds applied to the judgment, leaving a balance of \$382.52

due thereon; that after said judgment was docketed the plaintiff conveyed another tract of land of 25 acres, which belonged to him, to his son-in-law, and on the same day the son-in-law conveyed the land to the wife of the plaintiff; that execution issued on the judgment of 1908 to collect the balance due thereon and was levied on the said 25 acres; that a homestead was allotted under said execution, and exceptions thereto were filed, which were passed on at April term, 1912, and a judgment was then rendered substantially holding that the plaintiff was not entitled to a homestead and directing the land to be sold; that said land was sold under execution on the 1st day of July, 1912, and the defendant became the purchaser at the price of \$530, and took a deed therefor; that protest was made against the sale, upon the ground that it had not been properly advertised, and was not being offered for sale at the hour allowed by law. There was also allegation that the plaintiff was an ignorant man, and that the deed to his son-in-law and from him to the wife were executed in good faith and under advice that this was the best way to secure a homestead, and that the price paid by the defendant was inadequate. The defendant demurred to the complaint, upon the ground that it failed to state a cause of action in any one, and also that it showed no title or interest in the plaintiff. The demurrer was sustained, and the plaintiff excepted. The plaintiff then moved the court to allow him to amend the complaint by alleging, in substance, specifically that the plaintiff made the conveyance of the tract of land mentioned in the complaint, under which his wife obtained the deed therein mentioned, being ignorant of the true manner of securing to himself, his wife and children, their homestead rights, and that the true purpose and intent of the transaction was that the said property should be held in trust for the purposes of securing to the said plaintiff, his wife and children, the homestead allowed by the Constitution of North Carolina; that there was no intent to defraud any creditors in so doing, but that the plaintiff, through ignorance and advice of others, honestly, believed that this was the proper way to obtain his homestead rights for the benefit of his wife and children, and such was the expressed trust attached to the said deeds therein mentioned. The court declined to permit the plaintiff to amend the complaint as above, holding also as a matter of law that such amendment was immaterial and could not affect the result of the action. To the court's declining to allow such amendments and to its ruling the plaintiff excepted. The judgment also contains an adjudication of title, an order for a writ of possession against the plaintiff, and for an assessment of damages against the plain-

tiff and the surety on his bond. The plaintiff excepted and appealed.

G. V. Cowper, of Kingston, and Duffy & Koonce, of Jacksonville, for appellant. McLean, Varser & McLean, of Lumberton, and Frank Thompson, of Jacksonville, for appellee.

PER CURIAM. [1] The ruling of his honor on the motion to amend seems to have been in exercise of his discretion, and would not be reviewable, but we concur in the opinion that if the amendment had been allowed, the complaint, as amended, would not have stated a cause of action.

[2, 3] The facts are not clearly stated, but as they appear the judgment of 1912 would be an estoppel, and if there was no estoppel, the plaintiff could not establish a parol trust in his own favor against the grantee in his deed, under *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028, and his wife and children, alleged to be the other beneficiaries of the trust, are not parties.

[4] The exceptions to the form of the judgment are well taken. No answer has been filed by the defendant, and no facts are admitted, and the judgment upon the demurrer should do no more than adjudicate that the complaint does not state a cause of action, and that the plaintiff has no right to sue.

It also appears that the bond of the plaintiff does not purport to cover anything except costs.

The judgment will therefore be modified to the effect that the demurrer be sustained, the action be dismissed, and that the defendant recover of the plaintiff and his surety his costs.

Modified and affirmed.

STATE v. LUCAS.

(Supreme Court of North Carolina. Oct. 29, 1913.)

1. HOMICIDE (§ 118*) — SELF-DEFENSE — RETREAT TO THE WALL.

Where an unprovoked assault with intent to kill is made upon a person, he may stand his ground and, if necessary, kill his assailant, although, if the assault were not with intent to kill, he would be required to retreat to the wall before taking life in self-defense.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 168-171; Dec. Dig. § 118.*]

2. HOMICIDE (§ 118*) — SELF-DEFENSE — UNPROVOKED ASSAULT.

The rule requiring one to quit the fight before he can maintain self-defense applies only where the person who slays another provoked the dispute or entered into it unlawfully.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 168-171; Dec. Dig. § 118.*]

3. HOMICIDE (§ 300*) — HARMLESS ERROR — INSTRUCTIONS — CURE BY OTHER INSTRUCTIONS.

Error in an instruction which required the defendant to prove that he was without fault

in entering into the difficulty which resulted in a homicide and to show that he quit the fight and went as far as he could with safety requires a reversal of the conviction where it was the only instruction which attempted to lay down the rules of self-defense for the jury, although another instruction had referred to it in general terms.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

Theodore Lucas was convicted of murder in the second degree, and he appeals. Reversed, and new trial ordered.

Indictment for murder, tried before his honor, G. S. Ferguson, judge, and a jury at May term, 1913, of the superior court of Cumberland county. On the trial below it was proved that on March 15, 1912, in Cumberland county, the prisoner, Theodore Lucas, shot the deceased, Gilbert McDougal, with a pistol, inflicting wounds from which he shortly died.

There was evidence on part of the state tending to show that at the time there was altercation between the prisoner and deceased, when the latter was seen to put his hand on the prisoner's shoulder, when the latter drew his weapon and fired the shots which resulted fatally, and there was no adequate provocation or legal excuse for the homicide on the part of the defense. The prisoner, a witness in his own behalf, testified in part as follows: "I am the defendant in this action. I shot Gilbert McDougal. When I shot him, he came up to me, he did, and asked me what was that about me sending for him not to come up there. He was a married man and I had done discussed the matter, and said they just couldn't be together so much and I was the same as her brother. He made threats that he was going to get drunk and what he was going to do to me. When I shot him he was making towards me with a knife. He caught my arm. I was trying to keep him from striking me and was running backwards, and the first time I shot him I shot myself through the arm. He struck at me and caught and pulled me this way and I shot myself through the arm. He run me 10 or 15 steps after he was shot three times, and the last one he said: 'You damn son of a bitch, you better run. If I get you I will kill you.'" There was other testimony from eyewitnesses of the occurrence, tending to support this statement and tending to show that the homicide was committed by the prisoner in his necessary self-defense. There was evidence also to the effect that a knife was found near the deceased when he fell; one witness saying when so found it was shut and another that it was open.

The court being of opinion that there was no evidence to justify a conviction of murder

in the first degree, the case was submitted on murder in the second degree, manslaughter, or excusable homicide. There was verdict guilty of murder in second degree. Judgment, and prisoner excepted and appealed.

Shaw & MacLean, of Fayetteville, for appellant. The Attorney General and T. H. Calvert, Asst. Atty. Gen., for the State.

HOKE, J. (after stating the facts as above). After charging the jury correctly as to murder in the second degree and manslaughter, the court below, in reference to the prisoner's claim of self-defense, stated the rule as follows: "But if you are satisfied he was without fault at the time, that he did not enter into the quarrel willingly, that he did not enter into the fight maliciously, but that having entered into the fight he quit it and went as far as he could with safety and was followed by the deceased and then pushed to the wall and shot and killed the deceased, then he would be acting in self-defense"—and to this the prisoner duly excepted.

[1] It is held for law in this state that, when an unprovoked and murderous assault is made on a citizen, he is not required to retreat but may stand his ground and take the life of the assailant if it is necessary to do so to save himself from death or great bodily harm. *State v. Hough*, 138 N. C. 663, 50 S. E. 709; *State v. Blevins*, 138 N. C. 668, 50 S. E. 763; *State v. Dixon*, 75 N. C. 275.

In the *Hough Case*, the doctrine is stated as follows: "If an assault be committed under such circumstances as to naturally induce the defendant to believe that the deceased was capable of doing him great bodily harm, and intended to do it, then the law will excuse the killing, because any man who is not himself legally in fault has the right to save his own life or to prevent enormous bodily harm to himself. (4) There is a distinction between an assault with felonious intent and assault without felonious intent; in the former a person attacked is under no obligation to flee but may stand his ground and kill his adversary, if need be; in the latter he may not stand his ground and kill his adversary, if there is any way of escape open to him."

In the *Blevins Case*, speaking to the position the court said: "It has been established in this state by several well-considered decisions that where a man is without fault, and a murderous assault is made upon him, an assault with intent to kill, he is not required to retreat but may stand his ground, and if he kill his assailant, and it is necessary to do so in order to save his own life or protect his person from great bodily harm, it is excusable homicide and will be so held (*State v. Harris*, 46 N. C. 190; *State v. Dixon*, 75 N. C. 275; *State v. Hough*, 138

N. C. 663 [50 S. E. 709]); this necessity, real or apparent, to be determined by the jury on the facts as they reasonably appeared to him. True, as said in one or two of the decisions, this is a doctrine of rare and dangerous application. To have the benefit of it, the assaulted party must show that he is free from blame in the matter; that the assault upon him was with felonious purpose; and that he took life only when it was necessary to protect himself. It is otherwise in ordinary assaults, even with deadly weapons. In such case a man is required to withdraw if he can do so and to retreat as far as consistent with his own safety. *State v. Kennedy*, 91 N. C. 572. In either case he can only kill from necessity. But in the one he can have that necessity determined in view of the fact that he has a right to stand his ground; in the other he must show as one feature of the necessity that he has retreated to the wall."

It will be noted from these citations, and they are in accord with the doctrine prevailing here, that when one is subjected to an unprovoked assault, felonious or otherwise, he is not always required to quit the combat in order to maintain the position of self-defense. As we have seen, if the assault is unprovoked and with intent to kill, the person may stand his ground, and if an ordinary assault he must retreat to the wall; that is, withdraw as far as safety permits.

[2] This principle of requiring one to quit the fight in order to maintain self-defense obtains only when the person who slays another has provoked the dispute or entered into it unlawfully.

In the first part of this excerpt, therefore, the court was correct in holding that, in order to establish self-defense, the prisoner must be without legal fault in entering upon the difficulty; but having said this and on the facts in evidence he committed error in imposing on the prisoner, as he did, the further burden of showing he "quit the fight," went as far as he could with safety, and was followed by deceased, and then, being pushed to the wall, he then shot and killed the deceased.

[3] It is urged for the state that, while this direction, when standing alone, may be subject of criticism, it should not be held for reversible error because in the charge as a whole the position of self-defense has been fairly presented. We are fully mindful of this wholesome rule for construing a judge's charge, which has been approved in several of our recent decisions, but are not at liberty to adopt the suggestion of the learned counsel in the present instance. While his honor in a former part of the charge made one reference in general terms to the doctrine of self-defense as being a killing from necessity, it is in this present portion that he lays down the rule on the subject for the jury's guidance, and it is the only place he intends or

professes to do it. There is nothing in any other portion of the charge that corrects or tends to correct or qualify the rule as stated, and in our opinion it amounts to reversible error, entitling the prisoner to a new trial. It is so ordered.

New trial.

KISTLER v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Oct. 29, 1913.)

APPEAL AND ERROR (§ 781*) — DISMISSAL OF APPEAL—GROUNDS—COLLUSIVE ACTION.

The Supreme Court will not attempt to construe Laws 1907, c. 24, § 3, and the act of Congress ratified March 3, 1913 (Act March 3, 1913, c. 117, 37 Stat. 732), as to transportation of intoxicating liquor, without the benefit of a full argument by opposing counsel in a case in which there is a real controversy, and will therefore dismiss an appeal from a judgment in an action brought to obtain a construction of such act where it is apparent that both parties are interested on the same side of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.*]

Appeal from Superior Court, Burke County; Cline, Judge.

Action by A. M. Kistler against the Southern Railway Company. From a judgment for the plaintiff upon an agreed statement of facts, the defendant appeals. Appeal dismissed.

This is an action to recover one barrel of beer, consigned to the plaintiff, and heard upon an agreed statement of facts. There was judgment in favor of the plaintiff, and the defendant excepted and appealed.

S. J. Ervin, of Morganton, for appellant. W. A. Self, of Hickory, for appellee.

PER CURIAM. This is a proceeding to obtain a determination of the question whether the defendant can legally transport a barrel of beer from a point beyond the state to Morgantown, N. C., and there deliver it to the plaintiff. The plaintiff files a brief contending that chapter 24, § 3, Laws 1907, forbidding such act, and the act of Congress ratified March 3, 1913 (37 Stat. 732, c. 117), cannot deprive him of the right to receive such consignment. The defendant in his brief avers that he is ready to obey the law if he knows what it is and files a brief in accordance with the contention of the plaintiff. It is apparent that both parties are interested on the same side and that this is really a proceeding to ask the advice or opinion of the court on practically a "moot case," though there is no doubt as to the facts. There was no stay of execution, and the beer was doubtless delivered and long since consumed.

In *Parker v. Bank*, 152 N. C. 255, 67 S. E. 492, this court held that the object of the

suit was evidently to procure a construction of section 4, c. 150, Laws 1909, and that it was instituted solely for the purpose of obtaining the opinion of the court, and dismissed the action. That case referred to *Blake v. Askew*, 76 N. C. 327, in which it was attempted in a similar way to obtain the opinion of the court as to the validity of the special tax bonds and where the same action was taken. In this case it would be necessary to construe the above statutes of the state and of the United States, and we are not willing to pass upon a question of such importance without the benefit of a bona fide controversy and full argument by opposing counsel. The court has refused to entertain controversy submitted to obtain the opinion of the court upon the administration of the public school system (*Board of Education v. Kenan*, 112 N. C. 567, 17 S. E. 485) or to advise a sheriff as to the application of moneys (*Millikan v. Fox*, 84 N. C. 107; *Bates v. Lilly*, 65 N. C. 232).

We must therefore enter an order: Appeal dismissed.

OUTLAW v. GRAY.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. MINES AND MINERALS (§ 55*)—CONVEYANCE—CONSTRUCTION.

An indenture under seal granting on a stated consideration all of the marl and fossil deposits under the grantor's land, to the grantee, his heirs and assigns, together with the right to enter and remove the same, is a conveyance in fee, and is not a mere temporary license revocable at the will of the grantor, and hence the right to remove the marl and other deposits passes to the executors and representatives of the grantee.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

2. DEEDS (§ 90*)—CONSTRUCTION.

A deed should be construed most favorably to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. § 90.*]

3. MINES AND MINERALS (§ 55*)—CONVEYANCE.

The minerals beneath the surface of land may be conveyed in fee separate from the surface of the land.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

Clark, C. J., and Hoke, J., dissenting.

Appeal from Superior Court, Lenoir County; Allen, Judge.

Action by F. P. Outlaw against M. E. Gray. From a judgment for plaintiff, defendant appeals. Reversed.

Loftin & Dawson and G. V. Cowper, all of Kinston, for appellant. Rouse & Land, of Kinston, for appellee.

BROWN, J. The case turns upon the construction of an indenture from Julia E. Gray

to M. E. Gray, the material part of which is as follows: "That said party of the first part for and in consideration of the sum of ten dollars (\$10.00) to her in hand paid by the said party of the second part, receipt of which is hereby fully acknowledged, the said party of the first part hath given, granted, bargained, and sold, and by these presents do give, grant, bargain, sell, and convey unto the party of the second part, his heirs, executors, administrators, and assigns, the right of entering in and upon the lands hereinafter described for the purpose of searching for all marl deposits and fossil substance, and for taking and removing therefrom said marl and fossil substance, which he may find imbedded in the earth of the said lands, and for mining and quarrying operations for that purpose to any extent he may deem advisable, but not to hold possession of any part of the said lands for any other purpose whatsoever." Here follows a description of the lands and a covenant that no other consideration by way of rent is to be paid for the marl except that recited in the deed, and a clause wherein the grantee covenants that "no damage shall be done to said lands other than shall be necessary in conducting the operations specified." The instrument is under seal.

[1] The plaintiffs contend that the written instrument is a mere license to quarry for marl and fossil substances in the earth and that it expired with the death of the grantor. His honor so held. The defendant contends it is a deed in fee and that it conveys in fee simple all "marl deposits and fossil substances" under the surface of the land described in the instrument under a covenant upon the part of the grantee that no damage shall be done the land other than shall be necessary to remove such deposits.

The character of the instrument and the language employed are both appropriate to the conveyance of a fee-simple estate in "all the marl deposits and fossil substances" imbedded in the earth of the lands described therein, and such is the legal construction we put upon it. It must be admitted that the deed is sufficient in form to convey a fee in the land itself had that been the subject of conveyance. That being so, it is sufficient to convey a fee in the mineral deposits described in it. The grant is made upon a present and stated consideration, and not upon a rent charge or other consideration payable in the future. It is made of "all the marl deposits and fossil substances" imbedded in the land, and not only of such as the grantee may from time to time remove within a given time. As the grantee is given the right to remove "all the marl deposits," his interest cannot be terminated until they are removed. Under a revocable license they could be terminated at any time. It is made to the grantee and "his heirs, executors, ad-

ministrators and assigns," and not to the grantee for years or life. Every clause and recital in the instrument appears to be inconsistent with the idea of a temporary license revocable at the will of the grantor, and is wholly consistent with an intention to convey a fee.

[2] If the meaning is doubtful, we should construe it a fee; that being more favorable to the grantee. Devlin on Deeds, c. 25.

[3] That mineral substances beneath the surface of the earth may be conveyed by deed distinct from the right to the surface itself is now well settled. The common-law courts of England regarded such rights as incorporeal hereditaments, a right issuing out of a thing corporate, because there could be no livery of seisin. In this country, where livery of seisin is not essential in the transmission of the title, such rights are regarded as corporeal hereditaments and pass by apt words in a deed, though not susceptible of livery of seisin; delivery or registration of the deed taking its place. *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 449. The conveyance of such rights in fee is common in Pennsylvania and other mining states. In that state there are numerous decisions to the effect that a conveyance of the right to take the coal under the grantor's tract of land is a conveyance of the entire ownership of the coal in place beneath the land. *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 761, and notes. This case is almost on all fours with the case at bar. The words employed in this deed are very comprehensive and express absolute ownership and complete enjoyment of the interest conveyed. They are inconsistent with the idea of a temporary and transient use.

Reversed.

CLARK, C. J., and HOKE, J., dissent.

BARFIELD v. HILL et al.

(Supreme Court of North Carolina. Oct. 15, 1913.)

1. ADVERSE POSSESSION (§ 115*)—EVIDENCE—QUESTIONS FOR JURY.

In an action to try the title to land, where the plaintiff introduced evidence tending to prove adverse possession for more than 21 years under color of title, a motion to nonsuit was properly denied.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.*]

2. TRIAL (§ 141*)—DIRECTION OF VERDICT—WHEN POWER MAY BE EXERCISED.

Where the evidence is uncontradicted, and only one inference can be drawn therefrom, the judge may direct the jury to find a certain verdict if they believe the evidence, but it is very rare that a verdict can be properly directed when the sole question is the possession of land, and much evidence is offered on each side.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ELGIN CITY BANKING CO. v.

McEACHERN et al.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. **BILLS AND NOTES (§ 330*)—TRANSFER—INDORSEMENT—NECESSITY.**

Under Revisal 1905, § 2178, providing that a negotiable instrument payable to order may be negotiated by the indorsement of the holder coupled with delivery, the delivery of a promissory note payable to order without indorsement makes the transferee a mere equitable owner, and he does not take the paper free from defenses good between the parties as he would were he a bona fide purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-804; Dec. Dig. § 330.*]

2. **BILLS AND NOTES (§ 330*)—DEFENSES.**

A mere equitable owner of a promissory note takes it subject to defenses good against the holder, and consequently, where the note was procured by fraud, the transferee's want of notice of the fraud is immaterial; it being a good defense against him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-804; Dec. Dig. § 330.*]

3. **EVIDENCE (§ 318*)—ADMISSIBILITY—HEARSAY.**

In an action upon a note, where the plaintiff was a mere equitable holder of the instrument, a letter written by one not a party to the note tending to show good faith of plaintiff, is inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

Appeal from Superior Court, Robeson County; Ferguson, Judge.

Action by the Elgin City Banking Company against R. A. McEachern and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action upon a note executed by the defendant and payable to the order of Albert O. Tracy for the purchase price of a horse. The plaintiff alleged that the note was transferred for value and before it was due by indorsement to Coleman & Son and by Coleman & Son to the plaintiff. The defendant denied the indorsement by Tracy and alleged that the note was procured by false and fraudulent representations. Defendants further alleged that the note was not to become effective until and unless it was signed by 14 solvent persons, the plan of sale being that 14 men would take shares of \$200 each, making up the total purchase price of \$2,800, and it was only signed by 11 men, some of whom were not solvent.

The evidence as to the indorsement of the note was as follows:

Charles R. Coleman testified: "I reside at Wayne, Ill., and am engaged in importing and breeding Percheron horses and farming. I am associated with my sons in business under the firm name of Charles R. Coleman & Sons. On February 13, 1910, I purchased from Alvin O. Tracy the note of Robert A. McEachern et al. [The note was exhibited to him and is the same note sued on in this case.] I accepted this note, the face value

thereof with accrued interest thereon in payment for an imported stallion. Mr. Tracy gave me the bank letter from the Bank of Red Springs at the same time that I bought the note. The purchase price of the horse I sold Tracy was something like a thousand dollars. I inquired about the note from Tracy, and he satisfied me that the makers were solvent and responsible. I made no inquiry as to what the note was given for. He recommended it so highly that he said he had just as soon put his name across the back of the note. He said he would put his name on the back of the note."

The jury returned the following verdict:

"(1) Did the plaintiff become the holder of the note sued on before overdue and without notice that it had previously been dishonored and did it take it in good faith and for value, without notice of any infirmity or defect in the same? Answer: No.

"(2) Is the plaintiff the equitable owner of the note sued on? Answer: Yes.

"(3) Did the defendants sign the note sued on with the agreement made at the time that the note should be surrendered in the event Tracy or his agent, James, failed to procure the signature of 14 solvent or responsible parties to said note? Answer: Yes.

"(4) Was the execution of the note sued on procured by false and fraudulent representations, as alleged in the answer? Answer: Yes."

The plaintiff requested the following special instructions to be given to the jury by his instructor:

"(1) If the jury shall find from the evidence that the note in question was, on the 13th day of February, 1910, sold and delivered, for value, by Alvin O. Tracy to Charles R. Coleman & Sons, and on the 10th day of May, 1910, the same was indorsed, sold, and delivered by said Coleman & Sons to the Elgin City Banking Company, for value, the said plaintiff is presumed to be the holder of said note in due course."

His honor refused to give this instruction, and the plaintiff excepted.

"(2) If the jury shall find from the evidence that the Elgin City Banking Company had no knowledge of any fraud or defect in the execution of said note, at the time the purchase of same from said Coleman & Sons, and that said note was indorsed by said Coleman & Sons and delivered, for value, before maturity, to plaintiff, the said Elgin City Banking Company will be presumed to be the holder of said note in due course."

His honor refused to give this instruction. Plaintiff excepted.

His honor charged on the first issue:

"In order for the plaintiff to be the holder of the note in due course, it is necessary for the plaintiff to show to you from the evidence, and by its greater weight, that it is a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purchaser of the note for a valuable consideration, and before it is due, and in order to constitute the plaintiff a holder in due course, it is necessary that it should be indorsed by the payee on the note, and when the indorsement is denied it devolves upon the plaintiff to prove the indorsement by the greater weight of the evidence. So that one of the first questions for you to inquire into is whether or not the note was indorsed by Tracy to Coleman. The evidence touching the indorsement, and the only testimony in regard to that, is contained in the deposition of Coleman, and it is contained in that portion of the deposition in which the question is asked: 'Was there any contract between you and A. O. Tracy or between the firm of C. R. Coleman & Son and A. O. Tracy at or prior to the indorsement of this note that the note should be returned if it is not good, and he recommended it so highly that he had said he had just as soon put his name across the back.' There was nothing said about the indorsement on the note; he said he would put his name on the back of the note; that is all the evidence touching the question of indorsement. It is contended on the part of the defendants that it was only a promise to put it on the back of the note, and there is no evidence that he actually did write his name on the back of the note, but he only agreed to do it without any proof that he did do so. If, upon the evidence, you shall be satisfied by its greater weight that he indorsed the note, then it would be your duty to find that as a fact in consideration of the first issue; but if the proof does not satisfy you by its greater weight when you come to examine that part of the testimony, and you fail to find that it was indorsed by A. O. Tracy, not that his name was on it but if he put his name on it himself, then it will become your duty to answer the first issue, 'No,' because, unless it was indorsed by the payee, A. O. Tracy, the legal title would not pass to Coleman and could not by Coleman's indorsement pass to the plaintiff. If you should find that the note was indorsed, then it was purchased for a valuable consideration, without notice of its infirmity."

Judgment was entered upon the verdict in favor of the defendants, and the plaintiffs excepted and appealed.

A. P. Spell, of Red Springs, and R. E. Lee, of Lumberton, for appellant. McIntyre, Lawrence & Proctor and McLean, Varser & McLean, all of Lumberton, for appellees.

ALLEN, J. [1] As the note sued on is payable to order and not to bearer, the indorsement by Tracy was necessary to pass the title to Coleman & Son, freed of the equities and defenses of the makers against the payee, and without such indorsement the holders of the note were only the equitable

owners and subject to these defenses (Revisal, § 2178; Tyson v. Joyner, 139 N. C. 72, 51 S. E. 803), and the jury, under proper instructions, has found in answer to the first and second issues that the indorsement was not made. Coleman & Son then became the equitable owners of the note under the findings of the jury, subject to the legal defenses of the defendants against Tracy; and, as they could not sell more than they owned, the plaintiff took the note by purchase from Coleman & Son with the same infirmity attached. It follows, therefore, that the prayers for instruction requested by the plaintiff were properly refused, as they are predicated upon the idea that the plaintiff was a holder in due course and was the owner of the legal and equitable title.

[2, 3] In this view of the case, it is not necessary to consider the first four exceptions to evidence, as they all bear on the question of good faith on the part of the plaintiff, and its notice of fraud, which was immaterial if the plaintiff was only the equitable owner. It also appears that his honor charged the jury that the plaintiff had no actual notice of any fraud.

The letter offered in evidence was properly excluded, as the declaration of a stranger and hearsay, but, if admitted, it could have had no bearing on the case except to show good faith on the part of Coleman & Son in the purchase of the note, and good faith could have added nothing to their title if there was no indorsement.

There are many other exceptions in the record; most of them being directed to the evidence to prove false and fraudulent representations. We have examined all of them and find nothing that will justify a reversal of the judgment.

The evidence of fraud is stronger than in many of the actions on so-called "horse notes" that have been before us.

No error.

ROBINSON v. SECURITY LIFE & ANNUITY CO.

(Supreme Court of North Carolina. Oct. 29, 1913.)

1. INSURANCE (§ 138*)—LIFE POLICY—PREMIUMS—CONTRACT—MODIFICATION.

Where plaintiff contracted to take out a life policy under an agreement that he should be permitted to pay a quarterly premium of \$38.53, when in fact the quarterly premium on the policy which should have been charged was \$40.84, so that the contract was discriminatory, plaintiff was not for that reason required to pay the increased amount, but was entitled to refuse to enter into a new contract to do so.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246-249; Dec. Dig. § 138.*]

2. INSURANCE (§ 138*)—LIFE POLICY—STATUTES—CONSTRUCTION.

Revisal 1905, § 4775, provides that no life insurance company shall discriminate in favor of individuals of the same class and equal ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pectation of life in the amount of payment of premiums or rates charged, nor shall any company make any contract of insurance other than as plainly expressed in its policies, nor allow as inducement to insurance any rebate or premium payable on a policy, or any special favor or advantage in dividends, etc. *Held*, that such act purported to operate on insurance companies alone and did not invalidate a policy or agreement between the parties by which insurance was granted at less than the regular premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246-249; Dec. Dig. § 138.*]

3. INSURANCE (§ 198*)—INVALID CONTRACT OF INSURANCE—RECOVERY OF PREMIUMS.

Where an insurance company issued a policy for less than the regular premium in violation of Revisal 1905, § 4775, prohibiting discrimination among insureds of the same class, and accepted premiums at the reduced rate for a number of years, and then canceled the policy as illegal under the statute, the insured and insurer were not in *pari delicto*, and, the offense of the insurance company being but *malum prohibitum*, insured was entitled to recover the premiums paid as money received to his use.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

Appeal from Superior Court, Wayne County; Carter, Judge.

Action by M. E. Robinson against Security Life & Annuity Company. Judgment for defendant, and plaintiff appeals. Reversed.

This is an action to recover damages for the wrongful cancellation of a policy of insurance. On the 18th day of January, 1902, the defendant issued to the plaintiff a policy of insurance, in which it was provided that the premium should be \$154.11, payable annually, and at that time and since then the insured had the right, under the by-laws of the defendant, upon notice, to change the premium from an annual to a quarterly premium.

Dr. M. E. Robinson, the plaintiff, testified as follows: "Mr. Van Noppen came down here about the time they were organizing this company, in January, 1902, and he said that he wanted to get some prominent men insured in this company so that he could get some insurance, and asked me to give him a few names. I did so, and he came back and said if I would give him some insurance, he would give me enough medical examinations of applicants to pay the premium for the first year. He said that I could take out a policy with the premium of \$154.11, payable annually in advance, or I could pay a quarterly premium of \$38.53. He made a calculation at the time. I told him that I would take it quarterly, and I have been paying this quarterly premium for ten years, until they merged this company with the Jefferson Standard and others, some time last year. Since then they came around and said that they had made a mistake on my premium, which should have been \$40.84, and that I would have to pay this amount in the future, or they would cancel the policy. He told me my quarterly premium would

be \$38.53, and I told him that I would take the quarterly premium and have been paying it. I do not remember whether the first year's premiums were all paid out of medical service or not. I never did at any time pay \$154.11 premiums in advance or any other way, as that receipt states. I wrote to Mr. Grimesly to draw on the Bank of Wayne for payment of the quarterly premiums of \$38.53, and the company has drawn drafts for that amount every quarter for over ten years. I paid \$38.53 quarterly until April, 1912, when the contention arose. The agent of the company filled out the application for the policy at the time. The agent told me that the premium would be \$38.53 quarterly, and the company drew drafts for that amount for about ten years. I supposed that the policy set out our agreement correctly. I never made any complaint about the policy after I got it. There was an inducement offered us. I knew when I took out this policy that I was getting a special and material inducement as to the amount of premiums to be paid. I did not know that it was unlawful to take a policy under such inducements."

G. A. Grimesly testified as follows for defendant: "I was raised in Greene county and am secretary of the Security Life & Annuity Company. I became secretary in the early part of January, 1902. I kept the books of the company. The first annual premium on the policy of Dr. Robinson was paid in advance. The policy is dated January 18, 1902, the same month I became secretary. It was the duty of the treasurer to call upon policy holders for their premiums after the policies were written and delivered. I called on Dr. Robinson as secretary, about 11 months after the policy was written. Dr. Robinson never made any complaint to the company about the terms of this policy, nor were there any objections sent or offered to the company on account of the provisions of the policy that I ever heard of. The first objection I ever heard from Dr. Robinson to the provisions or terms of the policy was when he was given notice of the error in quarterly premium, some ten years after he had received the policy. The error in collecting this premium occurred as follows: We were collecting one-fourth of the regular annual premiums of \$154.11 instead of the usual quarterly premium. As soon as we discovered that, we attempted to correct it. The rules and regulations of the company are that the policies were written on an annual basis; that is, we charged an annual premium. The first year the agent was authorized to collect that premium. The annual premium is due in advance. If the policy holders elect to pay the quarterly premium instead of the annual premium, they may do so. The quarterly premium is not one-fourth of the annual premium with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any company that I know of. The quarterly premium is made usually with all companies by adding 6 per cent. to the annual premium and dividing by four. That is the deferred premium, and the interest is added to cover the cost of collecting. If he desires to pay semiannually, the custom is to add 4 per cent. and divide by two. The error in Dr. Robinson's premium was discovered in April or May, 1912. I thereafter demanded of him the same amount that other policy holders for like insurance were paying and no more. As soon as I notified Dr. Robinson of the mistake, he notified me that there was no mistake and of his agreement with Mr. Van Noppen. He wrote me a number of letters. From the time of the issuing of the policy up until the time of the discovery of the mistake ten years afterwards, there was no complaint made by Dr. Robinson that I know of. We called on him for the payment of the annual premium and he said he wanted to pay it quarterly. I do not think we drew drafts. I think Dr. Robinson's statement that he wrote me and requested me to draw on him was correct to the best of my recollection. I think he wrote me that he might be off on business and to draw on the Bank of Wayne. I failed to draw for the proper amount."

At the conclusion of the evidence there was judgment of nonsuit, and the plaintiff excepted and appealed.

Russell M. Robinson, of Goldsboro, and John M. Robinson, of Charlotte, for appellant. A. L. Brooks, of Greensboro, for appellee.

ALLEN, J. We will at the outset eliminate from the discussion the evidence as to the agreement with the agent of the defendant, and will assume that this agreement is merged in the written policy under the authority of *Floors v. Insurance Co.*, 144 N. C. 237, 56 S. E. 915.

Conceding this much, and treating everything as true which the evidence reasonably tends to prove, which is the established rule in passing upon judgments of nonsuit, it appears that the defendant issued its policy to the plaintiff in 1902, stating the annual premium to be \$154.11; that the by-laws of the defendant gave the plaintiff the right, at his election, to change the premium from an annual to a quarterly premium; that after the policy was issued the defendant drew a draft on the plaintiff for the annual premium, and he said he wished to pay his premiums quarterly; that thereafter the defendant drew on the plaintiff quarterly for ten years for a quarterly premium of \$38.53, which the plaintiff paid; that after the expiration of ten years the defendant demanded that the plaintiff pay a quarterly premium of \$40.84, which he refused to do; that the policy was thereupon canceled; that the plaintiff knew he was paying a reduced

premium, but did not know that this was illegal, if it was so.

[1] The reasonable inference from these facts, and inferences which the jury had the right to draw, are that after the policy was issued the plaintiff and defendant agreed to change it, acting under the authority of the by-laws of the defendant, and that for ten years the contract of insurance in existence was one to pay a quarterly premium of \$38.53 and not an annual premium of \$154.11. If this was the contract, whether legal or illegal, the plaintiff had the right to refuse to enter into a new contract at an increased premium, and no fault can be attributed to him in doing so.

This brings us to the consideration of the two questions chiefly debated in the oral arguments and the printed briefs:

(1) Is the contract, which the evidence of the plaintiff tends to establish, legal?

(2) If illegal, can the plaintiff maintain his action to recover the premiums paid under it, when the defendant, relying upon the plea of illegality, refuses to perform the contract?

[2] The defendant contends that the contract, as interpreted, is an unjust discrimination in favor of the plaintiff and forbidden by Rev. § 4775, which reads as follows: "No life insurance company doing business in this state shall make any distinction or discrimination in favor of individuals between insureds of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance." This section of the Revisal is in all material respects like section 4773a (Revisal 1908), which was considered at this term in *Blount v. Royal Fraternal Ass'n*, 79 S. E. 299, and should receive the same construction. The statute does not invalidate the contract of insurance or the agreement of the parties, and it purports to operate upon insurance companies alone. It says "no life insurance company shall make any distinction or discrimination," and fails to denounce as illegal a contract of insurance which gives a lower rate to the insured than to others, and it is manifest that at least one of the purposes of the statute was for the benefit of the stronger insurance companies, by declaring that in soliciting insurance all companies

should be on an equal footing, and that none should offer inducements below the published rates.

Mr. Vance, in his treatise on Insurance, speaking of statutes imposing conditions upon insurance companies to do business and regulating their contracts, says (pages 86 and 87): "When, however, the statutes imposing conditions upon doing business by the foreign insurer merely prohibit the making of the contract without compliance with their terms, the question as to the rights of the parties becomes of much greater difficulty. In accordance with the general rule that a contract that is prohibited is illegal, and therefore void, it would follow that neither one of the parties would take any rights under the contract, or could enforce the agreement against the other. Yet to apply this general doctrine to a contract made under such circumstances as usually attend the making of a contract of insurance would work great hardship and be manifestly unjust. The party insured cannot, without great difficulty, discover whether the insurer has complied with all the statutory requirements or not; and while it is true that the statutes imposing these conditions upon the insurer are public acts, and therefore presumed to be known to all, yet it would be unreasonable to require that every person to whom a corporate insurer offers a contract of insurance should make an exhaustive investigation in order to discover whether his co-contractor has been fully qualified to make the agreement that is proposed, which is a question of fact. It would seem that the insured has a right to presume that the insurer has complied with all the requirements of law. Accordingly, it is held by the great weight of authority that when the insured attempts to enforce such a contract, made in good faith, against the unlicensed insurer, the latter will be estopped to escape liability under the contract by pleading his own infraction of law. The same principle of estoppel, however, does not apply when the insurer is endeavoring to enforce some right under the contract against the insured. The plaintiff, not having legally qualified himself to make the contract under which he sues, has no standing in law or equity when he attempts to enforce it." Our case is stronger than the one covered by the quotation, as there is no statute which prohibits the contract made by the plaintiff.

[3] We might therefore rest our decision on the legality of the contract, but it is not necessary to do so. The contract is not immoral, and, if illegal, it is so by reason of the provisions of the statute (Rev. § 4775), and the action is not to enforce the contract, but to recover money received by the defendant under it, and after a refusal to perform. The citation from Vance marks the difference in the relations of the parties to the contract under these circumstances, and demonstrates that they are not in equal

fault. It is there said "that the insured has the right to assume that the insurer has complied with all the requirements of the law," and that "the latter will be estopped to escape liability under the contract by pleading his own infraction of law," and that the insured may maintain an action upon the contract when the insurer cannot.

This principle is clearly recognized in several recent decisions in our court, and notably in *Herring v. Lumber Co.*, 159 N. C. 382, 74 S. E. 1011, 42 L. R. A. (N. S.) 64, which in its essential features is almost identical with the one before us. In that case, the plaintiff and certain other neighboring land-owners agreed to sell their timber to the defendant in consideration of the payment of a stipulated sum, and the building of a standard gauge railway from Delway to Wallace, and the contract provided for the payment of a penalty upon failure to build the railway. The plaintiff conveyed his timber, and, when the defendant refused to build the railway, sued for the penalty, and one of the defenses set up was that the contract for building the railway was illegal and forbidden by Revisal, § 2598. The court, in considering the contention of the defendant as to the illegality of the contract, says: "We need not decide whether or not this is a correct position, as we are of the opinion with the plaintiff upon another view of the matter. It appears in the case that the plaintiff and his neighbors, who joined with him in the agreement to sell their timber to the Wallace Manufacturing Company, one of the defendants, were influenced in fixing the price of the same by the stipulation of the said company to construct this road, and that they sold the timber at much less than its reasonable worth because of this agreement, believing that if the road was built and put into operation the benefit or advantage they would derive therefrom would compensate them for the loss of the difference between the price charged by them for the timber and the real value thereof. This being so, it would seem to be very unjust and inequitable that the defendants should repudiate their agreement and rely on its invalidity for the purpose of evading the payment of a reasonable price for the timber; in other words, that they should be allowed to keep the amount of the difference between the price paid for the timber and its true value, and, at the same time, refuse to execute their part of the contract to build the road, even upon the ground that it is *malum prohibitum*. If the stipulation to construct the road is invalid, the plaintiff, if *particeps criminis*, is not in *pari delicto*. He can recover the amount of his loss without declaring upon the alleged illegal stipulation, and relief can be given without enforcing this part of the contract. In such a case the action, it may be said, is not based on the agreement alleged to be illegal or invalid, but on the promise created by law to repay mon-

ey of the plaintiff improperly obtained. 9 Cyc. p. 547."

Many authorities are cited in support of this position, and among others *Morville v. Am. Trust Soc.*, 123 Mass. 129, 25 Am. Rep. 40, in which the language used is so apposite to the facts in this record that we reproduce it: "The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises when the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act."

We are therefore of opinion that if the contract is illegal, which is at least doubtful, the plaintiff, not being in *pari delicto* with the defendant, can maintain his action, and that there was error in granting the motion to nonsuit.

Reversed.

FEREBEE v. NORFOLK SOUTHERN R. CO.

(Supreme Court of North Carolina. Oct. 29, 1913.)

1. MASTER AND SERVANT (§ 111*)—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE.

Plaintiff, a baggageman, while passing out onto the steps of a baggage car at night, as his train was moving into a station, fell from the car owing to the steps having been torn away after the train left its starting point. Some weeks prior to the accident, the railroad company placed and maintained a large number of boxes unsecured on a trestle platform, about 12 or 14 inches from a passing car. On the night in question one or two of the boxes had toppled over from jar or other cause, and struck and tore away the steps of the car. Held, that defendant was guilty of actionable negligence in leaving the boxes where they might collide with a passing train, and that such act was the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 215-217, 255; Dec. Dig. § 111.*]

2. MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—PROXIMATE CAUSE—NEGLIGENCE—VIS MAJOR.

Where defendant railroad company was negligent in placing a quantity of boxes near

the track where they might topple over and strike parts of a moving train, as they did, breaking the steps of a baggage car and resulting in injury to the baggageman, such negligence being the proximate cause of the injury, the railroad company was not relieved from liability because an unexpected or unusual storm might also have contributed to the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

3. DAMAGES (§ 53*)—PERSONAL INJURIES—MENTAL SUFFERING.

In an action for injuries to a servant, mental suffering, consisting of worry concerning the welfare of his wife and child during the period when he was unable to work, is too remote to constitute a proper element of damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100, 255; Dec. Dig. § 53.*]

Appeal from Superior Court, Wake County; Ferguson, Judge.

Action by W. G. Ferebee against the Norfolk Southern Railroad Company. Judgment for plaintiff, and defendant appeals. New trial for rehearing on the issue of damages.

The action was brought under the Federal Employer's Liability Act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1911, p. 1316]); the train on which plaintiff was employed and injured being engaged at the time in interstate commerce, and was submitted and determined on the following issues and verdict:

"(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) What is the whole amount of damages, if any, sustained by the plaintiff? Answer: \$15,000.

"(3) Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

"(4) What amount, if any, shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to the plaintiff's own negligence? Answer: ———"

R. N. Simms, of Raleigh, for appellant. Ward & Thompson, of Elizabeth City, and Douglass & Douglass and W. H. Lyon, Jr., all of Raleigh, and W. W. Elliott, of Norfolk, Va., for appellee.

HOKE, J. We find no reversible error affecting the determination of the first and third issues. There was evidence tending to show that, at the time of the occurrence, plaintiff was an employe of defendant company as baggagemaster and flagman on a train carrying passengers and freight from Raleigh, N. C., to Norfolk, Va., and that it was a part of plaintiff's duties to go out on the steps of the baggage car as the train moved into a station yard for the purpose of receiving the United States mail and, further, of preventing persons from getting on or off train when it was in motion and to assist the conductor in seeing that the

passengers entered and departed from the train in safety; that on June 2, 1912, at 9:15 p. m., the train on which plaintiff was so employed left the station yard in the city of Raleigh on its regular run for Norfolk, and, as it was approaching the station of Wendell, plaintiff, in the line of his duty, went on the platform and started down the steps, and, they having been torn away after the train left Raleigh, he fell through the opening, was dragged some distance by the train, and was fearfully crushed and mutilated and permanently injured; that the night was dark; there was no light on the platform at the time except a little railroad lantern, carried by plaintiff, and which threw no light up or down but just "glared from the sides."

[1] It was further proved that for some weeks or longer prior to the occurrence, on the platform or walkway of a trestle, in the Jones street yard, in the city of Raleigh, there had been left a number of boxes to hold oil cans for engineers and other things; these boxes, 4 feet tall and 13 and 18 inches thick, the same being on the trestle platform, setting up on end and unsecured in any way and about four feet from the rail, leaving them 12 or 14 inches from the car. And the evidence further tended to show that, on the night in question, one or two of these boxes had toppled over from the jar or other causes and had struck and torn away the steps and thus occasioned the injury complained of. It was a negligent act to leave boxes of that shape and size so near the main track of the railroad where they were liable, at any time and from ordinary causes, to fall over and collide with defendant's trains, and, the jury having accepted this version of the occurrence and determined, further, that such act was the proximate cause of plaintiff's injuries, an actionable wrong has been established; the statute on which the suit is brought, the Federal Employer's Liability Act, having made provision that contributory negligence, even if it existed, shall only be considered in diminution of damages.

[2] It was urged for defendant that the evidence tending to show the prevalence of an unusual windstorm on the night in question has not been allowed its proper weight, but, on the facts in evidence, the position cannot avail the defendant. The negligent placing of the boxes having been accepted as the proximate cause of the injury, or one of them, the defendant is not relieved, though an unexpected or unusual storm should have contributed also to the result. In *Shearman & Redfield on the Law of Negligence* (6th Ed. § 16), it is said: "Inevitable accident is a broader term than an act of God. That implies the intervention of some cause not of human origin and not controllable by human power. An accident is inevitable if the person by whom it occurs neither has nor is

legally bound to have sufficient power to avoid it or prevent its injuring another. In such a case, the essential element of a legal duty is wanting, and it cannot therefore be a case of negligence, etc." Pursuing the same subject in section 16 B, the author says, further: "The rule is the same when an act of God or an accident combines or concurs with the negligence of the defendant to produce the injury or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his own negligent act or omission." And, as heretofore stated, no reason is shown why the verdict on the third issue, that as to contributory negligence, should be disturbed; it having been made to appear that plaintiff went out on the platform and started down the steps, in the performance of his duty, and the jury, under a proper charge, having found that he was careful at the time and, under all the circumstances, had no reason to anticipate nor expect that the steps had been torn away.

[3] On perusal of the record, however, we must hold that there was error committed on the trial of the issue as to damages. On that issue, the plaintiff, over objection by defendant to both question and to specific portions of the answer, was allowed to testify as follows: "Q. In what respect were you troubled mentally? A. I was troubled about having a wife and child on me, with no prospect and no future; I was worried about having a boy four years old; I was worried all the time about no income whatever; I never received a cent for the period of nine months; I had a wife and a child, who had never been to school a day in his life, to educate. (The defendant objects to the last part of the answer.)" It is very generally held that mental suffering which would naturally result from physical injury, wrongfully inflicted, is a proper element of the damages which may be awarded, and, in such case it may be allowed whether spoken to directly by the witness or not; but the decisions are also to the effect that the damages recoverable from this source must be confined to those which are the natural and proximate result of the injury as it affects the person himself, and that the concern which may be caused by its possible or probable effect upon others may not be considered. The effort to fix upon proper compensation in injuries of this character is, in many cases, very unsatisfactory, and the testimony received in this instance would introduce such an additional element of uncertainty and of divergence among litigants suffering the same or similar injuries that it has been very generally regarded as too remote. *Atchison, etc., R. R. v. Chance*, 57 Kan. 40, 45 Pac. 60; *Maynard v. Oregon R. R.*, 46 Or. 15, 78 Pac. 988, 68 L. R. A. 477; *Statler v. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063;

Pittsburg R. R. v. Story, 63 Ill. App. 239; Keyes v. Railway, 36 Minn. 290, 30 N. W. 888; Brown, Receiver, v. Sullivan, 71 Tex. 470, 10 S. W. 288; 1 Sedgwick on Damages (9th Ed.) § 439.

For the error indicated, there must be a new trial on the issue of damages, and it is so ordered.

Partial new trial.

DELL SCHOOL et al. v. PEIRCE.

(Supreme Court of North Carolina. Oct. 22, 1913.)

1. PLEADING (§ 85*)—TIME TO PLEAD—EXTENSION—NOTICE.

A defendant is bound to take notice of any order made in the regular term extending the time of pleading, and the law presumes that he has full notice of it, particularly where he himself is an attorney.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.*]

2. JUDGMENT (§ 167*)—DEFAULT JUDGMENT—OPENING—COST BOND.

Under the direct provisions of Revisal, § 453, a defendant, in an action for the recovery of land, is required to file a cost bond before he may answer, plead, or demur, consequently the filing of such cost bond is a condition precedent to the setting aside of a default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 326, 330, 333, 334; Dec. Dig. § 167.*]

3. JUDGMENT (§ 138*)—DEFAULT JUDGMENT—VACATION—CARE REQUIRED.

A defendant seeking to set aside a default must show that he used care in protecting his rights; the standard of care required being that which an ordinarily prudent man bestows upon his important business.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.*]

4. JUDGMENT (§ 106*)—DEFAULT JUDGMENT—TAKING DEFAULT.

A default judgment may be rendered, although the cause is not on the trial or motion docket.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.*]

5. EQUITY (§ 64*)—MAXIMS.

The law will assist those who are diligent and will not take from them the advantage they have thus acquired and turn it over to those who have been inactive.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 64.*]

6. EQUITY (§ 60*)—MAXIMS.

He has the better right who was first in point of time.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 181; Dec. Dig. § 60.*]

7. JUDGMENT (§ 143*)—DEFAULT—VACATION—EXCUSABLE NEGLIGENCE.

Defendant, an attorney, was duly served with process on July 4th; the writ being returnable to the August term. At the August term plaintiffs were allowed 30 days to file a complaint, which they filed on September 14th. Defendant attended the November term and examined the order and the complaint which had been filed but did not move for time to answer or enter an appearance or file cost bond. He left before the final adjournment, and plaintiffs took a default judgment. *Held*, that he was not

entitled to a vacation of the judgment, as he should have moved the court for leave to file an answer, even though the case was not on the trial or motion docket, and his rights lost by his own carelessness.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.*]

8. JUDGMENT (§§ 143, 145*)—DEFAULT—VACATION—GROUNDS.

To warrant a vacation of a default judgment, it must appear that the defendant's neglect was excusable and that he had a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-295; Dec. Dig. §§ 143, 145.*]

9. JUDGMENT (§ 162*)—DEFAULT—VACATION—BURDEN OF PROOF.

The burden of establishing a meritorious defense necessary to procure the setting aside of a default judgment rests upon the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 319-322; Dec. Dig. § 162.*]

10. APPEAL AND ERROR (§ 219*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

A party cannot on appeal complain that the judge failed to find additional facts, where it does not appear that any request was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315, 1317-1320, 1322, 1323; Dec. Dig. § 219.*]

11. PROCESS (§ 126*)—SERVICE—VALIDITY.

Service of process upon one attending court as a witness is not void but voidable and hence must be attacked by motion to set aside, the defendant appearing specially for the purpose of the motion; his remedy, in case the motion is overruled, being to except, answer, and appeal from the final judgment.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 156½; Dec. Dig. § 126.*]

12. APPEARANCE (§ 9*)—GENERAL APPEARANCE—WHAT CONSTITUTES.

An appearance will not be considered special simply because so called; hence a party seeking to set aside a default waives defects in the summons by asking leave to file an answer and cannot move to set aside the judgment on the ground of the want of jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

Appeal from Superior Court, Duplin County; Allen, Judge.

Action by the Dell School and others against W. W. Peirce. Defendant defaulted and thereafter moved to set aside the judgment, and from the denial of his motion he appeals. *Affirmed*.

This is a motion before Judge Allen to set aside a judgment rendered at November term, 1912, by Judge Carter. The judge found the following facts: "Summons was issued July 4, 1910, and personally served by the deputy sheriff on that date and returned to the August term, 1910, of the Superior court of Duplin county. At the August term, 1910, an order was duly entered before his honor, Frank Carter, judge presiding, in open court, making additional parties plaintiffs and allowing the plaintiffs 30 days to file complaint, and no order other than that was made as to pleading, and on September 14, 1912, the plaintiffs filed a duly verified complaint. The August term, 1912, of the said

court adjourned on the 7th day of September, 1912. The defendant, W. W. Peirce, is a practicing attorney in the courts of this state. No appearance has even been entered on the docket of this court either by the defendant or by an attorney for him. The defendant attended the November term, 1912, of said court and personally examined the order at the November term, 1912, and the complaint which was filed by the plaintiffs; the same being on file in the clerk's office. No motion was made before the court for time to answer, and no time was granted by the court or by counsel, and there is no rule of the Duplin bar allowing time to answer without application to the court; nor has the defendant ever filed answer in this cause; nor has he given the bond required by the statute or asked to be allowed to do so. The defendant left the court on Friday before final adjournment on Saturday, and, on Saturday before the final adjournment, the plaintiffs moved the court for judgment, for the want of an answer. A member of the bar present, not of counsel on either side, suggested that the defendant desired time to answer. The plaintiffs insisted upon their motion, and, after hearing the same, his honor, Carter, judge, rendered the judgment set out in the record. The judgment at the November term, 1912, does not appear to have been rendered against the defendant through such mistake, inadvertence, surprise, or excusable neglect as entitles him to relief, and it is so adjudged; nor does he show, in the opinion of the court, a meritorious defense to the action." The court denied the motion, and defendant appealed.

W. C. Munroe and W. W. Peirce, both of Goldsboro, and Winston & Biggs, of Raleigh, for appellant. A. D. Ward, of New Bern, and Johnson & Johnson, of Warsaw, for appellees.

WALKER, J. It would be useless to discuss each of the 11 assignments of error, as the material questions are: (1) Was there excusable neglect on the part of the defendant? (2) Did he show a meritorious defense?

[1] This is an action to recover the possession of land. Defendant knew that at August term, 1912, an order had been made enlarging the time for filing pleadings. The August term adjourned September 7, 1912, and the verified complaint was filed September 14, 1912. Whether the defendant actually knew before the November term, 1912, that the time for filing pleadings had been extended, the order was made at a regular term, it was his duty to be there and take notice of it, and the law presumes that he had full knowledge of it. *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901; *Zimmerman v. Zimmerman*, 113 N. C. 432, 18 S. E. 334; *Hemphill v. Moore*, 104 N. C. 379, 10 S. E. 318; *Clark's Code* (3d Ed.) § 595, and the numerous cases in the notes. At any rate,

the defendant knew at the November term what had been done and should then have asked the court for further time to file his answer and defense bond. Instead of doing so, he left the court and took his chances. No reasonable explanation is given for this apparent neglect of his own interest. Being himself an attorney, he cannot well plead ignorance of the law, and he must therefore have known that his time for pleading had expired. To say the least, defendant, in any view of his case, left his affairs in a very precarious state and with a seeming disregard of consequences.

[2] He has never yet tendered his defense bond, which must precede his right to answer. It is so distinctly provided by statute. *Revisal*, § 453; *Jones v. Best*, 121 N. C. 154, 28 S. E. 187. That section requires him to file this bond "before he is permitted to answer, plead, or demur." That was his first duty at November term, as soon as he learned the cause of action, if he intended to defend the action, and this he failed to do.

[3-7] And he took no proper action in any way looking to the exercise of his right to defend, or to its revival, as it had then been lost by his delay. We have seen that he had notice of the order at August term, extending the time to plead, and this required him to make reasonable inquiry as to the filing of the complaint and to be on his guard. He had not even entered his appearance on the docket. The law does not allow a party to sleep on his rights. He must keep awake and be alert, exercising the care and watchfulness of an ordinarily prudent man in protecting his rights and saving his interests. We have held that the standard of care by which he must be judged is that which a man ordinarily prudent bestows upon his important business. *Roberts v. Alman*, 106 N. C. 391, 11 S. E. 424. We said in the recent case of *McLeod v. Gooch*, 162 N. C. —, 78 S. E. 4, that "a party has no right to abandon all active prosecution of his case simply because he has retained counsel to represent him in the court." This applies with peculiar force to the defendant, now applying for relief, as he has assumed the dual position of attorney and client and must therefore give both his personal and professional attention to his business on the docket. We do not think that, in any view of the facts, the defendant has made out a case of excusable neglect. There was apparent inattention and indifference throughout the progress of the cause, without any adequate explanation. Even if the case was not on the trial or motion docket, defendant should at least have moved for leave to file his answer, and, if he had done this, the court, in the exercise of its discretion, may have granted his motion. The fact that this case was not on the trial or motion docket did not prevent the court from giving judgment, though it might have excused defendant's absence if

he had been otherwise diligent and active. He took the chance of leaving his case to take care of itself, with no one duly authorized to represent him and look after his interests, and he must abide the result. We cannot take away the advantage his adversary has gained, and legitimately so, by due attention to the case. Vigilance is often a part of the price we must pay for what we get and what we keep after it is acquired. He who neglects his interests is apt to lose them, which is the plight of defendant now. It early grew into one of the cardinal maxims of the law that it will assist those who are diligent and not those who sleep on their rights, and the law will not take from him, who has been thus diligent, what he has secured thereby and turn it over to him who has lost by his inaction. Broom's Legal Maxims (6th Am. Ed.) p. *857. Heath, J., once remarked that "this is one of the maxims which we learn on our earliest attendance in Westminster Hall" (Cox v. Morgan, 2 B. & P. 412), and it is the one underlying the law of limitations or statutes of repose. So much importance does the law attach to diligence in protecting our interests that it has another maxim equally fundamental and closely related to the one just mentioned, "Qui prior est tempore, potior est jure;" that is, he has the better right who was first in point of time. Broom, 345.

[8] Having reached the conclusion that there is no excusable neglect, it is unnecessary that we should discuss or decide whether defendant has shown a meritorious defense. If he has, as his neglect was inexcusable, the motion should still be denied. He must not only show such a defense but excusable neglect as well. We have, though, carefully considered the other branch of the case and are of the opinion that he has shown no legal merits—nothing that would defeat plaintiff's recovery.

[9] At least he has not made it clear to us, and the burden of doing so is upon him.

[10] He complains that the judge should have found additional facts, but there was no request that he should do so, and such a request must appear. McLeod v. Gooch, supra; Albertson v. Terry, 108 N. C. 75, 12 S. E. 892; Hardware Co. v. Buhmann, 159 N. C. 511, 75 S. E. 731. This is the well-settled practice.

[11, 12] His next position is that he was a nonresident, attending court as a witness, when the summons was served upon him. But this goes to the jurisdiction of the person and the defective service of process. In order to avail himself of it, he should have appeared specially. In a case precisely like this one, the court held that such a service was not void but voidable, and advantage, therefore, could be taken of it only by a special appearance. Cooper v. Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731. The court there said: "Service in such cases is not

void but voidable; hence the party, before appearing in the action, should by special appearance move to set aside the return of service (Thornton v. Machine Co., 83 Ga. 288 [9 S. E. 679, 20 Am. St. Rep. 320]) and, if the motion is denied, should request the judge to find the facts and enter them on the record together with the exception to the ruling, so that it may come up for review on the appeal from final judgment. Guilford County v. Ga. County, 109 N. C. 310 [13 S. E. 861]."

A motion to set aside a judgment upon the ground of excusable neglect is one addressed to the merits and equivalent to a general appearance and therefore a waiver of any defective service of process. Scott v. Life Assn., 137 N. C. 515, 50 S. E. 221. This case has been frequently approved. Quoting from it in Woodard v. Milling Co., 142 N. C. 102, 55 S. E. 71, Justice Brown says: "The test for determining the character of an appearance is the relief asked; the law looking to its substance rather than form."

A further reference to Scott v. Insurance Co., and what it decided, may serve to bring this important distinction between a general and special appearance, and the office of each, more clearly before us. We there said: "If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc. pp. 502, 508. The question always is what a party has done and not what he intended to do. If the relief prayed affects the merits or the motion involves the merits, and a motion to vacate a judgment is such a motion, then the appearance is in law a general one. Id. pp. 508, 509. The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the jurisdiction of the court is general. 2 Enc. of Pl. & Pr. 632. The effort of the company evidently was to try the matter and obtain a judgment on the merits while standing just outside the threshold of the court. This it could not do. A party cannot be permitted to occupy so ambiguous a position. * * * If a defendant invokes the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. * * * If he appears to the merits, no statement that he does not will avail him, and, if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not"—citing numerous cases. It all comes to this: That he cannot take the inconsistent position of denying the authority of the court to take cognizance of the cause by reason of some defect in the process and at the same time seek judgment in his

favor upon the merits. Affirming this principle as laid down in *Scott v. Life Asso.*, are the following cases: *Allen-Fleming Co. v. Railroad*, 145 N. C. 37, 58 S. E. 793; *Warlick v. Reynolds*, 151 N. C. 606, 66 S. E. 657; *Grant v. Grant*, 159 N. C. 528, 75 S. E. 734.

In *Currie v. Mining Co.*, 157 N. C. 209, 72 S. E. 980, Justice Allen concludes the opinion as follows: "The defendants, Allen and Gollconda Company, in their application to have the judgment set aside, asked to be allowed to answer, and this is equivalent to a general appearance by both"—citing *Scott v. Life Asso.* That is our case. The other exceptions are without any merit. The defendant should first have appeared specially, if he questioned the jurisdiction of the court over him; and, if his motion to dismiss was denied, he should have excepted and then proceeded (without appeal) to his motion to set aside the judgment and appealed from the final order. The procedure is stated in *Cooper v. Wyman*, supra.

We find no error in the record.
Affirmed.

JOHNSON v. SEABOARD AIR LINE RY. CO.
(Supreme Court of North Carolina. Oct. 22, 1913.)

1. TRIAL (§ 165*)—TAKING CASE FROM JURY—NONSUIT—DIRECTED VERDICT—DETERMINATION OF MOTION.

In ruling upon a defendant's motion for a nonsuit or a directed verdict, the court must adopt the evidence of the plaintiff and reject that of the defendant except in so far as the latter is in the plaintiff's favor.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. RAILROADS (§ 301*)—ACCIDENTS AT CROSSINGS—MUTUAL RIGHTS.

Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross, but the traveler must yield the right of way to the railroad in the ordinary course of the latter's business.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 956; Dec. Dig. § 301.*]

3. RAILROADS (§ 312*)—ACCIDENTS AT CROSSINGS—DUTIES OF RAILROAD.

While a train has the right of way at a crossing, it is the duty of the engineer to give signals and exercise vigilance in approaching such crossings.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 988-1001, 1003-1005; Dec. Dig. § 312.*]

4. RAILROADS (§ 301*)—ACCIDENTS AT CROSSINGS—MUTUAL DUTIES—LOOKOUT.

A railroad company and a traveler on a highway approaching a crossing are charged with a mutual duty of keeping a careful lookout for danger, and the degree of vigilance is in proportion to the known danger.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 956; Dec. Dig. § 301.*]

5. RAILROADS (§ 327*)—ACCIDENTS AT CROSSINGS—DUTIES OF TRAVELER—LOOK AND LISTEN.

On reaching a railroad crossing, and before attempting to go upon the track, a traveler must look and listen in both directions for ap-

proaching trains, if not prevented from doing so by the fault of the railroad company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

6. RAILROADS (§ 327*)—ACCIDENTS AT CROSSINGS—DUTIES OF TRAVELER—NATURE.

The duty of a traveler to look and listen when approaching a railroad crossing is not always absolute, but may be qualified by attendant circumstances.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

7. RAILROADS (§ 324*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

If a traveler fails to exercise the degree of care required of him when approaching a railroad crossing, it is such negligence as will bar his recovery, if it was the proximate cause of his injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1020-1025; Dec. Dig. § 324.*]

8. RAILROADS (§ 326*)—ACCIDENTS AT CROSSINGS—DUTIES OF RAILROAD—OBSTRUCTIONS.

If a traveler's view is obstructed or his hearing an approaching train is prevented, especially if through the fault of the railroad company, and the company's servants fail to warn him of the approach of a train, and he attempts to cross the track, having used his faculties as best he could under the circumstances, negligence will not be imputed to him.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1037-1042; Dec. Dig. § 326.*]

9. RAILROADS (§ 334*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—SUDDEN PERIL.

Where a traveler is without fault, or his fault is excused by some act of the company, or the company has the last clear chance to avoid the accident, the traveler, suddenly confronted by a peril, may, without the imputation of negligence, adopt such means of extrication as are apparently necessary, and is held only to such measure of care as a man of ordinary prudence would exercise in the same circumstances.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1027; Dec. Dig. § 334.*]

10. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for injuries received by a 12 year old boy, who was injured at a railroad crossing over a frequented street by the rear portion of a train engaged in making a flying switch, and which was concealed by cars upon a siding, evidence held sufficient to take to the jury the question of the boy's exercise of due care.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

11. APPEAL AND ERROR (§ 928*)—PRESUMPTIONS—INSTRUCTIONS NOT IN RECORD.

Where the instructions of the court as to the negligence of the railroad company and the contributory negligence of the person injured at a railroad crossing are not in the record, it will be presumed that the verdict was found under proper instructions on such issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3748-3754; Dec. Dig. § 928.*]

12. RAILROADS (§ 312*)—ACCIDENTS AT CROSSINGS—GROSS NEGLIGENCE—FLYING SWITCH.

The act of a railroad company in making a flying switch across a public highway in the midst of a populous town, or village is gross and criminal negligence, which would render

those responsible guilty of manslaughter if death were caused thereby.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 988-1001, 1003-1005; Dec. Dig. § 312.*]

13. RAILROADS (§ 337*)—ACCIDENTS AT CROSSINGS—CAUSE OF INJURY—NEGLIGENCE OF COMPANY.

Where a boy, as he approached a railroad crossing, looked and listened, but his view was obstructed by cars upon a siding near the crossing and his attention was attracted by a train which had just passed and apparently was about to return, and was injured by the rear portion of that train, which was making a flying switch, and there was no warning given him of the approach of that portion of the train, the negligence of the company, and not the boy's want of care, was the cause of the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1090-1095; Dec. Dig. § 337.*]

14. RAILROADS (§ 301*)—ACCIDENTS AT CROSSINGS—DUTY OF TRAVELER—DEGREE OF VIGILANCE.

A greater degree of vigilance is required of a traveler approaching a railroad crossing than is required of employees of the company who are engaged in the performance of their duties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 956; Dec. Dig. § 301.*]

15. RAILROADS (§ 324*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—APPEARANCE OF SAFETY.

Where a traveler is deceived by appearances produced by the negligence of the railroad company in such a way, and to such an extent, that a man of ordinary prudence would not anticipate danger, the company cannot escape liability by imputing the blame to him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020-1025; Dec. Dig. § 324.*]

16. RAILROADS (§ 347*)—ACCIDENTS AT CROSSINGS—ADMISSIBILITY OF EVIDENCE—RELEVANCE.

In an action for injuries to a traveler at a grade crossing, where the plaintiff testified that his view was obstructed by cars upon a siding, evidence of measurements of other cars, which were not shown to have been of the same width as those on the siding, is inadmissible to prove that the cars could not have been in the position claimed without being struck by a train on the other track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124-1137; Dec. Dig. § 347.*]

17. WITNESSES (§ 369*)—BIAS OF WITNESS—ACCEPTING PASS.

In a personal injury action against a railroad company, it is proper for the plaintiff to show by cross-examination of a witness for the defendant that the company furnished the witness transportation to come to the trial as a circumstance from which bias may be inferred.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1187, 1188; Dec. Dig. § 369.*]

18. APPEAL AND ERROR (§ 1004*)—REVIEW—QUESTIONS OF FACT—DAMAGES.

Under Const. art. 4, § 8, giving the Supreme Court jurisdiction to review upon appeal any decision of the courts below or any matter of law or legal inference, the court has no power to review the action of the trial court in affirming a verdict for damages for personal injuries which were claimed to be excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

19. DAMAGES (§ 100*)—MEASURE—DIMINISHED EARNING CAPACITY.

In an action for personal injuries resulting in diminished earning capacity, the measure of damages is not the difference between the probable earnings of the plaintiff before and after the injury, but the reasonable present value of the diminution of his earning capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 100.*]

20. APPEAL AND ERROR (§ 1178*)—REVERSAL—NEW TRIAL—PARTICULAR ISSUES.

Where the only error in the trial of an action for personal injuries was in the instructions as to the measure of damages, a new trial will be granted only upon the question of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

On Motion for New Trial.

21. NEW TRIAL (§ 168*)—APPLICATION IN APPELLATE COURT—DETERMINATION.

Where the defendant moves for a new trial upon the ground of newly discovered evidence after the case is argued in the Supreme Court, the application should be carefully scrutinized, and the burden is upon the defendant to rebut the presumption that the verdict is correct and that there has been a lack of diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 7, 232, 245, 252, 253, 266, 280, 284, 286, 291, 292, 294, 296, 303, 305, 318; Dec. Dig. § 168.*]

22. NEW TRIAL (§ 168*)—APPLICATION IN APPELLATE COURT—SUFFICIENCY—NEWLY DISCOVERED EVIDENCE.

An affidavit in the Supreme Court for a new trial upon the ground of newly discovered evidence must show that the witness will give the evidence; that it is probably true; that it is competent, material, and relevant; that due diligence was used to procure the testimony at the trial; that it is not merely cumulative; that it does not tend only to contradict or impeach a former witness; and that it is such that a different result will probably be reached upon another trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 7, 232, 245, 252, 253, 266, 280, 284, 286, 291, 292, 294, 296, 303, 305, 318; Dec. Dig. § 168.*]

Appeal from Superior Court, Lee County; Daniels, Judge.

Action by Clarence Johnson against the Seaboard Air Line Railway Company. Judgment for the plaintiff, and defendant appeals. Affirmed in part and reversed and remanded in part, and motion for a new trial denied.

The plaintiff alleged that on or about September 1, 1910, he, a boy of about 12 years of age, was attempting to cross the track of the defendant railroad on Elm street in Maxton, N. C., at a public crossing; that the defendant was engaged in making what is known as a flying switch; that it negligently ran over the plaintiff as he was crossing the defendant's tracks on said street; that his foot was injured by being run over; and that he was damaged in the sum of \$20,000. The specifications of negligence in the complaint are as follows: (1)

The train of the defendant was operated in a negligent and careless manner and at an unlawful rate of speed. (2) Defendant had no one on the car, which struck the plaintiff, to control its movements. (3) No lookout was kept on the car. (4) No warning or signal whatsoever was given of its movements or approach, and defendant was making what is known as a flying switch. (5) That the street is constantly used by the public in passing and repassing over the defendant's tracks from one side to the other, and defendant permitted a string of cars to remain standing on one of its tracks, and they so obstructed the view of plaintiff, as he approached the tracks on his bicycle, that he could not see the loose cars, as they moved toward the crossing, after being detached from the train.

The defendant answered, denying all the allegations of negligence, and alleged that plaintiff was guilty of negligence, in that he was coming down Elm street on a bicycle and crossed defendant's track, after being warned not to do so, and instead of keeping on the street, where there was no danger, he suddenly turned his wheel or bicycle, and, running parallel with the said track, he fell under the moving train, and this was the sole cause of his injury. Much evidence was introduced by the parties to sustain their respective contentions. There was evidence tending to prove the following facts: The Seaboard Air Line Railway at the crossing consists of a main line and a side track, which side track branches off west of the crossing and enters, at some distance, the cotton oil mill yard; this part of the track being known as the oil mill siding, and lying on the north side of the main track, next Robert Croom's residence. A "pass track" connects the main line with the side track, leaving the main line just west of the crossing and merging with the side track upon and east of the crossing. All the tracks at one point on the crossing are only 19 feet across. Elm street at this place is a much-used thoroughfare on one of the principal residential streets, all three of the principal churches being on it and near this place. It is much used by children going to the graded school, about 200 yards away on this street, cotton oil mill employes, and citizens at large.

The witness for the plaintiff, as well as the plaintiff himself, testified that the view of the pass track mentioned above, and of the main track west of Elm street, was entirely obscured by a line of standing cars on the oil mill siding, coming almost down to the street. The defendant's witnesses stated that they were making a "running switch," but that the loose car had upon it the conductor and a flagman. The evidence of the plaintiff, and of some of plaintiff's witnesses, is that there was no person on the car, and no warning was given of its ap-

proach. There is no evidence that any sufficient warning was given at this time. The defendant, however, relied upon a warning, which its evidence tended to show had been given the plaintiff when the train first arrived at Maxton, and was then some 500 or 600 feet west of the crossing, and standing still, to, "Stop! We are going to make a switch," after which, so the witness testified, he walked back some 200 feet and turned the train into the switch. Plaintiff testified that the negro was not at the crossing at all.

The witness McNell, who made the map, testified that he did not know the width of the street; its edge was not well defined; he did not measure the distance between the south edge of the oil mill track and the north edge of the "pass track" on the west side of the street; but he used the map to illustrate his evidence as to measurements he did make. He put some designs on the oil mill track at the direction of young Johnson to represent standing cars, but did not say that the number and the exact position were directed by him.

Plaintiff testified in part as follows: "I started to Strickland's store and went on the left-hand side as you go down street towards Wilmington, Strickland's store being on the opposite side of the railroad; was going after some groceries for my mother; was on a bicycle. I went out the back yard down a path to Elm street, and went then in the usual way starting to Strickland's store, and when I came to the Seaboard crossing at Elm street near Mr. Robert Croom's residence, I found a train there, that was shifting and had blocked the crossing. I stopped for it to get out of the way. Stopped somewhere between Mr. Croom's house and the railroad. A colored woman was there, but I did not know her at that time. It was Eliza McIver. She was between me and the Seaboard track, and had a gocart with a child in it and one by it. At the time I stopped there waiting for that track to clear, I noticed on that oil mill siding some box cars. Q. How near down to Elm street did they come? A. They ran near about onto Elm street, just enough to pass by. They were shifting, and the train was running back and forth. I did not attempt to cross the street until the engine cleared and went on towards the depot with some cars attached to it. When it went by I looked and listened and started across. Q. What did you look for? A. I looked for another train. Q. Did you see another? A. No. Q. What effect, if any, did those cars standing on the oil mill track have with your seeing it? A. It was between me and the loose cars. After the track was cleared and the engine had gone down towards Maxton going east, I started across the tracks. Just as I got about across, I heard somebody holler, 'Lookout!' and I looked around and saw a car, and I tried to get between

the tracks, and by that time it struck me. I tried to get between the main line and the side track to clear the cars so I would be safe. Q. Could you tell which track that loose car was going to take, the main line or the siding? A. No, sir. Q. If you had gotten between that main line and the side track, would you have been clear, regardless of what it took? A. Yes, I could have gone down and beaten it to where it was going. Q. What happened? A. The car struck me about that time and ran over me. I had not gotten quite clear of that side track that the car came in on. No one was at the crossing except Eliza McIver. I could not see the cars on the main line because of those box cars, and the cars that I saw were on the oil mill side track. They were not blocking the street, but they were near about on the street. I did not see any loose cars on the main line west of Elm street; I saw one down at the crossing at the oil mill. I saw no cars on the main line except that one down at the crossing. That crossing was about a block west of Elm street, and the other cars I saw were near about to Elm street on the oil mill side track. They ran near about up to Elm street, but I cannot say exactly how close, and those cars stayed on the oil mill track until after I passed over. When I started down Elm street, this colored woman, who was ahead of me, was about 10 feet from the track, and I was 10 or 15 feet behind her. I was riding a boy's bicycle and I was 12 years old at that time. I remained where I was until I saw the engine go towards the depot. I then immediately got up on my bicycle and rode across, but not until after I looked both ways and listened for another train. I crossed the railroad about the middle of Elm street and was stricken by the cars. Q. Was any one on those loose cars? A. No, sir. After the car ran over me, I got up and started home, and I saw a man who I took to be the flagman coming towards the switch. When the flagman came, I asked him to carry me home. He did not do anything, but only stood and looked at me. Mrs. Croom came out there and asked him to carry me in her house, if he would not carry me home. He stood and looked at me and did not say anything. About that time Cleo Strickland came along, and I asked him to carry me home. He said, 'All right, get up,' and I got up in the wagon, and he started on across and got to the next crossing. He started the nearest way, got to the nearest crossing, and there was a car on that crossing, and we stopped to let it pass, and the flagman came running down there and said—they said carry me to the hospital. I think it was the flagman who said carry me to the hospital. Elm street is used for all the school children going to school, people going to the Baptist, Methodist, and Presbyterian churches, and people use it to go to the col-

lege. It is one of the public thoroughfares of the town. The employes of the oil mill also cross there. They carried me to the hospital, operated on me, and put me to sleep. I had my foot mashed up, a hole cut in the back of my head, and a hole cut in my thigh."

Plaintiff then described his injuries more minutely, as follows: "My foot is perfectly useless, or near about so. I can't use it at all from the heel to the end of the toes. The foot is sensitive and I can't bear any weight on it at all. In walking I put my weight on my heel. I suffered all the time. Sometimes I got a chance to sleep. This accident happened on Thursday about 10 o'clock, and, on Saturday following the Thursday, they dressed my foot again and found some gangrene in it. They cut the bone, cut all the flesh off of my foot, and cut two of my toes off. After that when the doctor dressed it he kept cutting off some. He cut off the ball of my foot and scraped the bone. I stayed in the hospital six weeks. I was not under the influence of ether on Saturday when those parts were cut off of my foot, and it hurt me so I had just had to scream and holler. I could not help it. After I left the hospital, I walked on crutches for over a year, and during that time I was not able to put my foot to the ground any. Have not been able to use the forepart of my foot from the instep out to amount to anything. Since then it pains me whenever I work any. If I stand up right smart it hurts me. Can't lift any weight on that foot, and I lost a job because I could not lift and stand on my foot. When the weather changes it feels like neuralgia. The leg of my injured foot is about one-half inch smaller than the other one. Prior to this injury I was carrying water for the oil mill and got 50 cents per day. I can read and write and figure some. I do not use tobacco in any form and do not drink. My health was pretty good prior to this injury."

The defendant offered evidence tending to show that the plaintiff was not injured as he had testified, but fell under the cars and was hurt, as set forth in the answer, and that he was injured by his own carelessness, and not by any negligence of the defendant; that he failed to look and listen when his sight and hearing were unobstructed. The usual four issues were submitted to the jury as to negligence, contributory negligence, the last clear chance, and damages, and the jury answered all of them (except the third, which was not answered) in favor of the plaintiff, assessing his damages at \$10,000. The court charged the jury upon the law relating to negligence under the first three issues, and there was no exception thereto. Defendant has reserved these exceptions, which are the ones mentioned and argued in his brief:

(1)-Refusal of motion to nonsuit or to

charge the jury "that, upon all the evidence, the plaintiff, Clarence Johnson, is guilty of contributory negligence."

(2) Excluding the evidence of the witness C. C. Hatch that he had measured other box cars and ascertained their size and dimensions, this with a view of showing by comparison of those cars with those at the crossing in question, upon the assumed similarity of the two, that cars on the main track could not have passed cars standing on the siding in the position described, and as testified by plaintiff.

(3) Plaintiff, on cross-examination of defendant's witness Bonnie Helms, who was employed by it as brakeman, asked him if he came to Maxton on a railroad pass furnished by the defendant. The question and answer were admitted, and defendant excepted.

(4) The court charged the jury on the issue of damages as follows, omitting immaterial parts: "Under this issue he is entitled to a reasonable compensation for such injury as you may find to have been negligently inflicted by the defendant, which was the direct and necessary consequence of the injury so negligently inflicted; a reasonable compensation for any and all pain which he may have suffered or may hereafter suffer for all diminution of his power to earn money—his diminished earning capacity, as the books put it. Plaintiff contends that he cannot now perform, and that he will never be able to perform, work that men usually do in attempting to make a living. He has introduced the mortuary tables that show his expectancy of life is 47 years, and they have made some figures about how much he would earn during that length of time. You are to consider what he was earning when he was hurt, and you may consider the mortuary table about how long he is likely to live. You may consider from what you find from this evidence what his earning capacity will be as he goes on, and then you will satisfy yourselves what would be the amount that he would lose from the earning capacity by reason of this injury to his foot. He is entitled to the difference between what he would make if the injury had not been done and what he would make with it done. You are not bound by the mortuary tables. You are not bound by figures of the plaintiff or defendant as to any amount which you should give him in consequence of his diminished earning powers. Something was said by the defendant's counsel about a thousand dollars being a large verdict; but you are not bound by what he claims. You are not bound by what his counsel think he ought to have. You are not bound by what the defendant thinks he ought to have, or his counsel. It is a matter in your sound discretion. You are to exercise your best judgment and your reason upon this evidence. If you reach this issue and say what is the value of his diminished earning capacity, then, when you

do that, you are to add reasonable compensation for his pain and suffering. In view of all the circumstances, consider this young man's condition in life and his probable future, as far as you can ascertain it, what is a reasonable compensation for the pain and suffering which he has undergone; and when you ascertain that, gentlemen, you add that to such amount as you may have determined to be the amount in which his earning capacity has been diminished by reason of the injury; put both amounts together, and that will be your verdict."

(5) That the court refused defendant's motion to set aside the verdict, as being against the weight of the evidence, and the verdict as to damages, because they are excessive.

Judgment upon the verdict, and defendant appealed.

A. A. F. Seawell, of Sanford, and Robinson, Caudle & Pruette, of Wadesboro, for plaintiff. W. H. Neal, of Laurinburg, and K. R. Hoyle, of Sanford, for defendant.

WALKER, J. (after stating the facts as above). [1] The defendant's motion for a nonsuit upon the evidence, and its request for a peremptory instruction to answer the issues in its favor, were both properly denied. The rule as to the treatment of the evidence upon such a question is not only very familiar, but has been stated in various ways so clearly and with so much repetition as to have become somewhat trite and even hackneyed. We must again say that we are not at liberty to select those portions of the testimony more favorable to a defendant in such a case than the rest and act upon it for his special benefit. Such an imposing array of the evidence in his behalf would be not only one-sided, when we are required to hear both sides equally and fairly, but would manifestly be partial and unjust. The rule is rather the other way. We restated it concretely in the recent case of *Osborne v. Railroad*, 160 N. C. 309, 78 S. E. 16, much like ours in its essential facts, though not literally so. Some of the language then used will practically fit almost any case, and is surely applicable to the one at bar. We there said: "Defendant requested the court to enter a judgment of nonsuit upon the evidence, as plaintiff's intestate was guilty of such contributory negligence in driving upon the crossing, without looking or listening, as barred his recovery. The judge could not have done so without deciding an issue of fact, which he is forbidden to do; that being the function of the jury. Pell's Revision, § 535, and cases cited in note. The evidence favorable to defendant's view of the case may be ever so strong and persuasive; but, if there is a conflict of testimony, it must be left to the jury, and they must find the facts. This is a case where there was a serious dispute as to the facts, which, of course, carried the case to the jury. It is our duty,

upon a motion for a nonsuit, to consider the evidence in the view most favorable to the plaintiff, for at least one reason, which is, that the jury may adopt his version of the facts as the true one. It would be contrary to all our decisions to discard the proof in his favor and consider only that favorable to the defendant, or to permit the latter to overthrow the former, even if it is more reasonable and convincing. Such a course would contravene the express terms of the statute and would nullify its plain and explicit injunction that we, as judges, should confine ourselves to the law of the case and leave the finding of facts to the jury." See *Brittain v. Westhall*, 135 N. C. 492, 47 S. E. 616; *Deppe v. Railroad*, 152 N. C. 80, 67 S. E. 262; *Hamilton v. Lumber Co.*, 156 N. C. 519, 72 S. E. 588. We would not hazard much, if anything, by stating broadly that *Osborne's Case*, just cited, seems to cover this case as with a blanket, and we may refer to it later in order to show the striking similarity between the two. As generally pertinent to the case in hand, we may formulate the following rules:

[2] 1. Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross; but the traveler must yield the right of way to the railroad company in the ordinary course of the latter's business. *Duffy v. Railway Co.*, 144 N. C. 26, 56 S. E. 557.

[3] 2. While a train has the right of way at a crossing, it is the duty of the engineer to give signals and exercise vigilance in approaching such crossings. *Coleman v. Railway Co.*, 153 N. C. 322, 69 S. E. 251.

[4] 3. A railroad company and a traveler on a highway crossing are charged with a mutual duty of keeping a careful lookout for danger, and the degree of vigilance is in proportion to the known risk; the greater the danger, the greater the care required of both. *Railway Co. v. Hansbrough's Adm'x*, 107 Va. 733, 60 S. E. 58.

[5] 4. On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances; he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so, and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective. *Cooper v. Railroad*, 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391, 6 Ann. Cas. 71; *Coleman v. Railroad*, 153 N. C. 322, 69 S. E. 251; *Wolfe v. Railroad*, 154 N. C. 569, 70 S. E. 993, in the last of which cases the rule was applied to an employé charged with the duty of watching a crossing and warning travelers of the approach of trains, and he was required to exercise due care, under the rule

of the prudent man, for his own safety by looking and listening for coming trains.

[6] 5. The duty of the traveler arising under this rule is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue as to his contributory negligence, by not taking proper measures for his safety, to be submitted to the jury. *Sherrill v. Railroad*, 140 N. C. 255, 52 S. E. 940; *Wolfe v. Railroad*, supra.

[7] 6. If he fails to exercise proper care within the rule stated, it is such negligence as will bar his recovery, provided always it is the proximate cause of his injury. *Cooper v. Railroad*, supra; *Strickland v. Railroad*, 150 N. C. 7, 63 S. E. 161; *Wolfe v. Railroad*, supra.

[8] 7. If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company; its failure to warn him being regarded as the proximate cause of any injury he received. *Mesic v. Railroad*, 120 N. C. 490, 26 S. E. 633; *Osborne v. Railway*, supra.

[9] 8. If a traveler is without fault, or if his fault is either excused by some act of the company or is not the proximate cause of his injury, the company having the last clear chance, and if, in attempting to cross a track on a highway, he is suddenly confronted by a peril, he may without the imputation of negligence adopt such means of extrication as are apparently necessary and is only held to such measure of care as a man of ordinary prudence would exercise in the same circumstances. *Vallo v. Express Co.*, 147 Pa. 404, 23 Atl. 594, 14 L. R. A. 745, 30 Am. St. Rep. 741; *Lincoln v. Nichols*, 37 Neb. 332, 55 N. W. 872, 20 L. R. A. 855; *Crampton v. Ivie Bros.*, 124 N. C. 591, 32 S. E. 968; and especially *Douglass v. Railway*, 82 S. C. 71, 62 S. E. 15, 63 S. E. 5; 3 Elliot on Railroads (2d Ed.) § 1173.

With these general rules to guide us, the solution of the question presented will not be difficult.

[10] This young boy rode up to the crossing on his bicycle and, as he testified, looked and listened for a train. He saw one pass, composed of an engine and box cars; the latter being shifted by the engine. He could not see to the west because of box cars standing on one of the tracks, which obstructed his view. He did look to the east at the moving train, believing and having good reason to believe, that it was coming back, and not suspecting that it had detached cars for the purpose of making a "flying switch." He

did not and could not hear the noise of the loose cars as they came up to the crossing, for he could not see them through the solid intervening cars, and no warning was given of their approach; the first notice he had of them being the cry of the woman, which he heard at the very time he was stricken by the cars and knocked under them. He therefore had no chance to escape. There was no one on the loose cars to give him a signal to leave the track, and the cars on the adjoining track were so near the crossing as to render such a signal ineffective if it had been given. This is his version, and, if accepted as true by the jury, it made out a perfect case for him. Defendant denied it, and alleged that he voluntarily rode between the cars in a negligent manner, not made very clear, and fell from his wheel under the cars and was crushed as he described. They allege that there was a man on the cars to warn those using the crossing, and that a proper and effective signal was given by him and the woman, which was disregarded. In this conflict of views, the jury were the proper and only arbiters.

[11] They found for the plaintiff, and, as we must assume, under proper instructions from the court, as this part of the charge is not in the record, error not being presumed unless alleged and shown. This being so, the facts are as stated by the plaintiff, and he was therefore justly and legally entitled to the verdict. If we should non-suit him or direct a verdict, it would be to reject all of his evidence in favor of that of defendant, which is out of the question. We must adopt his and reject the defendant's, except so far as the latter makes in his favor.

[12] In this view of the facts, what are the legal questions involved and the ultimate rights of the parties under them? This court has recently declared, in *Vaden v. Railroad*, 150 N. C. 700, 64 S. E. 762, that: "Making 'flying switches' on the railway tracks and sidings running across and along the streets of populous towns is per se gross negligence, and has been so declared by all courts in this country and by text-writers generally. It is stated in one of the best known text-books that the use of a running switch in a highway in the midst of a populous town or village is, of itself, 'an act of gross and criminal negligence on the part of the company'"—citing *Sherman & Redf. Neg.* (3d Ed.) § 466; *Wilson v. Railroad*, 142 N. C. 333, 55 S. E. 257; *Allen v. Railroad*, 145 N. C. 214, 53 S. E. 1081; *Bradley v. Railroad*, 126 N. C. 742, 36 S. E. 181; *Farris v. Railway*, 151 N. C. 483, 66 S. E. 457, 40 L. R. A. (N. S.) 1115; *Railroad v. Smith*, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 66, to which is appended a most valuable note upon this subject. In this respect, the *Vaden* Case and this one cannot possibly be distinguished. So we see that defendant was "grossly" in

fault at the very inception of this lamentable occurrence. It started wrong in the beginning and continued wrong throughout. It had set a death trap for the passer-by, and the plaintiff unwarily, but without fault, was caught in it, and came very near losing his young life. Will the railroads never stop doing, in this respect, what the courts have so emphatically condemned as contrary to law and humanity? If plaintiff had been killed, upon the facts found by this jury, the person to blame for his death would have been guilty of manslaughter for his palpable negligence with full knowledge of its dangerous tendency.

[13] Not only did defendant make the dangerous "flying switch," but by its negligent conduct in concealing the moving of the detached cars, and by failing to give proper signals or warning to travelers using the crossing, it threw the plaintiff off his guard and enticed him into the trap. The jury having repudiated the defendant's version of the facts and accepted the plaintiff's, there is no room left for the argument that the latter was guilty of contributory negligence, because they have found that he looked and listened and was prevented from any effective use of his faculties or his senses by the wrongful conduct of defendant in moving its cars rapidly without an engine, where they could not be seen, or the noise of their movement heard by plaintiff, and failing to give any warning of their approach. There is no logic that can withstand such an array of facts, and no law which justifies or excuses the defendant's conduct. It is like *Wolfe's Case*, in that plaintiff's attention was riveted on the moving train that had just passed with every indication of its immediate return, and the resemblance does not end here, for *Wolfe's* view to the east was obstructed by cars standing on a side track, just as plaintiff's view to the east was, in this case, obstructed by cars similarly situated. *Wolfe v. Railway*, 154 N. C. 569, 70 S. E. 993.

[14] While a greater degree of vigilance is required of a traveler than of an employé engaged in the performance of other duties for defendant, as in the instance of *Wolfe*, the principle underlying the two cases is essentially and broadly the same. Justice Manning said in *Farris v. Railroad*, 151 N. C. 483, 66 S. E. 457, 40 L. R. A. (N. S.) 1115: "While we are in no wise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well-considered decisions of this and other courts, yet 'it cannot always be said that he is guilty of contributory negligence, as a matter of law, because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company or his attention was rightfully directed to something else as well.'" The crucial facts are

that plaintiff did look and listen and seems to have done the best he could under the circumstances. His suspicion was disarmed by the defendant's fault, and he did not, therefore, anticipate any danger in crossing at the time he did. All this brings this case under the direct control of *Osborne v. Railroad*, 160 N. C. 309, 78 S. E. 16, which is peculiarly analogous to it. We there said: "Applying these principles to the case, it will appear by a bare reading of the evidence that it should not have been withdrawn from the jury by granting a nonsuit. The jury, by their verdict, evidently found that the intestate and J. E. Puckett did look and listen, in the exercise of that degree of care characteristic of the man of ordinary prudence, and, further, that no signal from the approaching train was given. In *Mesic v. Railroad*, 120 N. C. 490 [28 S. E. 633], after stating that it is the duty of a traveler on the highway, when he approaches a railroad crossing, to look and listen, even though the railroad may have been negligent, the court says: 'The rule, however, does not prevail where to look would be useless on account of obstructions, natural in themselves, or such as had been placed by accident or design by the company's employes on their tracks, and when at the same time the engineer had failed to sound the whistle or ring the bell for the crossing, and in consequence of this failure the plaintiff had been induced to go upon the track and take the risk'"—citing *Hinkle v. Railroad*, 109 N. C. 473, 13 S. E. 884, 26 Am. St. Rep. 581; *Alexander v. Railroad*, 112 N. C. 720, 16 S. E. 896; *Russell v. Railroad*, 118 N. C. 1098, 24 S. E. 512; *Norton v. Railroad*, 122 N. C. 910, 29 S. E. 886. See, also, *Inman v. Railroad*, 149 N. C. 128, 62 S. E. 878; *Morrow v. Railroad*, 146 N. C. 14, 59 S. E. 158; *Norton v. Railroad*, supra; and *Farris v. Railroad*, 151 N. C. 483, 66 S. E. 457, 40 L. R. A. (N. S.) 1115. Judge Elliott states the rule to be that "where the employes of a railroad company by negligent or wrongful acts mislead a traveler, and put him off his guard, the company may be liable although the traveler may have done that which, but for the wrongful or negligent acts of the company, must have been considered negligence on his part." He adds that the traveler, though, must continue to exercise ordinary care to avoid injury according to the better reasoned decisions. But this is but another form of stating the general principle that, if the situation and surroundings are suggestive of danger, ordinary care must be used to avoid it.

[15] If the traveler is deceived by appearances produced by the negligent act of the railroad employes, in such way and to the extent that a man of ordinary prudence would not anticipate danger, the company cannot take advantage of its own wrong and impute the blame to him so as to defeat his action. The railroad company must abandon the device of the flying switch as

a means of shifting its cars, which has been strongly condemned by us, as we have seen, or it must take the consequences of its causing injury to persons in the lawful use of its crossings, or, at least, it must, by proper signals, whether from the top of the car or on the crossing, and by the exercise of that degree of care, which is commensurate with the danger it has produced or enhanced, provide against resulting damage. Maxton is a populous town, one of our largest and most prosperous, and this crossing is much used by the public, including school children. Common prudence demands that care, duly proportioned to the great risk they incur when they cross its tracks, should be taken in order that it will not be further increased by the continuance of unnecessary and highly dangerous methods in the operation of trains.

This case illustrates the danger of the "flying switch" and shows how easily it may entrap the unsuspecting traveler. 1. The following car was not coupled to an engine, which by its noise and smoke, its bell or whistle, would attract attention, and, being much lighter, it moved almost noiselessly. 2. The engine with its cars had passed, making noise by ringing its bell and otherwise at the other end of the track, and by its movements indicating its return. 3. No one was at the crossing to signal that shifting was in progress. 4. The traveler relies upon the reasonable supposition that there is no danger ahead, and goes on, not anticipating that defendant, in violation of the law, would make a flying switch, especially under such circumstances. 2 Thompson on Neg. §§ 1612, 1697, and note. Add to all this the intervening line of cars which entirely obstruct his view and conceal the impending danger, and the trap is complete.

We do not impute any moral wrong to defendant, as we are dealing only with the legal aspect of the case; but the defendant was negligent to the point of recklessness, even if its acts were thoughtlessly and not intentionally committed.

[16] The second exception is clearly untenable. It was irrelevant to the controversy that the witness C. C. Hatch had measured other box cars, unless it had been shown that the box cars near or at this crossing were of the same dimensions. It is admitted that there is no uniformity in the width of box cars, and that those on the oil mill siding, which obstructed plaintiff's view, were not measured by the witness or any one else. The rule for estimating or judging one thing by its resemblance to another, therefore, does not apply, as, at least, substantial identity between them must first be shown before it is admissible to institute the comparison so that you may reason from one to the other, for the purpose of proving the objective fact. This is so in regard to values, and is equally so as to size, quality, and quantity, or any other characteristic which admits of compar-

ison. If the car at the crossing had been measured, no comparison would have been necessary. It is similitude that opens the door to this kind of evidence and lets it in. We have so held. *Warren v. Makely*, 85 N. C. 12; *Chaffin v. Manufacturing Co.*, 135 N. C. 95, 47 S. E. 226. Without this element, the evidence, if admitted, would be purely conjectural, and would introduce irrelevant and diverting matters, confusing to the jury and prolonging the trial indefinitely. *Waters v. Roberts*, 89 N. C. 145. We have assumed, for the sake of argument, that the question would otherwise be competent and relevant, which is by no means clear or to be taken as granted, and for that reason have left out of consideration other reasons assigned in support of the court's ruling.

[17] Plaintiff was permitted to show, against defendant's objection, that Bonnie Helmes, one of its witnesses and employed as its brakeman, had come to the place of trial on a free pass, given to him by defendant. The purpose was to show his bias. Wigmore says, in his work on Evidence (volume 2, § 949): "The range of external circumstances from which probable bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place. Accurate concrete rules are almost impossible to formulate, and where possible are usually undesirable. In general, these circumstances should have some clearly apparent force, as tested by experience of human nature, or, as it is usually put, they should not be too remote. The relation of *employment*, present or past, by one of the parties, is usually relevant." But the very point was squarely decided in *A. G. S. R. Co. v. Johnston*, 128 Ala. 283, 29 South. 771, where it is said: "A witness may be questioned on cross-examination about matters which tend to show bias or partiality towards the party by whom he is introduced; and, in an action against a railroad company to recover damages, it is permissible for the plaintiff, on cross-examination of witnesses introduced by the defendant, to show that they were furnished free transportation for their attendance on the trial, or that they were given the general privilege of riding on the defendant's road, such evidence having a tendency towards establishing a bias on the part of such witnesses." See 1 *Greenleaf Ev.* (16th Ed.) 450. The case of *Cecil v. Henderson*, 119 N. C. 423, 25 S. E. 1018, cited by counsel for defendant, is not applicable. The two questions are essentially different.

[18] The defendant moved in the court below to set aside the verdict, because it is against the weight of the evidence and the damages are grossly excessive, and the motion was pressed in this court with zeal by counsel, but we must deny it, as we are not authorized to try the facts or to revise the findings of the jury in a case like this, nor

do we assent to the claim that the damages are grossly or "shockingly" excessive. We are not, therefore, at liberty to review the ruling against defendant on the motion, but must leave it as we find it, the final appeal in such cases being to the presiding judge; and we may add that there is nothing in the evidence to show that his discretion was not properly exercised, nor are we willing to intimate that we would reverse if we had the power to review. The eminently just judge, before whom the case was tried, would not have hesitated to set aside the verdict if, upon a fair consideration of the proof, it was right to do so. We have just said, at this term, in *Pender v. Insurance Co.*, 79 S. E. 293: There "was some evidence which was properly submitted to the jury, and the defendant having failed to have the verdict set aside by the judge below, because it was against the weight of the evidence, must abide by the result as final and beyond our control. We can review by appeal 'any decision of the courts below upon any matter of law or legal inference'; but in jury trials, at least, our jurisdiction ends when that is done. We cannot review findings of fact in such cases. Const. art. 4, § 8." See *Benton v. Railroad*, 122 N. C. 1007, 30 S. E. 333, and cases therein cited.

[19] We are of the opinion, though, that there was an error in the charge as to damages. The three clauses in the charge to which exceptions were specially reserved in the assignment of errors are these: (1) "He is entitled to the difference between what he would make if the injury had not been done and what he would make with it done." (2) "If you reach this issue, and say what is the value of his diminished earning capacity, then, when you do that, you are to add reasonable compensation for his pain and suffering." (3) "He is entitled to the difference between what he would make if the injury had not been done and what he would make with it done," and the following: "If you reach this issue and say what is the value of his diminished earning capacity, then, when you do that, you are to add compensation for his pain and suffering." Also the following: "And when you ascertain that, you add that to such amount as you may have determined to be the amount to which his earning capacity has been diminished by the injury." The same instruction was given in *Fry v. Railroad*, 159 N. C. 357, 362, 74 S. E. 971, 973. It will be sufficient to sustain this exception that we refer to that case and what we there decided. We there said: "There was error in the following instruction as to damages: 'If you find that he has been permanently injured, and that such injury partially incapacitates him to earn money, then he would be entitled to recover damages for partial incapacity, if you find the injury was caused by the negligence of the defendant. He would be entitled to recover the

difference between what he is able to earn at the present time, and in the future, and what he would have been able to earn if the accident had not happened; and, passing upon his expectancy, the mortuary table has been read to you, and you will bear that in mind in awarding damages, if you find that the plaintiff is entitled to recover anything.' In an action for injuries by negligence, such as this one, the plaintiff is only entitled to recover the reasonable *present value* of his diminished earning power in the future, and not the difference between what he would be able to earn in the future, but for such injury, and such sum as he would be able to earn in his present condition. *Railroad v. Paschall* [41 Tex. Civ. App. 357] 92 S. W. 446. Where future payments for the loss of earning power are to be anticipated by the jury and capitalized in a verdict, the plaintiff is entitled only to their present worth. *Goodhart v. Railroad*, 177 Pa. 1 [35 Atl. 191, 55 Am. St. Rep. 705]. The damages to be awarded for a negligent personal injury resulting in a diminution of earning power is a sum equal to the *present worth* of such diminution, and not its aggregate for plaintiff's expectancy of life. *O'Brien v. White*, 105 Me. 308 [74 Atl. 721]. The rule, as we see, may be stated with varying phraseology, but they all carry the same idea, that the estimate should be based upon the present value of the difference between plaintiff's earning capacity, and not the total difference caused by the injury. The rule is supported by many authorities in this and other jurisdictions. *Pickett v. Railroad*, 117 N. C. 616 [23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611]; *Wilkinson v. Dunbar*, 149 N. C. 20 [62 S. E. 748]; *Benton v. Railroad*, 122 N. C. 1007 [30 S. E. 333]; *Watson v. Railroad*, 133 N. C. 188 [45 S. E. 555]; *Railroad v. Carroll*, 84 Fed. 772 [28 C. O. A. 207]; *Fulsome v. Concord*, 46 Vt. 135; *Kinney v. Folkerts*, 84 Mich. 616 [48 N. W. 283]. In *Pickett v. Railroad*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611, a similar instruction was held (opinion by Avery, J.) to be objectionable, because "it left * * * the date which should be the basis of the final calculation, to say the least, uncertain, if his language was not susceptible of the construction that the net income would be estimated as of the period when those dependent on him would have realized the benefit of his labor had he not come to an untimely end." It is there said that the jury should be told that it is the *present value* of the net earnings or income, the rule being stated succinctly and clearly in the seventh headnote of the case. The identical rule is laid down in *Benton v. Railroad*, 122 N. C. 1007, 30 S. E. 333 (opinion by Clark, J.), citing *Pickett's Case*; *Burton v. Railroad*, 82 N. C. 504; *Kesler v. Railroad*, 66 N. C. 154. This is not merely the

just and reasonable rule, where all the damages are to be awarded and paid presently, and not as they accrue in the future, but it is the only one admissible under the statute, and it is said in *Benton's Case* to have been established by the precedents. Any other principle, if adopted, would enable a plaintiff to recover more than could possibly be earned, as no man realizes at once the full earnings or accumulations of a lifetime.

[20] There must be a new trial of the issue as to damages, and it is restricted to that issue, as was done in *Tillett v. Railroad*, 115 N. C. 662, 20 S. E. 480; *Pickett v. Railroad*, supra; the error relating only to the damages.

New trial.

On Motion for New Trial.

[21] Since this case was argued, the defendant has moved for a new trial, upon the ground of newly discovered evidence. Applications of this kind, as we have held, should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. 14 Am. & Eng. Enc. Pl. & Pr. 790.

[22] We require, as prerequisite to the granting of such motions, that it shall appear by the affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. *Turner v. Davis*, 132 N. C. 187, 43 S. E. 637; *State v. Starnes*, 97 N. C. 423, 2 S. E. 447; *Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748; *State v. De Graff*, 113 N. C. 688, 18 S. E. 507; *Shehan v. Malone*, 72 N. C. 59; *Mottu v. Davis*, 153 N. C. 160, 69 S. E. 63; *Aden v. Doub*, 146 N. C. 10, 59 S. E. 162. When we examine the affidavit of Hector Austen, and the others, upon which the defendant bases its motion for a new trial, we find that it falls far short of complying with the rule we have just stated. In some respects the proposed testimony is merely cumulative, and in others it only tends to contradict or impeach the plaintiff's witnesses at the trial. It is not very definite. The witness does not speak with sufficient positiveness and directness to give us the slightest assurance that there will be a different result if we grant the application. He states that the brake was not applied to the car making the flying switch, which would tend rather to strengthen than to weaken the plaintiff's

case. It is not satisfactorily shown that the testimony of the witness, if desired, could not have been secured at the trial by the exercise of proper diligence. We are convinced that the testimony, if it had been introduced before, would not have changed the result. We refer now to the second affidavit of Hector Austen, made in behalf of plaintiff.

Motion denied.

**VARNVILLE FURNITURE CO. v.
CHARLESTON & W. C. RY. CO.**

(Supreme Court of South Carolina. Sept. 15, 1913.)

1. COMMERCE (§§ 10, 61*)—INTERSTATE COMMERCE—VALIDITY OF STATE LEGISLATION.

Civ. Code 1912, § 2573, providing that every claim for freight overcharged or for loss of or damage to property while in the possession of common carriers shall be adjusted and paid within 30 days in case of shipments wholly within the state, and within 40 days in case of shipments from without the state, and that failure to adjust and pay such claims within such periods shall subject the common carrier so failing to a penalty of \$50, does not unlawfully regulate or unreasonably burden interstate commerce, and is valid in the absence of legislation by Congress on the same subject.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 8, 81-84, 89; Dec. Dig. §§ 10, 61.*]

2. CARRIERS (§ 2*)—CONSTITUTIONAL LAW (§§ 247, 303*)—LOSS OF OR INJURY TO GOODS—PENALTIES FOR DELAYED SETTLEMENT.

This section does not deprive carriers of their property without due process of law, or deny to them the equal protection of the laws.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.* Constitutional Law, Cent. Dig. §§ 703, 863-866; Dec. Dig. §§ 247, 303.*]

3. COMMERCE (§ 8*)—INTERSTATE COMMERCE—VALIDITY OF STATE LEGISLATION.

The Carmack amendment to the interstate commerce law (Act June 29, 1906, c. 3591, § 7; pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), which provides that any common carrier receiving property for interstate transportation shall issue a receipt or bill of lading therefor, and shall be liable to the holder thereof for loss, damage, or injury to such property caused by it or any connecting carrier, does not defeat the recovery of penalties under Civ. Code 1912, § 2573, for the failure of a carrier to adjust and pay claims for overcharges of freight or loss of or damage to property promptly, where such penalties were incurred prior to its enactment, even if section 2573 is superseded and annulled by that amendment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

4. COMMERCE (§ 8*)—INTERSTATE COMMERCE—VALIDITY OF STATE LEGISLATION.

Civ. Code 1912, § 2573, requiring carriers to adjust and pay claims for overcharges of freight, or for loss of or damage to property while in its possession within 30 days in case of shipments wholly within the state, and within 40 days in case of shipments from without the state, and imposing a penalty of \$50 for each failure to adjust and pay a claim within the period specified, is not inconsistent with, and was not superseded by, the Carmack amendment to the interstate commerce law (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), which provides that common carriers receiving

property for interstate transportation shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any connecting carrier, that no contract, receipt, etc., shall exempt the carrier from the liability thereby imposed, but that nothing therein shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law, and that such carrier may recover from the carrier on whose line the loss occurred the amount it may be required to pay, since that amendment applies only to the subject of liability on contracts, while section 2573 applies to the entirely different subject of settlement of the claims of shippers, and hence, Congress not having acted on the subject covered by section 2573, that section is valid as applied to interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

5. COMMERCE (§ 8*)—INTERSTATE COMMERCE—VALIDITY OF STATE LEGISLATION.

The authority of Congress to regulate interstate and foreign commerce is supreme and unlimited except by the federal Constitution, and when Congress legislates upon any particular subject of such commerce, all conflicting state laws, whether statute or common law, affecting the same subject are thereby superseded; but, in the absence of such legislation, the police power of the state remains unimpaired.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. § 3.*]

6. COMMERCE (§ 8*)—INTERSTATE COMMERCE—VALIDITY OF STATE LEGISLATION.

There is no conflict, as to the carrier against which actions shall be brought, between Civ. Code 1912, § 2573, imposing a penalty for the failure of carriers to pay claims for overcharges of freight or for loss or damage to property within periods therein specified, and the Carmack amendment to the interstate commerce law (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), which requires common carriers receiving property for interstate transportation to issue a receipt or bill of lading therefor, and making such carriers liable to the holder thereof for any loss, damage, or injury to such property caused by it or any connecting carrier, and providing that nothing therein shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law, since, conceding that the proviso saves only remedies under existing federal laws, the amendment does not limit the remedy of the holder of the bill of lading to an action against the initial carrier, as at the time of its enactment such holder, under the law as it then existed and was administered by the federal courts, had a right of action against the carrier actually causing the loss or damage, and, moreover, section 2573 does not require all actions to be brought against the terminal carrier.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

7. COMMERCE (§ 8*)—LOSS OF OR INJURY TO GOODS—DAMAGES.

The provision of the Carmack amendment to the interstate commerce law (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), that nothing in that section shall deprive any holder of a receipt or bill of lading issued by a common carrier of any remedy or right of action which he has under existing law continues all rights and remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, by state statute, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

common law, not inconsistent with the rules and regulations prescribed by the provisions of that act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Hampton County; R. W. Memminger, Judge.

Action by the Varnville Furniture Company against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. B. Grier, of Greenwood, and J. W. Manuel, of Hampton, for appellant. S. G. Varn, of Varnville, and J. W. Vincent, of Hampton, for respondent.

HYDRICK, J. Plaintiff recovered judgment against defendant in a magistrate's court for \$14.75, damages done to a shipment of furniture, while in defendant's possession in this state, and \$4.60, overcharges in the freight collected by defendant thereon, and \$50, the penalty allowed by statute (Civ. Code 1912, § 2573), for the failure of defendant to pay plaintiff's claim for said damages and overcharge within 40 days after the filing thereof with defendant's agent. The initial carrier, the Southern Railway Company, received the shipment at High Point, N. C., to be transported over its own and connecting lines and delivered to plaintiff at Varnville, S. C., and issued its usual bill of lading therefor. Defendant received the shipment from the Southern Railway Company at Allendale, S. C., and delivered same to plaintiff at destination in a damaged condition. The circuit court affirmed the magistrate's judgment.

The only question made in the courts below and brought here by the grounds of appeal is that the statute above cited, under which defendant was penalized for its failure to pay plaintiff's claim within the time required, is void, as applied to interstate commerce, because: (a) It unlawfully regulates and unreasonably burdens the same; and (b) it deprives defendant of its property without due process of law, and denies to it the equal protection of the laws; and (c) it is in conflict with that provision of the federal statute regulating interstate commerce known as the Carmack amendment (Act June 29, 1906, c. 3591, § 7, para. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]).

[1, 2] The learned counsel for appellant admits that the first and second grounds above stated have been foreclosed by the decisions of this court which have been affirmed by the Supreme Court of the United States in *A. C. L. R. Co. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411, in which the validity of the statute now under consideration was affirmed. He contends, however, that the third ground was not in-

volved in any of those cases, and that the effect of the federal statute above referred to, as it has been interpreted and applied in recent decisions of the federal Supreme Court, has been to supersede and annul the state statute.

[3] It is said that the delicts upon which the penalties were inflicted in the *Mazursky* Case, and the others decided with it, occurred prior to the adoption of the Carmack amendment. As to that matter, the reports of those cases (except the *Charles* Case) are silent. But, if the fact be as stated by appellant's counsel, it is true that the federal statute would not have defeated the recovery of penalties incurred prior to its enactment. *Yazoo, etc., R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1, 33 Sup. Ct. 213, 57 L. Ed. 389, decided January 20, 1913.

[4] But the arguments in the Supreme Court of the United States in the *Mazursky* Case show that the point was made and pressed upon the attention of the court that, if the state ever had power to enact this statute, it was valid only until Congress should take action upon the same subject, and that Congress having taken such action, by the passage of laws regulating interstate commerce in great detail, it had thereby excluded or superseded the power of the state. At the time those cases were argued, the Carmack amendment had been on the statute books over three years; and, if it had the effect which is now claimed for it, it is strange that it was not mentioned either by counsel who argued the cause or by the court in its opinion in disposing of the contention above stated, as was done in the *Greenwood Grocery Company's Case* above cited, with regard to a similar effect given to the provisions of the Hepburn act. The omission points with force to the conclusion that it was not supposed, either by counsel or by the court, to have any bearing upon the point at issue. Because, even though for the reason above stated it could not have controlled the decision, yet it would almost certainly have been advanced as an argument tending to show the intention of Congress to take possession of the field covered by the state statute. Besides this, the *Mazursky* Case has been cited several times by the Supreme Court of the United States in cases subsequently decided, which involved the superseding effect of the provisions of the federal statute regulating interstate commerce upon conflicting state laws, without any intimation that its authority is limited by the fact suggested. On the contrary, in *Southern Ry. Co. v. Reid*, 222 U. S. 436, 32 Sup. Ct. 140, 56 L. Ed. 260, in answering the contention, which was based upon the authority of the *Mazursky* Case and the *James Case*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, that the North Carolina statute under consideration was a valid exercise of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the police power of the state, the court said: "In those cases, and in the later case of *Western U. Tel. Co. v. Commercial Mill Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088 [36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815]. the principle is expressed that 'there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those engaged in interstate commerce.' Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it. But the facts of those cases distinguish them from the case at bar, and make their principle inapplicable. In the *Telegraph Company Cases*, there was a failure to transmit or deliver telegrams, in violation of the duty so to do imposed by particular state statutes. In the *Railroad Case*, a statute of the state of South Carolina which required carriers to settle within a specified time claims for loss of or damage to freight while in their possession within the state was sustained against the objection that it was an interference with interstate commerce. *In none of the cases, however, was there any federal legislation upon the subject involved, and in all of them such circumstance was stated as an element of decision.* The circumstance is important, and we are brought to the inquiry whether it exists in the present case." (Italics added.) It appears therefore that, even as late as the decision of the *Reid Case*, which was filed in January, 1912, the court had not discovered that there was any conflict between the Carmack amendment and this statute, the validity of which was affirmed in the *Mazursky Case* upon the ground of the absence of "*any federal legislation upon the subject involved.*"

[8] But, treated as an open question, the conclusion is inevitable that there is no such conflict. We wish to make it clear at the outset that we concede that the authority of Congress to regulate interstate and foreign commerce is supreme and unlimited, except by the federal Constitution, and that, when Congress legislates upon any particular subject of such commerce, all conflicting state laws, whether statute or common law, affecting the same subject, are thereby superseded. On the other hand, we maintain that, in the absence of such legislation, the police power of the state remains unimpaired. These propositions are universally recognized, and they have been reaffirmed in the very latest decisions of the Supreme Court of the United States. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *Chicago, etc., R. Co. v. Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275, 55

L. Ed. 290; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, decided January 6, 1913; *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511 (Minnesota rate case), decided June 9, 1913.

Let us inquire, then, what is meant by "the subject," when it is said that, when Congress has legislated upon or taken possession of "the subject," inconsistent state laws are superseded. This question was considered in *Southern Railway Co. v. Reid*, supra, where the court said: "It is well settled that if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised. The question occurs, To what extent and how directly must it be exercised to have such effect? It was decided in *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352, that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by nonaction leaves power in the states over merely incidental matters. 'In other words,' and we quote from the opinion, * * * 'the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. * * * *Until specific action* by Congress or the commission the control of the state over those incidental matters remains undisturbed.' The duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared * * * to be a common-law duty which the state might, 'at least, in the absence of congressional action, compel a carrier to discharge.' The principle of that case, therefore, requires us to *find specific action*, either by Congress in the interstate commerce act, or by the commission, covering the matters which the statute of North Carolina attempts to regulate." (Italics added.)

The same question is so clearly and fully discussed in *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, and that case is so directly in point, that we quote from the opinion at length. After stating that the statute of Indiana, which was assailed in that case, and which was adopted in 1907, after the passage of the pure food and drugs act of Congress of June 30, 1906 (Act June 30, 1906, c. 8915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), covered the

same general subject, the court pointed out that the provisions of the state statute upon which it was attacked as being in conflict with the food and drugs act were not included in the legislation of Congress, and on that ground it was held that there was no conflict between the two, and that the state law was therefore valid. The court said:

*"But this (the legislation of Congress) does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients (the thing prohibited by the act of Congress), and it may be quite another to give no information as to what the ingredients are (the thing required by the state statute). As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade-names which do not reveal the ingredients of the composition, and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients,' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture. * * * Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial, it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act, that 'nothing in this act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, 'except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.' Section 8. We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.*

"Is, then, a denial to the state of the exercise of its power for the purposes in question necessarily implied in the federal statute? For when the question is whether a federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 [27 Sup. Ct. 350], 51 L. Ed. 553, 9 Ann. Cas. 1075; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 32 Sup. Ct. 160 [56 L. Ed. 237]; Southern R. Co. v. Reid, 222 U. S. 424, 436, 32 Sup. Ct. 140 [56 L. Ed. 257].

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. This principle has had abundant illustration. Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 19 Sup. Ct. 289, 42 L. Ed. 688; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; Crossman v. Lurman, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401; Asbell v. Kansas, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101; Northern P. R. Co. v. Washington, 222 U. S. 370, 379, 32 Sup. Ct. 160, 56 L. Ed. 237, 240; Southern R. Co. v. Reid, 222 U. S. 424, 442, 32 Sup. Ct. 140, 56 L. Ed. 257, 262.

"In Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878, the Supreme Court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the state certain cattle alleged to have been affected with Texas fever, which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the state of cattle which were liable to communicate the fever. It was contended that Act Cong. May 20, 1884, c. 60, 23 Stat. at L. 31 (U. S. Comp. St. 1901, p. 299), known as the animal industry act, together with Act March 3, 1891, c. 544, 26 Stat. at L. 1044, appropriating money to carry out its provisions, and section 5258 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3564), covered substantially the

whole subject of the transportation from one state to another state of live stock capable of imparting contagious disease, and therefore that the state of Kansas had no authority to deal in any form with that subject. The act of 1884 provided for the establishment of a bureau of animal industry, for the appointment of a staff to investigate the condition of domestic animals, and for the report upon the means to be adopted to guard against the spread of disease. Regulations were to be prepared by the Commissioner of Agriculture and certified to the executive authority of each state and territory. Special investigation was to be made for the protection of foreign commerce, and the Secretary of the Treasury was to establish such regulations as might be required concerning exportation. It was provided that no railroad company within the United States, nor the owners or masters of any vessel, should receive for transportation, or transport, from one state to another, any live stock affected with any communicable disease, nor should any one deliver for such transportation, or drive on foot or transport in private conveyance from one state to another, any live stock knowing them to be so affected. It was made the duty of the commissioner of agriculture to notify the proper officials or agents of transportation companies doing business in any infected locality of the existence of contagion; and the operators of railroads, or the owners or custodians of live stock within such infected district, who should knowingly violate the provisions of the act, were to be guilty of a misdemeanor punishable by fine or imprisonment.

"The court held that this federal legislation did not override the statute of the state; that the latter created a civil liability as to which the animal industry act of Congress had not made provision. The court said (169 U. S. 623, 624 [18 Sup. Ct. 492, 42 L. Ed. 878] supra): '*May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress?* This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, *unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.* *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243, 247. * * * Whether a corporation transporting, or the person causing to be transported, from one state to another cattle of the class specified in the Kansas statute should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their state of such diseased cattle is a subject about which the animal industry act did not make any provision. That act does

not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some state enactment for damages arising out of the introduction into that state of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability.'

"In *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, the question arose under a statute of Colorado which had been passed to prevent the introduction into the state of diseased animals. The statute made it a misdemeanor for any one to bring into the state between April 1st and November 1st any cattle or horses from a state, territory, or county south of the thirty-sixth parallel of north latitude, unless they had been held at some place north of that parallel at least 90 days prior to importation, or unless the owner or person in charge should procure from the state veterinary sanitary board a certificate, or bill of health, to the effect that the cattle or horses were free from all infectious or contagious diseases, and had not been exposed thereto at any time within the preceding 90 days. The expense of any inspection in connection therewith was to be paid by the owner.

"The plaintiff in error had been convicted of bringing cattle into the state in violation of the statute. There was no proof in the case that the particular cattle had any infectious or contagious disease, but it did appear that they were brought from Texas, south of the thirty-sixth parallel, without being held or inspected as the statute required. Its provisions were ignored altogether as invalid legislation. When the plaintiff in error refused to assent to the state inspection he showed to the authorities a certificate signed by an assistant inspector of the federal bureau of animal industry, who certified that he had carefully inspected the cattle in Texas and found them free from communicable disease. It was insisted that the statute of Colorado was in conflict with the animal industry act of Congress, but the court sustained the state law for the reason that, *although the two statutes related to the same general subject, they did not cover the same ground, and were not inconsistent with each other.*

"The court thus emphasized the general principle involved (187 U. S. 148, 23 Sup. Ct. 96, 47 L. Ed. 108, supra): '*It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police power of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has often been reaffirmed—that "in the application of this principle of supremacy of an act of Congress in a case*

where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts should not be reconciled or consistently stand together." (Italics added.)

In each of the cases hereinbefore cited, the court holds that the police power of the states still exists unimpaired, except in so far as laws adopted thereunder may conflict with the legislation of Congress upon the same subject. Therefore we cannot accept as sound the contention of appellant's counsel that the Supreme Court of the United States has held that the act to regulate commerce "was intended to cover and regulate the entire subject of interstate commerce, leaving nothing to the state, either by way of legislation, policy, or regulation." To sustain that contention, he cites the following from the Croninger Case: "Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it." When the language quoted is given its proper setting, and read in connection with the context, it clearly appears that "the subject" referred to was not the whole subject of interstate commerce, but the limited subject "*of liability of the carrier under a bill of lading which he must issue,*" as required by the Carmack amendment. The whole paragraph from which the quotation is taken reads as follows: "That the legislation (the Carmack amendment) supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist." (Italics added.) Read as a whole, the passage shows clearly that "the subject" which the court had in mind was "the subject of such contracts"; that is, of liability on contracts which any carrier receiving property for interstate transportation is required to issue.

Having seen what the subject of the Carmack amendment is, let us examine the state statute to see what subject is dealt with by it, and thereby determine whether they cover the same subject, and whether there is any conflict between them. The state statute merely penalizes the failure of carriers to perform a common-law duty—namely, the duty to

make reasonably prompt settlement of the claims of shippers for loss of or damage to property while in their possession. The performance, or the failure of performance, of that duty has nothing whatever to do with the liability of the carrier under the contract of shipment. The statute does not attempt to impose, increase, or diminish that liability, or to affect it in any way whatever. It merely says that, assuming the liability to exist, the carrier should discharge it with reasonable promptness, and penalizes his failure to do so. With as much reason could it be said that a statute which imposes the costs of the action upon the losing party imposes or affects in any way the liability upon which the action is predicated. The two things are separate and distinct. The payment of costs is imposed as a penalty for failure to pay the debt without suit, and the payment of the penalty is imposed for a like reason—the failure to pay a just claim within a reasonable time, without compelling the shipper to resort to the courts to collect it. Where no liability exists, no penalty can be recovered; and, unless the shipper recovers the full amount which he has claimed, he cannot recover the penalty. The carrier is therefore protected against being penalized for the failure to pay unjust or exorbitant claims.

We look in vain through the legislation of Congress to find any rule or regulation on the subject of the prompt settlement of such claims. By no sort of implication can that subject be brought within the provisions of the Carmack amendment. That it is one proper for the exertion of the state authority, in the absence of congressional action, is settled by the Mazursky Case. The reason for the statute and the grounds upon which it should be sustained are set forth in that case and in the Seegers Case, 73 S. C. 71, 52 S. E. 797, 121 Am. St. Rep. 921, and 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108. The annulling of it would leave shippers at the mercy of interstate carriers, and allow them to practically confiscate small claims for loss of or damage to property while in their possession; because, in the great majority of cases, the amounts involved are too insignificant to justify the employment of legal counsel to collect them. That there was great abuse in that regard, and an evil which needed a remedy, is evidenced by the statute.

We shall next consider the decisions of the Supreme Court of the United States which are relied upon by appellant to show that the state statute conflicts with the legislation of Congress, and attempt to show that they cannot be so interpreted. The Carmack amendment reads as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or

injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

This legislation was construed and applied in the case of *Adams Express Co. v. Croninger*, supra, in which the company was held liable in the state court for the full value of a diamond ring and interest thereon, to wit, \$137.52, notwithstanding a limitation of the company's liability, by stipulation in the bill of lading, to the agreed value, to wit, \$50, when the shipper had obtained the lower of two alternative rates of transportation, which were based upon the value of commodities above and below \$50, which rates had been made and filed with the Interstate Commerce Commission and duly published. The ruling of the state court was based upon the state law, which declared void all contracts limiting the common-law liability of carriers. The Supreme Court of the United States held that the Carmack amendment indicated "a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular states." That being the purpose, all state laws conflicting therewith were necessarily superseded. As to the liability thereby imposed, the court said: "The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court, as well as many courts of the states." (Italics added.) As the liability imposed (except that for the default of connecting carriers) is not beyond that imposed by the common law, it certainly cannot be said to cover the same field as the statute of this state, which imposed a liability unknown to the common law. We have heretofore pointed out the essential differences between the federal and state law.

In *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683 (decided March 10, 1913), the principle of the Croninger Case was reiterated, and, in addition, it was held that any valid limitation of

liability stipulated for in the bill of lading for the benefit of the initial carrier and its connecting carriers insured to the benefit of each succeeding carrier in the route.

The case of *Missouri, K. & T. R. Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690 (decided March 10, 1913), came within the principle of the Croninger and Carl Cases, and it was further held, in that case, that a stipulation in the bill of lading limiting the time to 90 days within which an action could be brought against the carrier to enforce the liability incurred thereunder was reasonable and valid, and that it superseded state statutes which declared such a stipulation invalid, in so far as the same were applied to interstate shipments. In each of the foregoing cases, the subject regulated by the state was embraced in the contract for interstate transportation, control of which had been assumed by Congress in the Carmack amendment.

The case of *Chicago, etc., R. Co. v. Hardwick Farmers' Elevator Company*, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284 (decided January 6, 1913), does not come under the Carmack amendment, but under section 1 of the Hepburn act, amending the original act to regulate commerce. In the *Hardwick* Case, the state court imposed upon a carrier a penalty provided by a statute of Minnesota for delay in furnishing cars to initiate an interstate shipment. The original act to regulate commerce declared that the term "transportation" should embrace all instrumentalities of shipment or carriage, and the Hepburn act declared that it "shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable requests therefor, and to establish through routes and reasonable rates applicable thereto." (Italics added.) The Supreme Court reversed the state court, and held that "Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act." Not only had the act of Congress imposed upon such carriers the specific duty of furnishing cars for interstate shipments, but it had gone further and provided remedies and penalties for the violation of that duty. It necessarily followed that the state law was superseded because it covered the same field.

In the case of *St. Louis, etc., R. Co. v. Edwards*, 227 U. S. 265, 33 Sup. Ct. 262, 56 L. Ed. 506 (decided February 24, 1913), the court of Arkansas imposed upon an interstate carrier the penalty provided by what was called "the demurrage statute" of that

state, because of a failure to make prompt delivery of freight on arrival at destination." The Supreme Court reversed the judgment, and held under the principle announced in the Hardwick Case, that the subject of the *delivery* of interstate shipments is so far embraced in the provisions of the Hepburn act, above quoted, as to supersede the Arkansas statute, which dealt with the same subject. We fail to see wherein this state statute has anything whatever to do with contracts made by the initial carrier relative to its liability or that of its successors in the route for loss or damage to the property caused by it or them so as to bring it within the principles of the Croninger, Carl, and Harriman Cases, or with the *receipt* or *delivery* of interstate shipments so as to bring it within the principles of the Hardwick and Edwards Cases.

In this connection, we notice the statement in the argument of appellant's counsel that this court held in the Charles Case, 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762, that "prompt delivery of goods" is the legal equivalent of "prompt settlement of proper claims for damages," and that the Supreme Court of the United States held the same in the Mazursky Case. Counsel has evidently misunderstood the court. The language used was: "The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claims for damages." From the context, it appears that the court meant only that the effect of the statute was not to burden interstate commerce, but rather to benefit it, by stimulating carriers to take proper care of goods while in their custody, so that delivery thereof in good condition would be made, knowing that, if they failed in that duty, they would be under the compulsion of the statute to perform the alternative duty of making prompt settlement of proper claims therefor. The language of this court above quoted, and much more of the opinion of this court in the Charles Case, was quoted in the opinion of the Supreme Court of the United States in the Mazursky Case, but no comment was made upon this point, and it was not an element of decision.

[8] Appellant's next contention is that the Carmack amendment conflicts with and supersedes the state statute, because it required that all actions for loss of or damage to interstate shipments shall be brought against the initial carrier, while the state statute requires that they shall be brought against the terminal carrier. In this appellant has erroneously construed both the federal and the state statutes. The federal statute does not limit the right or remedy of the holder of the bill of lading, in case of loss or damage, to an action against the

initial carrier receiving property for interstate transportation. While it says that that carrier shall be liable, on the principle that succeeding carriers in the route are its agents, it does not say that it alone shall be liable, or that the holder of the bill of lading shall pursue that carrier only. On the contrary, the act expressly preserves the right of the holder of the bill of lading to pursue the carrier which actually caused the loss or damage, for it says, "Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." Certainly, under the law as it existed at that time, the holder of the bill of lading had a right of action against the carrier which actually caused the loss or damage. In fact, prior to the Carmack amendment, as the result of the almost universal practice of carriers to limit their liability by stipulation in the bill of lading to loss or damage occurring on their own lines, that was practically the only right he did have, in case of loss of or damage to his goods in the course of interstate transportation; and the fact that he frequently found it very difficult, and sometimes impossible, to find out which one of the several connecting carriers was actually in default, and the expense and inconvenience of prosecuting his claim against a carrier in a distant state, were some of the reasons which led to the adoption of the Carmack amendment. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 200, 31 Sup. Ct. 164, 55 L. Ed. 180, 31 L. R. A. (N. S.) 7. To hold that the initial carrier alone is liable to the holder of the bill of lading would, in many cases, cause the very expense and inconvenience which the statute was designed, in part at least, to obviate. A consignee in South Carolina might be compelled to bring suit against the initial carrier in California to collect a claim of insignificant amount, or abandon it, when the carrier whose default caused the loss or damage was at his door. Such a construction of the act would defeat one of its purposes. Why should the owner of the goods be compelled to sue the initial carrier, if he can prove that the terminal carrier lost or injured his goods, and what right has the carrier who lost or injured his goods to contend that he should not be held liable in an action by the owner? If the initial carrier is held on his statutory liability, the carrier in default is liable over to him. What difference can it make to the carrier who is ultimately liable whether he pays the damages to the owner of the goods or to the initial carrier?

It is argued, however, that in the Croninger Case, the Supreme Court construed the proviso above quoted as preserving to the holder of the bill of lading only the rights or remedies which he may have had under existing federal law. Without conceding that the language of the court, used in the connection in which it was, can be properly con-

strued to so limit the effect of the proviso, it cannot be denied that, under the law, as it then existed and was administered by the federal courts, the holder of such bill of lading did have a right of action against the carrier which actually caused the loss or damage. Referring to the language in the Croninger Case, which is relied upon by counsel for appellant, the court gave, as an instance of the rights preserved by the proviso, the then existing right of the holder of the bill of lading to a remedy against a succeeding carrier in default, in the following language: "One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former."

[7] While the foregoing is sufficient to dispose of this contention, so far as it affects the decision of this case, it might not be amiss, in this connection, to say that the remark of the court which appellant relies upon was made in answering the contention in argument in that case that all rights and remedies under all existing laws, including state laws which were in conflict with the purpose and intent of the act, were preserved by the proviso. The court pointed out the absurdity of that construction by showing that it would result in the destruction of the act by the proviso, and in the nullification by a conflicting state law of the regulation of a national subject by the supreme authority of Congress, and said, in answering that argument, that a more rational construction would be "to construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing federal law at the time of his action." But that was far from saying that that was the proper construction, or the only one, to be given to the proviso. On the contrary, the court had already given the proviso the same construction which it had given a similar provision in the act of 1887, in the Abilene Case, to wit, "that it was 'evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by state statute, or common law, *not inconsistent with the rules and regulations prescribed by the provisions of this act.*'" (Italics added.) By this language, the proviso was held to preserve rights and remedies for the redress of some specific wrong or injury given by state statute or the common law, *provided the same are not inconsistent with any rule or regulation prescribed by the act itself*, a construction which merely harmonizes the provisions of the act with its purpose.

Equally untenable is the construction put upon the state statute by the appellant—that it requires all actions to be brought against the terminal carrier. This court has expressly held that the terms of the statute limit "the

loss and damage which a carrier is required to adjust and pay for to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier." *Venning v. A. C. L. R. Co.*, 78 S. C. 56, 58 S. E. 983, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768.

The judgment of the circuit court is affirmed.

GARY, C. J., and FRASER, J., concur.

WATTS, J. (dissenting). This action was brought in the magistrate's court to recover \$14.76 damages to a shipment of furniture, in transit, from High Point, N. C., to Varnville, S. C., and for \$5.25 overcharge in freight, and for \$50 penalty for failure to pay the claim in 40 days. The defendant demurred to so much of the complaint as asked for penalty of \$50 on the grounds, in substance, that the statute under which this action is brought is unconstitutional because it amounts to a burden on and regulates interstate commerce, because it deprives the defendant of its property without due process of law, and because it deprives it of equal protection of the laws. The magistrate overruled the demurrer, and defendant answered, denying the allegations of the complaint, and the case was tried before the magistrate without a jury. From the testimony it appears that in the first week in March, 1912, the plaintiff ordered a car load of furniture from High Point, N. C., to be shipped to Varnville, S. C. The shipment was delivered to the Southern Railway Company, at High Point, N. C., to be transported over its line from High Point, N. C., to Allendale, S. C., and there delivered to the Charleston & Western Carolina, the defendant, at which point the defendant received the shipment and transported it to Varnville, S. C., and there made delivery to the plaintiff, the consignee and owner and holder of the bill of lading.

The evidence shows: That the furniture was damaged in transit, but whether on defendant's line or not it does not appear. At the trial the defendant asked the magistrate to hold that the claim for \$50 as a penalty as applied to an interstate shipment was a burden on interstate commerce. That the penalty act as applied to an interstate shipment was unconstitutional, null, and void. The magistrate refused to so hold, and gave judgment for plaintiff, for full amount claimed, and \$50 penalty. The defendant appealed to circuit court, and his honor Judge Memminger, affirmed the judgment of the magistrate's court. The defendant appeals, and questions the correctness of his honor's ruling. These exceptions question the validity of the penalty act of February 23, 1903 (24 St. at Large, p. 81) as amended Feb. 19, 1910 (26 St. at Large, p. 719) on the ground that said act as applied to an interstate shipment is

unconstitutional and in conflict with the due process clause and the commerce act of the federal Constitution. That it is a regulation of interstate commerce, and it is in conflict with the act of Congress as amended June 29, 1906. These exceptions should be sustained. The recent decisions of the United States Supreme Court, the final arbiter in such matters, and by whose decisions this court is bound, clearly establishes the propositions: First, legislation of the states in regulation of interstate commerce was permissive only, permission being implied by failure of Congress to legislate, but the permission has been taken away by recent federal legislation, especially the Hepburn act, and the Carmack amendment. Second, the provision "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action he has under existing laws" refers to rights and remedies provided by federal statutes, and necessarily excludes those provided by the state statutes. Third, the duties and liabilities of carriers in interstate commerce are provided by the federal statute, and the regulations of the federal statute supersede and annul all state statutes providing penalties for the failure to perform any duty or obligation incident to interstate commerce.

Transportation is declared by the federal statutes to embrace all instrumentalities of shipment and carriage, including "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation and refrigeration, icing, storing and handling of property transported." The words italicized indicate the reason for holding that this case falls within the rule above set out, laid down by the Supreme Court of the United States in the following cases: *Chicago, etc., Railroad Co. v. Hardwick Elevator Co.*, 226 U. S. 427, 33 Sup. Ct. 174, 57 L. Ed. 284; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314; *Kansas City, etc., Railroad Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; *St. Louis, etc., Railroad Co. v. Edwards*, 227 U. S. 265, 33 Sup. Ct. 262, 57 L. Ed. 506; *M., K. & T. R. Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690. These cases so fully and conclusively cover the principle involved that it seems clear to me that the judgment should be reversed.

DEAVER-JETER CO. v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Oct. 1, 1913.)

1. COMMERCE (§ 8*)—CONCURRENT POWERS—FREIGHT—ACTIONS FOR LOSS—JURISDICTION. The courts of this state are not deprived of jurisdiction of an action against a delivering carrier for damages for loss of goods, on the ground that the shipment was interstate, and

that under the Carmack amendment to the interstate commerce act only the initial carrier was liable, it being a resident of another state and liable there for the loss.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. § 8.*]

2. CARRIERS (§ 76*)—FREIGHT—ACTIONS FOR LOSS—PARTIES PLAINTIFF.

The consignee of freight who purchased the goods and received a bill of lading was the real party in interest to an action against the railroad company for damages for the destruction en route; the title being in the consignee in the absence of an intention or agreement to the contrary.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 256-271, 363; Dec. Dig. § 76.*]

3. CARRIERS (§ 132*)—FREIGHT—ACTIONS FOR LOSS—BURDEN OF PROOF—DESTRUCTION BY ACT OF GOD.

In an action against a delivering carrier for damages for the destruction of goods en route, the burden was upon defendant to prove that the goods were destroyed by the act of God, and that it had exercised due care to prevent the consequences of such act.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 578-582, 605; Dec. Dig. § 132.*]

4. CARRIERS (§ 109*)—FREIGHT—ACTIONS FOR DESTRUCTION—WHAT LAW GOVERNS.

An action against a delivering railroad company for damages for the destruction of goods en route is a common-law action, so that the state law, and not the law as declared by the federal courts, would be applicable though the shipment was interstate.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 496; Dec. Dig. § 109.*]

Appeal from Common Pleas Circuit Court of Union County; F. B. Gary, Judge.

Action by the Deaver-Jeter Company against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 91 S. C. 503, 74 S. E. 1071.

B. L. Abney, of Columbia, and Sanders & De Pass, of Spartanburg, for appellant. John K. Hamblin, of Union, for respondent.

HYDRICK, J. In August, 1908, the Fehcheimer-Kelfer Company, of Cincinnati, Ohio, sold plaintiff a bill of goods and delivered them to the Louisville & Nashville Railroad Company for transportation and delivery to plaintiff at Carlisle, S. C. The goods were destroyed at Hamberg, S. C., while in defendant's possession. Defendant denied liability for the loss on the ground that it was caused by the act of God, to wit, an unprecedented flood in the Savannah river. Under the instructions of the court, the verdict establishes the fact that the flood was not the sole cause of the loss, but that the goods could have been saved by the exercise of due care, after the defendant knew, or should have known, that they were in peril.

[1] Appellant's first contention is that the circuit court had no jurisdiction of the action, because the shipment was interstate, and, therefore, under what is known as the Carmack amendment to the act of Congress

regulating interstate commerce, only the initial carrier is liable for the loss, and, of course, that carrier can be sued only in the courts of the state of its legal residence. We have recently decided that contention adversely to appellant's view in the case of *Varnville Furniture Company v. C. & W. C. Ry. Co.*, 79 S. E. 700.

[2] The next question is, Is the plaintiff the real party in interest, and entitled to maintain this action? There is no doubt of it. The testimony is that the goods were sold to the plaintiff and delivered to the initial carrier for the plaintiff, and the bill of lading was sent to the plaintiff. The general rule is that, in such circumstances, in the absence of an intention or agreement, expressed or implied, to the contrary, the title is in the consignee. 35 Cyc. 317; 4 A. & E. Enc. L. (2d Ed.) 525. In so far as the agreement of the *Fechheimer-Keifer Company* to save the plaintiff harmless from the costs and expenses of the action is relied upon by the defendant to sustain this objection, it is concluded by the decision on the former appeal in this case. 91 S. C. 503, 74 S. E. 1071. In so far as the testimony of the manager of the plaintiff company is relied upon for that purpose, it may be said that it was nothing more than his opinion on a question of law. The undisputed facts vested in plaintiff at least a *prima facie* title to the goods, and the right to maintain the action. There was no direct evidence that the sale had ever been rescinded. Even if it can properly be said that there was any conflict in the evidence, the question was submitted to the jury and resolved in plaintiff's favor.

[3] There was no error in the instruction that the burden was upon defendant to prove that the goods were destroyed by the act of God, and that it had exercised due care to prevent the consequences of the act of God.

[4] Appellant cites and relies upon the case of *Railway Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909, for the proposition that, when a carrier shows that a loss was caused by an act of God, as by flood, he is excused, without proving affirmatively that he was guilty of no negligence, and contends that, as this was an interstate shipment, the law as declared by the federal Supreme Court must be applied to the case. We cannot sustain that contention. The cause of action is not created or given by any federal statute. It is an action given by the common law, and it is therefore subject to the same rules of law and evidence as any other common-law action. *Aldrich v. Railroad Company*, 79 S. E. 316, and cases cited. If the question were an open one, the case cited by appellant would be of very high persuasive authority, but as no federal question is involved, it

would not be of controlling authority, and as the question has been frequently decided otherwise in this court, we feel bound to follow our own decisions. In *Ferguson v. Railway*, 91 S. C. 61, 74 S. E. 129, the rule as stated in *Slater v. Railway*, 29 S. C. 96, 6 S. E. 936, was approved. In the *Slater Case* the rule is thus stated: "Where an act of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there be any negligence on the part of the carrier, which, if it had not been present, the injury would not have happened, notwithstanding the act of God the carrier cannot escape responsibility. And the onus is upon the carrier to show, not only that the act of God was the cause, but that it was the entire cause; because it is only when the act of God is the *entire* cause that the carrier can be shielded."

Without attempting any detailed statement or analysis of the testimony, which can subserve no useful purpose, we think there was evidence from which a reasonable inference could have been drawn that, if defendant had exercised proper diligence after it discovered, or should have discovered, that the goods were subject to the perils of the flood, they could have been saved. There was therefore no error in submitting that issue to the jury, or in sustaining the verdict.

Judgment affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

BENNETT v. SOUTHERN RY.-CAROLINA DIVISION et al.

(Supreme Court of South Carolina. Sept. 15, 1913.)

1. MASTER AND SERVANT (§ 274*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for the death of a locomotive fireman, who was killed when his engine was derailed at a burning trestle, evidence of the engineer's reputation for carelessness is inadmissible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

2. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for the wrongful death of a locomotive fireman, killed when his engine was derailed at a burning trestle, where it appeared that immediately after another engine had passed over the trestle it was discovered to be on fire, testimony of a witness that he saw places nearby where fire had been dropped is admissible as tending to show the origin of the fire.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

3. TRIAL (§ 139*)—RIGHT TO NONSUIT.

If there is any competent evidence at all tending to sustain the allegations of the com-

plaint, the case should be submitted to the jury, and nonsuit denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

4. TRIAL (§ 295*)—INJURIES TO SERVANT—ACTIONS—PRIMA FACIE CASE.

A statement in the charge that proof of an injury to a servant by defective machinery was prima facie evidence of negligence on the part of the master was not error, where from the whole charge it was made clear that plaintiff could not recover, unless she showed affirmatively by a preponderance of the evidence that the injuries sued for were caused by the master's negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. MASTER AND SERVANT (§ 250¼, New, vol. 15 Key-No. Series)—INJURIES TO SERVANT—NEGLECT OF MASTER—FEDERAL STATUTE.

As the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) is general in its terms, and makes no specific regulations as to the quantity and method of proof of negligence, the laws of the state wherein the action is brought govern, and hence, even in an action brought under such statute, proof that the injury was caused by defective appliances makes out a prima facie case of negligence on the part of the master, where that is the rule of the state.

6. TRIAL (§ 295*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action for the wrongful death of a locomotive fireman, brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), the court charged that proof of injury to defendant by defective machinery was prima facie evidence of negligence on the part of the master. Other portions of the charge correctly stated the master's duty to furnish the servant with a safe place to work and appliances; it nowhere being even intimated that the master was an insurer of the safety of his servant. The charge further limited the jury to a consideration of the negligence specified in the complaint, and required proof by a preponderance of the evidence to justify a verdict for plaintiff. *Held* that, as the court required the jury to consider the charge as a whole, it was not objectionable as a charge upon the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

7. APPEAL AND ERROR (§ 882*)—PERSONS ENTITLED TO ALLEGE ERROR.

Where the court gave the requests of defendant, he cannot complain of the error therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

8. DEATH (§ 95*)—WRONGFUL DEATH—DAMAGES—ELEMENTS.

The recovery under federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for the wrongful death of a servant is limited to compensation for pecuniary loss.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.*]

9. DEATH (§ 95*)—WRONGFUL DEATH—DAMAGES—ELEMENTS.

A recovery of punitive damages allowed in case of wrongful death is limited to the material loss which is susceptible of a pecuniary valuation, and does not include the inestimable loss of the society and companionship of a deceased rel-

ative, though it is broad enough to include damages for the loss of the services of husband or wife, and, in case the beneficiary is a child, damages for the loss of training, counsel, education, and nurture which the deceased would have bestowed.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.*]

10. APPEAL AND ERROR (§ 979*)—ALLOWANCE—DISCRETION OF COURT.

Where there is sufficient testimony to support the verdict, the allowance of a new trial is discretionary with the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Fairfield County; T. S. Sease, Judge.

Action by Hattie E. Bennett, as administratrix of the estate of Luther W. Bennett, deceased, against the Southern Railway-Carolina Division and the Southern Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

The exceptions were as follows:

"(1) Except because the presiding judge erred in excluding and not allowing the question and answer of the witness W. H. Green, on cross-examination, as to whether he considered McAllister, one of the defendants' engineers, and in charge of the train on which plaintiff's intestate was killed, one of the most careful engineers in the service; this testimony being proper in reply to the charges and specifications of negligence made in the complaint as to the running of the train on which the deceased was at the time of his death, the error being in denying the right of the defendants to show the general reputation and character of its servant who had charge, and was alleged to have been reckless in the management and operation of its engine, which said reckless operation resulted in the death of the deceased, and, further, who was also charged with willful and wanton conduct in running and operating its train at a dangerous and reckless rate of speed, and in failing to keep and maintain any lookout, or give any signal or warning to plaintiff's intestate.

"(2) Except because the presiding judge erred in allowing and permitting the witness W. A. Summers, on his direct examination, over the objection of defendants, to testify that he saw a couple of places where fire had been dropped out at a point about a mile above Alston, and at least 2½ miles from the trestle in question; the error being that such testimony was incompetent and irrelevant, such fires not being shown to have originated from coals escaping from defective, old, and burned-out ash pans and grates, as charged in the complaint, but originating from sparks from the smokestack and no negligence being alleged as to defects in the

smokestack or as to fires connected therewith.

"(3) Except because the presiding judge erred in not granting a nonsuit in the cause upon motion of defendants; there being no testimony showing or tending to show any negligence upon the part of the defendants or breach of duty owing to plaintiff's intestate in the particulars alleged in paragraph 7 of the complaint: (a) It appearing that there was no evidence showing or tending to show negligence, as specified, in subdivision (a) of paragraph 7 of the complaint; that the defendant company carelessly, recklessly, wantonly, and willfully operated locomotive engines on its line of railroad over the trestle bridge therein mentioned, which said engines contained defective, old, and burned-out ash pans and grates which permitted sparks and live coals to drop on said trestle bridge. (b) It appearing that there was no evidence tending to prove the allegations of negligence contained in specification (b) of the seventh paragraph of the complaint; that there was a failure to inspect the trestle bridge on which plaintiff's intestate was killed; or that said trestle bridge was composed of old, worn-out, and defective timber and materials which caused the same to become easily ignited by fire. (c) It appearing that there was no testimony to prove or tending to prove negligence, as specified in subdivision (c) of the seventh paragraph of the complaint; that the defendant company furnished and maintained an unsafe and dangerous place, to wit, the trestle bridge, upon which plaintiff's intestate was required to perform the duties required of him as locomotive fireman. (d) It appearing that there was no testimony to prove or tending to prove that the defendant company failed to properly inspect and repair the engines and parts of engines through which fire, coal, and cinders might fall, and escape, and ignite the trestle bridge, as set forth in subdivision (d) of the seventh paragraph of the complaint. (e) It appearing that there was no testimony to prove or tending to prove that the defendants failed to properly inspect and repair, or failed to maintain in a safe, suitable, and proper condition the said trestle and trestle bridge upon which plaintiff's intestate lost his life, or that there was any failure upon the part of the defendant company, its agents, and servants to inspect such trestle and trestle bridge, as set forth in subdivision (e) of the seventh paragraph of said complaint. (f) It appearing that there was no testimony to prove or tending to prove that the defendants negligently, wantonly, or willfully ran and operated the first locomotive engine, to which the engine on which the plaintiff's intestate lost his life was attached, at a dangerous and reckless rate of speed, and without keeping and maintaining a proper lookout, or giving any signal or warning by bell, whistle, or otherwise to plaintiff's intestate, or that

such alleged negligence caused the engine, on which plaintiff's intestate was discharging his duty, to run into said burning trestle.

"(4) Except because the presiding judge charged the jury, after stating to them that the relation which existed between the plaintiff's intestate and the defendant company was that of master and servant, and that the master must furnish a reasonably safe place, instrumentalities, tools, and the like to the servant in the discharge of his duties as such servant, that, 'where it appears that the servant is injured by defective instrumentalities, machinery, places or things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing means, places, and instrumentalities in matters of that kind,' the error being, it is submitted that the master is not the absolute insurer of the safety of the servant, nor does any presumption as to the master's negligence arise from the fact of injury to the servant, nor does the burden of proof in an action by the servant against the master for an injury from instrumentalities or machinery shift from the servant to the master, but the servant must prove the negligence of the master, as alleged in his complaint; that this is true both as to law prevailing in this state, and especially under the Employers' Liability Act of Congress, under which this action was brought and tried, and that said charge is an improper and erroneous construction of said act and deprives the defendants of their full right of defense under said act.

"(5) Except because the presiding judge erred in charging the jury with reference to the duties and liabilities existing between a master and servant as follows: 'The master must use due care, the care that is due, to see that the place in which, the instrumentalities with which, the servant is to perform his duties as a servant are safe and suitable. Where it appears that the servant is injured by and through defective instrumentalities, machinery, or places and things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities, and matters of that kind;' the error being: (a) That no presumption of negligence on the part of the master arises from mere proof of injury to a servant through defective instrumentalities, machinery, or places, nor is it prima facie evidence of negligence on the part of the master, nor does the burden of proof shift from the servant to the master to show that the master exercised due care in furnishing places, means, instrumentalities, and matters of that kind. (b) That such charge entirely excludes the element of knowledge upon the part of the master, and would make the master liable upon mere proof of defective instrumentalities, machinery, or places, without proof that

the master knew of such defects, or ought to have known of such defects in the exercise of reasonable care. (c) That said charge was erroneous, because it deprived the defendants of a substantial right of defense, arising under a proper construction of the act of Congress known as the federal Employers' Liability Act, under which this case was brought and tried, and which was the sole and exclusive law upon the subject. (d) That, as applied to the case before the jury, the above charge was a charge upon the facts, and was tantamount to telling the jury that, in the event they found that there were defects in the trestle or in the instrumentalities of the defendant company's engines, and that by reason thereof Bennett lost his life, that they should find, and that the law was that this made out a case of negligence against the defendants, and that their verdict should be for the plaintiff, unless the defendants showed by the preponderance of the testimony that they had exercised due care in furnishing places, means, instrumentalities, and matters of that kind, and that such charge was in violation of the Constitution of this state.

"(6) Except because the presiding judge erred in refusing the motion of defendants for a new trial, which was made upon the ground that the verdict in the case was so excessive that it cannot be sustained under the facts or charge in the case as a verdict for compensatory damages under a proper construction of the federal Employers' Liability Act, which limits the measure of damages to the actual pecuniary loss sustained by the beneficiaries under that act; the error being as it is respectfully submitted: (a) That there is no testimony tending to sustain a verdict for \$20,000, when the undisputed testimony of the plaintiff herself shows that her husband and intestate was earning only \$65 to \$75 per month at the time of his death, and it was an error of law, under the federal Employers' Liability Act, under which the action was brought and tried, to allow such verdict to stand as a verdict for compensatory damages; there being no testimony to support it for such an amount. (b) That, by the refusal to set aside such verdict and grant a new trial, the defendants have been deprived of a substantial right secured to them by said act of Congress, and it was error of law not to grant a new trial absolutely, when the undisputed evidence shows that such verdict was for a grossly larger sum than compensatory damages, or damages for the pecuniary loss sustained by the plaintiff and the other beneficiaries under said federal Employers' Liability Act, and when the provisions of that act contain the supreme and exclusive law that authorized or allowed an action for the recovery of damages to and by the plaintiff for the alleged wrongful death of her said husband and intestate, and when said act, as construed by the federal courts, limits the damages recoverable thereunder, in

cases of wrongful death, to the actual pecuniary loss sustained by the beneficiaries for whose benefit an action is allowed by said act. (c) That the verdict was clearly against the charge of his honor to the jury, when applied to the undisputed facts, and it was error of law not to wholly set it aside, and grant a new trial absolute."

B. L. Abney, of Columbia, and McDonald & McDonald, of Winnsboro, for appellant. W. Boyd Evans, E. J. Best, and P. A. McMaster, all of Columbia, and G. W. Ragsdale, of Winnsboro, for respondent.

WATTS, J. This was an action brought in the court of common pleas by the plaintiff to recover \$75,000 damages on account of the alleged negligent, reckless, and willful killing of her husband, Luther W. Bennett, while he was engaged in the employment of the defendant as a locomotive fireman. The action is brought for the benefit of plaintiff and her three infant children. The case was heard before his honor, Judge Sease, and a jury at September term of the court, for Fairfield county, 1912, and resulted in a verdict for the plaintiff for \$25,000. A motion for a new trial was thereupon made, which was granted, unless the plaintiff would remit \$5,000 of the verdict. The remittitur was thereafter made. Judgment entered therein, and appeal was made therefrom, and appellants by six exceptions ask for reversal. The exceptions should be set out in the report of the case.

[1, 2] Exceptions 1 and 2 allege error on the part of his honor in the exclusion of the testimony of the witness W. H. Green, on cross-examination, and admitting over objection the testimony of the witness W. O. Summers. As to the first exception, which imputes error to his honor in excluding the question and answer of the witness Green, on cross-examination, whether he considered McAlister, the engineer in charge of the train on which plaintiff's intestate was killed, one of the most careful engineers of the defendants, it is overruled as being without merit. The question for the jury was not to determine what the engineer's general reputation was, but what his conduct was on the particular occasion—whether or not at this particular occasion he was guilty of any negligence or dereliction of duty. As to exception 2 in imputing error to his honor in allowing witness Summers to testify that he saw places where fire had been dropped about two miles from the trestle bridge, which was on fire, on the ground that the same was incompetent and irrelevant, this exception is overruled. It was competent to go to the jury for them to determine how the fire originated. It was discovered immediately after one of defendant's locomotive engines had passed over the bridge in question, and it was a question for the jury to determine how cross-ties and bridge caught fire and burned. This testimony tended to elucidate how and

by what means the fire originated which destroyed the trestle, and his honor's ruling is sustained in the case decided by the Supreme Court of the United States of *Grand Trunk Ry. v. Richardson*, 91 U. S. 454, 23 L. Ed. 358. This exception is overruled.

[3] The third exception alleges error on the part of his honor in refusing to grant the motion for nonsuit. The law is so well settled that there is no error in refusing a motion of nonsuit; if there is any competent evidence at all to sustain the allegations of the complaint that quotation of authority is unnecessary under such circumstances, the case must go to the jury. There was sufficient evidence in this case to carry the case to the jury, and his honor committed no error in so holding. This exception is overruled.

[4, 5] Exceptions 4 and 5 allege error on the part of his honor in his charge to the jury; said error being in charging the jury that proof of injury to a servant by defective machinery is prima facie evidence on the part of the master, it being alleged, among other things, that such charge deprived the defendants of a substantial right of defense arising under a proper construction of the act of Congress, known as the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), and also upon the ground that such a charge was in violation of the Constitution of this state as a charge on the facts. We do not think the charge of the circuit judge, to the effect that the proof of injury to a servant by defective machinery is prima facie evidence of negligence on the part of the master, was erroneous, and not in harmony with the federal decisions, when his whole charge is considered. By reference to his charge as a whole the jury could not have inferred that the plaintiff could recover, unless she showed affirmatively by the burden of proof on the part of the plaintiff that the deceased's injuries were caused by the master's negligence. The federal Employers' Liability Act is general in its terms, and makes no specific regulation as to the quantity, quality, and methods of proof of negligence, and, in the absence of any such regulation, will conform as near as possible to the state law in the manner and mode of trial and the rules of pleading, evidence, and law applicable thereto as was said by the Supreme Court of North Carolina in *Fleming v. Norfolk Southern Ry. Co.*, 160 N. C. 196, 76 S. E. 212: "The federal statute being thus general in its terms, and making no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the state court, the procedure should conform as near as may be to that of the state law applicable, including the 'character of the action, the order and manner of trial, the rules of pleading and evidence,' etc. *Hughes on Federal Procedure*, p.

355; *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 225."

In *Green v. Railway Co.*, 72 S. C. 402, 46 S. E. 47, 5 Ann. Cas. 165, the court says: "When an injury to a servant is proved to result from a defective machine, the law puts upon the master the burden of proving that he used due care in making it safe." The court further says: "It sometimes happens, however, that a description of the appliance and of the nature of the accident will indicate negligence by the master in providing appliances which he could not, as a reasonable man, regard adequate for the purpose for which they were used. But this is an inference from proof of the circumstances or physical facts as given in evidence, and not a presumption of law."

"Proof of negligence is a condition precedent to the liability of the master. The proof may be either direct or circumstantial; but the plaintiff must assume the burden of furnishing evidence of one kind or the other."

[6] An examination of the judge's charge, as a whole, satisfies us that the language he used and issues he submitted to the jury to determine under the pleadings and evidence in the case was not prejudicial to the defendants and not a charge on the facts. In charging what duty was imposed on the master, as to furnishing the servant with a place to work, instrumentalities, machinery, appliances, etc.; he correctly defined what the law was, as decided by this court in a number of cases, and from nothing that he said could the jury infer that the master was an insurer of the safety of the servant. The charge of the judge told the jury in substance that the plaintiff's case was to make out by preponderance of the testimony, and in this connection used the following language: "The action here being tried is based entirely upon negligence, and, in order for the plaintiff to recover, the law imposes upon her the burden of proof of satisfying you by the preponderance or greater weight of the testimony that the defendants were negligent in the particulars described in the complaint. Every cause of action depends entirely upon the negligence alleged in the complaint, and, even if you were to find the defendants were negligent in some particulars, but were not negligent in the particulars mentioned in the complaint, then the plaintiff could not recover. In other words, in order to recover in this action, the plaintiff must establish by the preponderance of the evidence that the defendants were negligent in the particulars alleged in the complaint. No other negligence could be considered by you in making up a verdict. If you should find in favor of the plaintiff." During his honor's charge he said this to the jury: "Now, as I sometimes tell juries, I cannot give you all the law in one proposition, therefore you must take my charge as a whole. It is not intended to be contradic-

ory; that is, one proposition contradict another. They are intended to qualify or modify one another. And, gentlemen, this is a long case. The principal points involved and the requests are very long. You will have to pay strict attention, and take my charge as a whole." Take the charge as a whole—the general charge, what was said by his honor in charging defendants' request—we fail to see wherein his honor said anything that was prejudicial to the defendants as complained of in this assignment of error, and this exception is overruled.

The errors complained of in the fifth exception are overruled, for the same reason that exception 4 is overruled.

The sixth exception complains of error on the part of the judge in refusing a new trial absolute, on the ground that the verdict was excessive, and could not be sustained as compensatory damages under a proper construction of the federal Liability Act, and against the law laid down by the court when applied to the undisputed facts of the case.

[7-8] We have already held that his honor committed no error in refusing the motion for a nonsuit, and sending the case to the jury for their determination. The judge, in charging the jury as to the measure of damages, and the mode of ascertaining the same, and what elements enter into the consideration of the same, could not have considered anything but pecuniary loss or damage. The judge charged the written requests of defendants, as prepared by them and asked for, and adopted the exact language. They cannot now be heard to complain of getting what they asked for; but his honor charged the correct law as laid down in the case of *Mich. Cent. R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed 417, by the Supreme Court of the United States, February 15, 1913:

"The word 'pecuniary' did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage. A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.' *Patterson, Railway Acci. Law*, § 401. Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from

the parent, and which can only be supplied by the service of another for compensation.

"In *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, and 29 N. Y. 252, 86 Am. Dec. 297, the court stated that: 'The word "pecuniary" was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though grievous and painful to be borne, cannot be measured or recompensed in money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of damages.' To the same effect are the cases of *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924, which was followed by the Circuit Court of Appeals for the Eighth Circuit in *Atchison, T. & S. F. R. Co. v. Wilson*, 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57; *Lett v. St. Lawrence & O. R. Co.*, 11 Ont. App. Rep. 1; *Penn. R. Co. v. Goodman*, 62 Pa. 332; *Louisville, N. A. & C. R. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010; *Tiffany, Death by Wrongful Act*, §§ 154 to 162, inclusive; *Patterson, Railway Acci. Law*, §§ 401-406.

"No hard and fast rules by which pecuniary damages may in all cases be measured is possible. In *Lett v. St. Lawrence & O. R. Co.*, cited above, it was said, in the opinion of *Patterson, J. A.*, after a review of all the English cases construing the act of Lord Campbell: 'That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefits of the statute cannot be claimed.' The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of the husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.' *Tiffany, Death by Wrongful Act*, §§ 158, 160-162.

"The court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a 'balm to her feelings.' They were directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The court did not stop there, but further instructed the jury that: 'In addition to that, independent of what he was receiving from the compa-

ny, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure as far as you can what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband.' *Vreeland v. Michigan Cent. R. Co.* (C. C.) 189 Fed. 496. This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way. A minor child sustains a loss from the death of a parent, and particularly of a mother, altogether different from that of a wife or husband from the death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation, and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages. *Tilley v. Hudson River R. Co.* and *Lett v. St. Lawrence & O. R. Co.*, both cited above. If the case at bar had been of such character, the loss of 'care and advice' might have been a proper matter for compensation.

"Neither 'care' nor 'advice,' as used by the court below, can be regarded as synonymous with 'support' and 'maintenance,' for the court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice, and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband. In this part of the charge the court erred. The assignments of error are otherwise overruled. But for this error the

judgment must be reversed, and a new trial ordered."

[10] There was sufficient testimony to sustain the verdict, and it was within his honor's discretion to grant or refuse a new trial. This exception is overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, J., concur.

FRASER, J. I cannot concur in the result in this case. Ordinarily this court has no jurisdiction to consider the amount of the verdict in damage cases. This is an action under the federal statute, and the Supreme Court of the United States in *Michigan Central Rail Road Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417 (Feb. 15, 1913), construed the statute and held that the recovery is confined to the pecuniary loss alone, and that the pecuniary loss is to be determined by the allegations of the complaint and the evidence in the case. The only evidence of pecuniary loss in this case is the wages of the deceased. The wages did not exceed \$900. There was no other evidence of pecuniary loss. The loss of \$900 per annum is not a basis of a judgment for \$20,000. There may be undisclosed circumstances which would render the verdict entirely proper. Under the *Vreeland Case* the circumstances must be alleged and proved. No evidence is a question of law. I find no evidence upon which this judgment for \$20,000 can be sustained under the *Vreeland Case*. The court says in the *Vreeland Case*, 227 U. S., at page 74, 33 Sup. Ct., at page 197, 57 L. Ed. 417: "It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband. In this part of the charge the court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed, and a new trial ordered."

The only difference is that in the *Vreeland Case* damages, which were discretionary, were allowed in the charge and here they were allowed in the judgment. It is the judgment that counts. For these reasons I cannot concur.

BENNETTSVILLE & C. R. CO. v. GLENS FALLS INS. CO.

(Supreme Court of South Carolina. Sept. 25, 1913. On Petition for Rehearing, Oct. 23, 1913.)

1. EVIDENCE (§ 413*)—PAROL EVIDENCE—ADMISSIBILITY.

In an action by a railroad company to recover upon an insurance policy, issued to indemnify it from loss by fire of cotton for which it was liable as a common carrier, evidence of an agreement between the carrier and the shippers whereby the carrier became liable as a common carrier for cotton is admissible, not tending to modify the contract of insurance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1855-1857, 1859, 1860; Dec. Dig. § 413.*]

2. INSURANCE (§ 146*)—CONTRACTS—CONSTRUCTION—AMBIGUITY.

Where there is an ambiguity in a contract of insurance, it should be construed against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

3. INSURANCE (§ 175*)—CONTRACTS—CONSTRUCTION.

A fire policy was issued to indemnify a railroad company from loss of cotton by reason of its liability as a common carrier, the policy providing that liability should attach from the issuance of the company's bill of lading and terminate upon delivery. Cotton which was intended for an immediate shipment was accepted without the issuance of a bill of lading, not all the cotton being delivered simultaneously, the company holding the bales as they were delivered until a suitable quantity were hauled, whereupon it made a shipment and issued a bill of lading. *Held*, that though the bill of lading was not issued to the shipper until after the cotton was burning, the insurer was liable, the shipper being liable as a common carrier for the loss of the cotton; the ambiguity in the policy being resolved in favor of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. § 175.*]

4. INSURANCE (§ 165*)—CONTRACTS—LIABILITY.

Where a fire policy was issued to indemnify a railroad company upon all liability as a common carrier of cotton in bales in transit in cars, or in or on depots or platforms, on line of assured's road, the policy covered cotton which was placed on the ground, but was intended to be immediately shipped.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 351; Dec. Dig. § 165.*]

5. APPEAL AND ERROR (§ 931*)—PRESUMPTIONS.

Where it was stipulated that the court should find the facts, it will be presumed that he disregarded all incompetent testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

Fraser and Hydrick, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Marlboro County; J. A. McCullough, Special Judge.

Action by the Bennettsville & Cheraw Railroad Company against the Glens Falls Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant's exceptions are as follows:

"(1) It is respectfully submitted that his honor, the presiding judge, erred in overruling the objection of defendant's counsel to the testimony of E. H. Duvall and other witnesses as to an agreement between said Duvall, representing Alex. Sprunt & Son, of Wilmington, N. C., for the delivery of cotton in bales by wagons at plaintiff's platform at Kollock, by which said plaintiff was to issue bills of lading each afternoon for all cotton delivered during the day, its liability as a common carrier, however, to begin on delivery of said cotton for shipment, and in refusing defendant's subsequent motion to strike out all such testimony, because inadmissible, as the alleged agreement was between other parties, without the knowledge or consent of defendant, and not binding on it.

"(2) It is respectfully submitted that his honor, the presiding judge, erred in holding and ruling that 'the contract was intended to insure the plaintiff against any liability as a common carrier for cotton in bales, in transit cars, or in or on depots, or platforms, on lines of assured's road; that the stipulation to the effect that the liability of the railroad company attaches from the issue of assured's bill of lading would not, under the agreed statement of facts in this case, and the undisputed facts, prevent a recovery; that the cotton here was actually delivered to the railroad company as a common carrier, was accepted by it as such. Its liability in case of loss attached. The stipulation with reference to the bill of lading only goes to the question of delivery and acceptance, and the delivery and acceptance can be proven and established otherwise than by the issuance and acceptance of the bill of lading'—because in so holding and ruling his honor treated the contract as intended to secure a certain object, stated by him as sought by the plaintiff, and which object was not otherwise revealed, and then interpreted the contract accordingly, by giving force and effect to only the first clause or paragraph of the rider, and declining to give any effect to the second clause, which fixed the period of the insurance on each lot of cotton; that is, its beginning and its termination, essential and vital elements in any contract, but especially an insurance contract.

"(3) It is respectfully submitted that his honor, the presiding judge, erred in considering the testimony and recognizing the agreement between the shipper and the railroad company mentioned in the first exception as valid and binding on defendant and enforceable as against it, and constituting a reason why it was liable under said policy, notwithstanding that the bill of lading was not issued until after the fire, and the destruction of practically all of the 43 bales of cotton, which he did in the last half of the 'ruling.'

"(4) It is respectfully submitted that his honor, the presiding judge, erred in ruling and holding that the defendant was liable under its said policy, notwithstanding it appeared that when said bill of lading was issued said cotton was mostly consumed, and all of it was then scattered about the nearby grounds, and not in bales or on platform, etc., as required by the terms and conditions of said policy.

"(5) It is respectfully submitted that his honor, the presiding judge, erred in holding that the interpretation and construction of the contract as to its not attaching until issue of bills of lading fixed by the parties thereto after deliberate consideration five months before the fire, as shown by the letters in evidence and the declaration and admission of Mr. Page, general manager of plaintiff, was not binding on them, and was immaterial.

"(6) It is respectfully submitted that his honor, the presiding judge, erred in failing to give to the contract its natural, fair, and reasonable construction in all of its terms and conditions invoked and relied upon by defendant, and in giving it a strained and unauthorized construction, ignoring and disregarding plain and essential conditions of its becoming effective, especially when there was no sufficient evidence of waiver to be considered, or which was considered.

"(7) It is respectfully submitted that on the above grounds his honor, the presiding judge, erred in holding the defendant liable to plaintiff for the amount of the loss sustained on said cotton, and directing the jury to find a verdict therefor, with interest, against the defendant."

John T. Seibels, of Columbia, and J. K. Owens, of Bennettsville, for appellant. McColl, McColl & Le Grand and Stevenson, Matheson & Stevenson, all of Bennettsville, for respondent.

WATTS, J. This was an action brought to recover \$3,005.32 insurance on 43 bales of cotton burned on the depot platform of the plaintiff at Kollock, S. C. The plaintiff alleges that the defendant, by contract in writing on August 4, 1909, agreed to insure the plaintiff for a term of one year from August 20, 1909, against all direct loss and damage by fire, as stated in paragraph 1 of its "rider," in the words: "On all liability of assured as a common carrier of cotton in bales, in transit in cars, or in or on depots, or platforms, on line of assured's road." The policy also has this: "This insurance covers all legal liability of the assured as a common carrier, not exceeding the actual cash value (market) of the cotton immediately preceding the fire, which cash value shall in no case exceed what it would then and there cost to replace same with cotton of like kind and quality, and attaches from the issue of assured's bill of lading, and ter-

minates upon delivery to consignee or succeeding carrier." After issue was joined the case came on to be heard before Hon. Joseph A. McCullough, as special judge, and a jury; after evidence was taken and case argued, the court directed a verdict for the plaintiff for the full amount claimed, \$3,517.21, and after entry of judgment defendant appeals, and by seven exceptions questions the correctness of judge's rulings, and alleges error; these exceptions should be set out in the report of the case.

[1] The first exception alleges error in admitting in the first instance over objection, the evidence of E. H. Duvall and other witnesses as to an agreement between Duvall, representing Sprunt & Son, and the plaintiff railroad company in reference to the delivery of cotton to railroad, issuance of bills of lading, etc., and later, in refusing the motion to strike out the same, as the alleged agreement was between other parties than the defendant and without its knowledge or assent. This exception is overruled for the reason it was competent to show by such testimony that the cotton destroyed or injured, had been tendered and accepted by the railroad company under such agreement or circumstances as to render the railroad company liable as a common carrier. The testimony was not offered to modify, vary, explain, or enlarge the contract made by insurance policy between the plaintiff and defendant, but for the purpose indicated, and is competent under the case of R. E. Allen, Bro. & Co. v. Burnett, 92 S. C. 99, 100, 75 S. E. 368, and authorities therein cited.

[2, 3] The second exception alleges error on the part of his honor in holding that "the contract was intended to insure the plaintiff against any liability as a common carrier for cotton in bales, in transit cars, or in or on depots, or platforms, on lines of assured's road. That the stipulation to the effect that the liability of the railroad company attaches from the issue of assured's bill of lading would not, under the agreed statement of facts in this case, and the undisputed facts proven, prevent a recovery. That the cotton here was actually delivered to the railroad company as common carrier was accepted by it as such. Its liability in case of loss attached. The stipulation with reference to the bill of lading only goes to the question of delivery and acceptance, and the delivery and acceptance can be proven and established otherwise than by the issuance and acceptance of the bill of lading." We think the court correctly held that the bill of lading covered the cotton, and it was delivered and accepted by the railroad for shipment. From the admitted facts in the case the court finds "that the cotton, which was burned, was accepted by the railroad company in good faith, and that it was liable as common carrier for the loss; that before the bill of lading was issued, and after 43 bales had

been delivered to the defendant railroad and accepted by them, the fire was discovered, and effort made to save the cotton, and it was taken from the depot and scattered about, and some time during the progress of the fire the bill of lading was actually issued." There was nothing in this contrary to good business principles; the railroad in the course of business had a perfect right, in the orderly dispatch of its business, to arrange with a party, who was engaged in the business of purchasing and shipping out cotton, to allow it to be put in its shipping yard, depot, or platform, bale by bale, one or more at a time, for the purpose of having a sufficient quantity to ship out on a car or flat, and not issue bills of lading for each lot as placed, but wait until a sufficient number were received to warrant a shipment, and issue bills of lading for the whole. The evidence shows this was done, and was the arrangement between the railroad and Duvall, and a receipt by them under these circumstances and conditions made them receivers as common carriers and liable as such, and the evidence shows that the cotton was received, not for storage, but for actual shipment by the railroad, and under such conditions that the liability attached as against them as common carriers even though no bills of lading had been issued by them. The judge committed no error in his construction of the two paragraphs of the rider in holding that the first one covers liability of the assured as common carrier on the cotton situate as this was and received by the common carrier under the agreement and the circumstances the cotton was received, and the second covers the legal liability of the assured as common carrier of the cotton so situated, and in holding, under the terms of the policy, "that this liability attaches from the issuance of assured's bill of lading and terminates upon delivery to the consignee or succeeding carrier." If there is any ambiguity, the phrases must be construed more strongly against the insurance company and in favor of the insured.

It is said in A. and E. Ency. Law, vol. 16 863: "If the terms of a policy are susceptible of two interpretations, equally reasonable, it is the general rule that the construction which is more favorable to the insured must be adopted." "In determining the meaning of the insurance contract the surrounding circumstances must be considered, and the interpretation, if capable of two, which will protect the insured should be adopted." *Mellon v. Ohio Ins. Co.*, 40 Pa. Super. Ct. 623. The property in this case was tendered and accepted for shipment prior to the signing of the bill of lading, and the liability attached to the railroad, as common carriers, from that time, to wit, from the time it was received and accepted by them for shipment regardless of the fact

that the bills of lading were not issued until later. *Copeland v. Southern Ry. Co.*, 76 S. C. 476, 57 S. E. 535; *Mobile R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527.

[4] The third and fourth exceptions allege error on the part of his honor in considering testimony and recognizing the agreement between the shipper and the railroad, and in holding that defendant was liable when the bill of lading was issued when cotton was partially consumed and scattered over the grounds, and not on platform, etc., as required by the terms and conditions of the policy. His honor was correct in admitting evidence to show what the agreement was between Duvall and the railroad, for the reason stated in considering the first exception herein, and that the evidence proves an agreement that the railroad company was receiving and accepting the cotton, not for storage, but for actual shipment, and under this state of facts becomes liable as common carrier. There is nothing in the policy that restricts the railroad from receiving and accepting cotton for shipment, even on the ground if, at or near its depot, platform, and shipping point, that would be a narrow construction to place on the agreement between the parties as to terms and place of insurance to hold that in order to load cotton received and accepted by a common carrier for shipment you should first put it on the platform, or in the depot, when it might be more convenient and less expensive to load from the ground near or at the platform, or depot. If cotton got on fire the railroad company had the right, in order to save it or minimize the loss, to throw it on the ground, and it would be still covered by insurance. The evidence showed that the issuance of the bill of lading was carrying out the contract previously made between the shipper and the railroad, and his honor committed no error in so holding and recognizing this agreement between the shipper and the railroad. These exceptions are overruled.

[5] The fifth, sixth, and seventh exceptions are overruled for the reasons given in overruling the other exceptions, and for the further reason it was agreed between counsel, representing both sides, that his honor should decide the facts of the case, and it is reasonable to suppose that in reaching his conclusions he did not consider any incompetent or irrelevant testimony, and there is sufficient testimony to sustain his findings, and we see no error of law in any of the exceptions. All the exceptions are overruled.

Judgment affirmed.

GARY, C. J., concurs.

FRASER, J. I dissent. The rider covered (1) the property insured; (2) the limitations of its liability as to value, including the time of the commencement and termination of liability; (3) the conditions under which it will not be liable at all; (4) the terms of pay-

ment of premiums. By the express terms of the contract the defendant was not to be liable before the bill of lading was given, nor after it had been delivered to a succeeding carrier. The defendant had the right to say, at the time of issuing the policy, "I will not be liable to you until you have fixed your liability to the shipper in writing." It did say so, and the plaintiff agreed to the stipulation by accepting the policy. Suppose the goods had been burned while in the hands of a succeeding carrier, and plaintiff having lost the evidence of the delivery should be made to pay the loss. Suppose, further, upon a suit for the loss which it (the plaintiff) had paid, the insurance company should be able to supply the proof of the delivery. Could any one hold that the delivery to the succeeding carrier was not a complete defense? The contract provided that the liability "attaches from the issue of the assured's bill of lading," and I do not think the courts have power to change it.

HYDRICK, J., concurs.

On Petition for Rehearing.

PER CURIAM. After careful consideration of the within petition, it has not been made to appear that any matter of fact or question of law material to the case has been overlooked or disregarded. It is therefore ordered that the petition be dismissed, and the stay of remittitur heretofore granted be revoked.

GREER v. ARRINGTON.

(Supreme Court of Appeals of West Virginia.
Sept. 23, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 89*)—RECEPTION OF EVIDENCE—INTOXICATING LIQUORS.

In a suit under our civil damage act, it is not error to deny defendant's motion to exclude plaintiff's evidence, when the evidence tends in an appreciable degree to support the theory of the declaration and on which right of action is based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

2. APPEAL AND ERROR (§ 260*)—OBJECTION BELOW—ADMISSION OF EVIDENCE.

Error, if any, in the admission of evidence, if competent, will not be regarded here, unless covered by an exception at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

If on the trial of an action under our civil damage act there be evidence that defendant sold intoxicating liquors to plaintiff's husband, contributing to his habits of inebriety, other evidence that he was intoxicated in defendant's saloon on a particular day, from liquors not proven to have been sold by him, though not

very material, is not wholly irrelevant, and it is not reversible error to admit such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

4. TRIAL (§ 48*)—ADMISSIBILITY—IMPEACHING EVIDENCE.

Though evidence of plaintiff, admitted over defendant's objection, tends to contradict the evidence of one of the latter's witnesses, on a collateral matter, and may not be good as impeaching evidence, nevertheless, if such evidence be good as evidence in chief, and as tending to support any of the issues, it is not reversible error to admit it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.*]

5. INTOXICATING LIQUORS (§ 309*)—ACTION FOR DAMAGES—EVIDENCE.

If such evidence as is referred to in the preceding point, tends to show defendant's knowledge, or reason to believe plaintiff's husband was in the habit of drinking intoxicating liquors to excess, that being the ground of action, and a fact necessary to establish, it is not error to admit it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 444-448; Dec. Dig. § 309.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

In such action it is error to submit instructions to the jury on the question of injury to plaintiff's person, when there is no evidence of such personal injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

7. DAMAGES (§ 215*)—EXEMPLARY DAMAGES—INSTRUCTIONS.

It is also reversible error in such action to peremptorily charge the jury that they *shall* or *should* find exemplary damages, such damages being wholly within the discretion of the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 543-547; Dec. Dig. § 215.*]

8. APPEAL AND ERROR (§ 1031*)—HARMLESS ERROR—INSTRUCTIONS—EXEMPLARY DAMAGES.

Where the trial court has committed error in giving such peremptory instructions, this court cannot assume from the size of the verdict that defendant has not been prejudiced thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

9. TRIAL (§ 267*)—INSTRUCTIONS.

Though an instruction be good as an abstract proposition of law, but as applied to the concrete case, may tend to mislead the jury, it is not error to so modify the language as to make it cover the case presented.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

10. APPEAL AND ERROR (§ 216*)—WAIVER OF ERROR—FAILURE TO OBJECT.

And though it is the duty of the trial court, by sections 4 and 5, chapter 38, Acts 1907 (Code Supp. 1909, c. 131, §§ 9aIV, 9aV), on so modifying an instruction, if objected to, to so inform the jury, and give the instruction as its own, and not as that of the proponent of the original instruction, yet if there be no timely objection or exception to such erroneous action of the court, the error will be deemed to have been waived.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216;* Trial, Cent. Dig. § 674.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error to Circuit Court, Mason County.

Action by Lena Greer against E. P. Arrington. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

John L. Whitten and Somerville & Somerville, all of Point Pleasant, for plaintiff in error. Rankin Wiley, of Point Pleasant, for defendant in error.

MILLER, J. In her declaration, in two counts, a wife charges defendant in the first with having sold intoxicating liquors to her husband, who, to the knowledge of defendant, had acquired the habit of drinking to excess, beginning April 30, 1908, and had continued therein up to the date of the institution of her suit, and by reason whereof he had neglected his work, squandered his money, and whereby she had been injured in her means of support, and by reason whereof he had been discharged from his employment, and had been without employment for the period of three months, and was yet without employment, and whereby he was sick and disordered, and was unable and did not provide or furnish means of support for plaintiff, and whereby she was injured in her means of support. She also charges that by reason of such unlawful acts she sustained great bodily pain, anguish and anxiety.

In the second count she charges defendant with the same unlawful acts, and that they were done willfully and with intent on his part to injure plaintiff and deprive her of her means of support, with like results to her and her husband, and depriving her of her good health and injuring her in her domestic relations and affairs and inflicting on her other wrongs and injuries; all to her damage \$5,000.00.

Numerous errors are assigned in the petition for the writ; but we will notice those only which seem to have merit, or have been relied on in argument, treating the others as abandoned.

[1] First, it is insisted that the court erred, on the conclusion of plaintiff's evidence, in denying defendant's motion to exclude plaintiff's evidence relating to the discharge of John W. Greer from its employment by the Baltimore & Ohio Railroad Company. The contention is that plaintiff's action is based solely on the theory of injury sustained solely from the discharge of her husband and by reason of sales of liquor to him on the day or the day preceding such discharge, and that there being no evidence of any sale or sales to him on that day, the case must fail. In this view we think defendant is in error. The declaration is not based on that theory, but on the theory of a sale or sales beginning April 30, 1908, and continuing thereafter up to the date of the suit, and by reason of which plaintiff's husband was discharged. The facts were not very well or very clearly

developed on the trial, but there is evidence that defendant made numerous sales to plaintiff's husband while he owned the saloon, between June, 1908, and April 28, 1909, the latter being the date of the suit, and the jury might very well have concluded, as they likely did, that these sales contributed to the injury of plaintiff in her means of support, provided of course there was evidence of such loss of support. The evidence is abundant that plaintiff's husband was in the habit of drinking to intoxication, and that this fact was known to defendant, or to his bartenders, one of them plaintiff's brother, at the time sales were made, which sales were unlawful, and may have contributed to his habits of inebriety, and her consequential loss of support. We think there was no error in the ruling of the court admitting this evidence.

[2] Another point of error is based on defendant's bills of exception Nos. 4 and 5. These relate to certain testimony of plaintiff as to her alleged loss of support by sales of intoxicants to her husband. The main point against this evidence is that the questions and answers assumed that Greer's discharge by the railroad company was the result of alleged illegal sales of intoxicants to him by defendant, as to which it is contended there is no evidence. With respect to bill of exception No. 4, the motion, which was overruled, was not to strike out all the evidence, but only that part of it and covered by one of the questions and answers stating that Greer had been out of employment nearly one half of the time during that season. With respect to bill of exception No. 5, the questions and answers relate to plaintiff's changed condition of living after her husband's discharge by the railroad company. The answers were each objected to and none of them were answered except the last, namely, whether prior to that time plaintiff kept a servant. The bill of exception does not cover the answer, nor was the answer objected to. The answer was, "Yes, sir." This was followed by the question: "Was the servant discharged?" Answer, "Yes, sir," and "For what cause?" Answer, "Because I did not have the money to pay her." To which questions and answers there was no objection or exception. We cannot, therefore, notice the alleged error. Besides we see no error in this testimony. True the questions and answers are based on plaintiff's theory, that defendant had sold liquors to her husband, and that he had lost his job on the railroad due to his inebriety, and that plaintiff had been injured in her means of support, and that defendant had contributed thereto. And we cannot see that this evidence was not pertinent to the questions before the jury.

[3] The next point is covered by bill of exception No. 6, involving evidence of Horton Greer, son of plaintiff. This relates to the condition his father was in at the railroad

station, the day or day before he was discharged. It was proven not only by this witness, but by defendant, that Greer was drunk on that day. Though numerous questions and answers are covered by the bill of exceptions, only the last, relating to the father's condition, was objected to. True what Greer's condition, as to sobriety, was on that day, was not very material unless defendant sold him the liquor, which we may say was not proven, but he was in defendant's saloon only a few minutes before he was seen at the railroad station, and if by prior sales which defendant did make, he contributed to his drunken habits, a question for the jury on the whole evidence, and not for the court, we do not think the evidence wholly irrelevant. As already noted, plaintiff's case did not depend alone on the condition her husband was in on that day.

[4, 5] By his bill of exceptions No. 8, defendant complains of the evidence of plaintiff, admitted over objection, as to an alleged conversation with her brother, Wirt Greer, a witness for defendant, as to which the latter had been interrogated by plaintiff, on cross-examination. He did not remember the conversation. Mrs. Greer being recalled did recollect it, and swears, that her brother in a conversation, in February, year not designated, but presumably the February preceding the trial in October, 1909, referring to an occasion when her husband had been drunk, and he had taken his money and watch off of him for safe keeping, told her that because her husband was then in a drunken condition they did not then sell him more than three drinks. As to this matter Greer's testimony, though given on cross-examination, was in chief, for defendant had not examined him on that subject. It is therefore contended that plaintiff's evidence was improper, not binding on defendant, because relating to a conversation, at which he was not present, and was not proper to impeach Greer. The evident purpose of interrogating Greer was to show knowledge on his part, that plaintiff's husband was in the habit of drinking to intoxication. But as he did not remember the incident, her testimony, of course, his being on a collateral issue, would not be proper to impeach his. But was her evidence not proper evidence in chief, as tending to show that defendant's bar tender and agent had notice when selling liquors to her husband of his intemperate habits? The incident, if it occurred in January or February, 1909, antedated the suit, and if sales were then made to Greer, they were covered by the declaration, and took place within the time of defendant's ownership of the saloon. On this view the evidence was material and proper, for section 21, chapter 32, Code, makes sales of liquor to persons in the habit of drinking to intoxication, unlawful, if with knowl-

edge, or reason to believe such persons in the habit of drinking to excess. It was, therefore, essential to her success that plaintiff should show knowledge or reason for believing her husband in the habit of becoming intoxicated, for by section 26, of said chapter, right of action is given only when such knowledge or reason for belief is properly imputable to the defendant, and the evidence excepted to tended to show this, the unlawful sale being the ground of the action. *Duckworth v. Stalnaker*, 68 W. Va. 197, 200, 69 S. E. 850, citing *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009; *State v. Nichols*, 67 W. Va. 659, 69 S. E. 304, 33 L. R. A. (N. S.) 419, 21 Ann. Cas. 184; *State v. Davis*, 68 W. Va. 184, 69 S. E. 644. We think the evidence was proper.

[6] Another point of error relied on, relates to the giving of plaintiff's instructions numbered 4 and 6. Both instructions told the jury, that if they found certain facts assumed therein, and that plaintiff had been injured in *her person* or means of support, they *should find* for her such damages as they might find from the evidence she had sustained by reason of her husband's intoxication, "*and also exemplary damages*," not exceeding the sum sued for.

Three points are made against these instructions: (1) That both submit to the jury the question of injury to plaintiff's person, when there was no evidence of such injury; (2) that there was no evidence of injury to plaintiff's means of support; (3) that both substantially tell the jury they "should also find exemplary damages." Points 2 and 3, we think, are well founded. There is absolutely no evidence of injury to plaintiff's person. Without this the question was erroneously submitted to the jury. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009; *Carpenter v. Hyman*, 67 W. Va. 4, 66 S. E. 1078, 20 Ann. Cas. 1310.

[7, 8] Respecting the third point we have likewise held that it is judicial error for the trial court, under any circumstances, involving our civil damage act, to tell the jury that they *shall* or that they *should find* exemplary damages. The question of exemplary damages is dependent solely on the discretion of the jury, when actual damages are proven, and found by them, and the court is not permitted to control that discretion by peremptory instructions. *Fink v. Thomas*, 66 W. Va. 487, 66 S. E. 650, 19 Ann. Cas. 571; *Carpenter v. Hyman*, *supra*; *Pennington v. Gillaspie*, *supra*.

It is argued for plaintiff, on these two points, that as the sum found by the jury was so small, no damages to plaintiff's person, or exemplary damages, were or could have been included in the verdict of the jury. This argument is based solely on the size of the verdict. How do we know that it is not wholly made up of damages to person, or

exemplary damages? By submitting these questions to the jury the court assumed there was some evidence justifying them, but we find none. Besides in the third point and on the motion of defendant, overruled, to set aside the verdict for want of evidence of injury to her means of support, the sufficiency of the evidence to support any verdict is challenged.

[9] Another point is that defendant's instruction No. 5, good it is claimed under the rule of *Mayer v. Frobe*, 40 W. Va. 248, 22 S. E. 58, was modified and given by the court as modified over objection. As proposed this instruction would have propounded to the jury the proposition, that before they could assess damages against defendant, even if they should find he gave or sold intoxicating liquors to plaintiff's husband, within one year next before suit brought, they must believe from the evidence that he sold such liquors to plaintiff's husband with gross fraud, malice, oppression or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting plaintiff's rights. The only effect of the modification was to make the same rule apply whether the sale was made by defendant personally, or by his agents or bar tenders. Otherwise, as given, it was the same as proposed, and there was no error in this regard, in the modification. The original, perhaps, implied all that the amended instruction stated in clearer terms, but the jury might have misinterpreted it.

[10] But it is argued, that the court, in obedience to sections 4 and 5, chapter 38, Acts 1907 (Code Supp. 1909, c. 131, §§ 9aIV, 9aV), after modification of the instruction, should have given it, not as defendant's instruction, but as its own, and have so stated to the jury. Such, we think, is the clear mandate of that statute, and the statute should have been respected. But according to the record, while objection was made to the modification, which we think was not error, there was no timely objection to the reading of the instruction as if propounded by defendant. By not so objecting at the time, as we said in *State v. Clark*, 64 W. Va. 625, 645, 63 S. E. 402, the error was waived. On another trial it should not be overlooked that proof of an illegal sale of liquor in the eye of the law supplies the necessary ingredients of gross fraud, malice, etc., covered by this instruction. *Pennington v. Gillaspie*, supra.

Lastly, the motion for a new trial based on want of sufficient evidence to support the verdict. As for errors already noted there must be a new trial, we will not undertake to comment on the weight or sufficiency of the evidence.

The judgment below will be reversed and the defendant awarded a new trial.

SWARTHMORE LUMBER CO. v. PARKS.†
(Supreme Court of Appeals of West Virginia.
June 17, 1913.)

(Syllabus by the Court.)

1. EQUITY (§ 11*)—JURISDICTION.

A court of equity will not take cognizance of a fraud, working injury as a mere tort.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 21, 23, 24; Dec. Dig. § 11.*]

2. CONTRACTS (§ 324*)—BREACH OF CONTRACT—REMEDY IN EQUITY.

For breaches of contract, cognizable at law, there is no jurisdiction in equity to give redress by way of compensation or damages, if the bill has no object or purpose other than recovery of such compensation or damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.*]

3. EQUITY (§ 26*)—JURISDICTION—ACTIONS EX DELICTO.

Chapter 106 of the Code of 1906, authorizing attachments in equity, confers upon courts of equity no jurisdiction as to causes of action ex delicto.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 86, 87; Dec. Dig. § 26.*]

4. CORPORATIONS (§ 448*)—RIGHT OF ACTION—BREACH OF CONTRACT WITH PROMOTER.

A corporation does not succeed to the right of action of one of its promoters against his agent for breach of the contract of agency, antedating the existence of the corporation and complete in all respects before the date of its organization, in the absence of an express assignment thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.*]

Appeal from Circuit Court, Randolph County.

Bill by the Swarthmore Lumber Company against J. F. Parks. From a decree of dismissal, plaintiff appeals. Affirmed.

Taylor & Allen and W. B. & E. L. Maxwell, all of Elkins, for appellant. Blue & Dayton, of Philippi, and Harding & Harding, of Elkins, for appellee.

POFFENBARGER, P. The bill in this cause, dismissal of which for want of equity is complained of, proceeds upon two theories of right of recovery, a contractual relation between the parties in connection with which the defendant perpetrated a fraud, and a fraud on his part independent of such relation, working injury to the plaintiff. At the institution of the suit, an attachment, based upon fraud in the incurrence of the alleged liability, was sued out.

The fraudulent act complained of in the bill and set up in the affidavit for the attachment was a misrepresentation on the part of the defendant, an estimator of timber, as to the quantity of timber on a large tract of land of which the plaintiff became the owner. He was employed to make the estimate before the purchase was made, but not by the plaintiff. It is a corporation organized shortly after he made his report

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

as to the quantity of timber. J. G. Rouse, a promotor of the plaintiff corporation, procured the estimate to be made in the month of January, 1907. Having in view or contemplation the purchase of about 4,000 acres of timber land and a sawmill and other property from one J. Scott Bell, who represented the quantity of timber on the land to be more than 40,000,000 feet, Rouse, through one Capt. W. H. Cobb, employed the defendant to go upon the land and estimate the timber. Parks began his estimation about January 1st, and made his report on January 8, 1907, showing 39,000,000 feet of spruce and hemlock, 1,000,000 feet of bass wood, and 1,000,000 feet of other kinds of timber, making a total of 41,000,000. On the faith of this report and Bell's representation, Rouse, on the 12th day of January, 1907, entered into a contract with Bell for the purchase of the property at the price of \$162,331. By this contract, Bell bound himself to execute a deed on February 1, 1907, or immediately thereafter, to Rouse, or some one designated by him. In pursuance thereof, the deed was executed on January 30, 1907, to Albert A. Blakeney, as agent for the Swarthmore Lumber Company, the plaintiff corporation, which had not yet been organized or chartered. Rouse represented some undisclosed associates. On the 29th day of January, 1907, the interested parties held a meeting, and they decided definitely to organize a corporation to take over the property. Pursuant to this agreement, they entered into a formal one for incorporation, on the 20th day of February, 1907, and the certificate of incorporation issued by the Secretary of State bears date February 23, 1907. In the meantime, the contract with Bell was consummated in the following manner: Rouse had made a \$5,000 cash payment, and on the 30th day of January, 1907, a deed in which Bell is described as the party of the first part, Rouse as the party of the second part, and the Swarthmore Lumber Company as the party of the third part, was executed. It recited payment by Rouse of \$5,000, and stipulated for an additional payment of \$79,500 by the party of the third part on or before the delivery of the deed, as well as the execution of seven notes for \$5,000 each and one for \$4,165.50, all to bear date January 12, 1907. This deed was acknowledged February 1, 1907, and on the next day delivered to the clerk of the county court of the county for record, all of which indicates payment of the purchase money of the property in the name of the Swarthmore Lumber Company before the date of its organization.

The allegations of the bill, sustained by proof, show that, after its organization, the plaintiff corporation took charge of the property, operated the mill for a time, cut and manufactured some of the timber, and ascertained the existence of a very large short-

age in the estimated quantity, about 16,000,000 feet, and the plaintiff claims to have been injured and damaged by the defendant's false representation as to the quantity of timber to the extent of \$48,000, 16,000,000 feet at the price of \$3 per thousand. In September, 1908, it sued Bell in equity in the common pleas court of Erie county, Pa., to enjoin the collection of a balance due on the purchase-money notes, amounting to \$39,166.50, and for such other relief as it was entitled to have upon the facts and circumstances stated in the bill. The injunction granted thereon was afterwards dissolved, and the suit dismissed in consequence of a settlement of the matters in difference between the parties by an agreement.

Treating Bell and Parks as joint wrongdoers, the plaintiff claimed the right to recover from the latter as damages said sum of \$48,000. It also claims alternatively right of recovery of such sum from him, by virtue of his contract with Rouse, as damages for violation of its obligation by perpetration of the alleged fraud. A demurrer to the bill having been overruled, the cause was heard and decided on its merits.

Notwithstanding Parks was paid by Rouse for the estimate he made, he entered into an agreement with one McDaniel, who was interested as agent of Bell in effecting a sale of the property, by which he was to receive \$700 for his assistance in the consummation of the proposed sale. McDaniel paid him \$500 at about the time he reported his estimate, and he recovered the remaining \$200 in an action before a justice of the peace later. The bill charges him with having accepted this sum of money as an inducement to make a false report or estimate. On the contrary, the defendant says the agreement with McDaniel was made after his estimate had been completed and reported. As to this, there is some conflict in the testimony.

[1] In so far as the bill seeks a decree for money for damages for a mere wrong, done to the plaintiff, independent of any relation of contract, it states a cause of action not within the jurisdiction of a court of equity. A plain, clear, and positive declaration of this proposition and express application of it by way of decision is found in *Laidley v. Laidley*, 25 W. Va. 525. Fraud is a well-recognized ground of equity jurisdiction, and the statement of this principle is often made without limitation, but it has its limitations nevertheless. If the fraud amounts to nothing more than a mere tort, usually expressed by the phrase, "an injury by fraud and deceit," making a case in which the remedy at law is complete and fully adequate, there is no ground of equity jurisdiction. It is much easier to state the few instances in which courts of equity decline cognizance of causes of action arising out of fraud than to enumerate the great number of instances

in which it does intervene. "A court of equity can give damages in no case where the party has a clear remedy at law; nor even when he has no such remedy, unless, perhaps, under very peculiar circumstances." *Meze v. Mayse*, 6 Rand. (Va.) 660. "A court of equity will not entertain a bill filed for compensation of a breach of a contract, or to recover damages for a fraudulent representation, unless other distinct grounds of equitable jurisdiction are alleged and proved, and such compensation or damages are merely incidental to such distinct equitable jurisdiction." *Laidley v. Laidley*, cited.

[2] If the defendant could be regarded as standing in a relation of contract with the plaintiff, lack of general equity jurisdiction is equally obvious. The fraud alleged amounted to no more than a breach of the contract of agency, resulting in damage, making a cause of action for which an action at law is a remedy just as efficacious as a bill in equity. "It may be stated, as a general proposition, that for breaches of contract and other wrongs and injuries cognizable at law, courts of equity do not entertain jurisdiction to give redress by way of compensation or damages, where these constitute the sole objects of the bill." 2 Story's Eq. Jur. § 794.

In neither instance is the lack of jurisdiction supplied by the first paragraph of section 1 of chapter 106 of the Code, authorizing attachments in equity. Its terms, general in character and apparently giving right to attach in equity in all cases and for all sorts of demands, are to be taken distributively. They mean no more than that there may be an attachment in equity when the cause of action is one of equitable cognizance, and at law when the action is at law. The expression of legislative will was put in these general terms for mere brevity and convenience. *Peyton & Co. v. Cabell*, 25 W. Va. 540.

[3] The only exception in this respect is found in the last paragraph of section 1 of chapter 106, authorizing an attachment in a court of equity for a debt or claim, legal or equitable, whether the same be due or not, upon any of the grounds stated. In this clause, the words "debt or claim" do not include damages for a wrong. By the first paragraph of the section, an attachment is given in actions to recover such damages, but the last paragraph, conferring special equity jurisdiction, carefully omits claims arising out of tort. The first paragraph enumerates three classes of actions, those for claims or debts arising out of contract, and damages for wrongs. But two of these are enumerated in the last paragraph. The omission clearly signifies intent not to allow an attachment in equity for causes of action *ex delicto*. In the absence of terms expressly conferring it, such statutes are interpreted

as not giving equity jurisdiction. *Dunlop & Co. v. Keith*, 1 Leigh (Va.) 430, 19 Am. Dec. 755.

[4] As between the defendant and Rouse, who employed him to make the estimate, the claim asserted by the bill might be regarded as one arising out of contract for which an attachment is authorized. But there was no such relation between the plaintiff and the defendant. As between them, there was no employment nor any contract. The employment was effected and the work done before the plaintiff came into legal existence. That contract was completed and ended. Nothing remained to Rouse except a mere right of action, not in any sense an incident or concomitant of the conveyance to the corporation. It was a separate and distinct thing from what the corporation acquired under the deed of January 30, 1907. Assuming it to have been assignable, without deciding the question, that deed did not operate as an assignment thereof, nor is there any evidence of an assignment in any other form or by any other instrument. Corporations sometimes succeed to or take over rights and contracts of promoters, but, strictly and technically, contracts of promoters are not the contracts of the promoted corporations. The latter merely take over the rights acquired by the promoters. Many of the acts of the latter are thus adopted or inure to the benefit of the corporation, but they are acquired only as incident to property or contracts conveyed, assigned, or made over to the corporations. In no instance are the acts done before the corporation is organized the acts of the corporation itself.

Seeing no error in the decree complained of, we affirm it.

THOMAS v. STATE BOARD OF HEALTH.
(Supreme Court of Appeals of West Virginia.
Oct. 7, 1913.)

(Syllabus by the Court.)

1. PHYSICIANS AND SURGEONS (§ 3*)—LICENSING—REGULATION BY STATE BOARD OF HEALTH.

Section 9, c. 150, Code 1906, as amended and re-enacted by chapter 66, Acts of 1907 (Code Supp. 1906, c. 150), vests "the state board of health of West Virginia" with discretion to make reasonable rules and regulations respecting the granting of license to medical licentiates of other states with whose licensing authorities it has established reciprocal relations, and to refuse to grant license to those who have not complied with such rules and regulations.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. PHYSICIANS AND SURGEONS (§ 3*)—LICENSING—REGULATIONS BY STATE BOARD OF HEALTH.

A rule or regulation which requires a foreign medical licentiate to reside and practice his profession in the state which licensed him for one year before making application for license in this state is reasonable, and the fail-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ure of the applicant to comply with it will justify the state board of health in refusing him a license.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. PHYSICIANS AND SURGEONS (§ 3*)—LICENSING—REGULATIONS BY STATE BOARD OF HEALTH—CONSTRUCTION.

The year's practice in the foreign state must be in compliance with its laws.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 3; Dec. Dig. § 3.*]

4. PHYSICIANS AND SURGEONS (§ 3*)—LICENSING—REGULATIONS OF THE STATE BOARD OF HEALTH—CONSTRUCTION.

The interpretation given by said board to a rule or regulation adopted by it will be followed by the court, unless it appears to be clearly unreasonable and arbitrary.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 3; Dec. Dig. § 3.*]

Original application for a writ of mandamus by Claude A. Thomas against the State Board of Health. Mandamus refused.

M. F. Stiles, of Charleston, and McCluer & McCluer, of Martinsburg, for petitioner. A. A. Lilly, Atty. Gen., John B. Morrison, of Sutton, and J. E. Brown, of Charleston, for respondent.

WILLIAMS, J. Dr. Claude A. Thomas has made original application to this court for a writ of mandamus to compel the state board of health of West Virginia to issue him a license to practice medicine in this state.

Petitioner avers that he is a resident of the state of Maryland; that about the 6th of June, 1912, he was graduated from the Maryland Medical College of Baltimore, a reputable medical college in good standing in Maryland and in this state; that after receiving his college diploma the board of medical examiners of the state of Maryland issued to him on the 24th of July, 1912, a license to practice medicine and surgery in that state, and that thereupon he immediately entered upon, and has ever since been continuously engaged in, the reputable practice of medicine in that state; that the standard of qualification to practice medicine in Maryland is equivalent to the standard in West Virginia, and that each of said states accords to the medical licentiates of the other like privileges; that the board of health of West Virginia has heretofore established and maintained reciprocal relations in the said matter with like authorities in the state of Maryland, and has granted to graduates of said Maryland Medical College and licentiates of the board of medical examiners of Maryland licenses to practice medicine in this state; that on the ——— day of July, 1913, he made proper application to the state board of health of West Virginia, on blank forms furnished for the purpose by said board, setting forth therein the foregoing facts, for license to practice medicine in West Virginia, and accompanied said ap-

plication with the license issued to him by the board of medical examiners of the state of Maryland, and with the affidavits of nine reputable citizens and residents of Baltimore, Md., testifying to petitioner's good character, and to the fact that he had practiced medicine in Baltimore for one year prior thereto, and also tendered with his application \$25 to pay the fee required by section 11, c. 66, Acts 1907 (Code Supp. 1909, c. 150), and that said state board of health, at a regular session held in the city of Charleston on the 4th of August, 1913, refused to grant him a license, which action petitioner alleges was unjust, arbitrary, and contrary to the express terms of the statute, and greatly to his wrong and prejudice.

[1] On this petition an alternative writ was issued, to which "the state board of health of West Virginia" has made return, admitting its refusal to grant petitioner license, and assigning a number of reasons therefor, only one of which, however, we need consider, deeming it a sufficient justification for respondent's action in the premises; that is, that, under the reciprocal relation existing between respondent and the medical examining board in the state of Maryland, a medical licentiate from that state is required, by a rule or regulation adopted by respondent prior to petitioner's application, to reside and practice his profession in Maryland for one year after receiving his license there, and before making application for license here, which regulation it appears petitioner has not complied with. It may not be that respondent is given an unlimited discretion in the matter of granting or refusing licenses to applicants therefor, still, in view of the very nature of its duties and powers, as prescribed and defined by chapter 150, Code of West Virginia (1906), it must necessarily be vested with a very wide discretion, and especially so in the matter of establishing reciprocal relations between itself and like bodies in other states having similar powers, and in prescribing regulations for the granting of licenses to licentiates from such other states. Section 3 of said chapter authorizes it to "make and adopt all necessary rules, regulations and by-laws not inconsistent with the Constitution and laws of this state or of the United States, to enable it to perform its duties and transact its business under the provisions of this chapter." Section 9 of said chapter, as amended and re-enacted by chapter 66, Acts 1907, clearly gives it power to fix the standard of qualification for practitioners of medicine by empowering it to examine the applicant in respect thereto before issuing him a license, and by authorizing it to determine what medical colleges are reputable in its judgment, and what ones are not. It also has discretion to enter into reciprocal relations with like boards in oth-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

er states, whose standards of qualification are equal to that established by it in this state, and to admit licentiates of those states to practice in this state, without subjecting them to an examination, or to refuse to enter into such relation, and to require such applicants to pass an examination.

[2] It appears, however, that such reciprocal relation has been established between respondent and the board of medical examiners in the state of Maryland. Therefore, in view of its large discretion in these matters, respondent's regulation requiring medical licentiates of the state of Maryland to reside and practice their profession in that state continuously for one year before applying for license in this state is a reasonable one and wholly within its discretion. The board of medical examiners of Maryland exacts a like requirement of medical licentiates from this state who make application to it for license in that state. It is a reciprocal arrangement.

[3] The return denies that petitioner resided and practiced in Maryland for a year after he had been licensed there, and before making his application for license here, and avers that during the time petitioner claims to have resided and practiced in Baltimore, Md., he was residing in Martinsburg, W. Va., and practicing his profession in this state without a license so to do, which respondent charges to be dishonorable conduct. Petitioner replied specially to this and other charges in the return, and a number of affidavits, pro and con, were taken and filed. But it is not necessary to decide this question of fact, or the question of law growing out of it, i. e., whether, if the charge is true, it amounted to dishonorable conduct, for the reason that petitioner admits the fact that his Maryland license was not delivered to the recording court in the city of Baltimore, where he claims to have resided and practiced, until in January, 1913, which was only seven or eight months before he made application to respondent for license. If he did, in fact, practice his profession in that state prior to filing his license for recordation, it was unlawful, and could not avail him anything. Under the statutes of Maryland his license was inoperative until it was filed for recordation. Section 59, c. 217, Acts of Maryland 1894, makes it a misdemeanor for a physician or surgeon to attempt to practice his profession in that state without first having his license registered, and subjects the violator of the law to a fine of from \$10 to \$200 for each offense. So solicitous is the Legislature of that state regarding the enforcement of this statute that by another act (section 61a, c. 612, Acts 1902) it is made the duty of the police commissioners in the city of Baltimore and of the sheriffs of the various counties to see that all practicing physicians in the state are

duly registered in the respective counties in which they practice.

[4] Respondent's regulation respecting the granting of licenses to medical licentiates from the state of Maryland was reasonable and authorized by its discretionary powers, and petitioner had not complied with it.

For this reason, we refuse the writ.

BOWER v. VIRGINIAN RY. CO.

(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 446*)—INJURY TO LIVE STOCK
—EVIDENCE.

Demurrer to evidence rightly sustained.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

Error to Circuit Court, Raleigh County.

Action by R. L. Bower against the Virginian Railway Company. Demurrer to the evidence sustained, and plaintiff brings error. Affirmed.

File & File, of Beckley, for plaintiff in error. McGinnis & Hatcher, of Beckley, G. A. Wingfield, of Norfolk, Va., and E. W. Knight, of Charleston, for defendant in error.

ROBINSON, J. Did the court err in sustaining defendant's demurrer to the evidence? In other words, could the jury have found from the evidence that defendant's servants in charge of a heavy freight train were negligent in running the train on plaintiff's horse so that the animal was lost to plaintiff?

We are of opinion that the court's action is right. None of plaintiff's witnesses saw the train run on the horse. They mainly speak from what they observed as to the horse's tracks on the roadbed of the railroad. One of them was riding in the caboose of the train, but his testimony by no means establishes negligence. The mere absence of a continuous blowing of the whistle, or the failure to stop the train with a jolt, do not, under the circumstances presented, make negligence. Plaintiff's witnesses do not show that the train could have been stopped in time to prevent injury. On the other hand, the sole witness for defendant, the engineer, testifies to decisive facts wholly uncontradicted in the case—that he used every reasonable precaution to protect the horse from injury, that he made every effort to stop the train as soon as the horse darted to the roadbed from where it was grazing fifty feet away, and that the train could not have been stopped in a shorter distance than that in which it was stopped. All that plaintiff's witnesses say may be true, and still all that the engineer says as to the exercise of due care on his part and as to his inability to stop in a shorter distance may be true.

The testimony simply showing the distance the horse had run on the roadbed, as determined from the tracks of the animal, does not establish that the train could have been stopped in that distance. The jury could not merely infer that such distance was that in which the brakes on a heavy freight train going down grade could be put on with proper regard for the safety of the train and the train be brought to a standstill. If the engineer's uncontradicted testimony as to facts decisive in the case were false, plaintiff should have produced contradiction thereof, otherwise the engineer's testimony in such particular can not be disregarded.

Quite clearly, if the case had gone to the jury and a verdict for plaintiff had been found, it would have been the duty of the court, on motion, to set the same aside. Therefore, defendant's demurrer was well taken. *Dempsey v. Norfolk & Western Ry. Co.*, 69 W. Va. 271, 71 S. E. 284, 34 L. R. A. (N. S.) 682. The judgment will be affirmed.

LAMON v. GOLD et al.†

(Supreme Court of Appeals of West Virginia.
June 17, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 801*)—LIEN—ENFORCEMENT. When a judgment becomes barred by the statute of limitations, it ceases to be a lien on the debtor's land, and a court of equity will not enforce it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1387, 1575; Dec. Dig. § 801.*]

2. JUDGMENT (§ 795*)—LIEN—CONTINUANCE. The lien of a judgment continues so long as the right to have execution issued or to bring an action or *scire facias* on it is not barred.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1388-1394, 1397-1406; Dec. Dig. § 795.*]

3. JUDGMENT (§ 795*)—LIEN—DEBTOR'S DEPARTURE FROM STATE—EFFECT.

Notwithstanding a debtor's departure from and residence out of the state, after a judgment has been recovered against him, may not obstruct the creditor in the enforcement of his lien, it will suspend the running of the statute and preserve the lien of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1388-1394, 1397-1406; Dec. Dig. § 795.*]

(Additional Syllabus by Editorial Staff.)

4. JUDGMENT (§ 801*)—LIEN—MATTERS WHICH "OBSTRUCT"—ENFORCEMENT.

Code 1906, c. 139, § 11, relating to limitation of time for enforcement of judgments, provides for omission from computation of time for reasons stated in chapter 104, § 18, providing that "where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this state, if such person shall by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means obstruct the prosecution of such right, * * * the time that such obstruction may have continued shall not be computed as a part of the time within which the said right might or ought to have

been prosecuted." Held that, as thus used, the word "obstruct" does not mean to prevent altogether but rather to interrupt, to impede, or embarrass the creditor in the pursuit of any of his remedies.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1387, 1575; Dec. Dig. § 801.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4890-4894.]

5. JUDGMENT (§ 801*)—ENFORCEMENT BY "SUIT."

The word "suit," as used in Ann. Code 1906, c. 139, §§ 10, 11, relating to proceedings for enforcement of judgment liens, means a suit in equity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1387, 1575; Dec. Dig. § 801.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6768-6778; vol. 8, p. 7809.]

Appeal from Circuit Court, Berkeley County.

Bill by J. M. Lamon against Robert Gold and others. Decree for plaintiff, and Maria E. Janney appeals. Affirmed.

Faulkner, Walker & Woods, of Martinsburg, for appellant. J. O. Henson, of Charleston, for appellee.

WILLIAMS, J. This is a judgment creditors' suit, and Maria E. Janney, a defendant and judgment creditor, has appealed from a decree overruling her exceptions to the report of a master commissioner, to whom the cause was referred, to make report of the lands owned by the judgment debtor and the liens thereon.

In the years 1897 and 1898 a number of judgments were recovered against Robert Gold and his several indorsers on notes executed by him to different persons. Those judgments bear different dates. W. O. Nicklas, as administrator of Louisa Martin, deceased, recovered two judgments against said Gold on the 11th of January, 1898, for \$984.86 and \$492.73, respectively. Maria E. Janney paid these two judgments and took an assignment of them. In November, 1897, George I. Pitzer, first indorser on a note held by the Citizens' National Bank and joint judgment debtor with said Gold to said bank, having paid the judgment, instituted a suit in chancery against Gold and others, the purpose of which was to subject all his lands, except his estate in remainder in the dower lands of his mother, to the payment of the liens thereon. In that suit all his lands, except his said estate in remainder, were sold, and the proceeds derived therefrom were sufficient to pay only a portion of the liens. The purposes of that suit having been accomplished, it was retired from the docket by decree made on September 30, 1898.

J. M. Lamon, indorser for, and joint judgment debtor with, said Gold, having paid the judgment against him and his principal in favor of the Citizens' National Bank, brought the present suit on the 3d of June, 1909, the purpose of which is to subject Gold's undivided one-third interest in remainder in a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

tract of 69 acres; it being the tract which was assigned as dower to his mother out of the lands of which his father had died seised.

More than ten years had elapsed between the return days of the last executions issued on all of the judgments against said Gold and the bringing of the present suit, except the two judgments now held by Maria E. Janney. Executions were issued upon those two judgments on January 4, 1907, and were returned not satisfied on February 4, 1907, which was within ten years from the return of the last executions that had been issued thereon. Notwithstanding executions had not been issued on the prior judgments for a period of more than ten years before the suit was brought, the commissioner reported them as liens superior in dignity to the lien of the judgments held by Maria E. Janney, and she excepted to the report, and the court overruled her exceptions. Appellant's judgments are subsequent in date, but she contends that the prior judgments have not been kept alive by having executions issued thereon within the time required by section 10, c. 139, Code 1906, while she was diligent and did keep her judgments alive. She contends that her judgments are the only existing liens.

Robert Gold was a resident of the state at the time the judgments were recovered, but some time in the year 1899 he left the state and has ever since continued to be a nonresident. He was proceeded against, in this suit, by order of publication, but before final decree he filed his answer, admitting that the judgments reported in favor of appellees had not been paid.

Relying upon *Welton v. Boggs*, 45 W. Va. 620, 32 S. E. 232, 72 Am. St. Rep. 833, counsel for appellees insist that the statute of limitations is purely a personal defense to the debtor, and that, so long as he is living, one judgment creditor cannot rely upon it to defeat the lien of another judgment creditor. But counsel for appellant attack the soundness of that decision and have presented very strong argument in their brief to show that it is inequitable and against the weight of authorities upon that question and should therefore be overruled. In support of their argument they cite the following cases, viz.: *Callaway v. Saunders*, 99 Va. 350, 38 S. E. 182; *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419; *Monk v. Exposition Corporation*, 111 Va. 121, 68 S. E. 280; *Brandenstein v. Johnson*, 140 Cal. 29, 73 Pac. 744; *De Voe v. Rundle*, 83 Wash. 604, 74 Pac. 836; *Boucofski v. Jacobsen*, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898; 19 A. & E. E. L. (2d Ed.) 146. But we do not think that a decision of this question is essential to a determination of the case, for the reason that the suit is brought to enforce liens against the real estate of the debtor; and, if the court can see that the liens ceased to exist before the bringing of the suit, it will not enforce them. The court will not enforce a right

which it sees does not exist. Although section 5, c. 139, Code 1906, creating the lien of a judgment, does not expressly limit its duration, yet, in view of other provisions of the law, the lien ceases to exist after a time, if certain requirements for keeping it alive and in existence have not been complied with.

[1] The lien of a judgment is a right created by statute, and the Legislature has prescribed conditions and requirements for the preservation of such right, and noncompliance with those requirements will operate to divest the right. Ordinarily limitations relate to and affect the remedy without destroying the right. But a lien is a right; the enforcement of it is a remedy. If time has destroyed the lien, it cannot be restored by simple consent; it must be done by some kind of legal proceeding. So, while a barred judgment may furnish the basis of an action or *scire facias* on which another judgment may be obtained, if limitation is not pleaded, it is not evidence of a lien.

[2] The creditor's right to the lien of his judgment is gone forever when his right to sue out execution on the judgment or to revive it by *scire facias* is barred. In *Wendenbaugh, Adm'r, v. Reid*, 20 W. Va. 588, it was held that: "The lien of a judgment ceases when the right to sue out execution on the judgment or to revive it by *scire facias* is barred by the statute of limitations." The same question was decided in *Shipley v. Pew*, 23 W. Va. 487, and in *Reilly v. Clark*, 31 W. Va. 573, 8 S. E. 509. In the latter case Judge Snyder, in his opinion at page 573 of 31 W. Va., page 510 of 8 S. E., says that it has been repeatedly decided and has become the settled law of this state. One who seeks the enforcement of a right must certainly satisfy the court that the right exists; and if his bill is brought to enforce a judgment lien which the court sees does not exist, because the creditor's right to sue out execution on, or to revive, his judgment by *scire facias* is barred, it will not enforce it. It does not follow that, because a creditor obtained a judgment against his debtor, he may, at any time thereafter, enforce it as a lien against his debtor's land. If it is more than ten years old, he must show that he has kept it alive. But plaintiff alleges in his bill, and it is also an admitted fact, that Robert Gold left the state in 1899 and has ever since then been a nonresident.

This brings us to a consideration of the next question raised in the case, which is whether the debtor's absence from the state has prevented the running of the statute of limitations and has saved the liens of the judgments. Sections 10 and 11, c. 139, Code 1906, prescribe limitations upon the time of issuance of an execution on a judgment and also upon an action, suit, or *scire facias* brought on a judgment within a period of ten years from its date, or if execution issued within two years from the date of the judg-

ment, then in ten years from the return day of the last execution which has not been returned or which has been returned unsatisfied. Section 11 says no execution shall issue, and no action, suit, or scire facias shall be brought on any judgment after the time prescribed in section 10, but it contains the following provision in regard to computing the time, viz.: "The period mentioned in the fourth section of chapter one hundred and thirty-six of this Code, and any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted from the computation; and the sixteenth, seventeenth, eighteenth and nineteenth sections of chapter one hundred and four of this Code shall apply to the right to bring such action, suit or scire facias, in like manner as to any right, action, suit or scire facias, mentioned in those sections."

[3] The terms of the judgments in question place no limitation upon the right to sue out execution, and we have already said more than ten years had elapsed between the issuance of executions on all of the judgments, except upon the two now owned by appellant, and the bringing of this suit. But the judgment debtor left the state in 1899 and has ever since resided elsewhere, and therefore counsel for appellees insist that the debtor's becoming a nonresident after the recovery of the judgments, and his continuance as such, stopped the running of the statute, not only against their right to bring an action or scire facias upon the judgment, but also against their right to sue in equity for the enforcement of their liens. Section 18 of chapter 104 is referred to in section 11, c. 139, and is expressly made a part of it. So much of said last-named section as relates to the question under consideration reads as follows: "Where any such right as is mentioned in this chapter, shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, or if such right has been or shall be hereafter obstructed by war, insurrection or rebellion, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted."

There is a very able and ingenious argument by counsel for appellant in their brief to demonstrate that the time of the debtor's absence from the state should not be omitted from the computation of time unless his absence actually prevented the bringing of the suit. Otherwise they say the creditor has not been obstructed, and the statute was intended to apply only when there has been an actual obstruction of the right. But the language of the statute is too plain, it seems to us, to admit of doubt that the Legislature

regarded absence from the state, in and of itself, such an obstruction of the creditor's right as to justify a suspension of the statute of limitation on that account and did so suspend it. Whether, in all cases, absence from the state does operate as an obstruction or not, we think the Legislature, by the clearest intendment, so regarded it. It is put on the same footing with a party's absconding or concealing himself, and then follow these words, "or by any other indirect ways or means, obstruct the prosecution of such right." The words quoted clearly indicate that a debtor's departing from the state suspends the running of the statute. It is true that the debtor's absence did not prevent the bringing of this suit; he was proceeded against by order of publication, and that could have been done at any time after he became a nonresident. The location of the land sought to be subjected to the lien conferred jurisdiction. But the statute, being designed to protect a right, is entitled to a liberal construction; and, even if an actual obstruction were necessary to give it application, the obstruction of any of the creditor's remedies for the collection of his debt would be sufficient.

[4] The word "obstruct," as here used, does not mean to prevent altogether, but it rather means to interrupt, to impede, or embarrass the creditor in the pursuit of any of his remedies, whether by execution, action, scire facias, or by suit in equity. So, while the creditors were not prevented, by Gold's absence, from proceeding to enforce their liens against his land or from having executions issued on their judgments, they were certainly prevented from bringing an action on them or reviving them by scire facias; jurisdiction of the debtor's person being essential to those remedies. Hence his absence from the state has actually prevented the judgment creditors from pursuing some of their remedies.

The lien of a judgment remains so long as the right to bring an action on it or revive it by scire facias exists. If the debtor had returned to the state, at the time this suit was brought, we do not think the right of his creditors to bring an action or scire facias on their respective judgments and to exclude from the period of limitation the time of his absence can be doubted. Having such right, their liens are preserved and may be enforced in this suit. It was not necessary to revive the judgments by actions or scire facias before bringing the suit. The liens of the judgments never ceased. Sections 10 and 11, c. 139, authorize the bringing of a suit to enforce a judgment lien whenever and as long as the creditor has the right to bring an action or a scire facias. The statute treats them as alternative remedies; and, if any one of them is saved to the creditor, all are saved.

[5] The term "suit," as used in sections 10

and 11, clearly means a suit in equity for the enforcement of a judgment lien.

Finding no error, we affirm the decree.

McLAIN v. WEST VIRGINIA AUTOMOBILE CO.

(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913.)

(Syllabus by the Court.)

1. LIVERY STABLE KEEPERS (§ 7*)—KEEPER OF GARAGE—CARE OF AUTOMOBILE—DILIGENCE.

The law enjoins on the keeper of a garage for hire the duty safely to keep an automobile left in his custody, and he is bound to the exercise of reasonable diligence and care to that end.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

2. LIVERY STABLE KEEPERS (§ 7*)—KEEPER OF GARAGE—DUTIES AND OBLIGATIONS.

A count in assumpsit charging a garage keeper with the duty to take due and proper care of an automobile left in his custody and safely and securely to keep, store and care for the automobile without damage or injury, does not charge a higher degree of care than the law enjoins—reasonable or ordinary care to protect from injury.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

3. DAMAGES (§ 159*)—EVIDENCE—PLEADINGS.

A smaller amount of damages or injury than that laid in the declaration may be proved.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 429-438, 440-444, 447, 449-453; Dec. Dig. § 159.*]

4. LIVERY STABLE KEEPERS (§ 7*) — GARAGE KEEPERS—DILIGENCE—CUSTOMS.

A custom of garage keepers contrary to the implied obligation of reasonable care for safe keeping, arising in favor of an automobile owner by the storing of his car at a public garage, can not absolve the garage keeper from observance of such care.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

5. LIVERY STABLE KEEPERS (§ 6*) — GARAGE KEEPERS—CUSTODY OF CAR.

No garage keeper in the exercise of reasonable care can release a car left in his custody to another than the owner, without the latter's order, expressed or reasonably implied.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 6.*]

6. MASTER AND SERVANT (§ 302*) — TORTS OF SERVANT—SCOPE OF EMPLOYMENT.

A garage keeper cannot leave the garage solely in the hands of a servant and then say that the latter's negligence in releasing a car to one without authority from the owner is beyond the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.*]

Error to Circuit Court, Ohio County.

Action by W. H. McLain against the West Virginia Automobile Company. Judgment for plaintiff, and defendant brings error. Affirmed.

James W. Ewing, of Wheeling, for plaintiff in error. J. B. Somerville, of Wheeling, for defendant in error.

ROBINSON, J. This is an action in assumpsit by the owner of an automobile against a garage keeper, for damages arising from failure to exercise due and proper care in the keeping of the automobile.

Plaintiff delivered his automobile to defendant for the ordinary storage which owners and users of automobiles must necessarily have. Defendant was to receive from plaintiff eight dollars per month therefor. Thus defendant became a bailee for hire, with the obligations pertaining to such relation. Defendant's servant in charge of the garage at night, permitted one, who had no authority from plaintiff, to take the automobile out at two o'clock in the morning, and, on the "joy ride" which followed, the car was wrecked and broken to pieces. Plaintiff sought and has recovered the amount that he necessarily expended for the rebuilding and repair of the car.

[1] The law applicable to the relation of the parties herein has been modernly stated: "The liabilities of the garage keeper depends upon his care of the automobile while it is in his custody. He is bound to exercise reasonable care and prudence in keeping the machine in a safe manner, and must furnish reasonably safe accommodations. Any damage caused to the machine while in his custody, resulting from the lack of reasonable diligence and care, renders the garage keeper liable for whatever injuries the machine may have sustained. The failure to exercise due care constitutes a breach of the contract of bailment." Huddy on Automobiles, sec. 243. "The garage keeper is not an insurer of the automobiles left in his charge to be cared for, but he is bound to use reasonable or ordinary diligence in their care and keeping to the end that they be not damaged or destroyed." Berry on Automobiles, sec. 207.

[2] A demurrer to each of the two counts of the declaration was overruled. We are of opinion that the first count sufficiently states a cause of action, and, as the case was tried under that count wholly, it is unnecessary that we should consider the second count. It is true that the first count is not artfully drawn. It would have been well for the pleader in stating the case to have observed 2 Chitty on Pleading (11th Amer. Ed.) 341, 342. But we do not find the count susceptible to the criticism made that it charges defendant with a higher degree of care than the law implies. In a practical sense, the count, charging as it does defendant with the duty to take due and proper care of the automobile left in defendant's custody and safely and securely to keep, store and care for the automobile without damage or injury, does not charge a higher degree of care than the law enjoins—reasonable or ordinary care to protect from injury.

[3] A bill of particulars had been filed. It was proper to permit proof under it of the

cost of the repairs to the automobile made necessary by defendant's want of care, though the declaration averred that the automobile was "wholly lost to plaintiff." A smaller amount of damages or injury than that laid in the declaration may be proved. 1 Chitty, sec. 339.

[4] It was not error to exclude defendant's offer to prove the custom of garage keepers with reference to the care of automobiles in their custody and in respect to the surrender of such automobiles to chauffeurs or employees of the owners. In this case the contract arose from the relation of the parties. There was no conflict as to what that contract was. It was merely such as the law implied. A custom of garage keepers, to which plaintiff was no party, could not change the contract which the law established in his behalf. That law of course forbade such negligence in the garage keeper as the permitting of the car to leave the garage in the hands of one having no authority to take it. Such custom as defendant evidently sought to prove would have been a direct violation of the implied contract which called for reasonable care in the safe keeping of the automobile. It is not ordinary or reasonable care for one charged with the safe keeping of an automobile in a garage to allow it to go out on the road in the hands of a third party without the owner's consent. There may be a custom of surrendering automobiles at garages to chauffeurs of the owners, but the question of the authority of a chauffeur to take his employer's car from the garage is another matter.

[5] The party who was permitted by defendant to take plaintiff's car out had in fact no authority to do so. As to this point there is indeed no conflict in the evidence. But defendant sought to excuse itself by showing that the party had apparent authority to run the car because the latter had instructed plaintiff in its use on several occasions about two months previous. The evidence adduced is not sufficient to excuse defendant from the want of reasonable care in releasing the car. No garage keeper in the exercise of reasonable care can let out cars on such slight appearances of authority as is disclosed in this case. The only surrender of a car that the garage keeper can rightfully make is on the order of the owner, expressed or reasonably implied. No reasonable implication of authority arose in this instance. Indeed the employee in charge of the garage at the time virtually admits that he knew of the want of authority from plaintiff. He was the sole representative of defendant, charged with responsibility in its behalf. The court rightly refused the instruction asked for by defendant, tending to absolve it on the theory of apparent authority in the party to whom it released plaintiff's automobile.

[6] Another instruction sought by defendant and refused would have submitted to the

jury the proposition that defendant was only liable for the negligent acts of its servants when they were acting within the scope of their employment. If the instruction meant to refer to the servant in charge of the garage, the refusal was proper; for, it was surely within the scope of the employment of that servant to prevent cars from leaving the garage in the hands of those not authorized to take them. The garage keeper can not leave the garage solely in the hands of a servant and then say that his negligence in letting a car out is beyond the scope of his employment. That would leave the garage without anyone to protect cars; in itself it would be want of reasonable care. But if the proposed instruction meant to refer to another servant of defendant who accompanied the party that took out the car without authority from plaintiff, its refusal was proper because an instruction which was given for defendant concretely covered the point.

An order will be entered affirming the judgment.

BERNARD GLOEKLER CO. v. CARR.

(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913.)

(Syllabus by the Court.)

1. SALES (§ 23*)—CONTRACT—PROPOSAL AND ACCEPTANCE—BINDING EFFECT.

An offer and acceptance for the sale of drug store fixtures were in the following form: "We propose to furnish and erect complete in your store at Charleston, W. Va., the following fixtures: 25-foot wall case (McLean style); 18-foot tincture shelving; 11-foot patent medicine case; 6-foot tobacco case and humidor; 6-foot mirror; 12-foot R X work counter; 12-foot R X partition; 18-foot 6-inch settee, upholstered in green leather; 7-foot 6-inch mirror, above settee; 14-foot 6-inch 'L' case; three 6-foot cases; 5-foot wrapping counter, glass front and sliding door; 10-foot laboratory table. Exposed parts of above in solid and veneered mahogany; all glass bevel plate and all mirrors No. 1 grade same, metal back; all cases to be all plate—plate shelves 10-inch marble base; finish—best quality, hand polished and rubbed. Complete plans, specifications and details to be submitted and approved by purchaser. Price \$2,145. Bernard Gloekler Co., per Leon Shipman. Accepted: Jas. A. Carr, Carr's Drug Store." Held, in view of the evidence, that the contract was mutually binding on both parties, and Carr could not revoke it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

2. SALES (§ 177*)—CONTRACT—BREACH—WHAT CONSTITUTES.

His refusal to take the fixtures in conformity with the contract was a breach thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 445-450; Dec. Dig. § 177.*]

3. SALES (§ 23*)—CONTRACT—VALIDITY.

The contract was not invalid and unenforceable because of the concluding clause thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

4. SALES (§ 1*)—CONTRACT—DESCRIPTION—SUFFICIENCY.

The contract is sufficiently definite in the description of the fixtures.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.*]

Error to Circuit Court, Kanawha County.

Action by the Bernard Gloekler Company against James A. Carr, trading, etc. Judgment for plaintiff, and defendant brings error. Affirmed.

Goettman & Blecher and Cato & Bledsoe, of Charleston, for plaintiff in error. Price, Smith, Spilman & Clay, of Charleston, for defendant in error.

LYNCH, J. By an action of assumpsit brought in the intermediate court of Kanawha county, plaintiff seeks to recover damages for the breach of a contract between it and the defendant. The jury first impaneled found for defendant. On writ of error, the circuit court set the verdict aside and remanded the case. On the second trial the jury, at the direction of the court, found for plaintiff the sum of \$469.22; that being the amount claimed by the plaintiff in its bill of particulars and affidavit filed with the declaration. The intermediate court rendered judgment on the verdict, which, on writ of error, the circuit court affirmed.

[1-3] The contract, the breach of which is averred, is in substance that plaintiff proposed in writing to furnish and erect complete in defendant's store certain fixtures, designating each item by name or number or otherwise, and adding: "Exposed parts of above in solid and veneered mahogany; all glass bevel plate, and all mirrors No. 1 grade same, metal back; all cases to be all plate—plate shelves 10-inch marble base; finish—best quality, hand polished and rubbed. Complete plans, specifications and details to be submitted and approved by purchaser. Price \$2,145. [Signed] Bernard Gloekler Co., per Leon Shipman. Accepted: Jas. A. Carr, Carr's Drug Store."

On writ of error here, the defendant raises two questions, and none other: First. Was the contract sued on intended to be in truth a contract or merely a preliminary agreement or order revocable by either party until the fulfillment of certain conditions? Second. If intended by the parties to be a binding agreement, is it sufficiently certain to afford any basis of enforcing it?" both of which are in fact questions to be determined by the court.

The argument in support of the first proposition is that, until complete plans, specifications, and details were submitted by plaintiff and approved by defendant, the contract was incomplete, not binding on, and therefore revocable by, either of them. We do not agree to that conclusion. Nor does *Plumbing Co. v. Carr*, 54 W. Va. 272, 46 S. E. 458, or *Barrett v. Coal Co.*, 51 W. Va. 416, 41 S. E.

220, 90 Am. St. Rep. 802, cited, support it. Neither case asserts any such proposition. They hold that, where work is to be done or materials furnished to the satisfaction of the owner, the latter may withhold final payment if the work and materials are not satisfactory to him, provided his "rejection is in good faith and not fraudulent." If fraudulent and not in good faith, his rejection will not avail to defeat payment. In this case Carr did not afford plaintiff an opportunity to prepare and submit plans and specifications for his approval. Within an hour after accepting the order, he arbitrarily sought to revoke it, assigning as the only reason that he had purchased the same fixtures from another company at a materially reduced price. Our opinion is that plaintiff's offer and defendant's acceptance have all the necessary elements of a contract binding on both, notwithstanding the final clause providing for the approval of plans and specifications. These were not made a condition of the offer and acceptance, either in express terms or by implication. Carr neither in his letter addressed to plaintiff the day after his acceptance of the order nor in his testimony sought to rely on the final clause as an element of the contract of purchase. In the letter the difference in cost is urged as his reason for the recall of the agreement. In his testimony he frankly repeats and emphasizes the same reason. From his testimony it is also apparent that he did not attach any importance to the plans and specifications as an element of the contract. On the contrary, it is clear that he deemed them only a detail of the final completion of the work, the performance of which plaintiff assumed by the agreement—a conclusion in accord with reason and in harmony with a fair interpretation of the agreement. He testifies that "Mr. Shipman said that the plans and specifications would come in water colors and show the store as it would appear as you would walk in from the front, set in position; that is the idea I wanted of the store, to know how it would look." It was "to suit my taste in the matter." The natural and only reasonable inference from this statement is that the plans and specifications related only to the manner of doing the work; that is, when completed the fixtures should cause the store to appear attractive to his patrons, and hence be helpful in his business—an advertisement. Even after receiving the plans and specifications prepared and forwarded by plaintiff to defendant, he admits he had no objection to them, although he at once returned them to plaintiff.

Our interpretation is sustained, to some extent, by *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; *Alderton v. Williams*, 139 Mich. 297, 102 N. W. 753; *Moran Manufacturing Co. v. St. Louis Car Co.*, 210 Mo. 715, 109 S. W. 47; *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 265, 7 Sup. Ct. 875,

30 L. Ed. 967. In the Sellers Case the proposal was that Greer was to take all the Greer patents and all special machinery attached to punching machines and all other appliances belonging to the making of spikes, surrender his stock in Morris Sellers & Co., and to furnish it complete sets of templets for splices, the company to loan machine No. 4 for six months and pay Greer \$1,800 towards a new machine for cutting spikes, Greer to fill all the present orders so far as the material on hand would complete them; "this agreement to be put in proper form at as early a date as possible, pending the return of the company's attorney to draw up the necessary releases, etc." The court said: "There is nothing appearing on the face of the contract, nor is there anything in the evidence introduced on the hearing," to sustain the position that the proposal was not intended to be a complete and binding contract. "The contract is definite and specific in regard to what was to be done by each of the parties."

The Alderton Case holds that "a contract by which it is agreed to change a heading mill into a stave mill and carry on the business of manufacturing staves is not void for indefiniteness in that it fails to specify the kind of machinery to be bought or the kind of staves to be manufactured." Here the fixtures sold are specified in detail.

More directly in point is the Moran Case. The order proposed by defendant and accepted by plaintiff was: "Enter our order for 1,000 net tons of bar iron at \$1.70 per 100 lbs. f. o. b. our works, half card extra; no charge for cutting to length 5 feet or over; specifications to be furnished during balance of year." The car company declined to furnish the specifications, inferentially because the price of iron materially decreased before the expiration of the year. The court held that "the contract, in view of the evidence, was mutually binding on both parties, specifically stating the quantity, kind, and price of the goods sold, and the refusal of the buyer to specify and accept the goods in conformity with the contract was a breach thereof."

In Hinckley v. Steel Co., the court states the essence of the contract in the syllabus to the effect that the defendant agreed in writing to purchase from the plaintiff rails to be rolled by the latter "and to be drilled as may be directed" and to pay for them \$58 per ton. He refused to give directions for drilling, and, at his request, plaintiff delayed rolling any of the rails until after the time prescribed for their delivery, and then defendant advised the plaintiff that he should decline to take rails under the contract. The court held the defendant liable in damages for the breach of the contract. In this case it is also noted that defendant's excuse for not taking the rails under the contract was that he had arranged to purchase them at a lower price elsewhere. Likewise, in Wom-

ble v. Hickson, 91 Ark. 266, 121 S. W. 401, the plaintiff in error agreed for a fixed price to construct a house out of material to be furnished by Womble; the contract providing that "a drawing and specifications of said house are to be attached and become a part of the contract. The court held that "this was not a condition of the contract" and sustained a judgment for plaintiff.

[4] The argument on the second proposition is that the description of the fixtures is not sufficiently definite for the enforcement of the contract or to warrant recovery for its breach. This conclusion also fails to meet our approval. The contract definitely states what each was bound to do: The plaintiff to furnish certain fixtures fully specified and described, and the defendant to pay for them at a fixed price when set up and complete in his store. But it is said plaintiff subsequently specified each article with further detailed description. This it did in the plans and specifications submitted; but its act in this respect only made more definite that which before was already sufficiently certain to create a binding contract. Its motive, no doubt, was a desire to completely satisfy defendant and not because of any obligation resting upon it. Our conclusion upon this feature of the contract, its definiteness of description of the fixtures sold, accords with the views announced in the cases cited upon the first question propounded by defendant.

We therefore affirm the judgment.

WILSON v. JOHNSON.

(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 86*)—ACTION ON CONTRACT—SUFFICIENCY OF EVIDENCE.

The verdict in this case was not plainly unwarranted by the evidence considered most favorably in support thereof, and the court below erred in setting it aside and awarding defendant a new trial.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

2. NEW TRIAL (§ 70*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

Though the evidence be contradictory the verdict should not be set aside or interfered with, if, when considered most favorably in support of the verdict, it does not still appear plainly unwarranted by the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

3. APPEAL AND ERROR (§ 1005*)—GRANTING NEW TRIAL—GROUND FOR REVERSAL.

Though according to prior decisions of this and other courts it takes a stronger case in an appellate court to reverse an order granting, than one refusing a new trial, nevertheless, that rule in its application must be properly confined to cases where the evidence is not only conflicting, but also against the weight of the evidence, and the evidence is wholly insufficient to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

Error to Circuit Court, Cabell County.

Action by W. H. Wilson against J. W. Johnson. Judgment for the defendant, and plaintiff brings error. Reversed and rendered.

Simms, Enslow & Staker, of Huntington, for plaintiff in error. Williams, Scott & Lovett, of Huntington, for defendant in error.

MILLER, J. On appeal from the judgment of a justice plaintiff obtained a verdict for two hundred dollars, claimed to be due him from defendant, as per contract, for procuring one Dawkins to sell defendant a tract of timber land.

On motion of defendant the circuit court set aside the verdict and awarded him a new trial, and plaintiff has brought the case here to have that judgment reviewed, and asks at our hands judgment on the verdict in his favor, the same judgment which he contends the court below should have pronounced.

[1] No question of law is in controversy. The simple question presented is, Does the evidence warrant the verdict for plaintiff? Plaintiff proved by his own evidence that a year or two before his alleged contract with defendant, he had negotiated a sale of the tract in question to W. H. Dawkins, or the W. H. Dawkins Lumber Company; that after that nearly every time he met defendant the latter said something to him about that land, that one day when in defendant's office he said to him "Why not go and buy the timber now, or the land? Why not make the deal? It is not too late; they have not cut the timber; it is all there," and that defendant replied that, "Mr. Dawkins won't talk to me about trading on this property;" that he replied "Why I believe I could induce Mr. Dawkins to sell to you." Whereupon defendant answered: "Well, Mr. Wilson, if you will do that, I will pay you \$200.00 cash." Plaintiff swears he replied to that proposition: "Understand, if you will agree to pay \$200.00, I will go down and talk to Mr. Dawkins and I will try and induce him to trade with you, but I am not to make up any papers; I am to set no price, because I am well acquainted with Mr. Dawkins and we have had other dealings with him and I will try to persuade him to sell you this land." Plaintiff further swears that after making this bargain he got on the car and went to see Dawkins, and that after some persuasion, the latter agreed to sell the land to Johnson, but that no price was mentioned; that he came back and reported to defendant what Dawkins had agreed to do, and that he then considered his contract fulfilled; that a short time afterwards Johnson and Dawkins closed a bargain for the land, and that shortly after that he demanded of defendant the \$200.00, to which the latter replied: "Mr. Dawkins charged me so much for the land I couldn't afford to give you \$200.00." He further swears that he left the matter stand

in that way until defendant sold the soft timber to another company and he heard he had gotten a big price for it, when he again demanded his \$200.00, and defendant again refused to pay him. Wherefore this suit.

Plaintiff is corroborated by his witness Dawkins to the extent that the latter swears that he remembers the occasion when plaintiff came to his office and asked him to sell the land to Johnson. He did not remember all that was said, thought very little was said, but that plaintiff told him Johnson wanted to buy the land and wanted to know if he would go and see Johnson and have a talk with him, that he answered that he had bought the land for an investment and was going to hold it for a while; that he thought it would bring him more money, but would sell if he could get his price. As to the result of Wilson's visit and what influenced him to go and see Johnson and to finally sell him the land, the witness swears that a short time after Wilson called on him he went to see defendant, and further testified as follows: "Q. What caused you to go to see Mr. Johnson? A. Why I understood he wanted to buy it and I was up here in Huntington and I dropped in to see him. Q. You understood from Mr. Wilson, or he told you he wanted to buy it and in pursuance of his request you went to see Mr. Johnson? Is that right? A. I suppose that it was Mr. Wilson's request. Taking the length of time it has been, I wouldn't be sure. Mr. Wilson was there and talked to me and I saw Mr. Johnson afterwards. The deal was made after Mr. Wilson was there, I know that. Q. Did Mr. Wilson request you to go and see Mr. Johnson? A. Yes, sir, he asked me to go and see him. * * * Q. (By the Court.) Had Mr. Johnson before that been there to purchase this land from you? A. I think at one time he asked me something about it, but I don't remember what time it was."

Defendant, who was his only witness, swears, positively, that he never made the alleged contract with plaintiff. He testifies moreover, that before Dawkins acquired this tract, he was about to buy it from the same persons from whom Dawkins bought it, and intimates that having given plaintiff information of this purpose, the latter intercepted him in some way and procured the owners to sell to Dawkins; that on the day Dawkins closed his contract he asked him if he would sell him the tie stumpage, and that Dawkins replied he would not; that a week or ten days after that Wilson came to his office and said he could buy the boundary of timber, the tie stumpage; that he thought he could induce Dawkins to sell him the tie stumpage of oak for ties, and that he said to him, "Mr. Wilson, if you will induce Mr. Dawkins to sell me this boundary of timber, by the tie," (at prices which he stipulated) "I will give you \$200.00 to make that trade." He further swears that at the same time he dictated to his ste-

nographer a letter to Wilson, a copy of which he produced, stating dimensions and prices to be paid for the ties, and that the contract covered by this letter was the only proposition made or agreement had with plaintiff relative to this timber, and that plaintiff had never complied with that contract.

Plaintiff admits having received such a letter from defendant, some time before he made the contract sued on, but says he paid no attention to it, never presented the proposition to Dawkins. He is corroborated in this statement by Dawkins to the extent that the latter swears, that he does not believe Wilson ever proposed buying the tie stumpage, and that he does not think he ever showed him Johnson's letter, that he does not remember that he ever saw it. The evidence of this witness also tends to show that the defendant had attempted once or twice before plaintiff claims to have made his contract to buy from Dawkins, either the timber or tie stumpage, without success.

The foregoing is substantially all the evidence on the material facts, and presents the question whether the court below, within prescribed rules, was justified in denying plaintiff the fruits of his verdict.

[2] The rule of law governing trial courts in such cases, as declared in the decisions of this court and elsewhere, is that though the evidence be contradictory the verdict of the jury should not be interfered with, if when considered most favorably in support of the verdict it does not still appear plainly unwarranted by the evidence. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *State v. Cooper*, 26 W. Va. 338. The reason for this rule, founded in ancient law, is that when the case turns on the weight of the testimony, or inferences and deductions from facts proven, the jury and not the court are exclusively and uncontrollably the judges. *State v. Cooper*, supra; *Mitchell v. United States Coal & Coke Co.*, 67 W. Va. 480, 68 S. E. 366.

This rule we think particularly applicable to the case here. The question of the contract depended for the most part on the conflicting oral evidence of the witnesses, with no inconsiderable corroboration of plaintiff by his witness Dawkins. Certainly the trial court, though differing from the jury in the weight and credibility of the evidence of the witnesses, could not say the verdict was plainly not warranted by the evidence, or that manifest injustice had been done.

[3] But it is contended that as the court below on conflicting evidence set aside the verdict, the rule declared in *Miller v. Insurance Co.*, 12 W. Va. 116, 29 Am. Rep. 452, *Reynolds v. Tompkins*, 23 W. Va. 229, and lastly in *Varney & Evans v. Lumber & Mfg. Co.*, 64 W. Va. 417, 63 S. E. 203, should prevail, namely, that it takes a stronger case in an appellate court to reverse an order granting, than one refusing a new trial, and that as the court

below set aside the verdict and awarded a new trial, that judgment should not be disturbed. The rule invoked seems well recognized not only in our cases but in the decisions of many other states. 8 Am. Dig. 1714, and cases there collated. But the rule must be properly interpreted and applied. It may not be used to cover the error of the trial court in abusing its reasonable discretion, in awarding new trials by invading the province of the legal triers of fact, and because differing from them in the inferences or conclusions drawn from conflicting oral evidence substitute its judgment for that of the jury. As stated in *Miller v. Insurance Company*, supra, the rule is applicable where the evidence is *conflicting* and the verdict is *against the weight* of the evidence. As stated in 3 Am. Dig. 1714, supra, the rule is: "A stronger case must be made to justify the disturbance of an order granting a new trial for *insufficiency* of evidence than where one had been refused."

It cannot be truly said that the evidence of plaintiff in this case was insufficient to warrant the verdict, or that it was so overborne by the evidence of defendant as to evince corruption, partiality or prejudice on the part of the jury, justifying the court below in denying plaintiff the benefits of that verdict.

Our conclusion is to reverse the judgment below and enter judgment here on the verdict for plaintiff.

DONOHUE v. FREDLOCK, Mayor, et al.
(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 623*)—ABATEMENT OF NUISANCE—POWERS.

Under the provisions of the charter of a city that the council thereof shall have the power "to regulate the making of division fences and party walls by the owners of adjoining and adjacent premises and lots; to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome; and to abate by summary proceedings whatever in the opinion of the council is a nuisance," the council may abate only that as a nuisance which is recognized as such per se or branded as such by a lawful statute or ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1371-1374, 1383, 1384; Dec. Dig. § 623.*]

2. INJUNCTION (§ 85*)—PUBLIC OFFICERS—ILLEGAL RESOLUTION—ABATEMENT OF NUISANCE.

Equity has jurisdiction to restrain a municipal corporation from proceeding, under an illegal and invalid order or resolution, to remove an alleged nuisance, where private rights are encroached upon and substantial injury will ensue.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

Appeal from Circuit Court, Randolph County.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bill by Thomas Donohoe against A. M. Fredlock, Mayor, and others. Decree for defendants, and plaintiff appeals. Reversed, demurrer overruled, and injunction and bill reinstated.

E. D. Talbott, of Elkins, for appellant. H. G. Kump, of Elkins, for appellees.

LYNOH, J. Without an ordinance of a general character declaring what shall be deemed nuisances, and abatable because within such declaration, and without an ordinance regulating "the making of division fences," the council of the city of Elkins, assuming to act under the provisions of its charter, declared a fence constructed and maintained by Donohoe on his lots therein a nuisance, and ordered its abatement by him within a few hours thereafter, and, upon his failure to abate it, directed the police officers to remove it at his expense. Upon the bill before us, Donohoe obtained an injunction restraining enforcement of the order. The circuit court sustained defendants' demurrer to the bill and dissolved the injunction. This appeal followed.

The defendants, members of the council and its officers and agents, attempt to vindicate their action by the charter authority of the city (section 28, c. 81, Acts 1911), which provides that "the council of said city have the following general powers, * * * to regulate the making of division fences and party walls by the owners of adjoining and adjacent premises and lots, * * * to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome, * * * and to abate by summary proceedings whatever in the opinion of the council is a nuisance." They act upon the theory that these general powers are fully operative, in the absence of an ordinance enacted in due form and applicable alike to all persons and structures of the character described; the bill alleging, and the demurrer admitting, that the council had not adopted such ordinance at the date of its proceedings to abate the fence on his property.

[1] The Legislature could, in its discretion, enact, as the Legislatures of some states (Maine and Massachusetts being instances) have enacted, general laws defining and limiting the character and height of division fences. Having that power, it could, in the exercise of its legitimate authority, vest in any municipality like power and authority. Even with such a statute, the legislative grant to regulate division fences does not authorize the municipal council to declare any fence a nuisance unless and until its proper officers have, by a general ordinance, in fact declared the nature and character of the fences that may be so constructed. The power to regulate means only power to enact a reasonable ordinance for that purpose, and thereafter to enforce it by appropriate proceedings. It does not vest in the municipality

the power to declare the fence of any one citizen a nuisance and abate it, without first exercising its legislative power to prescribe what fences may properly be built and maintained. This the council of Elkins may have done. But the bill charges failure thus to prescribe any general rule applicable alike to all structures of this character prior to its attempt to declare plaintiff's fence a nuisance and to abate it as such by summary proceedings.

The authority of municipal councils in respect to the exercise of the powers conferred by charter or the general statute (chapter 47, Code 1906) on cities having been but recently discussed in *Parker v. Fairmont* (not reported) by Judge Robinson, a rediscussion could serve no useful purpose. That case is cited for the holding (points 1 and 2 of the syllabus) that, under the provisions of the charter of a city, the same as Code 1906, c. 47, § 28, that "the council shall have power to abate or cause to be abated anything which in the opinion of a majority of the whole council shall be a nuisance," the council may abate only that as a nuisance which is recognized as such *per se* or branded as such by lawful statute or ordinance. The rule thus stated, when applied, as it properly may be, to the facts averred by the bill in this case, renders certain the conclusion that the action of the council of the city of Elkins is erroneous, and subject to restraint by the injunctive process of a court of equity at the suit of the plaintiff. In addition to the authorities cited by Judge Robinson, we cite the following: *Grossman v. Oakland*, 30 Or. 473, 41 Pac. 5, 36 L. R. A. 593, 60 Am. St. Rep. 832; *Walker v. Jameson*, 140 Ind. 591, 37 N. E. 402, 28 L. R. A. 679, 683, 49 Am. St. Rep. 222; *St. Louis v. Heitzberg*, 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. Rep. 516; *McQuillin on Mun. Ord.* § 441; 3 *McQuillin on Mun. Corp.* § 901; *Joyce on Nuisances*, §§ 332, 344.

[2] Likewise, the third syllabus of the *Parker Case* settles the question discussed by the defendants here, namely, the existence of an adequate remedy at law by certiorari. It is that "equity will restrain a municipal corporation from proceeding, under an illegal and invalid order or resolution, to remove an alleged nuisance, where private rights are unlawfully encroached upon and irreparable injury will ensue." See, also, *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; *Railroad Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499; *Improvement Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 83 L. R. A. (N. S.) 759; *Hartman v. Mayor*, 1 *Marv. (Del.)* 215, 41 Atl. 74; *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423.

But defendants insist that the bill is fatally defective, and therefore that the court did not err in sustaining their demurrer, because it fails to aver irreparable injury consequent upon the consummation of the proceedings by abatement. They also likewise contend that the bill is defective because of the failure to

aver the absence of an adequate remedy at law. While the usual and better practice requires these technical averments, yet to hold a bill defective because of their omission, when it states the facts from which the court as well as the pleader may reasonably conclude that irreparable injury will probably ensue unless relief is granted, would seem to give to these phrases undue merit and effect. At best, they express mere conclusions from the facts averred. They are impotent for any purpose, unless the facts alleged warrant the conclusion. But there is authority at least holding it unnecessary, in order to obtain an injunction to restrain trespass, that plaintiff should aver or prove inability to obtain adequate compensation in damages in an action at law. *Manchester v. Manchester*, 25 Grat. (Va.) 825, 828; *Anderson v. Harvey*, 10 Grat. (Va.) 386, 398; *Rakes v. Rustin Land Min. & Mfg. Co.*, 22 S. E. 498, 2 Va. Dec. 156, 158.

The court is therefore of opinion to reverse the decree, overrule the demurrer, reinstate the injunction, and remand the case for further proceedings in accordance with the principles herein announced and otherwise according to law.

BANK OF UNION v. BAIRD et al.
(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913.)

(Syllabus by the Court.)

1. PRIOR CASE APPROVED AND REAFFIRMED.

Points 1, 2, 3, 4, 6, 7, and 8 of the syllabus in *Bank of Union v. Loeb Shoe Co.*, 76 S. E. 883, approved and reaffirmed.

2. TIME (§ 5*)—PROCESS—TIME FOR RETURN—"MONTH."

The summons of a justice, issued August 24, 1901, and returnable September 24, 1901, is not invalid under section 202, c. 50, Code 1906. Being returnable on the day of the next succeeding "month" corresponding with its date, it, by proper construction, conforms to the requirement of that section that it shall be returnable not less than one month after its date.

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 5-8; Dec. Dig. § 5.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4574, 4575; vol. 8, p. 7724.]

(Additional Syllabus by Editorial Staff.)

3. GARNISHMENT (§ 191*)—COSTS—RIGHTS OF GARNISHEE.

A garnishee may, when the debtor is served with process or defends the action, disregard any irregularity, but otherwise he pays a judgment against him at his peril, and therefore is allowed to charge the funds in his hands to the extent necessary to test the validity of the proceedings.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 372-379; Dec. Dig. § 191.*]

Poffenbarger, P., and Robinson, J., dissenting.

Error to Circuit Court, Kanawha County.
Action by the Bank of Union against A. Baird, trading, etc., and others. Judgment

for defendants, and plaintiff brings error. Reversed and remanded.

A. M. Prichard, S. S. Green, and A. P. Hudson, all of Charleston, for plaintiff in error. Couch & Briggs, of Charleston, for defendants in error.

LYNCH, J. [1] The fund involved, the questions for determination except two, and the parties interested save the defendant Hooton & Baird Company, are the same fund, questions, and parties as those involved in *Bank of Union v. Loeb Shoe Co.*, 76 S. E. 883, recently decided by this court. In each case, the controversy is between attaching creditors of Thomas Watson, an absconding debtor, who failed to appear. The opinion in the *Loeb Case* so fully discusses the legal questions involved that repetition thereof would avail nothing. The principles thereby announced, and sustained by sound reasoning and authority, are applicable and applied to the controverted facts of the present case.

The two questions distinguishing this from the *Loeb Case* are: First, whether the amount involved is sufficient to sustain jurisdiction here on writ of error; and, second, whether the second summons required by section 202, c. 50, Code, the first not having been served on Watson, who did not appear, is legally sufficient thereunder.

[3] The first was discussed by Judge Miller in the *Loeb Case*, but not decided because not necessary. It relates to the inclusion of the costs incurred by the garnishee on appeal from the judgment of the justice to the intermediate court of Kanawha county to test the validity of the attachment proceedings of Baird before the former. The garnishee, being a mere stakeholder, may, when the debtor is served with process to answer or is present defending the action, disregard any irregularity in such proceedings. But otherwise he pays a judgment or order against him at his peril. To this end he is allowed to charge the fund in his hands to the extent reasonably necessary to test the validity of the proceedings. *Railroad v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178; *Drake on Attachments*, §§ 692-698; 8 Am. & Eng. Enc. Law, 1218. Therefore the costs incurred by the Charleston National Bank, on the writ of error to the intermediate court, are properly payable out of the funds in its hands. To this extent the fund is depleted to the injury of the Bank of Union, should it appear that the Baird judgment is valid and a binding charge against the funds in controversy. It is therefore proper to include these costs. Including them, the amount in controversy is sufficient to sustain appellate jurisdiction.

[2] As to the second question, section 202, c. 50, Code, provides that where the first

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

summons issued by a justice in proceedings by attachment is not served on the defendant, and he does not appear to answer, there shall issue a second summons, returnable "not less than one or more than two months after its date." The summons so required and issued was dated August 24th, and made returnable September 24, 1901. The Bank of Union contends that the return day is less than one month after the date of issuance. We decline to give assent to that view. The time intervening is one month, and not less. By section 14, c. 13, Code, the word "month," when used in a statute, means a calendar month; that is, the period of time intervening between any date of one month and the corresponding date in the next succeeding month, when the latter has that number of days. Or, as generally stated, "it means a month as designated in the calendar, without regard to the number of days it may contain, and is to be computed, not by counting days, but by looking at the calendar; and it runs from a given day in one month to a day of the corresponding number in the next month, except where the last month has not so many days, in which event it expires on the last day of that month." 38 Cyc. 312, 313; Daley v. Anderson, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870; McGinn v. State, 46 Neb. 427, 65 N. W. 46, 30 L. R. A. 450, 50 Am. St. Rep. 617; Trust & Deposit Co. v. Buddington, 27 Fla. 215, 9 South. 246, 12 L. R. A. 770; Re Gregg's Estate, 213 Pa. 260, 62 Atl. 857; Williamson v. Farrow, 1 Bailey (S. C.) 611, 21 Am. Dec. 492.

But the bank places stress upon the word "after," as used in the section, and argues that a month after August 24th, the date of the summons, would not end until September 25th. It is pertinent to inquire what is the date for the expiration of the first month after August 24th, in view of the meaning of the word "month" prescribed by statute and as defined by the authorities cited. Is it not the corresponding date in the ensuing September? From August 24th to September 24th is one month, and the first and only period of one month after the first date. To September 25th is one month and one day after August 24th. The Legislature evidently intended the calendar month, after the date of the summons, as the month expiring on the corresponding date in the next succeeding month. See State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243. The propriety of this construction seems so obviously manifest that further discussion seems unnecessary.

We reiterate the principles announced in the Loeb Case, so far as applicable, and apply them to the facts here, which, as stated, are in the main those involved in the former. We hold that the Bank of Union attachment is valid; that the Baird attachment is invalid, because of the imperfect affidavit on

which it is based; that the amount in controversy exceeds \$100; that a subsequent attaching creditor has a right to contest the validity of a prior attachment on the same fund; and that both summonses issued by the justice in the Baird attachment proceedings, under sections 26 and 202, c. 50, Code, are sufficient.

As in the Loeb Case, so in this, we think there is error in the judgment of the intermediate court of Kanawha county of July 21, 1910, and for which we reverse it and remand the case, to be further proceeded in according to the principles enunciated in both cases, and further according to the rules and principles of law governing the trial of like cases.

ROBINSON, J. (dissenting). The affidavit for the Baird attachment is sufficient. The judgment ought to be affirmed.

POFFENBARGER, P., joins in this dissent.

GUERIN et al. v. PITTSBURG, C. C. & ST. L. RY. CO.

(Supreme Court of Appeals of West Virginia. Sept. 30, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 303*)—DUTY TO ALIGHTING PASSENGER.

It is the duty of a railroad company to stop its trains at stations a reasonable length of time for its passengers to alight with safety, and its failure to do so is negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 303.*]

2. CARRIERS (§ 303*)—INJURY TO ALIGHTING PASSENGER.

A railroad company is liable to a passenger who, without fault on his part, is injured, while attempting to alight, by the starting and sudden stopping of the train, after it had stopped at his destination to let off and take on passengers, but not long enough to give him a reasonable opportunity to get off.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 303.*]

3. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

When the verdict rests upon conflicting oral testimony of expert witnesses, and there are no controlling facts or circumstances, admitted or clearly proven, which are inconsistent with the jury's finding, the court should not disturb it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error to Circuit Court, Brooke County.

Action by Estella Guerin and Frank L. Guerin, her husband, against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. B. Sommerville, of Wheeling, for plaintiff in error. R. L. Ramsey, of Follansbee, and John J. Coniff, of Wheeling, for defendants in error.

WILLIAMS, J. Estella Guerin and Frank Guerin, her husband, recovered a verdict for \$5,000 in a joint action against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, a corporation, for a personal injury sustained by Mrs. Guerin, alleged to have been caused by defendant's negligence. The court refused to set aside the verdict and grant it a new trial on defendant's motion, and entered judgment on the verdict, and defendant obtained this writ of error.

The principal question presented is, Does the evidence support the verdict of the jury? Having purchased their tickets, plaintiffs, with their three little children, aged about one, four, and five years, respectively, boarded defendant's train at Pittsburg to go to Follansbee. They were riding in the rear coach of a train composed of five day coaches and a baggage car. They were seated on opposite sides of the aisle, near the front end of the coach, and when the train stopped at Follansbee Mr. Guerin took the baggage and the oldest child and got off, and Mrs. Guerin was following him, carrying the youngest child in her arms and leading the other. Just as she had gotten out onto the platform of the coach and was about to start down the steps the train began to pull out. The brakeman, who was between the third and fourth cars, says he had gotten onto the step and looked back, saw Mrs. Guerin's position, and called to her to "wait a minute," and immediately ran into the coach and put on the brakes and stopped the train suddenly, which threw her against the railing of the platform with such force, she says, as to bruise and injure her internally. The train had moved about the distance of half a car length, and was going at the rate of about two miles per hour when it was stopped. This occurred at 9:35 p. m. on the 24th December, 1908. It was therefore dark. There is evidence that the coach on which plaintiffs were riding was crowded with passengers, and that Mrs. Guerin was exercising reasonable care and diligence to alight from it when she was hurt. She had a child in her arms and was leading another by the hand, and was therefore necessarily hindered in her progress.

[1, 2] It was clearly the duty of defendant to stop its train a reasonable length of time to allow all its passengers for Follansbee to alight in safety. If, on account of the large number of passengers, it was necessary to make a longer stop than usual, it was its duty to do so. 4 Elliott on Railroads, § 1628. The uncontradicted evidence is that Mrs. Guerin had gotten out of the coach onto the platform, while the train was standing, and was in the act of starting

down the steps when the train started, and while she was in that position the brakeman caused the train to be stopped, after it had moved about half a car length, so suddenly as to jerk her against the railing. This was negligence. *Duty v. C. & O. Ry. Co.*, 70 W. Va. 14, 73 S. E. 331; 4 Elliott on Railroads, § 1627, and cases cited in note 10.

[3] It is also insisted that the verdict is excessive. It appears that the railing of the car came in violent contact with Mrs. Guerin's body on her right side just above, and a little in front of, the pelvic bone. She immediately went to the home of her mother about two squares from the station, and had arnica and witch-hazel applied to the bruised parts. On the next day, which was Christmas, she and her husband went by street car to Toronto, Ohio, to visit at the home of Mr. Guerin's father, and remained there two days and nights. They then returned to Follansbee and remained there the night of the 27th, and on the next day went to Pittsburg. On the 3d of January following she called in Dr. Henderson, her family physician at McKeesport, Pa., who gave her some medicine. He was called to see her again between the 5th and 10th of April following. At that time Dr. McCurdy was also called in, and he examined her, but gave her no treatment. She was sick abed for two weeks in August following, and was treated every day by Dr. Henderson. She then went to the home of her mother in Follansbee, and remained there two or three months, during which time, she says, she was not treated by any physician, but was ailing all the time. And in February, 1910, she was taken to the hospital in Pittsburg and underwent an operation. Dr. Dixon, who performed the operation, says he found a tumor on the right ovary, which was adhered to the appendix, also a degeneration, in the early stage, of the left ovary, and that the uterus was turned down at right angles toward the right ovary. He says he found it necessary to remove the ovaries, and did so, and also sewed up a laceration which he found in the perineum. The testimony conflicts as to whether these serious troubles were the direct result of the hurt she received on the 24th December, 1908, or were due to childbirth. Mrs. Guerin testifies that, prior to the accident, she was a perfectly strong and healthy woman, and that shortly thereafter she began to have pains in the region of the right ovary, which continued to grow more severe until the operation was performed. Dr. Dixon, who appears to be a skillful surgeon, testified, in answer to an hypothetical question based upon the facts and circumstances testified to by plaintiff's witnesses, that her injury was the direct result of the hurt which she received when alighting from the train. In view of the nature of her injury, it being altogether internal, the opinions of skillful physicians

and surgeons were the best proof of which the nature of the case was susceptible. And the opinion evidence of Dr. Dixon is sufficient to support the verdict. True he is contradicted by the opinions of other experts, but it was the province of the jury to decide upon the weight or value to be given to their testimony. There being no controlling facts or circumstances, undisputed, which are inconsistent with the testimony of Dr. Dixon, the court properly overruled defendant's motion to set aside the verdict.

Finding no error, the judgment is affirmed.

ASHBAUGH v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 68*)—GRANT OF RIGHT OF WAY—CONSTRUCTION—WIDTH FIXED BY USE.

Possession of a strip of land by a railroad company, manifested and evidenced by maintenance of its tracks on a part thereof and inclusion of the residue within a fence and care of it, as by moving it regularly, for a long period of time, as and for its right of way, under a general and indefinite grant thereof by deed, not specifying its width, without objection on the part of the owners of the tract of land out of which the grant was made, constitutes a practical construction of the grant, fixing and determining the width of the right of way and making it coextensive with such possession, although the possession and acquiescence are not shown to have commenced with the date of the deed or the construction of the road.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 159, 160; Dec. Dig. § 68.*]

2. RAILROADS (§ 68*)—GRANT OF RIGHT OF WAY—ENJOYMENT—CONSTRUCTION OF SIDE TRACK.

The construction of a side track within the area so occupied and used by the railroad company is not an enlargement of the easement granted by the deed and defined by the conduct of the parties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 159, 160; Dec. Dig. § 68.*]

Robinson, J., dissenting.

Error to Circuit Court, Kanawha County.

Action by J. W. Ashbaugh against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Simms, Enslow, Fitzpatrick & Baker, of Huntington, for plaintiff in error. A. M. Belcher, of Charleston, for defendant in error.

POFFENBARGER, J. The judgment for the sum of \$250, complained of on this writ of error, was recovered in an action of trespass on the case for an alleged injury done by the construction of a side track on a strip of land about 80 feet wide and 594 feet long, which the defendant claims as a part of its right of way, and which the plaintiff claims

as a part of his farm, not included in the right of way. The assignments of error insisted upon in the argument for the plaintiff in error include only rulings upon instructions and a motion to set aside the verdict. There is a general charge of erroneous rulings relating to the admissibility of evidence, but there are no specific assignments of such errors in the petition or the brief.

By their deed dated October 6, 1869, Joshua Morris and Benjamin Morris granted the right of way, the width of which is in controversy, with the following specification and description thereof: "The right of way for the construction of a double track of railway through the lands owned by them on the south side of Kanawha river in Kanawha county, West Virginia, provided no injury is done to the buildings thereon said lands lying above and adjoining the lands of Mrs. Crockett with all the privileges and immunities necessary and requisite for the construction, use and enjoyment of the same." Under this deed, the main line of the Chesapeake & Ohio Railway Company was constructed a great many years ago, and, at the date of the inception of this controversy, it consisted of a double track through the premises. On the north side of the strip occupied by the tracks, there was at that time a strip about 40 feet wide, extending to a county road, and about 594 feet long. In the year 1904 the defendant built on this strip a side track, the center of which was distant from the center of the adjacent main track 13 feet. From the plaintiff's fence, south of the south track of the defendant, apparently used and recognized as the limit of the right of way on the south, the distance to the center of the south track is 12 feet, from the center of the south track to the center of the north track 13 feet, from the center of the north main track to the center of the side track 13 feet, and from the center of the side track to the fence running along the south side of the county road 40 feet, according to the figures given on a map filed as a part of the plaintiff's evidence. The three tracks thus appear to occupy a strip less than 50 feet wide, measured from the fence on the south side of the railroad, but the plaintiff's contention is that under this grant the railway company was entitled to use only so much land as would accommodate its two main tracks, amounting to 29 feet, 13 feet between the centers of the two tracks and an allowance of 8 feet on each side. On the other hand, the railway company claims a grant of such land as it had the right, under the statute at that time, to condemn, namely, 100 feet, and, if not that, land for the accommodation of side tracks, signal towers, and telegraph poles, in addition to its main tracks, and lastly so much of the land as it took possession of and has used under the grant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Along the fence between the county road and the strip in controversy there are telegraph poles, some of which are on the side next to the county road and others on the side thereof next to the railroad. On these poles are the wires of the railway company and the Western Union Telegraph Company. Which company erected them in the first instance, the evidence does not show, but the employes and agents of the railway company say they belong to it. The plaintiff admits that at no time within the eight years of his ownership of his property, prior to the commencement of his action, did he in any manner exercise any control over the strip in question or make any use of it, nor is there any evidence tending to prove that his immediate predecessor in title, Mary Jane Layden, or his remote predecessors, the Morrisises, ever did so. He lived in the town of Marmet, just outside of which his land lies, for a period of about nine years, before he bought the land, and was unable to say anybody had ever made any use of the strip of land at any time during that period, but refused to admit that the railway company had done so. On the contrary, he denied that they mowed it and kept it clean. Though positively denying this in one part of his testimony, he says in another it did not do so to his knowledge, and he does not think it did. As to the location of the telegraph poles, he said, "I think some are on one side and some on another" (speaking of the fence). Having shown his ownership of the Morris land, subject to the right of way granted, he proved by the testimony of a civil engineer that it is possible to build a double-track railroad on 29 feet of ground. This witness was interrogated as to whether that would be sufficient for telegraph lines and side tracks, and he said, "No, I didn't say that; simply for the railroad tracks." When asked what would be a reasonable, necessary, and proper right of way for a double-track railroad, he said, "I could not tell that." Additional testimony of his on cross-examination shows that he did not mean to say 29 feet was a sufficient right of way for a double-track railway with "the privileges and immunities necessary and requisite for the construction, use, and enjoyment of the same."

The evidence adduced by the defendant tended very strongly to show its dominion over the strip of land for a long period of time. W. S. Spencer, roadmaster of the defendant for a period of about 15 years, ending in 1905, said that part of the road involved here was under his supervision, and he kept the grass mowed on it during all of that time, and that the fence had been built between it and the county road by the railway company in 1893 or 1894. He said the strip was kept clean by the company clear out to the county road, prior to the building of the fence. On cross-examination he was unable to give the dates on which he

had seen the men under his control working on the strip, but he was positive he had been there with them. He states emphatically he had been there and seen the men at work and seen the fence and telegraph poles. He instances one particular occasion on which he was with the men and tells what they did. He declares positively that he was there on other occasions and saw them at work, and further that it was his custom to visit them on the line at least once a week. J. W. Brightwell, foreman of carpenters for the railway company for more than 19 years, says he built that fence for the railway company in the spring of 1893, and that there was no evidence upon the ground then of the existence of a prior fence at that place. This evidence was supplemented by the testimony of J. P. Nelson and C. W. Johns, civil engineers and employes of the defendant company, tending to show necessity for the use, by the defendant in the operation of its road, of all the land occupied by its tracks and the residue of the strip between the road and the county road and even more.

[1] The court, in the instructions given and its rulings upon requests for instructions not given wholly ignored the theory of a definition or establishment of the width of the right of way by the conduct of the parties, or, in other words, by practical construction of the grant. Defendant's instruction No. 2 embodying this theory, was refused. The grant being general and indefinite in its terms, the rule of practical construction is obviously applicable. The acts and conduct of both parties prior and subsequent to the grant may be considered for the purpose of ascertaining their intention. Bigelow, judge, said in *Jennison v. Walker*, 11 Gray (Mass.) 423: "This rule rests on the principle that where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties, contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties." In *Bannon v. Angier*, 2 Allen (Mass.) 128, the same judge said: "Where a right of way or other easement is granted by deed without fixed and defined limits, the practical location and use of such way or easement by the grantee under his deed, acquiesced in by the grantor at the time of the grant and for a long time subsequent thereto, operate as an assignment of the right and are deemed to be that which was intended to be conveyed by the deed and are the same, in legal effect, as if it had been fully described by the terms of the grant." This principle or rule was applied in *Onthank v. Railroad Co.*, 71 N. Y. 194, 27 Am. Rep. 35. In *Indianapolis, etc., Co. v. Lewis*, 119 Ind. 218, 21 N. E. 660, involving the grant of a right of way over certain land, without any specification as to the width of the way

thereby conveyed, Coffey, judge, said: "But in a case like this, where the grant of the right of way does not fix its width, the declarations and acts of the parties are admissible in evidence to fix such width." The proposition has been stated in these words: "What shall constitute a right of way for a railroad is not defined by law, but, like any other easement, it is a subject of contract, and when the contract, as to the width of the right of way, is general or ambiguous, the intention of the parties may be shown by parol evidence of their contemporaneous acts and declarations." *Railroad Co. v. Reynolds*, 116 Ind. 356, 19 N. E. 141. See, also, *Prather v. Telegraph Co.*, 89 Ind. 501; *Railway Co. v. Rayl*, 69 Ind. 424; *Railroad Co. v. Reynolds*, 116 Ind. 356, 19 N. E. 141. Much additional authority might be cited, but enough has been given to show the application of a well-settled rule or principle of law to cases of this kind.

Defendant's instruction No. 2, refused by the court and, in our opinion, aptly framed to submit this theory of the case, reads as follows: "The court instructs the jury that if they believe from the evidence that the Chesapeake & Ohio Railway Company in 1869 acquired from J. & B. Morris a right of way for a double-track railway with all the privileges and immunities necessary and requisite for the construction, use, and enjoyment of the same, and under said deed took possession of the land in controversy, and exercised the privileges and ownership over the same, and have had it fenced for 16 years, then they should find for the defendant."

Lack of evidence of agreement upon the width of the right of way by conduct at the date of the deed or construction of the road is urged as an objection to the application of the rule, but the determining conduct need not go back to the date of the contract. Sometimes it does, and its legal effect is then often called contemporaneous construction, but the effect of the conduct of the parties to an indefinite or ambiguous contract is frequently termed "practical construction," and these words cover both contemporaneous and subsequent conduct. Beach on the Modern Law of Contracts says at section 721: "The subsequent acts are admitted to show how the parties understood their contract and are a practical construction of it." The rule was so understood and applied in *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637: "Practical construction of contracts is that given to agreements by the parties themselves by acts subsequently done with reference to the contracts. To such exposition of contracts the courts pay high regard and will effectuate it if they can do so consistently with the rules of law." *Clark v. Sayers & Lambert*, 55 W. Va. 512, 47 S. E. 312. Indeed, it seems that conduct under a contract by the parties thereto must of necessity be subsequent to the date thereof.

Contemporaneous conduct is not necessarily coincident with the date of the contract. The conduct may be subsequent and yet contemporaneous with the operation of the contract. In the light of these authorities, the objection is wholly untenable, and the instruction should have been given. The plaintiff failed to show the slightest objection to the defendant's dominion of the strip of land in controversy at any time within the long period of its duration. Such acquiescence on his part and that of his predecessors is conduct showing their understanding and interpretation of the grant and is legally binding upon them.

[2] The side track is within the area thus defined as the right of way. The construction thereof involves no enlargement of the easement. Hence the authorities cited against right of enlargement are inapplicable.

The evidence clearly and strongly tending to show definition and establishment of the limits of the right of way was unopposed by any adduced by the plaintiff, as will appear from the statement hereinbefore given. As a basis for a verdict in his favor, he relied altogether upon his title to the land, subject to the granted easement, and proof of the possibility of the maintenance and operation of a double-track railroad, without any privileges or conveniences, side tracks, telegraph lines, signal towers, or anything other than the mere tracks, upon a 29-foot right of way. He offered nothing at all in opposition to the evidence tending to show his acquiescence and that of his predecessors in the claim of the railway company to the strip in controversy as a part of its right of way under the grant in the deed. Hence the evidence of the defendant as to the establishment of the boundary or limits of the right of way by conduct was wholly unopposed and uncontradicted. It was clearly sufficient to sustain a verdict and of such volume and force as to render a verdict in favor of the plaintiff untenable and unjustifiable. In view of this situation, the defendant asked the court to give an instruction prepared and designated as No. 1, requiring the jury to find for the defendant, which the court refused. In so doing, it clearly erred. It is the duty of the trial court, when the evidence of the plaintiff is insufficient to sustain a verdict in his favor, or when a verdict in his favor would be contrary to the law and the evidence, to direct a verdict in favor of the defendant, if requested so to do. *Hoge v. Railroad Co.*, 35 W. Va. 562, 14 S. E. 152; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Cobb v. Lumber Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734; *White v. Brewing Co.*, 51 W. Va. 259, 41 S. E. 180. For the like reason, if the court had given defendant's instructions Nos. 1 and 2, and the jury had then found for the plaintiff, the verdict should have been set aside.

For the errors noted, the judgment will be

reversed, the verdict set aside, and the case remanded for a new trial.

ROBINSON, J. (dissenting). The evidence, and the law of the case, do not justify such an extension of the grant as the majority opinion upholds. The judgment should be affirmed.

DOUTHIT v. CITY OF BLUE RIDGE.

(No. 5,047.)

(Court of Appeals of Georgia. Oct. 28, 1918.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 642*)—VIOLATIONS OF ORDINANCES—PROSECUTION—CERTIORARI.

The writ of certiorari lies to review in the superior court the judgment of any inferior judiciary of this state; and this includes any municipal or mayor's court. See *Moore v. Winder*, 10 Ga. App. 385, 386, 73 S. E. 529.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

2. MUNICIPAL CORPORATIONS (§ 642*)—VIOLATIONS OF ORDINANCES—CERTIORARI—INSUFFICIENCY OF EVIDENCE.

The facts set forth in the answer of the magistrate showing that the ordinance of the municipality which the accused had been charged with violating had not been violated, the judgment of conviction was unauthorized by law, and the writ of certiorari should have been sustained.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Thomas Douthit was convicted of violating an ordinance of the City of Blue Ridge. From a judgment overruling a writ of certiorari, he brings error. Reversed.

Wm. Butt and B. L. Smith, both of Blue Ridge, for plaintiff in error. Thos. A. Brown, of Blue Ridge, for the State.

HILL, C. J. Judgment reversed.

WIMBISH v. STATE. (No. 5,091.)

(Court of Appeals of Georgia. Oct. 28, 1918.)

(Syllabus by the Court.)

1. HOMICIDE (§ 218*)—DYING DECLARATIONS.

The trial judge admitted the following statement made by the decedent as being prima facie a dying declaration: "He seemed to be conscious. He said that he could not live, and after he said that he called Olis [the accused], and some one asked him what did he want, and he told Olis to act fair with him, that he had promised to kill him, and if he had known that he was going to kill him he would have begged him not to do it." *Held*, there was no error in permitting this statement to go to the jury, with the instruction that it might be considered by them for the purpose of determining whether it was a dying declaration; the jury being clearly instructed as to what constituted a dying declaration, especially as the accused

admitted on the trial that he had killed the decedent.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 458, 459; Dec. Dig. § 218.*]

2. HOMICIDE (§ 319*)—NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered testimony was both negative and cumulative in character, its purpose being to show that the decedent did not make a dying declaration; and since the accused admitted on the trial that he shot the decedent and killed him, and set up self-defense, it is not probable that this evidence would produce a different result on a second trial.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 319.*]

3. VOLUNTARY MANSLAUGHTER.

The theory of voluntary manslaughter is supported by some of the evidence, and the verdict of that offense, approved by the trial judge, will not be disturbed.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Olis Wimblsh was convicted of voluntary manslaughter, and brings error. Affirmed.

L. J. Blalock, of Americus, for plaintiff in error. J. R. Williams, Sol. Gen., of Americus, for the State.

HILL, C. J. Judgment affirmed.

MEEKS v. STATE. (No. 5,090.)

(Court of Appeals of Georgia. Oct. 28, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 938*)—NEW TRIAL—GROUNDS.

There was but one witness for the state. He testified that the offense was committed in the presence of a person who at the time of the trial was not in the city where the case was being tried, and who lived 18 miles in the country. After verdict, a motion for a new trial was made on the ground of newly discovered evidence. The affidavit of the person mentioned by the state's witness was presented, and contained a statement that he was present on the occasion referred to by the witness, was with the accused during all the time claimed by the state's witness, and had ample opportunity of knowing whether the offense was committed at the time and place testified to, and that the accused did not commit the offense with which he was charged. This witness was properly vouched for, and there were also affidavits of the accused and of his counsel that they did not know, until after the testimony of the state's witness had been introduced, that the state would claim that the offense was committed in the presence of the person mentioned by the state's witness, and that the testimony of this person could not be obtained before the case was concluded, by reason of the fact that he was 18 miles in the country. *Held*, that in view of the fact that the father of the state's witness, who was a minor, was actively aiding the prosecution, and that the son's testimony was the only evidence against the accused, a new trial should have been granted, in order that the accused might have the benefit of the testimony of the person whose affidavit was presented on the hearing of the motion for a new trial. *Williams v. State*, 11 Ga. App. 21, 74 S. E. 448.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. § 938.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from City Court of Carrollton; James Beall, Judge.

A. J. Meeks was convicted of crime, and brings error. Reversed.

H. C. Strickland and R. W. Adamson, both of Carrollton, for plaintiff in error. C. E. Rook, Sol., of Carrollton, for the State.

POTTLE, J. Judgment reversed.

SANDERS v. STATE (No. 5,094.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

PREJUDICIAL ERROR—EVIDENCE.

There was no material or prejudicial error in the rulings of the trial judge in the admission of the testimony objected to on any of the grounds urged thereto, and the evidence fully authorized the verdict.

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Henry Sanders was convicted of crime, and brings error. Affirmed.

A. A. McCurry and A. S. Skelton, both of Hartwell, for plaintiff in error. Thos. J. Brown, Sol. Gen., of Elberton, and A. G. & Julian McCurry, of Hartwell, for the State.

HILL, C. J. Judgment affirmed.

FLANNIGAN v. STATE (No. 5,135.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

While the evidence was circumstantial, and not conclusive as to the guilt of the accused, the proved facts and circumstances were sufficient to authorize the conviction.

2. CRIMINAL LAW (§ 782*)—INSTRUCTIONS.

The following instruction to the jury was not erroneous: "The object of legal investigation is not the ascertainment of truth to an absolute or mathematical certainty. Mathematical or absolute certainty is not within the range of legal investigation."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. § 782.*]

3. CRIMINAL LAW (§ 552*)—CIRCUMSTANTIAL EVIDENCE.

There was no error in the following charge to the jury: "In order to warrant a conviction upon indirect or circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must be inconsistent with every other reasonable hypothesis, save that of the guilt of the accused."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

4. CRIMINAL LAW (§ 809*)—INSTRUCTIONS.

The following charge was free from error: "When you have reached a conviction under the evidence in this case, and under the principles of law controlling in this case, of the truth of the case, it is the duty of the jury to write that in their verdict. Let that verdict

reflect the truth of the case as revealed by the evidence, and under the principles of law controlling and governing the case." The use of the word "conviction," taken in connection with the context, could not have misled the jury into the belief that the presiding judge had reference to the conviction of the accused, rather than to the conviction of the minds of the jury after the consideration of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. § 809.*]

Error from Superior Court, Ben Hill County; W. F. George, Judge.

W. A. Flannigan was convicted of crime, and brings error. Affirmed.

D. B. Nicholson, of Rochelle, and Wilson, Bennett & Lambdin, of Waycross, for plaintiff in error. Jos. B. Wall, Sol. Gen., of Fitzgerald, for the State.

POTTLE, J. Judgment affirmed.

DAWSON v. STATE (No. 5,141.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 923*)—NEW TRIAL—GROUNDS.

"Relationship within the prohibited degrees of a juror to the defendant in a criminal case, although unknown to the defendant and his counsel until after the verdict, is not sufficient ground to set aside the verdict on a motion for new trial." Sikes v. State, 105 Ga. 592, 31 S. E. 567, following Wright v. Smith, 104 Ga. 174, 30 S. E. 651.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2237; Dec. Dig. § 923.*]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Thomas Dawson was convicted of crime, and brings error. Affirmed.

J. H. Smith, of Eden, for plaintiff in error. W. G. Warnell, of Hagan, and N. J. Norman, Sol. Gen., of Savannah, for the State.

RUSSELL, J. Judgment affirmed.

CAMERON v. STATE (No. 5,121.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REPETITION.

The written request to charge was pertinent and material to the contention of the accused. The entire charge is not in the record; but the trial judge, in his order overruling the motion for a new trial, states that he submitted to the jury the contentions of the accused embraced in the written request, and incorporated in his order the substance of his instructions on the contentions covered by the request, and an examination of these instructions shows that they clearly covered the substance of the written request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

2. REVIEW ON APPEAL.

No other error of law, except as above stated, being complained of, and the verdict being supported by the evidence, the judgment must be affirmed.

Error from City Court of La Grange; Frank Harwell, Judge.

Preston Cameron was convicted of crime, and brings error. Affirmed.

Mooty & Andrews, of La Grange, for plaintiff in error. Henry Reeves, Sol., of La Grange, for the State.

HILL, C. J. Affirmed.

GREER v. STATE. (No. 5,222.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Upon the trial of one for selling intoxicating liquor, testimony that the person to whom the liquor is alleged to have been sold went to the home of the accused and got a pint of whisky "from him and his wife," and thereupon laid 75 cents on the table in the room and went away, is sufficient to authorize a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Error from City Court of Jackson; H. M. Fletcher, Judge.

Lum Greer was convicted of violating the prohibition law, and brings error. Affirmed.

J. T. Moore, of Jackson, for plaintiff in error. C. L. Redman, Sol., of Jackson, for the State.

POTTLE, J. Judgment affirmed.

ROSS v. STATE. (No. 5,109.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 109*)—CONJUNCTIVE ALLEGATIONS—SPECIAL DEMURRER.

The accusation contained two counts. The first count charged generally the selling of intoxicating liquors. The second count charged the accused with having furnished liquor to Clarence Hogan, a minor, without first securing the written authority of the "parent and guardian" of said Clarence Hogan. The accused filed a special demurrer to the second count of the indictment, on the ground that the words "parent and guardian" were used, instead of the words "parent or guardian." The court overruled the demurrer. Held no error.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 109.*]

2. CRIMINAL LAW (§ 1160*)—WRIT OF ERROR—REVIEW—VERDICT.

There was some evidence to support both counts of the indictment, although not entirely satisfactory; but, since the trial judge approved the verdict, this court will not interfere.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

James Ross was convicted of crime, and brings error. Affirmed.

J. M. Lang, of Calhoun, for plaintiff in error. Sam P. Maddox, Sol. Gen., of Dalton, for the State.

HILL, C. J. Judgment affirmed.

HESTER v. STATE. (No. 5,102.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1151*)—APPEAL—DISCRETIONARY RULING.

Where a motion is made to continue the trial of a case because of the absence of a witness, and the state makes a countershowing as to the alleged testimony of the absent witness, this court will not interfere with the discretion of the trial judge in overruling the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

Error from City Court of Quitman; Wm. H. Long, Judge.

J. M. Hester was convicted of crime, and brings error. Affirmed.

J. D. Wade and Grover C. Edmondson, both of Quitman, for plaintiff in error. J. E. Morris, Jr., Sol., and M. Baum, both of Quitman, for the State.

HILL, C. J. Judgment affirmed.

FORTSON v. STATE. (No. 5,189.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 178*)—TRIAL—NOLLE PROSEQUI—"SUBMITTED."

A nolle prosequi may, without the consent of the accused, be entered at any time before the case has been submitted to the jury. Pen. Code, § 982. A case is not submitted to a jury, within the meaning of this section, until after the jury have been impaneled and sworn in the cause. Newson v. State, 2 Ga. 60; Franklin v. State, 85 Ga. 570, 11 S. E. 876; Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326-329; Dec. Dig. § 178.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6719, 6720.]

2. CRIMINAL LAW (§ 178*)—TRIAL—NOLLE PROSEQUI.

It appearing, from the allegations of the special plea in bar in the present case, that although the jury had been stricken and had taken their seats in the jury box, they had not been sworn, the plea was properly stricken on motion. Whether jeopardy begins immediately after the jury are sworn is not decided. The evidence authorized the verdict, and there was no error in overruling the motion for a new trial, which was based solely upon the ground that the verdict was contrary to the law and the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326-329; Dec. Dig. § 178.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Joe Fortson was convicted of crime, and brings error. Affirmed.

Pulliam Proffitt, of Elberton, for plaintiff in error. Boozer Payne, Sol., and R. J. Ward, both of Elberton, for the State.

POTTLE, J. Judgment affirmed.

SPICER v. STATE. (No. 5,172.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. MOTION FOR NEW TRIAL.

No error of law being assigned, and the evidence authorizing the conviction of the accused, the trial judge did not err in overruling the motion for a new trial.

2. INTOXICATING LIQUORS (§ 236*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence to the effect that the accused was seen to hand to the person named in the indictment as the purchaser of intoxicants a bottle, which was shortly thereafter obtained from the latter, and which contained whisky, and received in return, from the party to whom the bottle was handed, something which the witness could not see, but which was placed in the pocket of the recipient, is sufficient to support the inference that the person who parted with the bottle of whisky received, either by way of sale or barter, sufficient consideration to authorize a conviction of a violation of the general prohibition law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

Arthur Spicer was convicted of violating the prohibition law, and brings error. Affirmed.

E. E. Cox, R. L. Cox, and J. M. Mayo, Jr., all of Camilla, for plaintiff in error. R. C. Bell, Sol. Gen., of Cairo, and Little, Powell, Hooper & Goldstein, of Atlanta, for the State.

RUSSELL, J. Judgment affirmed.

DAVIS v. CITY OF ATLANTA. (No. 5,148.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1158*)—WRIT OF ERROR—DENIAL OF PETITION FOR CERTIORARI.

The plaintiff in error was convicted by the recorder of the city of Atlanta of a violation of a municipal ordinance which makes it an offense to have on hand intoxicating liquors for the purpose of illegal sale. The petition for certiorari contained no assignment of error of law, except the general assignment that the conviction was without evidence to support it. There was some evidence to support the finding of the recorder, and this court will not disturb the judgment of the superior court in refusing to sanction the petition for certiorari.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1158.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Rosa Davis was convicted of violating a municipal ordinance, and from an order of the superior court, denying a writ of certiorari, she brings error. Affirmed.

Morris Macks, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

HILL, C. J. Judgment affirmed.

CRONIN v. STATE. (No. 5,087.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 146*)—OFFENSE—SOCIAL CLUBS.

On the trial of an indictment containing two counts, the first charging the accused with the offense of selling intoxicating liquors, and the second with keeping intoxicating liquors on hand at his place of business, where the defense relied upon was that he kept the liquors at a social club and furnished same to members thereof, and had paid to the state the license tax of \$500, the following excerpt from the charge of the court is not only not erroneous, but clearly states the law applicable to that issue: "I charge you that that statute [referring to the tax act of 1909 as to clubs (Civil Code, § 933)] does not permit any club, organization, or association to sell or barter, for a valuable consideration, alcoholic, spirituous, or intoxicating liquors. That statute does permit an organization or club, or an association, either as an entity, as a corporation, or as a body of men, or as individuals, to keep on hand at the place selected by them, for the use of the members, alcoholic, spirituous, or intoxicating liquors, upon the payment of the license tax required by the General Assembly. But I charge you that the liquor so kept on hand, for such club, organization, or association, must belong to the club, association, or organization, either as a body, or to the individual members composing such club, association, or organization; and it is a violation of the law for such club, association, or organization, or any individual member thereof, to sell or barter, for a valuable consideration, alcoholic, spirituous, or intoxicating liquors." Union & Mechanics' Club v. Atlanta, 136 Ga. 721, 71 S. E. 1060.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.*]

2. INSTRUCTIONS.

The instructions objected to, when considered in connection with the entire charge of the court, are without material error.

3. CRIMINAL LAW (§ 878*)—VERDICT—SEPARATE COUNTS.

The evidence demanded a conviction on both counts of the indictment. The general verdict of guilty was therefore proper, and, if any error of law was committed, it was wholly immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

Error from City Court of Macon; Robt. Hodges, Judge.

J. P. Cronin was convicted of violating

the prohibition law, and brings error. Affirmed.

John R. Cooper, of Macon, for plaintiff in error. Jno. P. Ross, Sol. Gen., of Macon, for the State.

HILL, C. J. Judgment affirmed.

BUGG v. STATE.

WYATT v. SAME.

(Nos. 5,163, 5,164.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 955*) — NEW TRIAL — BRIEF OF EVIDENCE.

There is no law that requires one moving for a new trial to make up a brief of the evidence from the official stenographer's report; and, when the movant's counsel presents a brief of the evidence for the approval of the court, it is for the judge to approve or reject it, and it is immaterial whether counsel for the opposite party agrees to the brief, or can recollect the testimony, or approves the statement thereof. "The law does not require the approval of the brief of evidence by opposing counsel. He has nothing to do with it. The law requires the brief to be approved by the trial judge only." *Price v. High*, 108 Ga. 149, 33 S. E. 957.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2368-2372; Dec. Dig. § 955.*]

2. CRIMINAL LAW (§ 955*) — NEW TRIAL — BRIEF OF EVIDENCE.

On presentation of an incorrect brief of evidence, the trial judge may require that it be corrected, and upon the movant's failure or refusal to correct it the judge may refuse to approve it, but before refusing on the ground that the brief is incorrect, he should first call attention to the particulars in which it is incorrect and afford the movant an opportunity to correct it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2368-2372; Dec. Dig. § 955.*]

3. CRIMINAL LAW (§ 955*) — NEW TRIAL — BRIEF OF EVIDENCE.

The trial judge may, for himself, require the notes of the official stenographer to be written out at the public expense, for comparison with the brief of evidence as presented by the movant for a new trial, and to aid in refreshing the court's recollection of the testimony, but he has no power to require the movant to make up a brief of evidence from the report of the official stenographer, or to produce the report, or a copy of it, to be used in verifying the brief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2368-2372; Dec. Dig. § 955.*]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Willie Bugg and Martin Wyatt were convicted of selling crops under mortgage liens, and bring error. Reversed.

M. C. Few, of Madison, for plaintiffs in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, and A. G. Foster, Sol., of Madison, for the State.

RUSSELL, J. The point presented in these cases is very similar to that involved in *McConnell v. State*, 8 Ga. App. 394, 69 S. E. 120. The defendants in the court below were convicted of a misdemeanor—selling crops that were under mortgage liens—and, though the two cases do not involve the same transaction, the cases can properly be considered together, because each relates to the dismissal of the defendant's motion for a new trial. Both defendants moved for a new trial July 15, 1913, and the hearing was set for July 21st. The motions were regularly continued until July 28th, and then by consent were continued until August 1st, on which date they were taken up for hearing. As appears from the order of the trial judge, the continuances were granted for the purpose of affording counsel for the movant time to prepare and present a brief of the evidence. At the hearing counsel for the movants presented in each case what appears to be a quite full brief of the evidence, but the judge declined to approve either brief, and, upon motion of the state's counsel, dismissed the two motions for new trial. The movants sought to have this judgment reviewed by certiorari, but the judge of the superior court refused to sanction the petition in either case, and exception is taken to the refusal to sanction.

[1] We think that the judge of the superior court should in each case have sanctioned the certiorari upon the allegations of the petition with reference to the dismissal of the motion for new trial upon the ground that the movant had failed to present a correct brief of the evidence. It is true that in the case of *Bugg* the reason for the dismissal does not so plainly appear from the order of the judge as in the case of *Wyatt*; but the reason for the dismissal is made equally plain by the averments of the petition, and these must be accepted by the judge of the superior court as true until the coming in of the answer. *Linder v. Renfro*, 1 Ga. App. 58, 57 S. E. 975. In *Wyatt's Case* the order of the judge is quoted as follows: "The within motion for a new trial having been set for hearing on the 21st day of July, 1913, and, there being no brief of evidence by counsel in this case on said date, the hearing of this motion was continued by consent of counsel until July 28th, for the purpose of preparing and presenting a brief of evidence in said case, and for the same reason the said motion was not heard on July 28th. The same came on this date to be heard by consent of parties. There being no correct brief of evidence presented by counsel for movant, it appearing that the case had been reported by the official stenographer of this court and no effort had been made by movant's attorney to get a brief of evidence based on said report, on motion of the solicitor of this court this motion is dismissed on

the grounds that no correct brief of evidence is presented or made in this case, and no such brief as he could agree to had been presented. This August 1, 1913. K. S. Anderson, Judge city court of Madison."

[2, 3] From this order, as well as from the recitals of the petition for certiorari and the assignments of error contained therein, it is plain that the trial judge dismissed the motion for new trial because counsel for movant had not procured a transcript of the stenographic report of the official stenographer, and because for this reason the solicitor of the city court would not agree to the brief of the evidence as presented by counsel for the movant. It does not appear, from the petition for certiorari, that the judge of the city court could not remember the testimony, and for this reason was unable to correct the brief, nor does it appear that the court called the attention of the movant's counsel to those particulars wherein the brief of evidence was incorrect, and that counsel refused to correct it in accordance with the recollection of the court. If the judge had stated in the order that he was unable to remember the testimony delivered on the trial (*Martin v. Mendel*, 10 Ga. App. 417, 73 S. E. 620), or even if he had stopped with the statement that he declined to approve the brief because it was incorrect, nothing would be presented for review. It seems plain to us, however, from a reading of the order that the dismissal of the motion was based upon the fact that the solicitor of the city court would not agree to the brief as presented, and the movant's counsel had not procured a transcript of the stenographic report of the official stenographer. As was held by the Supreme Court in *Price v. High*, 108 Ga. 149, 33 S. E. 957: "The law does not require the approval of the brief of evidence by opposing counsel. He has nothing to do with it. The law requires the brief to be approved by the trial judge only. It may be necessary for him to have the full stenographic report written out, in order to ascertain whether the material evidence is all embraced in the brief of evidence presented to him. This he can require. *Central R. Co. v. Robertson*, 92 Ga. 741, 18 S. E. 986. If a brief of evidence containing only the material facts should be presented to a trial judge, and he refuse to approve it, a bill of exceptions would lie to this refusal." In *Central R. Co. v. Robertson*, supra, as in other cases, it was held that the judge has no power to require the party moving for a new trial, or his counsel, to make up a brief of evidence from the official stenographer's report, or to produce the report, or a copy of it, to be used in verifying the brief.

The real question, when a brief of evidence is presented within the time allowed by the

court for that purpose, is whether the brief is a correct statement of the material testimony delivered upon the trial. If it is, it should be approved, regardless of the views of the opposing counsel. If it is not correct the judge should point out to counsel for the movant those particulars wherein it is incorrect or defective, and afford an opportunity for the correction required by the court. It would not be fair to the movant to state in a general way that the brief is incorrect, without pointing out wherein it is incorrect. Of course, if counsel declines to make the required corrections, the court should refuse to approve the brief, unless, by reason of the fact that the court's recollection has been refreshed, the court remembers the fact in question to be as stated by counsel for the movant; and, of course, in cases like those of *Martin v. Mendel*, 10 Ga. App. 417, 73 S. E. 620, *Williams v. Johnston*, 94 Ga. 722, 19 S. E. 888, *Anderson v. McLean*, 94 Ga. 798, 22 S. E. 302, and *Gwinn v. Almand*, 110 Ga. 318, 35 S. E. 150, where by reason of lapse of time the judge is unable to remember the testimony, he may properly decline to approve the brief of evidence as presented; and in such a case dismissal of the motion for a new trial would follow. In *McConnell v. State*, 8 Ga. App. 396, 69 S. E. 121, this court said: "Refusal to approve the brief which had been filed and presented for approval by the attorney for the movant within the prescribed time, because the brief as presented and filed was incorrect, was not fair to the movant's counsel, unless his attention had been called to the particulars in which the brief was incorrect and an opportunity given him to make the correction. In no case is it the duty of counsel for the movant to present the stenographer's report of the evidence. He was not required by law to do so, and the judge had no power to require the movant to make up the brief of evidence from an official stenographic report, or to produce the report or a copy of it, to be used in verifying the brief. *Central R. Co. v. Robertson*, 92 Ga. 741, 18 S. E. 986. If the judge had deemed it necessary to have a full stenographic report written out to aid him in ascertaining whether all the material evidence was embraced in the brief as presented to him, he could have required it. *Price v. High*, 108 Ga. 145, 33 S. E. 956. But he certainly could not dismiss the motion because the brief of evidence was not made up from the official stenographer's report. We think that the court should not have dismissed the motion for a new trial for the reasons stated in his order; but, on the contrary, there should have been some effort made on his part to correct and approve the brief as filed and presented by the movant."

Judgment reversed.

**HALL v. STUDEBAKER CORPORATION
OF AMERICA. (No. 4,941.)**

(Court of Appeals of Georgia. Oct. 28, 1913.)

(*Syllabus by the Court.*)

1. SALES (§ 445*)—BREACH OF WARRANTY—ACTION—NONSUIT.

The plaintiff having made out a prima facie case by the introduction of evidence supporting the allegations in his petition, the court erred in granting a nonsuit.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303-1308; Dec. Dig. § 445.*]

(*Additional Syllabus by Editorial Staff.*)

2. SALES (§ 437*)—"EXECUTION" OF CONTRACT—EFFECT OF ADMISSION.

Where the defendant in an action for breach of a contract of warranty of an automobile admitted the "execution" of the contract, this was an admission of the doing of acts necessary to carry its purpose into effect and left plaintiff with the necessity of proving merely a breach and damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1248-1257; Dec. Dig. § 437.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2558-2561.]

Pottle, J., dissenting.

Error from City Court of Macon; Robt. Hodges, Judge.

Action by T. M. Hall against the Studebaker Corporation of America. Judgment for defendant, and plaintiff brings error. Reversed.

Sibley & Sibley, of Milledgeville, and A. L. Dasher, of Macon, for plaintiff in error. Hatcher & Smith, of Macon, for defendant in error.

HILL, C. J. Suit was brought in the city court of Macon against the Studebaker corporation of America for damages for an alleged breach of a contract of guaranty of an automobile. Upon the trial, after the introduction of evidence by the plaintiff, a nonsuit was granted. To this judgment he excepted.

[1] The plaintiff's petition contained substantially the following allegations: That the defendant was a nonresident corporation with an agent in Bibb county, Ga., to wit, the firm of Willingham & Wheeler, composed of E. J. Willingham, Jr., and J. C. Wheeler; that on June 24, 1911, plaintiff purchased of the defendant an automobile "known as an E. M. F. Roadster 30, and paid the full purchase price therefor," and at the time of purchase the defendant executed to the plaintiff the following contract of guaranty: "The Studebaker Corporation, E. M. F. Factories, Manufacturers of Automobiles. Certificate No. 6764, Motor No. 21447, Model E. M. F. 30. Detroit, Michigan, U. S. A. Guaranty: This is to certify that the Studebaker Corporation fully warrants and guarantees the automobile covered by this certificate for a period of one full year from the date of original sale by the dealer. This

guaranty includes all material and all equipment (tires excepted) used in connection with the construction of such automobile. Tops and windshield not guaranteed unless bearing E. M. F. nameplate. If any part or parts of this car break or prove defective within one year from any cause whatsoever, and the customer shall forthwith communicate the fact to the Studebaker Corporation or one of its authorized dealers, giving the number of the car and the name of the dealer from whom the car was bought and the date of purchase, and if it shall appear that such breakage was not due to misuse, negligence, or accident, the Studebaker Corporation will furnish such new parts either at its branch house or its factory in Detroit, Mich., free of charge to the owner. This guaranty does not apply either directly or indirectly to consequential damages of any nature whatsoever, or to the replacement of tires which are guaranteed by the manufacturers thereof. The Studebaker Corporation. Walter E. Flanders, Third Vice President. Attest: James E. Spencer, Assistant Sec't."

It was alleged that within six months from the date of purchase the said automobile proved defective in the following parts: Radiator, gasoline tank, left front fender, and body—and that notice of these defects was given the defendant, in compliance with the contract, but that the defendant failed and refused to comply with its agreement and make good the defects, to petitioner's damage.

The defendant in its answer admitted its nonresidence, denied that it had an agent in the firm of Willingham & Wheeler, but averred that this firm were dealers in automobiles manufactured by the defendant, admitted the execution of the contract at the alleged date of sale, and admitted that notice under the contract was given by the plaintiff and that the defendant failed and refused to replace the parts, but denied that the plaintiff had purchased the automobile from it, averring that, if such purchase was made, it was from some firm, or dealer, or person other than the defendant. It denied liability.

The written contract set forth in the petition was introduced in evidence. On the back of it was the following indorsement: "The Studebaker Corporation, E. M. F. Factories, Manufacturers of Automobiles, Certificate of Guaranty. Certificate No. 6764. Model E. M. F. 30. Car No. ——. Owner, Dr. T. M. Hall. Address, Milledgeville, Ga. Date of sale, June 24, 1911." The plaintiff introduced evidence in support of the material allegations of the petition. Counsel agree that the ground upon which the presiding judge based his judgment of nonsuit was that the plaintiff failed to show any privity of contract between himself and the defendant in that the evidence showed that the plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purchased the car from the R. H. McComb Auto Company, of Baldwin county, Ga., who was at that time a subdealer of Willingham & Wheeler, who were in turn dealers in "E. M. F." automobiles in Bibb county, Ga., and not agents of the defendant.

Conceding that this privity of contract between the McComb Auto Company and the defendant was totally lacking, nevertheless, under the construction that we place on the contract and in light of the allegations in the petition and admissions in the defendant's answer, we think the court erred in granting a nonsuit.

[2] The execution of an instrument such as is involved in the present case means the doing of all such acts as are necessary to carry into effect its purpose. And in a suit upon such a contract, when the defendant admits the execution of the instrument, the remaining elements of the case to be established by the plaintiff are its breach and consequential damages. In such a case, unless the defendant establishes some justification or excuse recognized by law, his liability is fixed. When, therefore, in the present case the defendant admitted the execution of the instrument, if, under the trial court's construction of the contract, this admission, together with the further admission in the answer that the notice required by the contract had been given (which notice was required to contain the number of the car, the name of the dealer from whom bought, and the date of the sale), did not carry with it the presumption that the sale was conducted through an authorized dealer or invoke the principle of ratification and so dispense with proof of authority in the McComb Auto Company, we are clear that these admissions did establish directly a privity or contractual relationship between the plaintiff and the defendant and left only the necessity of proof of a breach and damage to authorize the submission of the case to the jury.

It is true the plaintiff alleged in his petition that Willingham & Wheeler were agents of the defendant, but this allegation was merely for the purpose of showing the court's jurisdiction of the nonresident defendant; and, when the defendant appeared and pleaded to the merits, the allegation had completely served its purpose. Under the construction we place on the contract, the trial court having admitted evidence in support of the material allegations of the plaintiff's petition, the case should have been submitted to the jury's consideration and the court erred in granting a nonsuit.

Judgment reversed.

POTTLE, J. (dissenting). The alleged contract of guaranty upon which the suit was brought did not on its face purport to have been made with the plaintiff. It was therefore essential to the plaintiff's case that he should have shown that the guaranty was

delivered to him by some authorized agent of the corporation by whom it was executed. It appears, from the evidence, that the defendant executed a written contract of sale with Willingham & Wheeler Auto Company of Macon, Ga. This contract provided that this agent of the defendant should appoint subdealers to handle the defendant's automobiles at various places within the territory covered by the contract. It was, however, expressly provided in the contract that all agreements made with subdealers should be on forms to be furnished by the defendant and upon terms satisfactory to it, and that no such agreement would be valid until the defendant had approved it in writing. The evidence shows that the plaintiff purchased the automobile from the R. H. McComb Auto Company, of Baldwin county, but in the evidence there is nothing to show that the seller was the authorized agent of the defendant or that it had been appointed a subdealer by the Willingham & Wheeler Auto Company in the manner provided for in the contract between it and the defendant. It was essential to the plaintiff's case to prove either that the person from whom he purchased the machine was an authorized agent of the defendant and had been appointed a subdealer as provided in the contract with Willingham & Wheeler Auto Company. Unless one or the other of these things appeared, the plaintiff was not entitled to recover on the contract of guaranty. *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220. The plaintiff's remedy was to proceed against the seller by an action for damages for a breach of an implied warranty, and the seller in turn might have its remedy over against the person from whom it received the machine. In the evidence introduced in behalf of the plaintiff, no privity of contract was shown between him and the defendant, and the nonsuit was properly granted.

GADLIN v. STATE. (No. 5,113.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 922*) — NEW TRIAL — FAILURE TO INSTRUCT.

The evidence as to alibi not being such as to exclude the possibility of the defendant's presence at the time of the commission of the offense, and there being no request for an instruction upon the subject, the failure to charge on the defense of alibi was not a ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

2. CRIMINAL LAW (§ 1160*)—WRIT OF ERROR —REVIEW OF VERDICT.

The remaining assignments of error are without merit, and the verdict of the jury, approved by the trial judge, will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

Error from Superior Court, Ben Hill County; W. F. George, Judge.

Joe Gadlin was convicted of crime, and brings error. Affirmed.

J. A. Griffin and D. E. Griffin, both of Fitzgerald, for plaintiff in error. Jos. B. Wall, Sol. Gen., of Fitzgerald, for the State.

RUSSELL, J. Judgment affirmed.

HUNTER et al. v. STATE. (No. 5,085.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 824*)—LARCENY (§ 3*) —
ELEMENTS OF OFFENSE—DUTY TO INSTRUCT—
REQUESTS—NECESSITY.

This case is controlled by the rulings of this court in *Paulk v. State*, 5 Ga. App. 572, 63 S. E. 659, *Moses v. State*, 8 Ga. App. 446, 69 S. E. 575, and *Smith v. State*, 11 Ga. App. 385, 75 S. E. 447. From the state of the evidence in the record, it was the duty of the court (without a request) to instruct the jury that, if the intention to steal was not formed until after the killing of the cow, the defendants would not be guilty of the offense of cattle stealing, and could not be convicted under the indictment. It was error to charge the jury, in effect, that although the killing was accidental, if the defendants thereafter formed the intention of converting the carcass to their own use, they would be guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824;* Larceny, Cent. Dig. §§ 3-10; Dec. Dig. § 3.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

William Hunter and others were convicted of larceny, and bring error. Reversed.

W. F. Way and Bryan & Bryan, all of Moultrie, for plaintiffs in error. J. A. Wilkes, Sol. Gen., of Moultrie, for the State.

RUSSELL, J. Judgment reversed.

CAROLIS v. CITY OF ATLANTA.
(No. 5,133.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 642*)—CERTIORARI—BOND—SUFFICIENCY.

The petition for certiorari not having attached thereto either a certified copy of the bond required by section 5192 of the Civil Code, nor a certificate of the recorder's court of the city of Atlanta that such bond had been filed and approved as required by law, and it further appearing, from the allegation in the petition in reference to the bond, that the alleged bond was not conditioned as required by law, the judge of the superior court did not err in refusing to order the issuance of a writ of certiorari in behalf of one who had been convicted in the recorder's court. *Moon v. Jefferson*, 10 Ga. App. 572, 73 S. E. 854; *Cannon v. Americus*, 11 Ga. App. 95, 74 S. E. 701.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Chris Carolis was convicted in the recorder's court of the city of Atlanta. From the superior court's refusal to order the issuance of a writ of certiorari, he brings error. Affirmed.

Maddox & Sims, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

RUSSELL, J. Judgment affirmed.

SHIRLEY v. STATE. (No. 5,170.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

SALES (§ 484*)—CONDITIONAL SALES—TRANSFER OF PROPERTY.

It is a violation of section 722 of the Penal Code of 1910 for the purchaser of property on conditional sale, where title is retained by the vendor, to sell or incumber the property without the consent of the vendor and with intent to defraud him. If, however, one purchases personal property on credit, and title is not retained by the vendor, and a third person furnished the purchase money paid the vendor, and thereafter the purchaser executes to the person furnishing the money a bill of sale of the property as security for the indebtedness a subsequent sale of the property by the debtor without the consent of that person is not a violation of this section of the Code.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1365, 1433; Dec. Dig. § 484.*]

Error from Superior Court, Rabun County; J. B. Jones, Judge.

E. W. Shirley was convicted of violating Penal Code 1910, § 722, and brings error. Reversed.

W. S. Paris, of Clayton, for plaintiff in error. Robt. McMillan, Sol. Gen., of Clarks-ville, for the State.

POTTLE, J. The accused was convicted of a violation of section 722 of the Penal Code of 1910. The indictment charges that the accused, while holding personal property, to wit, a mule, under a conditional purchase and sale, by the terms of which the vendors, Dockins Bros., retained title until the payment of the purchase price, sold and incumbered the mule without the consent and approval of the said vendors and with intent to defraud them. The evidence shows that the accused purchased the mule from one Jordan, and that Dockins Bros. furnished all of the purchase price except \$5, which was paid by the accused. After the purchase from Jordan, the accused executed a paper which recited that "the title to the mule bought of S. Jordan is in Dockins Bros. until paid for by E. W. Shirley." Under no view of the evidence can Dockins Bros. be regarded as "vendors" of the mule within the meaning of the section of the Code under which the indictment was framed.

ed. As expressed by one of the Dockins brothers, their firm "stood good for a mule for Mr. Shirley; bought him a mule and paid for it." Taking the evidence all together, it is apparent that title to the mule never was in Dockins Bros. prior to the execution by the accused of the paper above referred to. It is simply a case where the accused bought a mule from Jordan, and Dockins Bros. agreed with Jordan to see that the purchase price was paid. The sale of the mule after the execution of the paper by the accused to Dockins Bros., if an offense at all, is not a violation of section 722 of the Penal Code. It is only where "title is retained by the vendor" that a sale of the property by the purchaser is a violation of this section of the Code. We think, therefore, that the evidence did not authorize the conviction, and that a new trial should have been granted.

Judgment reversed.

BENJAMIN-OZBURN CO. v. MORROW TRANSFER & STORAGE CO.

(No. 4,988.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

ASSIGNMENTS (§ 23*)—CARRIERS (§ 76*)—INJURY TO GOODS—ASSIGNABILITY OF RIGHT OF ACTION — TRANSFER BY TRUSTEE IN BANKRUPTCY.

The allegations of the petition set out a cause of action arising ex contractu, relating to a right of property. This right, being a chose in action, was legally assignable, and a suit by the assignee was maintainable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 40, 41; Dec. Dig. § 23;* Carriers, Cent. Dig. §§ 256-271, 363; Dec. Dig. § 76.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Benjamin-Ozburn Company against the Morrow Transfer & Storage Company. Judgment for defendant, and plaintiff brings error. Reversed.

Moore & Pomeroy, of Atlanta, for plaintiff in error. Daniel MacDougald, of Atlanta, for defendant in error.

HILL, C. J. This case is here on exceptions to the judgment sustaining a general demurrer and dismissing the petition. The plaintiff brought suit in the city court of Atlanta, alleging substantially that the defendant was engaged in the business of common carrier and warehouseman; that the Southern Soda Water Company was the owner of described personal property of the value of \$400, and employed the defendant to transfer this property and store the same in its warehouse; that the Southern Soda Water Company was adjudicated a bankrupt, and the plaintiff bought the property from the trustee in bankruptcy, under an order of the bank-

ruptcy court, and the trustee, in pursuance of an order of court, "transferred to petitioner all of the right, title, and interest which the Southern Soda Water Company had in and to any claim for damages against the defendant herein, growing out of injury to any and all of the property herein described;" that while this property was in the possession of the defendant under its agreement to safely transport, store, and protect the same, it was broken and damaged by the defendant, and because of such damage it was utterly worthless. Damages were asked in the sum of \$500; it being alleged that the property was damaged by reason of the negligence of the defendant in the handling of the same, and that the defendant was not in the exercise of ordinary care and diligence.

The trial judge treated the action as one sounding in tort, and the right of action as nonassignable, and the sole question for the determination of this court is whether the action was one ex delicto or one ex contractu. Section 3655 of the Civil Code provides that "a right of action is not assignable if it does not involve, directly or indirectly, a right of property; hence a right of action for personal torts or for injuries arising from fraud to the assignor cannot be assigned." But section 3653 of the Code provides that "all choses in action arising under contract may be assigned so as to vest the title in the assignee." Construing these two sections together, it is clear that any chose in action which arises from contract, or involves, "directly or indirectly, a right of property" may be assigned. These two sections of the Code distinguished damages to property and damages to person, and under them a right of action for damage to the person cannot be assigned, and a right of action for damage to property can be assigned. The petition in the present case does not claim any damages arising from a personal tort, or "from injuries arising from fraud to the assignor." The damages sought to be recovered arose from a breach of the contract of carriage or storage which the soda water company had made with the defendant company. The damages involved a right of property—a right to recover for any damage to the property while in the possession of the defendant, arising from its failure to exercise, as a bailee for hire or as a warehouseman, ordinary care in transporting and taking care of the property. If the soda water company had not been adjudicated a bankrupt, it would clearly have been entitled to recover from the defendant company damages for a breach of the contract. It is admitted that the trustee in bankruptcy had the right to transfer, under order of the bankruptcy court, this chose in action of the bankrupt. In our opinion it is clear that this chose in action arises upon the contract made by the soda water company with the defendant company; and sec-

tion 3653 of the Code, supra, expressly declares that such a chose in action may be assigned "so as to vest the title in the assignee." In other words, the construction which we place upon the petition is that it is a suit for damages resulting from a breach of contract, and not from a tort or a failure on the part of the defendant to perform some statutory duty—although we do not intend to hold that injury which arises out of the nonperformance of some duty fixed by statute would not be assignable, unless it involved some personal tort or fraud in the assignor.

Besides the view above expressed, we think the suit is maintainable under the ruling in *Askew v. Southern Ry. Co.*, 1 Ga. App. 79, 58 S. E. 242. In that case it was held that "the transferee of a bill of lading may maintain an action ex contractu against the carrier for failure to deliver to him all or any portion of the goods specified in the bill of lading, and this is true whether the loss of the goods or the shortage occurred before or after he acquired title to the bill of lading." *Askew & Company*, the plaintiffs in that case, ordered from *Horne & Goans*, of Chattanooga, Tenn., a car load of corn. *Horne & Goans* shipped the corn via the Southern Railway from Chattanooga, consigned to themselves at Newnan, Ga., "order notify *Askew & Co.*," and sent through bank a draft on *Askew & Co.*, with bill of lading attached. After the arrival of the corn at Newnan, *Askew & Co.* paid the draft and received the duly indorsed bill of lading, and the car of corn was delivered to them; but it was found that 22,306 pounds of corn had been lost in transit. *Askew & Co.* sued for the value of the lost corn, and the trial court dismissed the petition, on the ground that it set forth no cause of action; it being contended that, the corn having become lost before the plaintiff became owner thereof by securing the bill of lading, the right of action was in the consignor and not in the consignee. Judge Powell, speaking for this court, said: "Viewed solely as a tort, this might be correct; however, the failure to deliver the corn in accordance with the contract of carriage may be treated simply as a breach of the contract of carriage. Under the Civil Code [1895] § 3072 [Code of 1910, § 3648], 'personality to which the owner has a right of possession in the future, or a right of immediate possession, wrongfully withheld, is termed by the law a chose in action.' Under the Civil Code [1895] § 3077 [Code of 1910, § 3653], 'all choses in action arising upon contract may be assigned so as to vest the title in the assignee.' * * * Under the sections of the Code cited above, we think that upon the transfer to the plaintiffs of the bill of lading calling for the full quantity of corn, there was assigned to them the right of action for the defendant's loss or conversion of a part of it." Applying the

principle in that decision to the facts alleged in the petition in the present case, when the trustee in bankruptcy transferred by assignment to the plaintiff the personal property which was in the possession of the defendant warehouseman or bailee for hire, there was also assigned to the plaintiff the right of action for any damage which had been done to the property by the defendant while it was in its possession, whether this damage occurred before or after the assignment by the trustee. See, also, in this connection, *Paxson v. Warfield*, 6 Ga. App. 315, 65 S. E. 34.

If we entertained any doubt as to the character of the petition—whether it was one arising ex delicto or ex contractu—it would be our duty to accept that construction which would sustain the suit. *Wright v. Southern Ry. Co.*, 7 Ga. App. 545, 67 S. E. 272; *Southern Express Co. v. Pope*, 5 Ga. App. 690 (2), 696, 63 S. E. 809. We are clear that the allegations of the petition plainly show that the action was one for the recovery of damages arising as the result of the breach of contract, that it related to damage to property rights, and involved no element of a personal tort, and that the learned judge erred in sustaining the demurrer and dismissing the petition.

Judgment reversed.

KEATON v. BIRMINGHAM FERTILIZER CO. (No. 5,020.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. AGRICULTURE (§ 7*)—FERTILIZER—ACTION ON PURCHASE-PRICE NOTE—BURDEN OF PROOF.

Where suit is brought on a note given for the purchase of commercial fertilizer, and the defense relied upon, based upon section 1774 of the Civil Code of 1910, was that the consideration in part of said note had failed because of a deficiency in the commercial value of the fertilizer for which the note was given, it is incumbent upon the defendant to establish such defense by evidence that the fertilizer was deficient in some or all of its ingredients as guaranteed and printed on the sacks, and that by reason of the deficiency the commercial value thereof had fallen 3 per cent. below its total commercial value. *Cooper v. National Fertilizer Co.*, 132 Ga. 529, 64 S. E. 850. This deficiency in the commercial value of the fertilizer must be determined by a comparison with the official analysis of the state chemist.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

2. VERDICT SUSTAINED.

The evidence in behalf of the defendant did not show any deficiency in any of the ingredients composing the fertilizer for the purchase of which the note sued on was given, nor did it show that the actual commercial value of the fertilizer was less than 3 per cent. of its total guaranteed commercial value. A verdict for the plaintiff was therefore properly directed.

Error from City Court of Blakely; R. H. Sheffield, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Birmingham Fertilizer Company against P. H. Keaton. Judgment for plaintiff on directed verdict, and defendant brings error. Affirmed.

B. R. Collins and Glessner & Park, all of Blakely, for plaintiff in error. Rambo & Wright, of Blakely, for the State.

HILL, C. J. Judgment affirmed.

POTTLE, J., disqualified.

BENTON-SHINGLER CO. v. MILLS et al.
(No. 4,886.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 458*)—FORECLOSURE—AFFIDAVIT OF ILLEGALITY—AMENDMENT.

An affidavit of illegality filed by a defendant in a mortgage foreclosure proceeding is amendable to the same extent as are ordinary pleas. *McMichael v. Mackey*, 7 Ga. App. 773, 68 S. E. 332.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1339-1342; Dec. Dig. § 458.*]

2. PLEADING (§ 360*)—STRIKING OUT—EFFECT—FORECLOSURE—AFFIDAVIT OF ILLEGALITY.

A judgment striking a defense to the foreclosure of a mortgage, upon the ground that it was filed without leave of the court and after the original affidavit of illegality had been filed, does not preclude the defendant from offering and having allowed at a subsequent term of the court an amendment to the affidavit of illegality, setting up the same defense that he sought to raise in the amendment previously stricken.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 996-1002; Dec. Dig. § 360.*]

3. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—ORDER.

Even if the judgment allowing a plea of suretyship is error, the error is immaterial, if upon the trial of the issue thus raised the jury find in favor of the plaintiff and against the plea of suretyship.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

4. MORTGAGES (§ 114*)—DESCRIPTION OF DEBT—SUFFICIENCY.

In this state a mortgage must "specify the debt to secure which it is given." Civil Code 1910, § 8257. A mortgage which recites that it is given to secure the payment of a promissory note for a specified amount, and "such future advances in money, stock, merchandise, and plantation supplies," as may be made to the mortgagor by the mortgagee during a given year, is valid only as a mortgage to secure the payment of the note. Any indebtedness above the amount of the note is to be treated as an indebtedness on open account.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 223, 224, 241; Dec. Dig. § 114.*]

5. PAYMENT (§ 38*)—APPLICATION—RIGHT TO DIRECT.

Where a person is indebted to another, both upon a mortgage and upon an open account, he has the right, when making a payment, to direct that the payment be applied to the mortgage, rather than to the open account.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99-103; Dec. Dig. § 38.*]

6. INSTRUCTIONS AND FINDING APPROVED.

The evidence authorized an instruction upon the principle of law stated in the last preceding paragraph, and the finding of the jury was not without evidence to support it.

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by W. G. Mills and others against the Benton-Shingler Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Glessner & Park, of Blakely, for plaintiff in error. W. W. Wright, of Blakely, for defendants in error.

HILL, C. J. Judgment affirmed.

TRUEHEART v. STATE. (No. 5,126.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 71*)—CERTAINTY.

The indictment charged the accused with embezzlement, in that, being the cashier of the Georgia Southern & Florida Railway Company, a railroad corporation under the laws of Georgia, and as such cashier being in possession of a sum of money of a specified amount, and being as such charged with the possession, safety, and care of such money, he did embezzle, steal, secrete, and fraudulently take and carry the money away. *Held*, the indictment was not subject to demurrer upon the ground that it was too vague and indefinite, in that it failed to allege what fund or funds the accused was charged with embezzling, from whom the funds were obtained, or on what account or accounts the funds were obtained, or how the money came into his possession.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. § 71.*]

2. CRIMINAL LAW (§ 1103*)—APPEAL—BRIEF OF EVIDENCE—SUFFICIENCY.

The document transmitted with the record in this case as a brief of the evidence contains 34 typewritten pages. Eleven of the pages contain evidence set forth in extenso in narrative form, and the remainder of the document, to wit, 23 pages, is made up of questions and answers transcribed from the reporter's notes. Under repeated decisions of this court and of the Supreme Court, such a document cannot be considered as a brief of the evidence. *Cotton v. Cotton*, 136 Ga. 138, 70 S. E. 1015; *Carlisle v. Ray*, 133 Ga. 223, 65 S. E. 403; *American Standard Jewelry Co. v. Goodman*, 127 Ga. 543, 56 S. E. 642; *Brown & Adams v. Weichselbaum Co.*, 9 Ga. App. 728, 72 S. E. 176.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2381-2384; Dec. Dig. § 1103.*]

3. CRIMINAL LAW (§ 1103*)—APPEAL—BRIEF OF EVIDENCE—NECESSITY.

None of the questions made in the motion for a new trial, which are dependent upon and require an examination of the document purporting to be a brief of the evidence, can be considered by this court. *Whitaker v. State*, 138 Ga. 139, 75 S. E. 254; *Id.*, 11 Ga. App. 208 (7), 213, 75 S. E. 258.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2381-2384; Dec. Dig. § 1103.*]

4. CRIMINAL LAW (§ 804*)—EVIDENCE—JUDICIAL NOTICE.

This court will take judicial cognizance of the fact that the Georgia Southern & Florida Railway Company is a corporation chartered under the laws of this state. *Jackson v. State*, 72 Ga. 28; *Davis v. Bank of Fulton*, 31 Ga. 69. Besides, the name imports a corporation. *St. Cecelia's Academy v. Hardin*, 78 Ga. 39, 3 S. E. 305.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. § 304.*]

5. EMBEZZLEMENT (§ 39*)—EVIDENCE—INTENT.

It was not erroneous to instruct the jury in substance that if the accused falsified his account this would be a circumstance which might be considered by the jury in passing upon the question of criminal intent.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 62; Dec. Dig. § 39.*]

6. EMBEZZLEMENT (§ 36*)—PROOF REQUIRED.

Nor was it erroneous to charge the jury that it was not essential for the state to prove specifically that the accused appropriated any of the money alleged to have been embezzled by purchasing with such money any particular article.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 60; Dec. Dig. § 36.*]

7. CRIMINAL LAW (§ 1103*)—APPEAL—BRIEF OF EVIDENCE—NECESSITY.

None of the other assignments of error made in the motion for a new trial can be determined without considering the evidence; and, there being no such brief of evidence as required by section 6093 of the Civil Code, the judgment must be affirmed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2881-2884; Dec. Dig. § 1103.*]

Error from Superior Court, Lowndes County; *W. E. Thomas*, Judge.

W. H. Trueheart was convicted of embezzlement, and brings error. Affirmed.

L. Goodloe and *Dan R. Bruce*, both of Valdosta, for plaintiff in error. *J. A. Wilkes*, Sol. Gen., of Moultrie, and *E. K. Wilcox*, of Valdosta, for the State.

POTTLE, J. Judgment affirmed.

MYRICK v. STATE. (No. 5,075.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. OTHER DECISION CONTROLLING.

The questions of law made in this case are controlled by the decision of this court in *Myrick v. State*, 79 S. E. 580.

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Bryan County; *W. W. Sheppard*, Judge.

J. T. Myrick was convicted of crime, and brings error. Affirmed.

J. H. Smith, of Eden, for plaintiff in error. *N. J. Norman*, Sol. Gen., of Savannah, for the State.

HILL, C. J. Judgment affirmed.

JENNINGS v. STATE. (No. 5,182.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

INCEST (§ 14*)—EVIDENCE—SUFFICIENCY.

The evidence was not sufficient to authorize the verdict.

[Ed. Note.—For other cases, see *Incest*, Cent. Dig. § 12; Dec. Dig. § 14.*]

Error from Superior Court, Montgomery County; *W. F. George*, Judge.

E. J. Jennings was convicted of incest, and brings error. Reversed.

C. P. Thompson, of Atlanta, for plaintiff in error. *W. A. Wooten*, Sol. Gen., of Eastman, for the State.

POTTLE, J. The accused was convicted of incestuous adultery with his stepdaughter. The evidence was substantially as follows: The girl was 17 or 18 years of age and had been living in the house with her mother and the accused ever since the marriage of the accused to the mother some 14 or 15 years before. Upon being informed by the mother that the girl had missed her menstrual period, the accused called upon a negro midwife, who at the time was living eight miles away from his home, and requested the woman to do something to relieve the girl, stating at the time that she had caught cold and was suffering from menstrual suppression. In response to a question by the midwife, the accused stated that the girl had missed her periods for several months. Thereupon the midwife declined to make any effort to give the girl relief. She finally, however, consented to go and make an examination and ascertain what the trouble was and see if she could do anything. On the way home the accused told the midwife that he had been accused of being the author of the girl's trouble, and that, if she did not "do something for him, the crowd would do something for him." At this time, however, he strenuously denied that he had anything to do with the girl. When they reached the house the midwife discovered that the girl was well advanced in pregnancy. The accused told her, if she did not believe what he stated about not having brought about the girl's condition, to ask the girl. Subsequently the midwife did ask the girl and she replied that "pa" brought about her condition. At the time this reply was made, the accused was in an adjoining room, near enough to have heard the conversation between the girl and the midwife, and made no denial of the accusation but turned and walked away. The midwife testified that she did not know whether the accused heard what the girl said or not, but that he was near enough to have heard it. It further appears that the girl had remained practically all the time in her stepfather's house, rarely, if ever, leaving

the county. The girl was not sworn as a witness. The conviction of the accused was based entirely upon the testimony of the midwife, together with the evidence that the girl had been at his home continuously for a number of years. No evidence was introduced in behalf of the accused.

Eliminating immaterial facts, the only evidence produced against the accused consisted of the fact that he sought the services of a midwife to bring about an abortion; that he stated to the midwife that he was being charged with a crime in reference to the matter; that he endeavored at first to mislead the woman into the belief that the girl was not pregnant; that the girl charged "pa" with being the author of her shame; and that he did not then and there deny it. These facts and circumstances were not sufficient to justify the conviction. In every criminal case there is a presumption of law that the accused is innocent. Added to this, in a charge of this character, there is a natural presumption that the accused would not be guilty of an offense so heinous as the one charged in the present bill of indictment. To convict, the proof must be strong enough to exclude all reasonable doubt of the innocence of the accused and to exclude every other reasonable hypothesis save that of his guilt. The accused stated that he had always felt toward the child as if she was his own daughter. The jury had a right to disregard this statement of the accused entirely, but it accords with the natural feelings the law would presumptively ascribe to a person occupying toward the girl the position of the accused and would prevent his conviction, unless the proof came well up to the standard prescribed by law. The relation of stepfather and stepdaughter is such that intercourse between them is regarded by law as incestuous. *Lipham v. State*, 125 Ga. 52, 53 S. E. 817, 114 Am. St. Rep. 181, 5 Ann. Cas. 66. Incestuous adultery is a felony, and the female is regarded as an accomplice. Her uncorroborated testimony is therefore not sufficient to sustain the man's conviction. *Solomon v. State*, 113 Ga. 192, 38 S. E. 332; *Yother v. State*, 120 Ga. 204, 47 S. E. 555; *Durden v. State*, 120 Ga. 860, 48 S. E. 315. In the case last cited, it appeared that the female was a niece of the accused; that she visited his home for ten days; that about nine months after the visit she gave birth to a child, which, according to one witness, favored the accused. The girl testified that the accused was the father of the child. The conviction was set aside upon the ground that there was no sufficient evidence to support it. If the accused could not have been convicted on the uncorroborated testimony of his step-

daughter delivered under oath, certainly the mere hearsay testimony of another person that the girl had charged her "pa" with being the author of her shame would not alone be sufficient to justify his conviction.

It is true the jury were probably authorized to find that the accused heard the charge made by the girl and did not deny it. This is a circumstance against him, but it is by no means conclusive of his guilt. The natural feeling of horror and repulsion that one standing in the position of the accused would have had at a false accusation of this nature might well have caused him to turn and walk away in sorrow and shame without raising his voice in protest. He had previously protested his innocence to the midwife and had even suggested to her that she interrogate the girl to find out who had committed the offense. This conduct of the accused was more inconsistent with guilt than his silence was inconsistent with innocence. There were two witnesses for the state, the midwife and a white man who lived in the same community with the accused. With this last witness the accused put his character in issue, and from the lips of this witness came the statement that he had known the accused for 10 or 15 years; that his character was good; that before this charge was made nothing improper had ever been heard of by him; and that he was honest and upright. The state did not attempt to meet this testimony in reference to the good character of the accused. Where one is on trial for a despicable offense of this nature, good character is and ought to be regarded as a strong circumstance in his favor. A normal man is loath to believe that a man of the character which the accused seems to have been would deliberately bring about the ruin of his own stepdaughter whom he had taken into his home as an infant and nurtured just as if she had been his own flesh and blood. The accused may be guilty, but possibility of guilt is not enough to authorize his conviction. Where, as in the present case, the conviction is dependent largely upon circumstantial evidence, the circumstances must be inconsistent with innocence and must be so strong as to exclude every other reasonable hypothesis than that of his guilt. The evidence in this case did not come up to the standard of proof required by law, and for this reason the verdict of guilty should have been set aside.

The point is made in the record that the venue of the offense was not proven. This point seems also to be well taken, but we do not deal with it specifically, because in our opinion the evidence was not sufficient to show that any offense at all was committed by the accused.

Judgment reversed.

RENFROE v. STATE (No. 5,100.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§§ 865, 929*)—CORRECTION OF VERDICT.

The jury had had the case under consideration for some 18 or 20 hours, and, being unable to agree, called the sheriff and requested him to communicate with the court and ask the court either to recharge the jury or to order a mistrial. The sheriff replied: "Gentlemen, if it is a new charge you want, I am ready to go right down and submit it, but, if it is a mistrial, I would feel embarrassed to do it, because I have heard the judge say that he was conscientiously opposed to mistrials in Wilcox county. But I will submit it if you insist on it." This was all that passed between the sheriff and jury, and shortly afterward the jury returned a verdict of guilty. Upon the hearing of the motion for a new trial the facts above stated were admitted, and there were no properly identified affidavits from the jurors to the effect that they were not influenced by the conduct of the sheriff to return a verdict of guilty. *Held*, that a new trial should have been granted on account of this irregularity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2069, 2272-2279; Dec. Dig. §§ 865, 929.*]

Error from Superior Court, Wilcox County; W. F. George, Judge.

O. F. Renfrore was convicted of crime, and brings error. Reversed.

Haygood & Cutts, of Fitzgerald, for plaintiff in error. Jos. B. Wall, Sol. Gen., of Fitzgerald, for the State.

POTTLER, J. The general rule in this state is that before a plaintiff in error can obtain a reversal of the judgment complained of, he must show both error and injury. But the right of a party to a free, untrammelled, and impartial determination by a jury of the issues of fact involved is so sacred and so important that where misconduct of the jury has been shown, or where it appears that they have been unduly interfered with in their deliberations, injury to the losing party will be presumed. In all such cases a reversal necessarily results, unless it is affirmatively made to appear to the trial judge that the irregularity complained of resulted in no injury to the complaining party. *Obear v. Gray*, 68 Ga. 182; *Shaw v. State*, 83 Ga. 92, 9 S. E. 768; *Styles v. State*, 129 Ga. 425, 432, 59 S. E. 249, 12 Ann. Cas. 176; *Supple v. State*, 133 Ga. 601, 66 S. E. 919; *Griffin v. State*, 5 Ga. App. 43, 62 S. E. 685. In *Smith v. State*, 122 Ga. 154, 50 S. E. 62, the Chief Justice thus stated the rule: "This court, from the time of its organization to the present time, has striven to protect the purity and impartiality of jury trials; and, wherever there have been irregularities, unless fully explained and the court satisfied that the accused has not been injured, new trials have been granted. Where the misconduct of the officers and jury has been gross, this court and others

have held that a new trial should be granted on account of public policy, whether the accused was injured or not." In *Obear v. Gray*, supra, it was held that for a bailiff in charge of a jury, apparently finding it difficult to agree, to tell them that in his opinion the judge would keep them out a week or compel them to agree was such practice as necessitated a new trial. In the present case the jury were unable to agree. Suppose the jury stood 11 to 1 for conviction. The sheriff in substance tells this one juror that he ought not to make a mistrial, because the trial judge is conscientiously opposed to granting mistrials in that county. Such a remark was calculated to unduly influence the jury, and probably did have that effect in the present case. They requested a recharge after having been out for some 18 or 20 hours, without having been recharged, and returned a verdict shortly after the remark complained of was made by the sheriff. If the trial judge had sent for the jury after they had been deliberating for some hours and apparently unable to agree, and had stated to them that they must arrive at a verdict because he was conscientiously opposed to granting mistrials in that county, clearly such conduct on the part of the judge would have amounted to coercion, and would have demanded a new trial. The sheriff was assuming to act as the mouthpiece of the judge, and in so doing improperly interfered with the deliberations of the jury. Such a practice cannot be approved, and a new trial should have been granted.

Judgment reversed.

JOHNSON v. STATE (No. 5,093.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 139*)—KEEPING LIQUORS IN PLACE OF BUSINESS.

The accused was convicted of keeping intoxicating liquors in his place of business. The evidence shows that he received a package of whisky by express and delivered it to a hackman, with instruction to take it to his residence and to deliver it to his wife. The hackman carried the whisky to the home of the accused, and, finding no one there, took it across the street and deposited it in a restaurant, which was being conducted by the accused. The accused was absent, and did not know that the hackman had not left the whisky at his residence, but had deposited it in the restaurant. About 10 minutes after the whisky was left in the restaurant, its presence was discovered by a policeman, and the accused was arrested while on his way to the restaurant from some point in the city. There was no evidence that the accused knew until after his arrest that the whisky had been placed in the restaurant. *Held*, that the conviction was unauthorized, and should have been set aside on motion for a new trial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.*]

Russell, J., dissenting.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from City Court of Americus; W. M. Harper, Judge.

Israel Johnson was convicted of keeping intoxicating liquors in his place of business, and brings error. Reversed.

W. T. Lane, of Americus, for plaintiff in error. Z. S. Childers, Sol., of Americus, for the State.

POTTLE, J. Judgment reversed.

RUSSELL, J., dissents.

JONES v. STATE. (No. 5,179.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

NO ERROR APPEARING.

The evidence would have authorized a conviction of assault with intent to murder. It abundantly justified the verdict of shooting at another. The charges complained of were free from substantial error. Taken as a whole, the charge was more favorable to the accused than he had any right to demand. No reason appears for reversing the judgment overruling the motion for a new trial.

Russell, J., dissenting.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Willie Jones was convicted of assault with intent to murder, and brings error. Affirmed.

Raiford Falligant and Gordon Saussy, both of Savannah, for plaintiff in error. W. C. Hartridge, Sol. Gen., of Savannah, for the State.

POTTLE, J. Judgment affirmed.

RUSSELL, J. (dissenting). Without regard to the real truth of the transaction (which the testimony of the witnesses seems to confuse rather than to clarify), I am of the opinion that the charge complained of was not adjusted to the defenses presented by the accused upon his trial, and practically eliminated his statement to the jury.

SWYGERT BROS. v. BANK OF HARALSON. (No. 5,003.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. PARTNERSHIP (§§ 48, 54*)—PROOF—SUFFICIENCY.

Partnership or no partnership is a fact which may be proved by statements or admissions of the alleged partners.

Where suit on a promissory note is brought against a partnership as the alleged maker thereof, and the defendants rely upon the defense that the person who executed the note was not in fact a member of the partnership, while the admissions of that person, made in the absence of the others, would not be sufficient evidence against them of the existence of the partnership, yet where each one of the al-

leged partners had admitted that he was a member of the firm, their admissions would be sufficient to prove the existence of the firm as alleged.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 66, 68-73, 77, 79; Dec. Dig. §§ 48, 54.*]

2. PARTNERSHIP (§ 146*)—AUTHORITY OF PARTNERS—NOTES.

Under Civil Code 1910, §§ 3172, 3180, one member of a commercial partnership can bind it by signing its name to a promissory note under seal in the course of the business of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 242-251, 253-255; Dec. Dig. § 146.*]

3. PARTNERSHIP (§ 54*)—SUFFICIENCY OF EVIDENCE—BILLS AND NOTES.

The partnership was proved as alleged in the petition, no error of law appears, and the verdict for the plaintiff was properly affirmed by the trial judge in his refusal to grant a new trial.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 77, 79; Dec. Dig. § 54.*]

(Additional Syllabus by Editorial Staff.)

4. PARTNERSHIP (§ 37*)—DENIAL OF PARTNERSHIP—ACTION ON NOTE.

Where a bank made a loan, represented by two notes executed in the name of the partnership by one member thereof, in reliance upon a statement of each of the alleged partners that they were members of the firm, the partnership was estopped to deny its existence and membership in a subsequent action on the notes.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 37, 52; Dec. Dig. § 37.*]

5. PARTNERSHIP (§ 54*)—PROOF OF RELATION—SUFFICIENCY.

Only slight evidence is necessary to bind parties as partners in their relation to creditors; the proof required in such case being less than that required to establish the partnership inter sese.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 77, 79; Dec. Dig. § 54.*]

Error from City Court of Newnan; W. A. Post, Judge.

Action by the Bank of Haralson against Swygert Brothers. Judgment for plaintiff, and defendants bring error. Affirmed.

Hall & Jones, of Newnan, for plaintiffs in error. W. G. Post, of Newnan, for defendant in error.

HILL, C. J. Suit on two promissory notes purporting to have been made by Swygert Brothers was brought by the Bank of Haralson against Swygert Brothers, as a copartnership, and against A. M. Swygert, R. S. Swygert, W. A. Swygert, and S. C. Swygert, as the members of the firm. The individuals named were also sued as indorsers. The verdict was for the plaintiff, and the defendants' motion for a new trial was overruled. The case is here on exception to this judgment.

The record discloses that the controlling issue in the case is as to the existence of the partnership as alleged in the petition. Illustrating this issue, the evidence is uncon-

troverted that the two notes were executed in the name of Swygert Brothers by R. S. Swygert, and that the money obtained from the bank on these notes was deposited in the bank to the credit of the firm of Swygert Brothers. The evidence indicates also that R. S. Swygert signed not only his own name, but also the names of the other alleged partners, as indorsers on the two notes; but in the view that we take of the case we do not regard the question as to liability of these parties as indorsers as material, the whole case turning on the questions whether R. S. Swygert was a member of the firm of Swygert Brothers at the time he executed the notes, and, if so, whether he was authorized by that relationship to execute the notes in the name of the partnership, and whether the individuals named in the petition as members of the firm of Swygert Brothers were in fact members of the copartnership.

[1] It appears from the record that this is the second verdict on these issues in favor of the plaintiff. If, therefore, there is any evidence in the record in support of the verdict, it will not be disturbed by this court, unless some material prejudicial error of law was committed. We might content ourselves with the statement that the evidence on the question of partnership supports the verdict; but we will briefly summarize the evidence on this point. Repeated admissions were proved to have been made by each one of the alleged copartners that he was in fact a member of the firm of Swygert Brothers. It is contended by the learned counsel for the plaintiff in error that the existence of a partnership cannot be proved by the admissions of those alleged to be members. The general rule on this subject, which seems to be well settled, is that a partnership may be proved by evidence that each and all of the alleged partners admitted its existence, but that the admissions of one defendant, made in the absence of the others, is not evidence against the others of the existence of the partnership. This rule is stated as follows in *Flournoy v. Williams*, 68 Ga. 707: "The sayings or admissions of one of an alleged partnership, not in the presence of the others, nor brought to their knowledge and assented to or ratified by them, are inadmissible to bind the other party, or establish the existence of the partnership" so as to bind the other parties. Now the evidence discloses that the existence of the partnership alleged does not depend upon the admission of one of the partners, but that each one of the individuals named as partners admitted on several separate occasions that he was in fact a member of the firm of Swygert Brothers. So on this point we have the statement of each one of the alleged members of this firm, admitting his relationship to the firm. In other words, the existence of the partnership was shown by evidence of admissions of each individual who was alleged to be a partner that he was in fact a member of the

firm. The law being well settled that the admissions of an individual are binding upon him, it follows that, when all the alleged members of the firm admitted the existence of the partnership, the partnership was in fact proved. It is contended by learned counsel for the plaintiff in error that the law defines and establishes what constitutes a partnership, and that the existence of a partnership between given persons cannot be established by the admissions of one of them, and that his admission that he is a partner is simply his opinion, and the case of *Flournoy v. Williams*, supra, is relied upon as supporting this contention. As we have seen, that authority is simply to the effect that the admissions of one of the alleged partners would not be binding upon the others. The decision did not go to the extent of holding that the fact of partnership could not be proved or established by admissions. It is held, in *Sankey v. Hall*, 44 Ga. 229, that: "Partnership or no partnership is a fact, and a witness may so state, but the fact so stated may be qualified and explained by other facts in evidence, either from the witness or from other testimony;" and that: "The sayings of one of the partners, not expressly or by implication brought to the knowledge of the other, are no evidence against that other in an issue of partnership." Judge McCay, in discussing this point, says: "It is sometimes difficult to say what is a fact, and what is a conclusion. Half of what every man tells as facts is nothing but very certain conclusions. We think partnership or no partnership, ordinarily, may be stated as a fact." But, as above stated, it is well settled by authority that a partnership may be proved by evidence that each of the alleged partners admitted its existence and his membership. *Gordon v. Bankard*, 37 Ill. 147; *Smith v. Collins*, 115 Mass. 388; *Huysser v. Lawson*, 90 Mo. App. 82.

[4] The evidence is also undisputed that, in making the loan represented by the two promissory notes sued upon, the plaintiff bank relied upon the truth of the statement of each one of the alleged partners that they were in fact members of the firm. The bank, having acted upon these admissions, could have relied upon the doctrine of estoppel on this question of partnership under the principle laid down in *Thornton v. McDonald*, 108 Ga. 4, 33 S. E. 690; but the plaintiff is not compelled to invoke this doctrine. It can rely upon the fact of the partnership as proved by the admissions of each of the alleged members thereof. These admissions were denied by each one of the alleged partners; but this issue is foreclosed by the verdict.

[2] The partnership being proved, the question arises as to the authority of R. S. Swygert to execute the two notes sued on in the name of the partnership. One partner has the authority to bind the members of the firm within the legitimate business of the

firm. This rule is predicated upon the doctrine of agency. Civil Code 1910, §§ 3172, 3180. It is not denied that the two notes, if authorized, were within the scope of the legitimate business of the firm, nor is it denied that the firm got the proceeds of the notes. While the general rule as to the authority of one partner to bind a partnership is based upon his being a general agent of the firm while acting in the general scope of the partnership business, it is insisted that the notes were under seal, and that the authority to make these notes by one of the firm should also have been under seal. The authority to bind the partnership in the execution of a promissory note arises from the relationship, and not from any express authority from the other partners. In *Merchants' & Farmers' Bank v. Johnston*, 130 Ga. 661, 61 S. E. 543, 17 L. R. A. (N. S.) 969, 14 Ann. Cas. 546, construing sections 2643, 2651, of the Civil Code of 1895 (Code of 1910, §§ 3172, 3180), it is held that: "One member of a commercial partnership can bind it by signing its name to a promissory note under seal, in the course of the business of the partnership." In discussing the question, the court says: "No restriction is made as to sealed instruments. In the making of promissory notes, printed forms are commonly used, a very large percentage of which are prepared with a view to their execution under seal; the recital that they are given under seal and the device to be used as a seal appearing on the printed form. It is a matter of common practice for such notes to be executed by one partner on behalf of the firm, often with no attention paid to the fact that the notes thus given are under seal, and without any question arising as to the power of the partner to bind the firm in so executing them. Such notes are doubtless regarded by the parties as binding obligations on the firm in whose behalf they are executed, and we think they are to be so regarded under the law, in view of the broad power given to a partner in the sections of the Code above referred to." In *Griffin v. Colonial Bank*, 7 Ga. App. 126, 66 S. E. 382, it is held that: "Prima facie the execution of a negotiable note in the name of the partnership by one partner is within the scope of the partnership business, and binds the firm and individual members thereof;" and in *Bishop v. People's Bank of Calhoun*, 7 Ga. App. 432, 67 S. E. 119, it is expressly held that: "One partner in an ordinary commercial partnership has authority to execute a promissory note under seal, binding his copartners." See, also, *Fincher v. Hanson*, 12 Ga. App. 612, 77 S. E. 1068.

[3, 5] Besides the direct evidence of the existence of the partnership as alleged, there are circumstances in proof upon which the jury would have been authorized to infer that R. S. Swygert, who executed these notes in the name of the partnership, was not

only a member of the partnership, but was fully authorized to execute these notes. The evidence discloses that he was held out to the world by the other members of the firm as a member, the business of the firm was intrusted to him, and he executed all the notes and checks which were used by the firm in the transaction of its commercial business. The evidence shows that the individual members of the firm not only held themselves out to the world as partners, but they held out to the world the fact that R. S. Swygert was a partner of the firm, and that he was duly authorized as an agent to transact the business of the firm. As to creditors we think these facts were sufficient to bind each one of the defendants as partners, for it is a sound principle, both of law and honest commercial transactions, that only slight evidence would be necessary to bind the parties as partners in their relations to creditors, although it might require stronger proof to establish the partnership *inter sese*. *Chaffee v. Rentfroe*, 32 Ga. 477; *Scranton v. Rentfrow*, 29 Ga. 341.

We do not deem it necessary to discuss specifically each one of the special exceptions. We have examined them very carefully in the light of the general instructions to the jury and the evidence. While there may have been some immaterial inaccuracies in the instructions objected to, yet, when they are considered with reference to the entire charge of the court, we find no material error; on the contrary, the charge as a whole presents the issues most fully and favorably to the contentions of the defendant. As restricted by the rulings of the trial judge, there was no error in the admission of the evidence objected to. We have no hesitation in holding, after a careful consideration of the entire case, that the trial was not only fairly and ably conducted by the trial judge, but that his rulings were correct, that his instructions to the jury presented every material issue favorably to the defendant, and that the verdict in favor of the plaintiff is fully justified by the evidence.

Judgment affirmed.

HAYES v. STATE. (No. 5,076.)

(Court of Appeals of Georgia. Oct. 28, 1918.)

(Syllabus by the Court.)

TRESPASS (§§ 76, 84, 88*)—CRIMINAL LAW (§ 325*)—CRIMINAL RESPONSIBILITY—PRESUMPTIONS—QUESTIONS FOR JURY.

A tenant who in good faith claims possession of land under one who bona fide claims title and right of possession thereof cannot be convicted of the offense of trespass. To authorize a conviction it is essential that it be shown that the alleged trespass was committed willfully and intentionally, and, for this reason, proof that the act alleged to be criminal was done in good faith is a perfect defense, and any evidence showing that the possession of

the accused either originated or was continued in good faith is relevant and competent.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 166, 174, 182; Dec. Dig. §§ 76, 84, 88; * *Criminal Law*, Cent. Dig. § 729; Dec. Dig. § 325.*]

Error from City Court of Fitzgerald; D. E. Griffin, Judge.

J. C. Hayes was convicted of trespass, and brings error. Reversed.

H. J. Quincey, of Ocilla, and O. H. Elkins and Alex Koplín, both of Fitzgerald, for plaintiff in error. W. H. Horne, Sol., McDonald & Grantham, and L. Kennedy, all of Fitzgerald, for the State.

RUSSELL, J. The defendant in the lower court was convicted of the offense of trespass, and he excepts to the judgment refusing a new trial. The accusation charged the particular offense defined in section 216, par. 4, of the Penal Code; it being alleged that the accused did unlawfully squat and settle upon described land of M. Dixon, with no bona fide claim or color of title to said land, and without the consent of the owner, the said Dixon. It appears from the record that in 1912 Ike Hayes, a brother of the defendant, was in possession of this tract of land as a tenant of M. Dixon, and was about to be evicted. He moved out in the afternoon, and the defendant moved into the house in the early part of the night. From the relationship of the parties and the circumstances under which the defendant moved upon the premises, it is insisted that there was a conspiracy between these two brothers, and there are other facts disclosed by the record which might have authorized a conviction of the accused, if the jury had found him guilty, after having had submitted to them all of the evidence which was tendered bearing upon the question of his good faith. In our opinion, however, the trial judge erred in repelling certain evidence which certainly tended to illustrate the bona fides of the defendant's entry and possession of the premises claimed by the prosecutor, and, since it cannot be known what would have been the effect of this evidence upon the mind of the jury, the fact that it was withheld from them must be adjudged to have been prejudicial to the accused, and the error must be held to require the granting of a new trial.

It is perfectly plain from the record that the title to the premises upon which the accused was alleged to have squatted and trespassed is in dispute. The defendant introduced testimony showing that he is the tenant of one David Walsh, as guardian of the children of his deceased brother, William Walsh, and the prosecutor introduced a deed from L. Kennedy, as administrator of William Walsh, placing the title in himself. The testimony that the accused entered the premises as a tenant of David Walsh is unimpeached and uncontradicted by any other

evidence in the record. The accused offered in evidence his sworn answer to an equitable petition brought by Dixon to recover possession of the dwelling house and premises of which the accused was in possession, and to enjoin him from going upon the land, attempting to cultivate it, or in any way interfering with the possession of the tenants of Dixon, and this answer the court rejected. In it the defendant denied all the material allegations of the plaintiff's equitable petition, set up as a defense Walsh's title and his tenancy by contract under Walsh, and offered to give any bond required of him by the court to answer for damages which the plaintiff might recover against him. This answer was sworn to on January 25, 1913, prior to the filing of the accusation, which was not preferred until February 26th thereafter. In support of this answer the defendant tendered also the pleadings and the verdict thereon in the case in which the letters testamentary of L. Kennedy, as administrator of David Walsh, deceased, were annulled. And this testimony also was rejected by the court. The ground upon which the trial judge excluded the answer of the defendant in the action brought by Dixon, perhaps, was that it was in the nature of a self-serving declaration, because the answer was made after Hayes went into possession, and it might be imagined that he feared he would be prosecuted by Dixon. Regardless of this, however, we think the court erred in excluding the documentary evidence, because the very nature of the offense of trespass, and the absolute necessity that it be shown that the act alleged to be trespass was done willfully, makes relevant any act or saying of the accused from which good faith may be imputed.

Nothing is better settled than that the issue of title to land cannot be determined by a prosecution for trespass. In *Wiggins v. State*, 119 Ga. 217, 46 S. E. 86, Justice Lamar, speaking for the Supreme Court, holds that a prosecution for trespass is not intended as a substitute for the remedy provided by an action for forcible entry and detainer nor to serve the office of determining title. And in *Hateley v. State*, 118 Ga. 79, 44 S. E. 852, it was ruled that the Code section now under consideration "was not designed to try disputed land titles, but to punish those who willfully, and without claim of right, commit acts of trespass on the lands of others." An act which, as related to the true owner of land, might appear to be trespass is not in fact a trespass, if the act is committed in good faith by one who actually and sincerely believes that he is authorized (either because authorized by the true owner, or because he believes himself to be the true owner) to do the act in question. In fact the burden rests upon the state of proving the absence of good faith on the part of one accused of trespass, because the act must

generally be shown to be willfully done, and, under the particular paragraph upon which the charge against the defendant in the present case was based, it was essential for the state to show that the presence of the accused upon the premises in question was "with no bona fide claim or color of title, and without the consent of the owner." If, therefore, the defendant had any evidence which tended to show that he did have a bona fide claim dependent upon the consent of one who bona fide claimed to be the owner, it would be error to withhold such evidence from the jury, and thus deprive them of giving to the claim of the defendant equal consideration with that accorded to the claim of the prosecutor. In trespass it is altogether a question of bona fides, and not a question of real title. In *Cooper v. State*, 5 Ga. App. 697, 68 S. E. 719, we set aside a verdict of guilty as to two laborers who, without any knowledge of the title to the land, but in obedience to the instruction of the proper municipal officers, tore down a fence, although the evidence disclosed that the title to the land in question was without dispute in the complaining individual. This because, under the ruling of the Supreme Court in *Shrouder v. State*, 121 Ga. 615, 49 S. E. 702, *Wiggins v. State*, supra, and *Hateley v. State*, supra, the absence of any proof that the trespass was intended by the accused was fatal to the state's case. In *McClurg v. State*, 2 Ga. App. 624-626, 58 S. E. 1064, too, we held that the state must introduce such proof of bad faith as will overcome the presumption of innocence. And it follows, of course, that in rebuttal of such proof as the state adduces upon this point the defendant may submit any evidence tending to show his good faith. In *Woods v. State*, 10 Ga. App. 476, 73 S. E. 608, we held that the jury had the right to find that the claim of the accused was a mere pretext, and not made in good faith, and for that reason the judge did not err in approving their verdict; but in that case the prior declarations of the accused with reference to his claim of ownership were submitted to the jury, and we merely ruled, as we would rule in the present case if the defendant had been convicted after evidence submitted by him as to his good faith had been passed upon by the jury, that the jury had the right to prefer evidence indicating willfulness and bad faith to that tending to show good faith.

The fact that the guardian had no authority to rent the premises without an order from the court of ordinary, as provided in section 3067 of the Civil Code, might be immaterial on a consideration of the motive of the accused by the jury, because the presumption that every man knows the law is not of such potency, in competition with the presumption of innocence, when imputed knowledge is applied to matters of civil contract as it generally is when the act to which the

ignorance relates is one denounced by the penal laws of the state. In other words, society for protection against crime indulges the presumption that all men have in mind at all times those acts which are punishable as crimes, and either abhor them or dread the punishment which will ensue upon conviction. Crimes *mala in se* are presumably naturally adhorrent to a well-ordered mind and a clean conscience, and the law in maintaining itself, by fiction extends the operation of these natural feelings so as to include statutory offenses which are merely *mala prohibita*. But it is to be doubted if the presumption that every man knows the law extends with such force to mere matters of civil contract, upon which depend only rights of property, such as title to land, or the power of a guardian to make contracts of rental. As to such matters, it seems to us that it would be for the jury to judge from the circumstances of the case, and the intelligence and education of the parties, whether they did in fact know that one who assumed to have a right was not by law entitled to it.

Judgment reversed.

WILLIAMS v. STATE. (No. 5,201.)

(Court of Appeals of Georgia. Oct. 28, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 562*)—INTOXICATING LIQUORS (§ 236*)—SUFFICIENCY OF EVIDENCE.

Construing the evidence most strongly against the accused, a bare suspicion of his guilt may arise therefrom. Suspicion is not evidence, and a verdict based alone on suspicion is unauthorized by law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1253, 1263; *Dec. Dig. § 562*; *Intoxicating Liquors*, Cent. Dig. §§ 300-322; *Dec. Dig. § 236*.]

Error from City Court of Hall County; F. A. Irwin, Judge.

Sonnie Williams was convicted of selling intoxicating liquors, and brings error. Reversed.

W. B. Sloan, of Gainesville, for plaintiff in error. A. C. Wheeler, Sol., of Gainesville, for the State.

HILL, C. J. Williams was convicted of selling intoxicating liquors, and he excepts to the judgment overruling his motion for a new trial.

No assignment of error of law is made, and the complaint is that the verdict is without evidence to support it. The evidence is very plain, and in substance is as follows: One witness testified, that he went to a house, where he found three men; that the accused was standing in the door; that he got a pint of whisky in the house; he did not get it or buy it from the accused, and said nothing to him about it; that he went in and got the whisky off the bed, and threw

75 cents down on the bed; that he did not pay the accused for the whisky, and does not know who got paid for it. A policeman testified that he saw this witness come from the house, and that he caught him, and searched him, and found a pint of whisky on him; that the defendant lived in the house; and that, upon finding the whisky on the person of this witness, he immediately went into the house and found no one there but defendant, who was lying across the bed. There was no other evidence, and the accused made no statement to the jury.

In our opinion, the evidence is not sufficient to warrant a verdict of guilty. While the first witness for the state, according to his evidence, did not remember from which of the three men he bought the whisky, he did testify affirmatively that he did not buy it from the accused. The facts that the officer found the accused lying on the bed, and that the accused lived in the house from which the whisky was obtained, may be suspicious circumstances against the accused; but suspicion is not evidence. It is clear that the whisky might have been obtained from one of the other men present, who might also have lived in the same house with the accused. Construing the evidence most strongly against the accused, it fails to show his guilt to a moral and reasonable certainty and beyond a reasonable doubt, and therefore the conviction was unauthorized by law.

Judgment reversed.

COOPER v. STATE. (No. 5,220.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 914*)—DEFECTS IN PRELIMINARY AFFIDAVIT—TIME FOR OBJECTION.

That an accusation charging the accused with a criminal offense is not based upon a valid affidavit, in that the affidavit was not properly attested by the magistrate before whom it was alleged to have been made, is matter for demurrer or motion to quash. Objection to such an affidavit is not a proper ground to be incorporated in a motion for a new trial, and comes too late after verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2146-2151; Dec. Dig. § 914.*]

2. SUFFICIENCY OF EVIDENCE.

The verdict is supported by the evidence.

Error from City Court of Jackson; H. M. Fletcher, Judge.

Charlie Cooper was convicted of crime, and brings error. Affirmed.

J. T. Moore, of Jackson, for plaintiff in error. C. L. Redman, Sol., of Jackson, for the State.

HILL, C. J. Judgment affirmed.

DUNN v. STATE. (No. 5,191.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 295*)—INSTRUCTIONS—PROVOCATION.

The charge of the court on that portion of section 65 of the Penal Code of 1910 relating to "provocation by words, threats, menaces," etc., excepted to, was erroneous under the decision of this court in *Ross v. State*, 7 Ga. App. 732, 68 S. E. 56, and that of the Supreme Court in *Cumming v. State*, 99 Ga. 662, 27 S. E. 177, and a new trial should have been granted on this ground.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.*]

2. HOMICIDE (§ 309*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

The theory of voluntary manslaughter is reasonably deducible from the evidence for the accused, and it was not error to charge the jury on that subject.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

3. HOMICIDE (§ 174*)—EVIDENCE—LACK OF EFFORT TO ESCAPE.

There was no error in refusing to allow the accused to prove that he made no effort to leave the county or to escape after the commission of the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 369-371; Dec. Dig. § 174.*]

4. CRIMINAL LAW (§ 1134*)—WRIT OF ERROR—EXTENT OF REVIEW.

The assignments of error other than those dealt with above need not be determined, since it is not probable that the alleged errors will occur on another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.*]

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Waldo Dunn was convicted of homicide, and brings error. Reversed.

B. L. Smith and Thos. A. Brown, both of Blue Ridge, Jeff A. Hedden, of Copperhill, Tenn., and N. A. Morris and Geo. D. Anderson, both of Marietta, for plaintiff in error. Herbert Clay, Sol. Gen., of Marietta, for the State.

HILL, C. J. Judgment reversed.

SMITH v. STATE. (No. 5,136.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. FORGERY (§ 12*)—APPARENT LEGAL EFFICACY OF INSTRUMENT.

No error appears in the rulings of the trial judge on the admissibility of evidence, and the objections made to excerpts from the charge of the court are without merit, when considered in connection with the instructions as a whole.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 28-47; Dec. Dig. § 12.*]

2. CRIMINAL LAW (§§ 786, 822, 823*)—FORGERY (§ 48*)—INSTRUCTIONS—STATEMENT OF ACCUSED—CONSTRUCTION AS A WHOLE.

The trial judge clearly and fully presented to the jury the contentions of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984, 1990, 1991-1995, 3158; Dec. Dig. §§ 786, 822, 823; Forgery, Cent. Dig. §§ 124-128; Dec. Dig. § 48.*]

3. No ERROR APPEARING.

No error of law appears, and the verdict was fully supported by the evidence.

(Additional Syllabus by Editorial Staff.)

4. FORGERY (§ 16*)—"UTTER"—"PUBLISH"—"PASS"—"TENDER."

The words "pass or tender" are synonymous with the words "utter and publish." If the accused "uttered" a forged instrument, he "published" it. If he "passed" it, he "uttered and published" it. And if it be "uttered" and "published" and "passed," it necessarily was "tendered."

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 51-53; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7251, 7252; vol. 7, p. 5847; vol. 6, pp. 5215-5217; vol. 8, p. 7747; vol. 8, pp. 6910, 6911.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

J. B. Smith was convicted of uttering a forged instrument, and brings error. Affirmed.

P. W. Meldrim, of Savannah, for plaintiff in error. W. C. Hartridge, Sol. Gen., of Savannah, for the State.

HILL, C. J. James B. Smith was convicted in the superior court of Chatham county on an indictment containing two counts. The first count charged him with the offense of forging a certificate of stock, fully described in the count, and the second count charged him with falsely and fraudulently uttering and publishing as true the forged instrument described, with intent to defraud the Commercial Bank of Savannah. On the trial of the case the state abandoned the first count of the indictment, on the ground that the actual forgery of the instrument described did not take place in Chatham county. The jury found the accused guilty on the second count, and, his motion for a new trial being overruled, he brings error.

The forged instrument alleged to have been uttered and published as true was a certificate of stock issued by the Merchants' & Farmers' Bank of Claxton, Ga. It was alleged that the forgery consisted in altering the figure "5" on the face of the certificate to the figures "25," and the word "five" on the face of the certificate to the words "twenty-five," and the figure "5" on the reverse side of the certificate to the figures "25." It was proved that the certificate thus altered, which was apparently a certificate for 25 shares of the bank, was presented by the ac-

cused to the Commercial Bank of Savannah and a loan procured thereon by him from the bank for the sum of \$4,000, and it was proved both by the confession of the accused, repeatedly made, and by other evidence, that he had made the alterations in the stock certificate as alleged, raising the number of shares from 5 to 25 as alleged in the indictment. The introduction in evidence of the alleged forged stock certificate was objected to by the accused on the ground that there was no assignee mentioned in the transfer on the back of the certificate of stock. It appeared that the transfer on the back of the certificate was in the following form: "For value received hereby sell, assign and transfer unto ——— shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ——— to transfer the said stock on the books of the within named corporation with full power of substitution in the premises. Dated ———, 19——." Signed J. B. Smith, and attested. The certificate itself was in the following language: "Incorporated under the laws of the State of Georgia, No. 108. Shares 25. Merchants' and Farmers' Bank, Claxton, Ga. Capital, \$25,000.00. This certifies that J. B. Smith is the owner of twenty-five shares of one hundred dollars each, of the capital stock of the Merchants' and Farmers' Bank, transferable only on the books of the corporation by the holder hereof in person or by attorney upon surrender of this certificate properly indorsed. In witness whereof the said corporation has caused this certificate to be signed by its duly authorized officers and to be sealed with the seal of the corporation this 12th day of March, A. D. 1912. [Signed] S. P. Smith, President. J. B. Smith, Cashier [Seal of Bank]."

[1] It is insisted by learned counsel for the plaintiff in error that stock in a corporation is a chose in action, and that under the Code of this state, section 3653, an assignment of a chose in action must be in writing, and to constitute a valid legal assignment there must be an assignor who gives title, and an assignee to take title at the time the assignment is made, and both must be named in the assignment, and that here there is no assignee mentioned, nothing mentioned as being assigned, and no date of the assignment given; the words, "Dated ———, 19——," constituting no date. It is to be borne in mind that the stock certificate was issued to James B. Smith, certifying that he was the owner of five shares of stock in the Merchants' & Farmers' Bank of Claxton, Ga. He signs the assignment as assignor, and delivers the stock certificate thus signed by him to the bank as security for a loan of \$4,000. Even if this were a civil suit on the assignment, parol evidence would be admissible to prove the name of the assignee and the date of the assignment.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The writing itself would be sufficient to show that the stock certificate was the instrument or chose in action assigned by James B. Smith, to whom it had been issued by the corporation. The charge in the indictment is that James B. Smith altered this certificate of stock by raising the number of shares from 5 to 25 as stated in the indictment; and, as before stated, this was clearly proved, but this count of the indictment was abandoned by the state because the actual forgery in the raising of the number of shares from 5 to 25 was committed in some other county than that of Chatham. The second count, however, alleges distinctly that James B. Smith "did falsely and fraudulently utter and publish as true" this forged instrument, describing specifically the character of the forgery, knowing that this writing or stock certificate was falsely and fraudulently altered as described, "with the intent then and there to defraud the Commercial Bank of Savannah, the same being a banking corporation organized and existing under the laws of the state of Georgia." These are the essential allegations made by the second count, and they are sufficiently proved. This being true, it was wholly immaterial whether the transfer on the back of the certificate of stock was technically complete or not. The forgery of the certificate exactly as described, the uttering and publishing as true exactly as alleged, and the perpetration of the fraud upon the Commercial Bank of Savannah by reason of the uttering and publishing as true the forged instrument, were also clearly shown; and in our opinion, these facts having been shown, the accused was guilty on the second count, and it was wholly immaterial that the transfer on the back of the certificate of stock was incomplete in the particulars claimed. The forgery and the fraud were accomplished by the unlawful conduct of the accused as specifically alleged in the indictment, and as clearly shown.

[2] 2. The trial judge, after charging the jury in the language of the statute in reference to the prisoner's statement at the trial, and telling the jury that they might believe the statement in preference to the sworn testimony in the case, added the words "provided you believe it to be true." It is insisted that this additional charge was not authorized by the statute, and had the effect of intimating a doubt on the part of the court as to the truth of the prisoner's statement. While the Supreme Court and this court have repeatedly admonished the trial courts that it is best to charge on the prisoner's statement in the language of the Code without additional words, yet this court, in *McCullough v. State*, 10 Ga. App. 403, 73 S. E. 546, has expressly ruled that the addition of the words objected to here was not reversible error.

[3] 3. The following excerpt from the charge is objected to: "If you should find, beyond a reasonable doubt, that the defend-

ant fraudulently uttered, published, passed, or tendered, the paper described in the bill of indictment, knowing that the said writing had been falsely and fraudulently altered, with intent to defraud the person alleged in the bill of indictment, then he would be guilty under the second count in the indictment." It is insisted that this charge was error because the indictment does not charge the defendant with having passed or tendered the paper described in the bill of indictment. Section 245 of the Penal Code of 1910, under which this indictment was framed, in describing the offense, uses the following language: "If any person shall fraudulently make, sign, forge, * * * or shall fraudulently utter, publish, pass, or tender the same," etc. While the indictment charged only that the accused "did falsely and fraudulently utter and publish as true," it certainly could not be erroneous for the court in describing the offense to use the exact words of the statute.

[4] But it is manifest that this objection is without merit because the words "pass or tender" are synonymous with the words "utter and publish." If the accused uttered the forged instrument, he published it. If he passed it, he uttered and published it; and, if he uttered and published and passed it, he necessarily tendered it. The judge's use of all four of the words used in the statute, descriptive of the publication of the instrument by the accused, while unnecessary, since one would have been sufficient, certainly did not constitute an error.

4. The following excerpt from the charge of the court is excepted to: "If you find when it was signed, for instance, it was for five shares of stock, as contended by the state, and was subsequently raised or altered by the defendant to make it 25 shares of stock, and that was done fraudulently, then that would be a forgery, under the law of Georgia—if it was done falsely and fraudulently, with intent to defraud any person; and if that paper, so altered by him (if you find it was so altered), was uttered, published, or passed, or tendered by him for the purpose of defrauding the person named in the bill of indictment, then that would be uttering a forged instrument." The objection made to this charge is that the words "with intent to defraud any person" lay down a wrong rule of law; the indictment specifically alleging that the intent was to defraud the Commercial Bank of Savannah. Taking the excerpt as a whole, it is perfectly apparent that the jury could not have been misled by the use of the words "any person." This is especially shown by the fact that when charging concretely upon the second count in the indictment, upon which the conviction was had, the court specifically charged the jury that any uttering and passing of the forged instrument must be for the purpose of defrauding the person named in the indictment, and the person named in the in-

dictment was the Commercial Bank of Savannah.

5, 6. These grounds of the amended motion are fully covered by what is held in the first and fourth divisions of the opinion.

7. In charging on the probative value of evidence of good character, the trial judge used the following language: "When the guilt of the accused is made to appear to the satisfaction of the jury, they are authorized to convict regardless of the good character of the accused, but the jury have the right to consider his good character, not merely when his guilt is doubtful under the other evidence in the case, but when such testimony of good character may itself generate the doubt." It is alleged that the use of the words "to the satisfaction of the jury" were erroneous, in that it placed upon the accused too heavy a burden, because it was only necessary to raise a reasonable doubt as to his guilt in the minds of the jury. The court had previously charged fully as to the doctrine of reasonable doubt, and it was not necessary for him to repeat the charge on that subject; indeed, the charge specifically objected to in effect tells the jury that, if the evidence of good character is sufficient to generate a doubt of guilt, then they should acquit the accused.

After giving the case careful consideration, we are satisfied that no error of law was committed on the trial, and that the verdict is fully supported by the evidence.

Judgment affirmed.

WIMBERLY v. STATE. (No. 5,161.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

HOMICIDE (§ 163*)—ASSAULT WITH INTENT TO KILL—EVIDENCE AS TO CHARACTER OF PROSECUTOR.

A previous verdict of guilty in this case was set aside by this court, upon the ground that the court erred in certain instructions to the jury. 12 Ga. App. 540, 77 S. E. 879. Complaint is now made of several extracts from the charge of the court. The instructions complained of were free from error. The questions whether there was a specific intent to kill, and whether sufficient interval had elapsed between the shooting and a previous assault, claimed to have been made by the prosecutor upon the accused, for the voice of reason and humanity to be heard, were clearly and fully submitted to the jury for their determination. The charge of the court upon the subject of impeachment was entirely in harmony with the decisions of the Supreme Court and of this court on that subject. The judge clearly drew the distinction between a successful impeachment of a witness and a mere attack upon him in an effort to impeach him. There being no evidence that the prosecutor was attempting to make any assault upon the accused at the time the latter shot, it was not erroneous to reject evidence tending to show that the prosecutor was a man of a violent and turbulent character. *Crawley v. State*, 137 Ga. 777, 74 S. E. 537; *Doyal v. State*, 70 Ga. 134. The verdict was fully authorized by the evidence, and the punishment received by the

accused was richly merited. No reason appears for granting a new trial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 810-817; Dec. Dig. § 163.*]

Error from Superior Court, Houston County; H. A. Mathews, Judge.

Joe Wimberly was convicted of assault with intent to kill, and brings error. Affirmed.

J. C. Smith, of Ft. Valley, for plaintiff in error. Jno. P. Ross, Sol. Gen., of Macon, for the State.

POTTLE, J. Judgment affirmed.

WILLIAMS v. STATE. (No. 5,181.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. **SUFFICIENCY OF EVIDENCE.**

The evidence authorized the conviction of the accused.

2. **CRIMINAL LAW (§ 1105*)—NEW TRIAL — AMENDMENT OF MOTION—APPROVAL.**

The recitals in the grounds of the amendment to the motion for a new trial, not being approved as true by the trial judge, cannot be considered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2887-2889; Dec. Dig. § 1105.*]

3. **CRIMINAL LAW (§ 942*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.**

The trial judge did not err in overruling the ground of the motion for a new trial based upon alleged newly discovered testimony which was merely impeaching in its character.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2316, 2381, 2332; Dec. Dig. § 942.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Wyatt Williams was convicted of crime, and brings error. Affirmed.

Howard & Kea, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

RUSSELL, J. Judgment affirmed.

WILSON v. STATE. (No. 5,125.)
(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. **CRIMINAL LAW (§ 1159*)—APPEAL AND ERROR—REVIEW—VERDICT.**

There was evidence which would have authorized the jury to infer that, while justifiably shooting at another person, the defendant accidentally shot the person named in the indictment, but there was also evidence that the accused shot recklessly into a crowd and that by this shot the wound was inflicted. Consequently the verdict finding the accused guilty of the offense of shooting at another was authorized.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

2. NEW TRIAL PROPERLY DENIED.

There being no error of law complained of, it was not error to refuse a new trial.

Pottle, J., dissenting.

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Gus Wilson was convicted of crime, and brings error. Affirmed.

Chas. W. Worrill and G. H. Perry, both of Cuthbert, for plaintiff in error. B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

RUSSELL, J. Judgment affirmed.

POTTLE, J. (dissenting). Under the evidence the accused was guilty of assault with intent to murder or not guilty of any offense. To authorize a conviction for the statutory offense of shooting at another, it must appear that the accused intentionally shot at the person named in the indictment. If he shot at another person, either with the intent to kill or to wound such person, and unintentionally hit a bystander, he could not be convicted of the statutory offense of shooting at the bystander. He might be guilty of the offense of assault with intent to murder the bystander or of murder (if the latter had been killed), but in no event could he be convicted of the statutory offense of shooting at another.

QUINLAN v. STATE. (No. 5,144.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§§ 176, 242*)—SELLING WITHOUT A LICENSE—DEFENSES—MITIGATION OF PUNISHMENT.

The evidence demanded a finding that the accused engaged in the business of selling substitutes for intoxicants, without having first obtained a license and paid the tax required by law, in violation of section 448 of the Penal Code 1910. The fact that the license was obtained and the tax paid some months after the accused began to do business might be considered in mitigation of the punishment but constitutes no defense to a prosecution under this section of the Code.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 356-361; Dec. Dig. §§ 176, 242.*]

2. JURY (§ 116*)—CHALLENGES—ARRAY OR POLL.

The fact that the jurors put upon the accused had previously tried a similar case against another person afforded no ground for challenge to the array. If the accused desired to make the point that any of the jurors were not impartial, it should have been done by a challenge to the poll. *Bryan v. State*, 124 Ga. 79, 52 S. E. 298; *Paulk v. State*, 2 Ga. App. 662, 58 S. E. 1109. In view of the fact that the jurors were put upon their voir dire and qualified as impartial jurors, the ruling in *Lewis v. State*, 118 Ga. 803, 45 S. E. 602, is not applicable.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 542, 543; Dec. Dig. § 116.*]

3. CRIMINAL LAW (§ 1169*)—WRIT OF ERROR—HARMLESS ERROR.

Even if it was erroneous to admit in evidence a certified copy of the application made to sell "near beer," by the accused to the mayor and council, it was harmless error. It being admitted that the accused had engaged in the sale of "near beer" without a license and payment of the tax, it was wholly immaterial whether it was done with or without the consent of the mayor and council.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 921*)—NEW TRIAL—ERROR IN ADMISSION OF EVIDENCE.

For the same reason it is not cause for a new trial that the court admitted in evidence copies of a letter from the Governor of Georgia to the attorney assisting in the prosecution, designating him as special agent to collect the unpaid taxes due by "near beer" dealers, and a letter from this attorney to the accused demanding payment of the tax.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2206-2209; Dec. Dig. § 921.*]

5. CRIMINAL LAW (§ 918*)—NEW TRIAL—RESTRICTING TIME FOR ARGUMENT.

The refusal of the trial judge to allow counsel additional time, under superior court rule No. 5 (Civ. Code 1910, § 6264), to argue a misdemeanor case will not be cause for a new trial, when the evidence demands a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2192, 2196, 2196, 2219-2224; Dec. Dig. § 918.*]

6. CRIMINAL LAW (§ 1134*)—WRIT OF ERROR—EXTENT OF REVIEW.

In view of the fact that the evidence demanded the conviction, the assignments of error upon the charge of the court will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.*]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

J. J. Quinlan was convicted of selling liquor without a license, and brings error. Affirmed.

John R. Cooper, O. C. Hancock, and C. A. Clawson, all of Macon, for plaintiff in error. Jno. P. Ross, Sol. Gen., of Macon, for the State.

POTTLE, J. [1] The evidence demanded the conviction of the accused. It is a violation of the very letter of section 448 of the Penal Code to engage in the sale of substitutes for intoxicants without having first obtained a license and paid the tax required by law. This being so, it is wholly immaterial what instructions were given to the jury.

[2] The proper way to test the competency of an individual juror is by challenge to the poll. The fact that the panel of jurors put upon the accused had previously tried a similar case did not authorize a challenge to the array. Each juror should have been challenged, put upon his voir dire, and his impartiality tested. Under the decision in *Lewis v. State*, 118 Ga. 803, 45 S. E. 602,

relied on by counsel for plaintiff in error, where proper challenge is made, it is duty of the trial judge to frame appropriate questions and test the competency of the jurors. The record in the present case discloses that the jurors were put upon their voir dire, and all of them qualified. The refusal of the court to sustain the challenge is not cause for a new trial.

[5] Rule No. 5 of the superior court (Civil Code, § 6264) provides that if counsel for the accused in a misdemeanor case will state in his place or on oath, as the judge may require, that he cannot do justice to his client within the 30 minutes allowed by the rule, and state how much additional time will be necessary, "the court shall grant such extension of time as may seem reasonable and proper." In *Chance v. State*, 97 Ga. 346, 23 S. E. 832, the judgment was reversed because the trial judge refused to allow counsel one hour within which to argue a misdemeanor case. See, also, *Jones v. State*, 123 Ga. 129, 131, 51 S. E. 312. Since the adoption of the Code, and of course subsequent to these rulings, the rule has been amended by the substitution of the word "may" for "shall" in the reference to the extension of time, and the rule now contemplates that the court shall have some discretion in the matter. The evidence demanded the verdict. No amount of argument could have helped the accused. It will not be assumed that the jury would have been so swayed by the argument and eloquence of his counsel as to bring in a verdict in plain violation of law. There is nothing in the decisions of the Supreme Court to conflict with what we now rule, and there was certainly no abuse of discretion in refusing to grant the additional time.

Judgment affirmed.

ALLEN v. STATE. (No. 5,103.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

"In a criminal case, in which the guilt of the defendant is wholly dependent on circumstantial evidence, the jury should be instructed that, if the proved facts are consistent with innocence, the defendant is entitled to an acquittal." *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1081.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

Error from City Court, Houston County; A. C. Riley, Judge.

Jesse Allen was convicted of gaming, and brings error. Reversed.

J. C. Smith, of Ft. Valley, and W. J. Wallace, of Knoxville, Tenn., for plaintiff in error. R. E. Brown, Sol., of Ft. Valley, for the State.

RUSSELL, J. The accused was indicted with a number of others for the offense of gaming. In our opinion the testimony as to his guilt was wholly circumstantial. The deputy sheriff, who was the main witness for the state, testified that he, in company with Mr. Rowell, the chief of police of the city of Ft. Valley, approached in sight of the alleged gamblers, and in his presence Mr. Rowell wrote down the names of all who composed two crowds of persons apparently engaged in gambling, except one man, whose name was unknown. Jesse Allen, the defendant was in one of the gatherings of persons who were apparently gambling. This witness first testified that he saw Allen playing in a game of cards for money; that Allen was playing in a game with others in a circle with him; "I saw him reaching over and picking up. I also saw him reaching over for his cards." But it very plainly appears that all of this was merely a conclusion of the witness, reached from a general survey of the surroundings, because he immediately follows this testimony with the statement, "I could not and did not see any cards or money in the defendant's hands."

We would be far from saying that this testimony would not authorize a conviction if the jury, from the circumstances detailed, had reached the conclusion evidently entertained by the witness; but this should not deprive the defendant of having accorded to him a trial strictly legal in every respect, nor obviate the necessity of the jury's taking into consideration the well-recognized rule of law that, where the guilt of the accused is wholly dependent upon circumstances from which his guilt may reasonably be inferred, it is the duty of the jury to acquit, if the innocence of the accused may with equal reason be adduced from the circumstances in proof. In the present case the jury, under such an instruction, might have concluded that the defendant stated the truth when he asserted that he did not know one card from another, or might have believed the number of witnesses who themselves admitted their guilt and yet testified that Jesse Allen did not participate in the game. The fact that the defendant cried out, "Play down," and "Bet," does not necessarily compel the conclusion that he was anything more than a bystander, perhaps using the remark jocosely to those engaged in the game; nor does it necessarily follow from the fact that the defendant reached down in the circle that he was reaching after money or cards then being employed in an unlawful game. Of course we do not know what would have been the result if the jury had been properly instructed upon the law of circumstantial evidence, but the rulings of the Supreme Court and of this court are uniform to the effect that, where the guilt of the accused depends entirely upon circum-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 79 S.E.—49

stantial evidence, it is the duty of the judge to call the special attention of the jury to that fact and to instruct them that, where there is any other theory arising from the evidence, consistent with innocence, which is as reasonable as that which points to guilt, the defendant should be acquitted. See *Weaver v. State*, 135 Ga. 320, 69 S. E. 488, and citations; *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1031, and citations. The other exceptions in the motion for new trial are without merit.

Judgment reversed.

KINCAID v. STATE (No. 5,197.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. JURY (§ 116*)—CHALLENGES TO ARRAY—GROUND FOR.

The fact that the panel of jurors put upon the accused heard the evidence introduced upon a previous trial of one jointly indicted with the accused and after the conclusion of the evidence were ordered from the courtroom by the judge is no ground for challenge to the array. A challenge might have been made to any juror whose competency the accused desired to test.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 542, 543; Dec. Dig. § 116.*]

2. GAMING (§ 71*)—PLAYING OR BETTING—OWNERSHIP OF MONEY.

On the trial of one charged with gaming it is not error to charge that, if the accused played and bet for money as alleged in the indictment, it is immaterial whose money it was or who put up the money with which he played.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 166, 167; Dec. Dig. § 71.*]

3. CRIMINAL LAW (§ 925½*)—NEW TRIAL—GROUND FOR—DISCRETION.

The refusal of the trial judge to accede to a request privately made to him before the jury had retired, but after the indictment had been handed them, to conceal from the jury, by pasting paper over it, a verdict which a previous jury had entered on the bill of indictment on the trial of one jointly indicted with the accused is no cause for a new trial. This is a matter within the discretion of the trial judge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2248-2253; Dec. Dig. § 925½.*]

4. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where the guilt of the accused rests entirely upon circumstantial evidence, failure to charge the jury on the law relating to this character of evidence is error requiring the grant of a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Tip Kincaid was convicted of gaming, and brings error. Reversed.

Neel & Neel, of Cartersville, for plaintiff in error. Sam P. Maddox, Sol. Gen., of Dalton, for the State.

POTTLE, J. [1] 1. The accused challenged the array of jurors put upon him on the ground that the jury had heard the evidence introduced against one of the other persons jointly indicted with him and alleged to have been in the same game. This did not disqualify the entire panel of jurors, but, if the accused desired to test the competency of any particular juror, it should have been done by a challenge to the poll. *Quinlan v. State* (No. 5,144) 13 Ga. App. —, 79 S. E. 768. In the present case the trial judge fully guarded the right of the accused by putting each of the jurors upon his voir dire and asking him the statutory questions prescribed for felony cases. If the accused was not satisfied with any of the jurors who thus qualified, he should have put them upon the court as a *trior* and attacked their competency.

[2] 2. It was not erroneous to charge the jury that, if the accused played cards and bet for money as charged in the indictment, it was immaterial whose money it was or who put up the money with which they played.

[3] 3. The fact that the judge declined to accede to a request privately made to him before the jury had retired, but after the indictment had been handed the jury by the solicitor general, to conceal from the jury, by pasting a paper over it, the verdict of guilty which a previous jury had rendered on the trial of one of the other persons jointly indicted with the accused is not cause for reversing the judgment refusing a new trial. The request probably came too late to avail the accused, but, even if not, this was a matter in the discretion of the trial judge.

[4] 4. The evidence was very weak and barely sufficient, if at all, to authorize the verdict. There was no direct evidence that the accused himself played or bet for money. He was in a party, some of whom either had been playing or were preparing to play. The conviction was based wholly upon circumstantial evidence, and the judge should have charged the law in reference to this character of evidence. His failure to do so is made the subject of a special assignment of error in the motion for a new trial, and, following the ruling which we have recently made in *Allen v. State*, 79 S. E. 769, this ground of the motion is well taken and a new trial should have been granted. The general charge of the court is not sent up with the record so as to enable us to see exactly what the judge did charge, but, in approving the recitals of fact contained in the amended motion for a new trial, the judge certifies that he omitted to charge the rule relating to circumstantial evidence.

Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

CURRY v. STATE. HOLLINSHEAD v. SAME. WALKER v. SAME (two cases).
(Nos. 5,104-5,107.)

(Court of Appeals of Georgia. Oct. 28, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 493*)—EVIDENCE—SUFFICIENCY—CONCLUSIONS.

The evidence authorized the verdict, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1058; Dec. Dig. § 493.*]

Error from City Court of Houston County; A. C. Riley, Judge.

Henry Curry, Wesley Hollinshead, Claude Walker, and Jay Walker were convicted of gambling, and separately bring error. Affirmed.

J. C. Smith, of Ft. Valley, and W. J. Wallace, of Knoxville, Tenn., for plaintiffs in error. R. B. Brown, Sol., of Ft. Valley, for the State.

RUSSELL, J. The same exception to the charge of the court as that presented in the case of Jesse Allen v. State, 79 S. E. 769, is raised in the four writs of error now before us; but upon a review of the record it does not appear that the evidence as to these defendants is wholly circumstantial. The deputy sheriff in each of the cases now before us testified positively that he saw the defendants playing and betting for money. It may be that upon a cross-examination of the witness it would have been developed that this statement was a mere conclusion of the witness, as was apparent in Allen's Case. But the presumption is to the contrary, because it is to be presumed that counsel advisedly avoided further inquiry into the extent of the witness' knowledge, in the interest of his client, rather than that he neglected his duty to that client. For this reason there is a wide difference between the cases of these defendants and that of Allen.

Further exception is made as to the Walkers, in that complaint is made that in the charge of the court their defense was minimized by the statement that the defense of the accused rested *in part* upon alibi. The court's expression was not technically correct, for alibi is either a complete defense or no defense; but in the state of the evidence it is not apparent that the accused were injuriously affected by this inapposite statement of the court.

Judgment affirmed.

DUANE CHAIR CO. v. JACKSON.
(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error of law is complained of, and the evidence is sufficient to support the verdict.

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by George Jackson, by next friend, against the Duane Chair Company. From the judgment, defendant brings error. Affirmed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. Geo. G. Glenn and M. C. Tarver, both of Dalton, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

PAYNE v. POWER et al.
(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

PLEDGES (§ 34*)—RECOVERY BY PLEDGOR—TENDER.

A pledgor is not entitled to recover his pledge of his pledgee's assignee unless he pays the debt secured by the pledge, or tenders payment, or the facts excuse a tender. An allegation of an offer to pay is not the equivalent of a tender.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 90; Dec. Dig. § 34.*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by J. M. Payne against John Power and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Wynn & Wohlwender and Battle & Hollis, all of Columbus, for plaintiff in error. McCutchen & Bowden, of Columbus, for defendants in error.

EVANS, P. J. J. M. Payne filed his petition against John Power and Frank G. Power, setting up that on or about the 6th of June, 1911, he was indebted to the Bank of Phenix City, Ala., in the sum of \$1,500 and was desirous of borrowing such sum for the period of six months. Plaintiff was informed by the cashier of the bank that the defendant John Power had \$1,500 which he was authorized to loan, and the plaintiff agreed to substitute John Power as his creditor instead of the bank and was presented a note by the cashier, which he signed. Plaintiff had been president of the Bank of Phenix City and had for many months sustained confidential business relations to the cashier, and thus, relying upon the cashier, he did not read the note that he signed, which was made due one month after date. As collateral to secure the payment of the note, plaintiff pledged 30 shares of the capital stock of the Bank of Phenix City, of the par value of \$3,000, and the reasonable market value of \$3,300. The plaintiff further alleged that he heard nothing further of said note until March, 1912, when he was advised by an attorney at law, claiming to represent Frank G. Power, that he "held the said note

for adjustment." Petitioner then learned for the first time that the note signed by him had been made due 30 days after date, and that the defendant John Power pretended to have privately, and without notice to petitioner, sold to the defendant Frank G. Power, and the latter pretended to have purchased, petitioner's note and stock. It was charged that there was no bona fide sale of the note and stock, and that the pretended sale was a scheme between the defendants (who are brothers) to defraud petitioner out of his stock. The tenth paragraph of the petition was as follows: "Said defendants failed and refused to surrender to your petitioner his note given as aforesaid and to account to petitioner for the overplus from the sale of his said stock after the discharge of his obligation as aforesaid, though often requested so to do, and defendants failed to permit and allow your petitioner to pay his said note, together with interest thereon, according to the true contract and agreement at the time the same was executed, and to surrender the same to petitioner, together with his stock pledged as collateral security as aforesaid." It was charged that the defendants had appropriated to their own use a dividend on said stock amounting to \$210, which sum should be entered as a credit on the note. It was alleged that the transaction was a scheme between the cashier, in the alleged substitution of John Power as his creditor, for the bank, and the two defendants to defraud the plaintiff of his bank stock; that the plaintiff has always been ready, able, and willing to pay the obligation and would have at any time paid the same had he been notified of the maturity of the note, and "petitioner makes a continuing offer to pay his said note," with interest thereon. The prayers were that the defendants be required to surrender the bank stock upon the payment of the note, or, if the defendants cannot surrender petitioner's stock, then petitioner prays judgment for the difference between the amount due on his note and the reasonable and fair market value of his stock, and that his note be surrendered and canceled. The petition was dismissed on demurrer, and the plaintiff excepts.

It will be noticed that the allegation respecting the sale of the collateral is not a charge that the creditor sold the pledge without notice, but that he sold the note with the collateral. The creditor is not charged with an act having for its purpose the sale of the pledge in satisfaction of the debt; he is charged with selling the note and the collateral. Surely no one will dispute the right of assignment of a note secured by collateral. In a prior allegation the plaintiff says that the assignee's attorney notified him that he held the note for adjustment, not that he was attempting to collect any balance that might be left after crediting the proceeds from the sale of the pledged stock. Plaintiff's

allegation concerning the execution of the note does not even raise an imputation of actionable fraud against either defendant. The petition, when reduced to its last analysis, complains that the plaintiff, in consideration of John Power's paying his indebtedness to the bank, gave to him a note for the amount paid, with certain stock as collateral, which note and collateral John Power has conveyed to his brother Frank, and that the latter is trying to collect it. The plaintiff says that he has not been permitted to pay his note but is willing to pay it. The law looks more to acts than good intentions; the plaintiff should have tendered his indebtedness to the holder of his note and stock, or have alleged facts excusing a tender, before complaining that his creditor is withholding stock voluntarily pledged to secure his debt. The demurrer was properly sustained.

Judgment affirmed. All the Justices concur.

HANVY v. MOORE et al.

(Supreme Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—PETITION FOR ACCOUNTING—PARTIES.

In a proceeding by a legatee for an accounting of an estate reduced to cash, other legatees are not necessary parties. But where the moving legatee asserts a claim against the estate, dependent upon a construction of the will, it is not error to allow the other legatees to intervene as parties for the purpose of contesting such claim.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041-2060; Dec. Dig. §§ 473, 474.*]

2. WILLS (§ 506*)—CONSTRUCTION—"LEGAL HEIRS."

A testator, possessed of real and personal estate, died leaving a widow and eight children. He disposed of the residue of his estate as follows: "I will that the residue of my estate be distributed equally among by legal heirs." Held, that the widow was not included in the phrase "legal heirs," and did not share in the residue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4063, 4064.]

3. WILLS (§ 543*)—CONSTRUCTION—REMAINDER ESTATE.

In the second item of his will the testator gave to his wife, Georgia Brown, a year's support to be taken from his general estate, and all of his household and kitchen furniture, and certain lots of land "to her during her life or widowhood; on the event of her death or the termination of her widowhood the same to go to and be equally divided among my heirs, to wit: Georgia Brown, Tony Moore, Mark A. Brown, Carrie Harris, and Ella Stokeley. If my son Mark A. Brown, or my daughter Tony Moore, should die after my death and before the death of my wife, I desire that their parts of the above-named property shall revert to my general estate and be divided among my heirs." Held, that inasmuch as the wife is expressly named as one of those to take in remainder, she takes an estate for life or widow-

hood in the land devised, and also one-fifth of the fee in remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1169, 1302-1309; Dec. Dig. § 543.*]

4. WILLS (§ 487*)—CONSTRUCTION—PAROL EVIDENCE—INTENTION OF TESTATOR.

Where the terms of a will are plain and unambiguous, parol testimony as to the sayings or statements of the testator that he intended to dispose of his property in a certain way, and to certain persons, different from that expressed in the will, will be rejected.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action by G. E. Hanvy, administrator, against Mrs. S. S. Moore, administratrix, and others. Judgment for defendants, and plaintiff brings error. Reversed.

C. D. McGregor and A. L. Bartlett, both of Dallas, for plaintiff in error. T. W. Rucker, of Athens, J. J. Northcutt, of Acworth, Harris, Harris & Harris, of Rome, and W. E. Spinks, of Dallas, for defendants in error.

EVANS, P. J. L. L. Brown died testate, leaving a widow and eight children, all of whom were legatees under his will. The widow filed in the court of ordinary, against the executor of Brown, a petition for settlement. The executor answered that the widow had been fully settled with; and the children filed separate objections to the effect that the widow did not take under the second and sixth items of the will. An appeal was taken to the superior court. The widow died, and her administrator was made a party. The plaintiff objected to the allowance of an order making the legatees parties to the suit. In her petition she alleged that she was one of the legal heirs of her husband, and entitled to share in the residue of his estate, devised in item 6. The court dismissed this allegation on demurrer. In their intervention the legatees averred that it was the testator's intention to limit the interest in the land devised in the second item to the widow for life, and that the inclusion of her name as a remainderman was the result of a mistake. The court refused to strike this allegation on motion of the plaintiff, and submitted that issue to a jury, who returned a verdict adversely to the plaintiff.

[1] 1. A legatee may call the executor to a settlement of an estate which has been reduced to cash without making the other legatees parties to the action. Civil Code, § 5417. While this is true, we cannot see any objection to legatees voluntarily making themselves parties so as to contest the liability of the estate to the moving legatee. Though not necessary, they are proper parties.

[2] 2. The sixth item of the testator's will was as follows: "I will that the residue of my estate be distributed equally among my legal heirs." The testator left surviving him a widow and eight children. The court ruled

that under this item the children of the testator took the residuary interest in the estate, to the exclusion of the widow. At common law the widow did not take any interest in the land as an heir at law. It is contended that our statute of distribution has altered the common law so as to make the widow an heir at law. Our statute declares that upon the death of the husband without lineal descendants the wife is his sole heir; if there are children, or those representing deceased children, the wife shall have a child's part, unless the shares exceed five in number, in which case the wife shall have one-fifth part of the estate. If the wife elects to take her dower, she has no further interest in the realty. Civil Code (1910) § 3931. It has been held that this statutory provision must be construed in connection with paragraph 3 of the Civil Code, § 5249, which declares that dower may be barred, by the election of the widow, within 12 months from the grant of letters testamentary or of administration on the husband's estate, to take a child's part of the real estate in lieu of dower, and that a widow does not become vested as heir at law with an absolute estate in any portion of the property which belonged to her deceased husband, but merely has the right to take a child's part, or in certain cases one-fifth thereof. If she does not elect so to do within 12 months from the grant of letters of administration upon his estate, such right is lost, and, so far as the realty is concerned, she is remitted to the right of obtaining her dower by applying therefor within the time prescribed by law. Farmers' Banking Co. v. Key, 112 Ga. 301, 37 S. E. 447. The purpose of the statute, so far as real estate is concerned, is not to confer upon the widow any absolute right of inheritance, where the deceased leaves children, but to give her an election to claim a child's part (or, if the children exceed five in number, then one-fifth) of the estate of her deceased husband, or to have an assignment of dower in all the lands of which he died seised and possessed. The question was early submitted to this court as to whether, under the statutes codified in the sections to which we have adverted, the widow of an intestate was entitled to have advancements made by the testator to his children brought into hotchpotch for her benefit; and it was held that she had no such right, and that if she died within a year after administration on the estate of her husband, without having elected to take a child's part of the real estate, her executor could not recover any share therein after her death. Beavors v. Winn, 9 Ga. 189. It was said in Snipes v. Parker, 98 Ga. 522, 25 S. E. 580, that if "a man dies intestate, leaving a widow and children, the title to his realty vests in the latter, subject only to the former's right to take a child's part or have dower assigned therein." This ruling was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

expressly affirmed in *Farmers' Banking Co. v. Key*, supra. The decisions of this court proceed upon the footing that the statutory provision for the wife in the real estate of her deceased husband where children are left is not that of strict inheritance, but an allowance, under the law, of a portion of the realty equal to a child's part, or, if the children exceed five in number, to a fifth part of his estate, available only by affirmative action on her part within 12 months from the date of administration, as a substitute for her common-law right of dower. *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274. When the testator used the expression "legal heirs," in the absence of anything in the will to the contrary, it will be presumed that he had in mind those who would take naturally by inheritance, and not to embrace the widow, who was given by statute an elective right to a child's part in lieu of dower. An Iowa statute provides that if an intestate leaves no issue, one half of his estate shall go to his parents and the other half to his wife. A decedent at his death had a policy of life insurance payable to "his legal heirs." He left surviving him a widow and one child. It was held that the amount of the policy should go to the child. In the opinion the court said: "The distinction between the word 'widow' and the word 'heir' is marked in common parlance. No one having children speaks of his wife, in contemplation of her survivorship, as his heir; but it is believed, and it is universal, that she is referred to as 'widow' and the children as 'heirs.' While technically, and in the single instance stated in the statute, a widow may become a legal heir of her deceased husband, our conclusion is that, whether used in their technical or general sense, the words 'legal heirs' were not intended, and should not be construed, in this case, to include the widow." *Phillips v. Carpenter*, 79 Iowa, 600, 44 N. W. 898, 899.

In *Gibbon v. Gibbon*, 40 Ga. 562, an apparently contrary rule was promulgated. In that case a testator at the date of his will had a wife, a son, and a daughter, and brothers and sisters of both the whole and half blood. In his will he gave several legacies to his daughter for life, and at her death to her children, and if she died childless, then to the testator's "heirs of the full blood." The daughter died childless before the testator died. It was held that by the phrase "heirs of the full blood" the testator meant his statutory heirs, including his wife. The opinion in that case was pronounced by McCay, J., who based his conclusion upon a construction of the rules of inheritance now embodied in the Civil Code, § 3931, without taking into account the statute now contained in section 5249, par. 3, relating to the bar of the wife's dower. Brown, C. J., concurred, but wrote no opinion. Warner, J., dissented. In the dissenting opinion it was said: "If there are children or descendants of children, the

wife is not declared, *eo nomine*, to be an heir of the intestate. It is true provision is made for her; she takes a child's part of the estate, unless the shares exceed five in number, in which case she takes one-fifth of it. Thus it will be seen when there are children or the representatives of deceased children, the wife does not inherit equally as an heir of the intestate." Judge McCay reached his conclusion both from an interpretation of the will and the statute, and drew from the will certain illustrations evincive of the testator's intent to include the widow within the phrase "heirs of the full blood." We do not think that case should be extended beyond its peculiar facts; because the court drew from the testator's will a conclusion that such a construction was intended by the testator, because of an omission to consider the cognate law on the subject, because it was concurred in by only two judges, and, further, because it is not in harmony with a construction of the statute as given in prior and subsequent decisions in this court.

In view of special provision made by the testator for his wife in the second item of his will, and his general testamentary scheme, we believe that his conception of the words "legal heirs" embraced only his children and their descendants, to the exclusion of the widow.

[3] 3. By the second item of his will the testator gave to his "beloved wife, Georgia," a year's support to be taken from his general estate, and also all of his household and kitchen furniture, and certain lots of land "to her during her life or widowhood; on the event of her death or the termination of her widowhood the same to go to and be equally divided among my heirs, to wit: Georgia Brown, Tony Moore, Mark A. Brown, Carrie Harris, and Ella Stokeley. If my son Mark A. Brown, or my daughter Tony Moore, should die after my death and before the death of my wife, I desire that their parts of the above named property shall revert to my general estate and be divided among my heirs." This item of the will is plain and unambiguous. The testator, in addition to giving his wife a year's support, gave her a life estate in certain described land, and specifically gave her a remainder interest in fee to be divided between herself and four children, with a reversion to his estate of the interest of two named children should they die after the testator and before the wife. This contingency did not happen, as these children survived the wife. So we hold that, under this item, Mrs. Georgia Brown took a life estate in the devised land, and also a one-fifth estate in fee in the remainder. It is not unusual for a life tenant to be interested in the remainder estate. And, whatever may have been the testator's intent with respect to his wife's share in the remainder estate, we can only give effect to that intent expressed by him in clear and unambiguous words.

[4] 4. The court permitted parol evidence

tending to show that the inclusion of the wife's name as a remainderman was through the mistake of the scrivener. The rule is clear that when the terms of a will are plain and unambiguous, parol testimony as to the sayings or statements of the testator that he intended to dispose of his property in a certain way, and to certain persons different from that expressed in the will, will be rejected. *Smith v. Usher*, 108 Ga. 231, 33 S. E. 876; *Napier v. Little*, 137 Ga. 242, 73 S. E. 3, 38 L. R. A. (N. S.) 91, Ann. Cas. 1913A, 1013.

Judgment reversed. All the Justices concur.

RICKS v. RICKS.

(Supreme Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

1. DEMURRER TO PETITION.

The demurrer to the petition, which complained only that it was not properly paraphrased, is not borne out by the record.

2. RETURN OF SERVICE—EVIDENCE.

There was no evidence to support the traverse of the sheriff's return of service on this defendant.

3. TEMPORARY ALIMONY—EVIDENCE.

Though conflicting, there was evidence to support the finding of the judge, and to authorize the judgment granting temporary alimony.

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by H. L. Ricks against D. T. Ricks. Judgment for plaintiff, and defendant brings error. Affirmed.

L. B. Lightfoot, of Adrian, and Larsen & Larsen, of Dublin, for plaintiff in error. H. R. Daniel, of Swainsboro, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

HURT v. BARNES.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 18*)—GROUNDS—OVERRULING OF DEMURRER.

The overruling of a demurrer to a plea, and of objections to an amendment to a plea, can only be taken advantage of by timely exception. Such rulings are not proper ground for new trial. *Hawkins v. Studdard*, 132 Ga. 265, 63 S. E. 852, 131 Am. St. Rep. 190; *Bullock v. Cordele Sash, etc., Co.*, 114 Ga. 627, 40 S. E. 734.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.*]

2. EXCEPTIONS, BILL OF (§ 38*) — TIME FOR PRESENTATION AND ALLOWANCE—INTERLOCUTORY ORDER AND RULINGS.

Upon interlocutory orders and rulings, not excepted to pendente lite, error cannot be assigned in a bill of exceptions to the overruling of a motion for new trial, certified more than

30 days after the adjournment of the court at which such interlocutory orders were passed or rulings made. *Bullock v. Cordele Sash, etc., Co.*, supra; *City Council of Waycross v. Youmans*, 85 Ga. 708, 11 S. E. 865.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44-46, 48, 51-53, 56; Dec. Dig. § 38.*]

3. TRIAL (§ 255*)—FAILURE TO INSTRUCT—REQUEST.

In an action for damages for an alleged malicious arrest, where the defendant denies the allegations of the petition and pleads a set-off arising in tort, an omission to charge on the effect of the advice of counsel as bearing on the question of damages will not require a new trial, there being no request so to charge, and the court's charge not being sent up as a part of the record.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

4. PROPERTY (§ 9*) — EVIDENCE OF OWNERSHIP—INTEREST IN ESTATE.

Even if it was material to prove that the plaintiff had an interest in a certain estate, testimony that he was offered a certain sum of money for such interest is incompetent to prove the factum of interest.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9.*]

5. VERDICT SUSTAINED.

A general verdict for the defendant is supported by the evidence.

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by H. M. Hurt against J. L. Barnes. Judgment for defendant, and plaintiff brings error. Affirmed.

Sibley & Sibley, of Milledgeville, for plaintiff in error. D. B. Sanford, D. S. Sanford, and L. Kenan, all of Milledgeville, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

SMITH v. TATUM.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. BROKERS (§§ 54, 63*)—RIGHT TO COMMISSION—TENDER OF PURCHASE PRICE.

The general rule, in the absence of a different agreement, is that a real estate broker in whose hands property is placed for sale earns his commissions when, during the agency, he finds a purchaser ready, willing, and able to buy, and who offers to buy, on the terms stipulated by the owner. If the evidence shows such facts, and the owner refuses to carry out the trade, it is not generally necessary, in order for the broker or agent to recover his commissions, that the proposed purchaser should make to the proposed vendor an actual tender of the purchase price.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81, 94-96; Dec. Dig. §§ 54, 63.*]

2. VENDOR AND PURCHASER (§ 344*)—CONTRACT OF SALE—ACTION FOR BREACH—TENDER.

Where the relation between the owner of land and another is not that of principal and agent or owner and broker, but that of proposed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vendor and purchaser, if the purchaser seeks to obtain specific performance of a contract of sale for cash, or to recover damages for an alleged breach of such a contract by the vendor by refusing to make a conveyance, the general rule is that a tender of the cash must be made, unless it is waived.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1030-1035; Dec. Dig. § 344.*]

3. BROKERS (§ 82*)—VENDOR AND PURCHASER (§ 344*)—BREACH OF CONTRACT—TENDER—VARIANCE.

A petition alleged that the defendant, an owner of land, employed the plaintiff to procure a purchaser for it, and agreed that, if the plaintiff would find a purchaser at the price of \$5,500, the defendant would convey the land to such purchaser or purchasers, and that, if the plaintiff should sell the place for more than that amount, he should have the excess as compensation for his services and expenses. The evidence on behalf of the plaintiff tended to show that the defendant agreed with the plaintiff (who was not a real estate broker) that, if the former could sell the lot and get the latter \$5,500 cash, the defendant would make the plaintiff a deed to it; that the defendant did not say anything about paying the plaintiff for his services, but that if the plaintiff got any more than \$5,500 it made no difference, and that the plaintiff could have any more than that sum which he got. *Held*, that the allegata and probata did not correspond. The former made a case of agency, with compensation to be measured by the amount in excess of \$5,500 for which he could sell the property for the owner. The latter made a case of a contract to convey to the plaintiff for that amount in cash, leaving him to retain for himself any greater sum which he might receive from another purchaser.

(a) Under the case made by the evidence, a tender of the amount of purchase money was necessary, unless waived, in order to recover for a breach of the contract by a refusal to convey.

(b) There was no sufficient evidence of an unconditional tender or waiver thereof. A proposition for the owner to bring or send to a city in another state a conveyance to a purchaser from the plaintiff and receive payment, or that such proposed purchaser would send a check to a bank to be delivered upon delivery of the conveyance, did not amount to a tender. Nor did a general statement of tender by the plaintiff suffice, where it appeared that the facts did not constitute such a tender. *Terry v. Keim*, 122 Ga. 43, 49 S. E. 736.

(c) No question was raised as to the statute of frauds.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. § 82;* Vendor and Purchaser, Cent. Dig. §§ 1030-1035; Dec. Dig. § 344.*]

4. NONSUIT.

There was no error in granting a nonsuit.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by T. F. Smith against A. M. Tatum. Judgment for defendant, and plaintiff brings error. Affirmed.

H. P. Lumpkin, of La Fayette, and W. U. Jacoway and J. P. Jacoway, both of Trenton, for plaintiff in error. Foust & Payne, of Chattanooga, Tenn., for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

CAUDELL et al. v. ATHENS SAVINGS BANK.

(Supreme Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§§ 157, 164*)—PAROL—SECONDARY—ACTS OF CORPORATIONS.

Ordinarily the minutes of a corporation show the formal actions of its directors and stockholders, and before parol evidence thereof can be introduced, they should be produced or accounted for. Parol evidence, however, is admissible to prove the unrecorded acts and transactions of corporations, or of their officers or directors. *Bank of Garfield v. Clark*, 133 Ga. 796 (7), 799, 76 S. E. 95; *Fouche v. Bank*, 110 Ga. 827 (6), 850, 38 S. E. 256; *Ten Eyck v. Pontiac, etc., R. Co.*, 74 Mich. 228, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633; 2 *Thomp. Corp.* (2d Ed.) § 1842, 1847. See, also, *Handley v. Stuts*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470, 546, 547; Dec. Dig. §§ 157, 164.*]

2. REFUSAL OF INTERLOCUTORY INJUNCTION.

It was not error to refuse to grant an interlocutory injunction.

Error from Superior Court, Clarke County; O. H. Brand, Judge.

Action by J. J. Caudell and others against the Athens Savings Bank. Judgment for defendant, and plaintiffs bring error. Affirmed.

Jno. J. Strickland and Blanton Fortson, both of Athens, for plaintiffs in error. T. S. Mell, of Athens, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

LOUISVILLE & N. R. CO. v. BUTLER.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 103*)—MAINTENANCE OF CATTLE GUARDS.

Civ. Code 1910, § 2699, requiring railroad companies to build and maintain cattle guards on each side of every public road or private way established pursuant to law, and on the dividing line of adjacent landowners, where the railroad may cross such public roads, private ways, or dividing lines, on written notice by the owner of lands to be affected by such cattle guards, is intended for the protection of landowners whose lands are intersected by a railroad right of way, and not for the benefit or protection of the owners of land abutting on a railroad right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 315-319, 762, 763, 767, 769, 772; Dec. Dig. § 103.*]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by D. S. Butler against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

D. W. Blair, of Marietta, for plaintiff in error. R. N. Steed, of Spring Place, and Maddox, McCamy & Shumate, of Dalton, for defendant in error.

EVANS, P. J. The plaintiff sued the railroad company, claiming damage for an injury done to his growing crop by hogs, on account of the company's alleged failure to maintain a stock gap or cattle guard. The land upon which the trespass was committed was alleged to abut the railroad right of way. The defendant demurred to the sufficiency of the petition, upon the ground, amongst others, that its allegations did not show any duty on the part of the defendant to maintain a stock gap for the protection of owners of adjacent land. The court overruled the demurrer, and a verdict was returned for the plaintiff.

The plaintiff bases his right of action upon an alleged duty of the railroad company to maintain a good and sufficient cattle guard at a point on the public road where crossed by the railroad, for the protection of his land which lay adjacent to the railroad company's right of way. It is his contention that the Code section requiring railroad companies to maintain cattle guards at public crossings was intended for the protection of land which abutted on the railroad right of way, as well as that traversed by the railroad. By virtue of the Civil Code (1910) § 2699, every railroad company is required to build and maintain at its own expense good and sufficient cattle guards on each side of every public road or private way established pursuant to law, and on the dividing line of adjoining landowners, where the railroad may cross such public road, private way, or dividing lines, when necessary to protect said lands, on 30 days' written notice from the owner of the lands to be affected by such cattle guards. The cognate section (2701), which is a part of the same statute from which the other section was codified, provides that whenever the owner of any lands over which any railroad company may have acquired the right of way may desire additional cattle guards other than those provided for in the preceding section, or of any farm crossing on his land, it shall be the duty of the railroad company upon written notice to submit to the landowner a written estimate of the cost of such cattle guard or farm crossing; whereupon the landowner, if satisfied with the same, shall pay to the company the estimated sum, when the company shall at once proceed to build such cattle guards or farm crossings, etc. The plain purpose of the statute is to require railroad companies to build cattle guards at public road and private way intersections, and at dividing lines, where the railroad company constructs its track on its right of way which passes through the land of another. It was never designed that a landowner could require of a railroad company to construct cattle guards

over its right of way where the landowner's land only abutted upon the railroad company's right of way. The statute is for the benefit and for the protection of landowners whose lands are traversed by the right of way of the railroad company, and not for the benefit of adjacent landowners. The landowner whose land is not traversed by a railroad could with as much reason require a railroad company to construct cattle guards on its right of way over the land of his neighbor 500 yards away from his land, as he could require a cattle guard on the railroad's property which adjoined his land. According to the allegations in the present case, this statute raised no duty on the part of the railroad company to construct the cattle guard on the land of the plaintiff lying adjacent to its right of way, and it was error to overrule the demurrer raising that point. Judgment reversed. All the Justices concur.

McEWEN v. KELLY et al.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 310*)—DIRECTORS—DUTIES AND LIABILITIES.

Directors of a trading corporation must exercise ordinary care and prudence in the administration of its affairs. They may commit the active management of the business to authorized officers; but this will not relieve them from the duty of reasonable supervision.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1352-1362; Dec. Dig. § 310.*]

2. BANKRUPTCY (§ 145*)—TRUSTEE—CORPORATIONS—LIABILITIES OF DIRECTORS.

A trustee in bankruptcy of such a corporation succeeds to any right which it may have to sue directors and officers for a breach of duty, resulting in loss.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 205, 230-232, 234; Dec. Dig. § 145.*]

3. CORPORATIONS (§ 331*)—DIRECTORS—LIABILITY TO CREDITORS.

In a solvent going concern directors are the agents and fiduciaries of the corporation rather than of its creditors; but, under some circumstances, creditors of the corporation may have a cause of action against its directors on account of losses occurring from their maladministration and ultimately resulting in injury to the rights of such creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1448, 1449; Dec. Dig. § 331.*]

4. BANKRUPTCY (§ 302*)—ACTION BY TRUSTEE—PETITION—SUFFICIENCY.

The allegations of the petition considered, and held not to show a case for recovery against the directors of the corporation, except the one who was also secretary and treasurer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 1325; Dec. Dig. § 302.*]

5. APPEAL AND ERROR (§ 440*)—CORRECTION OF JUDGMENT PENDING APPEAL.

After a judgment has been entered sustaining a demurrer to an action brought against

three defendants and dismissing the entire case, and while the case is pending in this court on a bill of exceptions assigning error on such judgment, the judge of the trial court is without jurisdiction, even by consent of counsel, to enter another judgment reciting that it was intended to overrule the demurrer as to one of the defendants and altering the former judgment accordingly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2198-2201; Dec. Dig. § 440.*]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by C. McEwen, as trustee, etc., against W. M. Kelly and others. Judgment for defendants, and plaintiff brings error. Affirmed in part, and reversed in part.

McEwen, as trustee in bankruptcy of the Southern Iron Company, brought suit against W. M. Kelly, W. H. Totten, Jr., and W. C. Satterfield, seeking to recover \$3,490.57. So far as necessary to be set out, the allegations were as follows: Kelly, Satterfield, and Totten formed a partnership, in the latter part of the year 1905, for the purpose of mining and shipping ore, which continued until October 23, 1906, when a charter was granted to them. During the continuance of the partnership, Kelly was the treasurer. All of the stock in the corporation was taken by the three, Kelly taking 34 shares, and each of the others 33, and the three elected themselves directors. During the continuance of the partnership, the other two partners frequently asked Kelly for "a statement of the partnership," and he promised to make them a full and complete statement of its affairs but failed to do so. He drew numerous drafts on Totten to meet the expenses of the partnership. Totten and Satterfield became suspicious of Kelly and of his handling of the business. Upon incorporation, Totten and Satterfield intended to elect Satterfield secretary and treasurer, and Totten nominated him for that office and Kelly for president; but Kelly, winking at Totten and shaking his head, stated that Totten should have the honors of the corporation and nominated him for president, Satterfield for vice president, and himself for secretary and treasurer. All of them appear to have acquiesced in this, and the election was accordingly made. At some unspecified time prior to January 1, 1907, Kelly wrote to Totten, who was a nonresident, that he did not wish Satterfield to have charge of the office of secretary and treasurer, and if it were given to him he (Kelly) would withdraw from the company. It was further alleged that Totten "was unable to get any statement at that time, or between the date of incorporation and said January 1, 1907, from said Kelly as to the business of said corporation." On or about January 1, 1907, Kelly made to Totten and Satterfield a statement of the business of the company "that was unsatisfactory and meager and an ex-

remely poor showing of the business of the company." After January 1, 1907, Kelly established the practice of drawing a draft on Totten for the amount of the pay roll and sending to Totten a check for the amount, so that Kelly could cash the draft and Totten could deposit the check in Cincinnati, Ohio, and pay the draft, thus getting the use of the money for four or five days without interest; in other words, indulging in the practice known to the business world as "kiting." Totten protested against this, but Kelly gave a plausible explanation of it. In April, 1907, Kelly telegraphed to Totten to remit to him \$600 or \$700 to pay an open account. Totten went to Cartersville, the home office of the company, and called a meeting of the stockholders, at which Kelly was deposed from office and a new secretary and treasurer elected. Kelly turned over to his successor "what purported to be the books of the company." They were audited by the direction of Totten and Satterfield, and the "auditor reported * * * that W. M. Kelly had expended from the funds of the company the sum of \$1,655.33, for which there appeared to be no authority from the officers or directors of said company, and that in addition thereto said W. M. Kelly was due said company the sum of \$2,835.24 in cash which had not been turned over to his successor in office." Kelly admitted owing these amounts, and in July paid \$1,000, leaving a balance of \$3,490.57. Later he gave a check for \$1,000 more, but payment was refused by the bank on which it was drawn. On November 4, 1907, a petition in involuntary bankruptcy was filed against the company, and it was duly adjudicated a bankrupt, and the plaintiff was appointed its trustee in bankruptcy. The court sustained a demurrer to the petition and dismissed the action; and the plaintiff excepted. The supplemental order passed by the court is noticed in the opinion.

J. T. Norris, of Cartersville, for plaintiff in error. Thos. W. Milner & Son and Neel & Neel, all of Cartersville, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. Directors of a private corporation occupy a somewhat peculiar position. They have been variously classified as agents, mandataries, bailees, and trustees; and it has been sought to define their duties and liabilities to the corporation and its stockholders on the basis of such relations. A great deal of learning has been expended, and perhaps some of it wasted, in efforts to rigidly apply one or another of these analogies to facts to which it has not always been fully applicable. Directors are agents, but they are also agents clothed with a fiduciary character; and, while they are not express or technical trustees, they are selected to man-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

age the affairs and property of the corporation for its benefit, and they bear to it and to its stockholders a relation which in many respects may be called a trust relation; and thus by numerous courts they have been called trustees. Aside from any express statutory liability, those who accept the position of directors impliedly undertake to exercise ordinary care and diligence in discharge of the duties thus committed to them. They may commit the active transaction of the business to duly authorized officers; but this does not absolve them from the duty of reasonable supervision. Some courts have declared that they are only liable for gross negligence or breach of duty resulting in injury. But in some, probably most, of the cases so declaring, it will be found that the failure of directors to use ordinary care in supervision has been treated as amounting to gross negligence. Thus in *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546, it was said that, "when one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty (*crassa negligentia*) not to bestow them." In 2 *Thompson on Corporations* (2d Ed.) § 1268, it is said: "While they are not held responsible for ordinary mistakes or errors of judgment, they are liable for losses and waste of money and property occurring from neglect or inattention to the business or the willful violation of their duties. It is true that the degree of diligence is to be determined in each case in view of all the circumstances, such as the character of the corporation, the condition of its business, the usual method of managing such companies, as well as all other relevant facts." Breach of duty and loss or damage must concur to create liability. In *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, the decision of the majority of the court was concurred in by five justices, while four strongly dissented. The justices differed as to whether the facts there involved showed a case for holding certain directors liable, and the discussions in the two opinions are interesting. We deem it unnecessary here to deal with the exercise of discretion by directors, or the ordinary rule as to it, or the question whether liability may arise from its gross or flagrant abuse. Unfortunately some directors appear to think that they have fully discharged their duties by acting as figureheads and dummies; but this is a mistake and a delusion from which some of them are now and then awakened by a judgment for damages arising from allowing the corporation to be looted while they sat negligently by and looked wise.

[2] 2. A trustee in bankruptcy succeeds to any right of the corporation to sue for damages resulting to it by a breach of duty on the part of its directors. 2 *Thomp. Corp.* (2d Ed.) § 1316.

[3] 3. In a solvent, going concern, directors are the agents or fiduciaries of the corporation, not of its creditors. But directors are not wholly without duties to creditors. They cannot misappropriate the corporate assets or give them away, so that creditors are prevented from collecting their debts; and under some circumstances a trust or quasi trust relationship exists towards creditors. Thus it has often been held that in cases of insolvency all of the assets are applicable to the payment of debts and are not for distribution among stockholders, and that accordingly the directors stand in a trust relation toward creditors. In cases where, aside from statutory provisions, creditors have been held to have a right to sue directors on account of losses arising from misconduct or negligence, sometimes the decision has been based on the theory of a trust or quasi trust relationship, and sometimes on the idea that the liability of the directors to the corporation was an equitable asset, which the creditors might subject, if necessary. 2 *Thomp. Corp.* (2d Ed.) § 1313; *Tatum v. Leigh*, 136 Ga. 791, 72 S. E. 236, 25 Ann. Cas. 216.

A protracted discussion of the various decisions would be of no benefit. Light on the general subject may be found in *Thompson's Liability of Officers and Agents of Corporations*; 2 *Thomp. Corp.* (2d Ed.) § 1265 et seq.; 10 *Cyc.* 828 et seq. (by the same author); *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624, and note on page 637 et seq.; *Schley v. Dixon*, 24 Ga. 273, 71 Am. Dec. 121; *Fitzpatrick v. McGregor*, 133 Ga. 332, 342, 65 S. E. 859, 25 L. R. A. (N. S.) 50.

[4] 4. We now come to consider the facts of this case in the light of the principles above announced. The suit was by the trustee in bankruptcy of the corporation. The defendant Kelly was charged with misappropriation of corporate funds while acting as secretary and treasurer. The other two defendants were sought to be held liable on the ground of negligence. There was no charge of knowledge of or participation by them in his misappropriation. Throughout the petition the allegations are vague, general, and lacking in any direct statements to charge these two defendants with any specific breach of duty, resulting in damages to the corporation or the creditors. It was alleged that, while the firm business continued, the other two defendants asked Kelly for a statement but did not receive any, and that he drew drafts on Totten. There was no allegation that there was any partnership agreement, rule, or custom to have statements, or that the books were not accessible to the other members of the firm, or that any wrong was done to the partnership, or that the drafts on Totten were improper or unauthorized. After the incorporation, the three defendants were not only directors but owned all of the stock in the corporation and were then substantially the only parties at interest, so far as this record shows. For

some two months after the incorporation no statement was made by the secretary and treasurer. It does not appear that there was any by-laws, rule, practice, or custom requiring it sooner; and only inferentially is it alleged that it was asked for or could have been made earlier. The statement which was made is characterized as "unsatisfactory and meager"; but it does not appear that it was untrue or what was the matter with it. Indeed, it does not appear whether it was unsatisfactory at that time to Totten and Satterfield or was later unsatisfactory to the pleader. That it was "an extremely poor showing of the business of the company" does not allege any falsity or error. If the business itself were poor, the showing would probably not be good. Kelly indulged in some "kiting" for the company, but he made some "plausible" explanation, and it does not appear that the explanation was untrue or the kiting was unnecessary or against the corporation's interests. In April, 1907, he called on Totten for \$600 or \$700. He was thereupon deposed, and the books audited. It was reported by the auditor that Kelly had expended \$1,655.33 for which there appeared to be no authority from the officers or directors. What this was expended for is not stated. It was also reported that he had failed to turn over to his successor \$2,835.24 in cash. When these expenditures were made, or how long he had been a defaulter, does not appear; nor is there anything to show that an examination of the books at an earlier date would have disclosed any default. After its discovery Totten and Satterfield endeavored to collect the amount due by Kelly, and there is no complaint that their efforts were not diligent, though in part unavailing. It was alleged that no bond was required of Kelly. But no by-law or custom requiring such bond was averred; nor did the allegations suffice to show that it was negligence not to make such a requirement. In its last analysis, the effort to hold Totten and Satterfield liable rests on alleged negligence in the election of Kelly to the position of secretary and treasurer and the failure to discharge him sooner. The petition is not lacking in adjective characterizations of the conduct of these two defendants; but, vague under the general allegations, we do not think that it makes out a case of breach of duty on their part, with damages resulting therefrom. As to these defendants, the demurrer was properly sustained.

As to Kelly, misappropriation of assets and admitted liability were charged. The order in the record dismisses the entire case. An agreement and a copy of an order passed by the presiding judge after the bill of exceptions had been signed and transmitted to this court were later filed here. From these it seems that the order dismissing the

case as to Kelly was entered by mistake, as the court intended to overrule the demurrer as to him.

[5] The judge, however, was without authority to change a judgment as to which exception was pending in this court, nor could he do this even by consent. He having dismissed the action, and the case having been brought to the Supreme Court, it was out of his jurisdiction. We must deal with the judgment as rendered and brought to this court for review. We therefore affirm the judgment as to Totten and Satterfield and reverse the judgment as to Kelly.

Judgment affirmed in part, and reversed in part. All the Justices concur.

ARMSTRONG v. BOYD et al.

(Supreme Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 35*)—PROCEEDINGS TO REVOKE LETTERS—EXPENSES CHARGEABLE TO ESTATE.

Counsel fees and expenses, incurred by an administrator with the will annexed in defending a proceeding by certain legatees to revoke his letters on the ground of mismanagement (which proceeding was voluntarily discontinued), are not chargeable against the legacies due the legatees who instituted the proceeding, in a final settlement of the estate. Where such charges are proper, they go against the general estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

(Additional Syllabus by Editorial Staff.)

2. EXECUTORS AND ADMINISTRATORS (§ 35*)—PROCEEDINGS TO REVOKE LETTERS—ALLOWANCE FOR COUNSEL FEES.

Where the conduct of an administrator brings about a situation causing an heir to bring suit to revoke the letters of administration, he is not entitled to charge counsel fees, but where he is merely charged with misconduct, and is not guilty thereof, he should, under authority of Civ. Code 1910, § 4010, be allowed a reasonable amount to retain counsel in defending the suit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

Error from Superior Court, McIntosh County; W. W. Sheppard, Judge.

Petition for an allowance by William Armstrong, administrator, against W. M. Boyd, Jr., and others. Judgment for plaintiff, and defendants bring error. Reversed.

Chas. M. Tyson, of Darien, for plaintiffs in error. Wm. H. Boyd and P. W. Meldrim, both of Savannah, for defendant in error.

EVANS, P. J. Charlotte Pullen died testate, and W. H. Boyd was appointed her administrator with the will annexed. She bequeathed to four of her grandchildren certain special legacies in money. About three or four months after the appointment of the administrator, these legatees filed a suit to re-

move him, on the ground that he was mismanaging the estate. Judgment was rendered in the ordinary's court removing the administrator, and an appeal was taken to the superior court. On the appeal it was agreed that the entire proceeding should be dismissed, and that the administrator should at once cite the legatees for a settlement and distribution. The proceeding to remove the administrator was accordingly dismissed, and he cited all the legatees for a settlement in the court of ordinary; and in connection therewith he filed a petition to the court of ordinary, asking that all the costs and expenses of the proceeding to remove him as administrator be charged against the legacies due the legatees who joined in that proceeding. The correctness and reasonableness of the expenses and attorney's fees incurred in that proceeding were not disputed; but the legatees resisted the petition, and claimed that such expenses and attorney's fees were not chargeable against their legacies. The petition of the administrator to be allowed such charges was refused by the ordinary, and on appeal to the superior court judgment was rendered in his favor against the legatees for these charges. Exception is taken to this judgment.

[1, 2] Our Code declares that an administrator is authorized to provide competent legal counsel, according to the exigencies of the estate he represents. Civil Code 1910, § 4010. Does this authority extend to an allowance of counsel fees for services rendered to an administrator in a proceeding to revoke his letters of administration, on the ground that he wastes or mismanages the estate? Unquestionably the purpose of supplying administrators with legal advice is for the protection of the estate he represents. It is not to be presumed that every administrator is so versed in the law as to safely act in every contingency or exigency which may arise in the due administration of an estate. In order that the estate may not be frittered away in unnecessary litigation or its assets inadvertently diverted, provision is made for supplying the administrator with the advice of competent counsel. The object of providing counsel for an administrator is to guide him through problems and exigencies of the administration as he finds them, and not to extricate him from difficulties due to his own misconduct at the expense of the heirs. If the conduct of the administrator brings about the situation that gives rise to a suit against him by an heir, he is not entitled to charge counsel fees to protect him in his own fault or misconduct. *Ross v. Battle*, 113 Ga. 742, 39 S. E. 287. But where there is no actual misconduct in the administration, but only a charge of it, the administrator representing all the heirs should be allowed a reasonable amount to retain counsel in defending an unjust charge. In *Roberts v. Thomas*, 32 Ga.

31, it was held that when a complainant is justifiable for suing a trustee to recover or secure a trust fund in the hands of the defendant, the solicitor's fees of the trustee will not be allowed for resisting the bill. The rule is stated in *Lilly v. Griffin*, 71 Ga. 535, as follows: "While an administrator is authorized to provide competent legal counsel for the estate he represents, according to its exigencies, he cannot charge the estate with fees of counsel retained to defend a suit brought against him to recover or to secure the trust fund, whenever it appears that the complainant is justifiable in bringing the suit." According to the doctrine of these cases, if the suit is not justifiable—and the test to determine that would seem to be the result of the issue in favor of the administrator—the administrator should be allowed the money expended by him in the employment of counsel to defend the suit brought against him. The petition to remove the executor was voluntarily abandoned by the moving legatees. We, therefore, cannot consider that such a suit was meritorious, although its discontinuance was the result of consent.

But while an administrator is entitled to an allowance of counsel fees in defending an unsuccessful and unjustifiable suit brought against him by an heir charging a devastavit, this allowance is to be paid out of the general estate, and not out of the particular estate of the complaining legatees. As was said by McCay, J., in *Moses v. Moses*, 50 Ga. 9, 33: "It was a simple question of account—a charge of devastavit—and there is no more propriety in charging the plaintiffs with the counsel fees of the defendant than in any other suit in which the plaintiff fails. It would, we think, be a bad policy to put such a hindrance in the way of heirs or legatees seeking their rights that they shall pay for counsel to aid the executor in resisting their charge of a devastavit."

We know of no statute or rule of law which charges an heir with the expenses of litigation of the administration solely because he may fail in the suit; and we think that the court erred in so holding.

Judgment reversed. All the Justices concur.

FIRST NAT. BANK OF LA FAYETTE v. CASE THRESHING MACH. CO.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

GARNISHMENT (§ 210*)—CLAIM BY THIRD PERSON—SECURITY—PARTIAL DISSOLUTION.

The dissolution of a garnishment by a person not a party to the proceeding, authorized by the Civil Code 1910, § 5282, discharges the garnishee from further liability upon the filing of a dissolution bond. As the privilege of a stranger to the suit to dissolve the garnishment by bond exists only by force of the statute, a claimant of only a portion of the indebtedness

admitted by the garnishee is not entitled, under the statute, to dissolve the garnishment to the extent of the indebtedness claimed.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 402; Dec. Dig. § 210.*]

Error from Superior Court, Walker County; Jno. W. Maddox, Judge.

Garnishment proceedings by the Case Threshing Machine Company, and the First National Bank of La Fayette interposes a claim. From the judgment the claimant brings error. Affirmed.

H. P. Lumpkin, of La Fayette, for plaintiff in error. Foust & Payne, of Chattanooga, Tenn., and R. M. W. Glenn, of La Fayette, for defendant in error.

EVANS, P. J. A garnishment issued upon a pending suit, and the garnishee answered, admitting a certain amount of indebtedness. Judgment was entered against the defendant in the main action, and subsequently a third person, claiming a portion of the money admitted to be due by the garnishee, filed a bond to dissolve the garnishment, and also a traverse of the garnishee's answer. The court allowed a judgment against the garnishee, and the claimant excepts to the same as erroneous on the ground that the issue presented by the claim should have been first heard and determined. The correctness of the claimant's contention depends upon a statutory permission of a third person to partially dissolve a garnishment. The right of a stranger to the proceeding to have the garnished property or money released upon giving a sufficient bond does not exist independently of statute. The general design of such statutes is to enable a claimant, by a sort of intervention, to supersede the proceedings by giving security to perform the judgment of the court as to the liability of the garnishee. The statute provides that whenever any process of garnishment is served upon any person based upon any suit, and there shall be money or property in the hands of the garnishee, which is claimed to be the money or property of any person not a party to the proceeding upon which the garnishment is based, such claimant may dissolve the garnishment by filing in the proper court a bond with good security in twice the amount of the sum claimed in the suit, to be approved by the proper official, conditioned to pay to the plaintiff the sum that may be found due to the defendant upon the trial of any issue that may be formed upon the answer of the garnishee, or that may be admitted to be due in the answer, if untraversed. The garnishee upon answering shall be discharged from all further liability, and the plaintiff's remedy shall be upon the bond executed to dissolve the garnishment, and the claimant shall be a party to all further proceedings on the garnishment. Civil Code 1910, §§ 5282, 5283, 5289. Thus it will be seen that the statute does not contemplate a

partial dissolution of a garnishment. The statutory scheme is to substitute the claimant's bond for the garnishee's liability to the defendant, and to eliminate the garnishee from the case upon the filing of a dissolution bond. After the garnishment is dissolved, either the plaintiff or claimant may traverse the garnishee's answer; and if on the trial of the traverse it is found that the garnishee is indebted in a larger sum than admitted in the answer, the plaintiff may recover of the claimant and his sureties on the dissolution bond the amount of such indebtedness, to the extent of his judgment against the defendant. Civil Code, § 5289. This and other provisions of the garnishment statutes make it clear that the General Assembly never contemplated a partial dissolution of a garnishment. However desirable it might be to provide for partial dissolution, no statutory provision has been made for it; and it is not within the power of courts to amend the statute in this respect. The dissolution bond in the instant case did not fulfill the requirement of the statute, and the court did not err in so treating it, and in rendering judgment against the garnishee for the amount admitted in his answer to be due to the defendant. Judgment affirmed. All the Justices concur.

JAMES v. HILL et al.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. CANCELLATION OF INSTRUMENTS (§ 34*)—LACHES—DEEDS.

Where the heirs of a grantor, with the consent of his administrator, brought suit against his grantee and persons holding by purchase under such grantee, for the purpose of canceling the conveyances and recovering the land conveyed, on the ground that their ancestor was insane and lacking in mental capacity to make a deed, and that the defendants had notice thereof, and where it appeared that the deed was made by him in January, 1896, that he died in April, 1897, and that the defendants had been in possession since that time, and the suit was not brought until 1910, and no reason appeared why the plaintiffs did not know, or by the slightest diligence could not have known, of the substantial facts, so as to bring the suit within a reasonable time after the deed was executed and after the grantor's death, the action was properly dismissed on demurrer on the ground that it was stale and that the plaintiffs were in laches. *Bennett v. Bird*, 139 Ga. 25, 76 S. E. 568; *Spence v. Queen*, 139 Ga. 587, 77 S. E. 820; *Bailey v. Freeman*, 140 Ga. 71, 78 S. E. 423.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49-54; Dec. Dig. § 34.*]

2. CANCELLATION OF INSTRUMENTS (§ 34*)—LACHES—EXCUSE—DEEDS.

The allegations in the petition and the amendments by which it was sought to show that the heirs, with the consent of the administrator, brought suit within a reasonable time, were not sufficient for that purpose. The administrator of the decedent, as clerk of the superior court, recorded the deed shortly after it

was executed. One of the plaintiffs was a witness to it. The allegations in regard to the lack of knowledge on the part of other plaintiffs were insufficient to save the case, when considered in the light of the fact that they must have known that the defendants were in possession of the land and receiving the rents and profits thereof, and must have known of their father's mental condition, and in view of the fact that the deed from him was recorded in 1896.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49-54; Dec. Dig. § 34.*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by L. W. James and others against H. C. Hill and others. Judgment for defendants, and the plaintiff named brings error. Affirmed.

J. S. James, of Atlanta, for plaintiff in error. W. T. Roberts and J. R. Hutcheson, both of Douglasville, and E. S. Lumpkin, of Lithia Springs, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

MURRAY COUNTY v. WILSON.

(Supreme Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§§ 79, 80*)—COMPENSATION—ESTOPPEL—HIGHWAYS.

An owner of land, who petitions the county authorities to lay out a new road, agreeing to give through her land "the right of way for said road as it may be laid out by the reviewers, without cost" to the county, cannot afterwards recover in an action against the county for damages for the running of the road through her property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205-214; Dec. Dig. §§ 79, 80.*]

2. EVIDENCE (§ 441*)—PAROL—CONTRACTS.

A written agreement as indicated in the preceding note cannot be varied by oral testimony that the plaintiff signed the agreement because she was told the road would be run on a route different from that actually laid out. Southern Bell Telephone, etc., Co. v. Harris, 117 Ga. 1001, 44 S. E. 885; Burch v. Augusta, etc., Railroad Co., 80 Ga. 298, 4 S. E. 850; Lee v. Savannah, etc., Railroad Co., 115 Ga. 64, 41 S. E. 246.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

3. OVERRULING OF DEMURRER.

There was no error in overruling the demurrer.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by Mrs. S. E. Wilson against Murray County. Judgment for plaintiff, and defendant brings error. Reversed.

C. N. King and W. W. Sampler, both of Spring Place, for plaintiff in error.

HILL, J. Judgment reversed. All the Justices concur.

ARMISTEAD et al. v. WEAVER.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE—CHATTEL MORTGAGES.

Where an affidavit of illegality was interposed to the foreclosure of a mortgage on personalty, grounds thereof which set up parol agreements between the parties, made at or before the giving of the mortgage, and conflicting with its terms, were properly stricken on demurrer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441; Contracts, Cent. Dig. § 1616.]

2. CHATTEL MORTGAGES (§§ 233, 235*)—FORECLOSURE—SALE—AFFIDAVIT OF ILLEGALITY—SUFFICIENCY.

Where a mortgage on personal property is foreclosed in the statutory manner, and the defendant interposes an affidavit of illegality, but fails to replevy the property, it may be sold by special order of the court as in case of perishable property or property which is expensive to keep or liable to deteriorate from keeping.

(a) The allegations of the affidavit of illegality as to whether no order for the sale was granted at all, or whether one was granted which was averred to be illegal, and as to any illegality in the manner of conducting the sale, were vague, general, and insufficient to make any issue requiring submission to the jury.

(b) If by means of an amended affidavit of illegality the sale by the sheriff, which had taken place pendente lite, could be attacked and an accounting be had for the value of the property thus sold, the allegations of the affidavit were insufficient, and were properly stricken on demurrer.

(c) The case differs from that of Haunson v. Nelms, 109 Ga. 802, 35 S. E. 227, which arose on an equitable petition to set aside a sheriff's sale on account of the conduct of the sheriff.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 569, 572, 574, 575; Dec. Dig. §§ 283, 285.*]

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Action by G. A. Weaver, Jr., against J. B. Armistead and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. C. Armistead, of Zebulon, for plaintiffs in error. E. F. Dupree, of Zebulon, for defendant in error.

LUMPKIN, J. G. A. Weaver, Jr., foreclosed a chattel mortgage by making the statutory affidavit. The execution issued thereon was levied on the mortgaged property, consisting of two horses. The defendants filed an affidavit of illegality, which, as amended, made substantially the following points: (1) At the time of making the purchase of the two horses by the defendants from the plaintiff, it was agreed among the parties that, if the defendant should desire to sell either of the horses, they should have the right to do so, provided the purchase price of the horse thus sold should be paid to the mortgagee, leaving the other horse to stand for the balance due on the debt. Under and by virtue

of this agreement, the mortgagors sold one of the horses and paid the purchase price to the mortgagee, "and by the agreement said bay horse was then relieved from the lien of the mortgage." (2) At the time of the purchase of the horses it was further agreed among the parties that, at the maturity of the note given for the purchase money, if the mortgagors should have then paid to the mortgagee one-half of the amount due for the purchase price, the mortgagee would extend the date for the maturity of the note for the space of 12 months. At the maturity of the note the mortgagors had paid one-half of the amount due, and they demanded an extension of the note for 12 months in accordance with the agreement; but the mortgagee refused to make such extension. (3) After the filing of the illegality, the sheriff sold one of the horses described in the mortgage for the sum of \$51 "and perhaps a few cents"; the sale being claimed to be made under "what is known as a short-order sale." The illegality first averred that the sheriff had no order for the sale, but immediately proceeded to allege that the order was illegal and void and gave the sheriff no right to sell the horse, though it did not set out the order or show any reason why it was void. It was also alleged that the horse was not advertised "as required by law," but it was not alleged that no advertisement was made or what advertisement there was. It was then alleged that the illegality in the order and the advertisement deterred bidders who otherwise would have attended the sale, and that the horse was sold for \$51, and was bought by the mortgagee, although it was worth \$175. It was further alleged that the sale was conducted in an unfair manner, because it was advertised to take place within the usual hours of sale, and that as a matter of fact, as soon as the hands of the city clock reached the hour of 10 o'clock, the sheriff put up and sold the horse, in the absence of the mortgagors, "when there were no purchasers present." The mortgagors prayed that the horse be accounted for by the mortgagee at a fair valuation, "which, when done, affiants will pay any remainder that may appear to be due on said debt." On demurrer the affidavit of illegality and the amendment thereto were stricken, and the defendants excepted.

[1] 1. Both of the first two grounds of the

illegality are fatally defective, for the reason that they seek to set up a parol contract made before or at the time of giving the mortgage, and by which it was sought to change its terms. There may have been other reasons which would render them demurrable, but this will suffice. It is not the purchaser from the mortgagors who is asserting title; but the mortgagors who are asserting title for him. The agreement set up was not one made after the mortgage was executed, as in *Tucker v. Mann*, 124 Ga. 1003, 53 S. E. 504, and *Crenshaw v. Wilkes*, 134 Ga. 684, 687, 68 S. E. 498, but before or contemporaneous therewith. The amount paid to the mortgagee is not stated, so as to make the plea one of partial payment.

[2] 2. Taking the pleading most strongly against the pleader, there was no positive and unqualified averment that no order was granted authorizing the sale by the sheriff. The affidavit of illegality did use the expression that the sheriff had no order to sell, but immediately thereafter it attacked the order which was granted, and which it referred to as "the pretended order," as being illegal. It showed no reason, however, why it was illegal. Where a defendant fails to replevy personal property levied on under a mortgage *fi. fa.*, it may be sold by special order of the court as in cases of perishable property, or property which is expensive to keep or liable to deteriorate from keeping. Civil Code, § 3301. The allegations in this ground are vague and consist almost entirely of conclusions rather than of fact. If it be taken for granted that by an amended affidavit of illegality the sale could be attacked and an accounting be had for the value of the horse purchased by the mortgagee, the one filed in this case was too vague and indefinite in its character to raise an issue for submission to the jury.

The case of *Haunson v. Nelms*, 109 Ga. 802, 35 S. E. 227, which was cited by counsel for the plaintiff in error, arose on an equitable petition to set aside a sheriff's sale, where the sheriff had first accepted an affidavit of illegality and agreed not to sell the property, but subsequently changed his mind and sold it in a manner which evidently worked an injustice and a hardship to the defendant. It differs in its facts from the present case.

Judgment affirmed. All the Justices concur.

McAULAY v. McAULAY.

(Supreme Court of South Carolina. Sept., 1913.
On Rehearing, Oct. 29, 1913.)

1. DOWER (§ 20*)—CONVEYANCE IN FRAUD OF WIFE.

A decree which, while giving the widow dower in the real estate of her deceased husband, which he on the day of but prior to the marriage deeded to his daughter, refused to set aside, as in fraud of the wife, his will to his daughter of all his other property, made a few days after the marriage, there having been no valid antenuptial contract, affirmed per an equally divided court.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 15; Dec. Dig. § 20.*]

Watts and Hydrick, JJ., dissenting.

On Rehearing.

2. COURTS (§ 102*)—SUPREME COURT—VACANCY ON BENCH—POWER TO DECIDE CASE.

Under Const. 1895, art. 5, § 2, providing that the Supreme Court shall consist of five judges, any three of whom shall constitute a quorum for transaction of business, section 6, providing that no judge shall preside at a trial if he have any of certain enumerated disqualifications, and that in case all or any of the judges of the Supreme Court be thus disqualified, or be otherwise prevented from presiding in a cause, the fact shall be certified to the Governor, and he shall immediately commission, specially, the requisite number, and section 12, providing that in all cases decided by the Supreme Court the concurrence of three of the judges shall be necessary for a reversal, the Supreme Court is not without power to decide a case when there is a vacancy, though its decision can only be an affirmance; there being but two judges for reversal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 351, 352; Dec. Dig. § 102.*]

Appeal from Common Pleas Circuit Court of Abbeville County; R. W. Memminger, Judge.

"To be officially reported."

Action by Ressa G. McAulay against Minna M. McAulay, individually, and as executrix of Roderick Hugh McAulay, deceased. From a decree merely setting aside a deed as respects right to dower, part only of the relief asked, plaintiff appeals. Affirmed.

Wm. N. Graydon, of Abbeville, for appellant. Greene & Hill, of Abbeville, for respondent.

FRASER, J. [1] This is an action to set aside a deed and will for fraud, and to establish a contract. The following statement appears in the circuit decree: "From the pleadings and testimony herein it appears that Mr. McAulay, an aged widower of Due West, S. C., with one daughter and considerable property which had come to him from her mother, his deceased wife, became enamoured of a Virginia widow, relict of a deceased minister of the gospel. The Virginia widow had also some property of her own and a small pension from the church. They entered into a long correspondence, much of which is evidence. A visit by Mr. McAulay and his

daughter to the widow's home in Virginia, object matrimony, was the result. The widow declined marriage unless provided for out of the McAulay property. She testifies to an oral agreement that that would be done with Mr. McAulay, which the daughter agreed to. They were married, and returned to Due West. In less than two months Mr. McAulay died. On the very day of the marriage he had executed and delivered to the daughter, and she had forwarded for record at Abbeville, a conveyance of his real estate to her, and the same was duly recorded. The deed conveyed the property to the daughter for an expressed consideration of \$10 and for love and affection, and the heirs of her body forever, but reserving the right to the grantor a life estate. Within a few days after their return to Due West, Mr. McAulay, without the knowledge of his wife, made a will devising all of his other property to the daughter and her bodily heirs. 'And should she die without heirs of her body and my wife still survives, I desire it to go to her, Ressa G. McAulay, if she still remains single, and at her death or marriage, I desire it to revert to my kindred brothers and sisters, unless my daughter should will it otherwise.' The daughter was made executrix of this will, and the same has been duly probated, and she has qualified thereon. Practically, therefore, the Virginia widow got nothing by the deed or will."

The deceased wrote a letter to the plaintiff before marriage, stating that he had property, but he had hoped to conceal that fact until after marriage in order to reserve it as a pleasant surprise. He told her, however, that he did not want her to consider the property an inducement, as he wanted the marriage to be purely a "love scrape." The mention of a sordid consideration even by the very young and romantic suitor could not be considered by a court as entirely disingenuous—neither of these parties was young or romantic. As soon as the marriage was arranged, the deceased and the defendant left the house, and the conveyance of the real estate was made immediately before the ceremony.

The plan to defeat the rights of the wife which are about to attach must be perfected at once, and all that could be done to accomplish that purpose was done. The wife has no right in the personal property, and that can wait. They do wait, but not long. It is very clear that, having held out the property as an inducement, the husband at once set out to defeat the main consideration for the marriage, and the means used were the *deed* and the *will*. It needs no citation of authorities to show that two papers that are in fact parts of one transaction may be construed as one. The deed has been set aside as to dower. Its invalidity as to dower is conceded. The invalidity is too plain for argument. Why set aside the deed and not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
79 S.E.—50

the will? The answer is, the wife has a right to dower, inchoate, but still a right, and there is no right to distributive share. The answer would be complete if the right had accrued; but it had not. At the moment the deed was executed there was no more right to dower than to the distributive share. It is not the engagement to be married but the marriage that gives rise to the right of dower. An engaged man may make a deed, and the future wife has no claim of dower. But a deed made in contemplation of marriage, and to defeat the future right of dower, does not deprive the wife of dower, because it is a legal fraud. If this were a business contract, and the obligor had already started a scheme to deprive the obligee of all benefits under the contract, and afterwards had made other dispositions of his property, with the same purpose in view, the courts would not hesitate to set aside every step in the accomplishment of the fraudulent scheme. It may be said that the analogy does not hold because the wife is not a creditor. In this state she is a creditor, and her rights as a creditor are of the most sacred order.

Brooks v. McMeekin, 37 S. C. 303, 15 S. E. 1023: "Now, under the decision of our courts, marriage is decided to be a purchase for a valuable consideration of any rights conferred by the law upon the wife, although no expression of such results are mentioned when the contract of marriage is entered into by her. In *Rivers v. Thayer*, 7 Rich. Eq. 144, Chancellor Dargan announced the proposition in these words: 'Marriage is a valuable consideration. Some have considered it the highest known in law. None would say it was a lower consideration than money. There is nothing unreasonable in this. The great value of the consideration consists in this, that the wife surrenders her person and her self-dominion to the husband, and enters into an indissoluble engagement with him, foregoing all other prospects in life and if the consideration for which she stipulates fails she cannot be restored to the status in quo. She can have no remedy or relief.' In speaking of a wife's right to require the personal estate of her husband to be applied to the liens under the statutes of our state fixing the order of application of such personal estate by the deceased husband's personal representative so as to let in her claim of dower, in the case of *Willson v. McConnell*, 9 Rich. Eq. 513, the court uses this language: 'But this claim is met by a corresponding equity on the part of the widow, who is entitled to the position of a purchaser for valuable consideration against all but existing liens—liens existing before marriage.'

McCreery v. Davis, 44 S. C. 226, 22 S. E. 190, 28 L. R. A. 655, 51 Am. St. Rep. 794: "So in *Brooks v. McMeekin*, 37 S. C. 303, 15 S. E. 1019, this court held: 'We are therefore enabled to declare it to be the law, as

derived from our own decisions, that in this commonwealth marriage is a valuable consideration, paid by the wife for those rights and estates that, by our law, are accorded to the wife, *as a wife*.'"

It is true this authority refers to dower; but the law is not an aggregation of unrelated facts, but a science, and its rules ought to be followed to their legitimate and just consequences. It is true that a man can dispose of his personal property by will, and thereby defeat the third that would otherwise go to his wife. The question is, Can a man go to the altar with a well-defined and half-executed plan to deprive his bride of every consideration for which she marries him, and have the courts sustain the plan? Whether the consideration be money or love, both must go when the plan is revealed. Unless the rights of innocent purchasers for value are impaired, it ought not to be sustained. It is also true that a man may sell his property, and thereby defeat the claim of creditors; but, if the court finds that the sale was made for the purpose of hindering, delaying, or defeating creditors, the sale is void as to all who participated in that purpose, even though the purchaser paid full value.

Lowry v. Pinson, 2 Bailey, 324, 23 Am. Dec. 140: "A sale of lands, made for the purpose of defeating the recovery of damages for a breach of promise of marriage, is fraudulent and void, if the purchaser have notice of the fraudulent intent, although the agreement for the sale was made before suit brought for the breach of promise, and although the purchaser paid an adequate consideration, and went into immediate possession, and the whole of the purchase money was in fact applied to the payment of bona fide creditors of the vendor."

It is said in *State v. Chemical Co.*, 71 S. C. 569, 51 S. E. 464: "The plan may make the parts unlawful."

It is urged that there is no justice in taking any of this property from the defendant, because it was really hers, and was the savings from the income from her mother's property. There is no satisfactory proof of this. The evidence makes the income so small that it is difficult to see how the deceased saved anything at all from the combined income of husband and wife, and leads to the conclusion that there were other resources of which the defendant and her witness know nothing. A witness urged him to put the Due West property in his wife's name. "He replied that he didn't think a minister should put his property under his wife's petticoat." If it were his wife's, there was no impropriety. Even if the property in the name of the deceased had been bought with the income derived from her mother's estate, and her father did not inherit from his deceased wife the one-third now claimed by the plaintiff, yet, if, as the testimony shows (she did not

contradict it), the defendant represented to the plaintiff before the marriage that her father was worth \$10,000, she cannot now claim that the property is and was her own. 1 Bigelow on Fraud, p. 482. "Where a marriage has taken place on the faith of representations made by a third person, in regard to the circumstances of one of the parties to the marriage, such third person must make good his representation."

It may be, as suggested in argument, that it was modesty that kept the defendant from the stand. If so, we respect it; but, however great our respect for womanly modesty, it is not a substitute for evidence in the courts. The courts are bound by the evidence.

It is said the widow cannot claim both dower and a distributive share. The statute says "accept" and not "claim." The widow has not accepted either, and claims a distributive share.

The second exception must be sustained. The plaintiff's services must have been worth at least her lodging and food, and were not a provision under the contract. The exceptions that refer to the competency of evidence under section 438 of the Code are overruled as in contravention of the statute. Those that refer to the sufficiency of the contract are overruled. The contract was too vague and indefinite, even if it could have been proved.

This court can and does set aside the deed and will, because they were parts of one scheme to defeat the rights of the plaintiff, and the case is remanded for partition.

GARY, C. J., concurs in the result.

WATTS, J. (dissenting). I cannot concur in the opinion of Mr. Justice FRASER herein. Without the testimony of the appellant, not even a semblance of contract is established in reference to a marriage contract between Ressa G. McAulay and Roderick Hugh McAulay, and her testimony is inadmissible and in contravention of the statute. Section 438 of the Code. To admit this evidence would annul and abrogate this important section. The letters introduced do not establish any binding contract, and are vague and uncertain. They are just such letters as may be expected some persons do write when they expect to persuade some woman to marry the writer. An examination of McAulay's letter to the plaintiff will show that there was an agreement to marry between the parties already before he made any statement of his intentions to provide for her, and these statements of his intention to so provide were not made to secure a contract of marriage, for he says: "I wanted to take you by surprise in all of this; but the pressure was so great on you that I could not. * * * Let me know at once, so that I can make other arrangements, if you decide not to stand to our promise and betrothal to each other."

A reading of the correspondence convinces me that McAulay already had her agreement to marry him, and was only stating what his intentions were after the marriage contract was performed, and statements made by him as to what he intended to do for his wife were made by him, not in order to induce her to contract marriage with him, for she had already made the agreement, but were a mere expression of intention on his part to do what he would have done in the natural course of events. It is natural to suppose that the husband would do his duty and make reasonable provision for the support of the wife of his bosom after his decease; but, if the woman has any doubt about it, she should protect herself by a valid legal contract made before marriage, and, if she gives herself in marriage without this, then she takes the consequences. A woman who marries without a marriage contract takes the risk of inheriting whatever her husband gives her. If he dies intestate, she gets her share, whatever that may be. If he leaves a will, she is bound by that, unless she elects to claim her dower rights, and refuses to accept under the will. To hold otherwise would be to prevent a man who marries to dispose of his property as he sees fit. Whatever intention a person has at one time as to the disposition of his property, he has the right to change that intention before he carries it out, and dispose of it differently, as was said in *McKeegan v. O'Neill*, 22 S. C. 473. *McKeegan*, in writing to his nephew in regard to certain negotiations for the sale of certain land, states price, and says: "But you will get all I am worth at my death." The court says, in regard to the intention of *McKeegan*: "No doubt he intended to do this, and when he wrote this letter this intention was present in his mind, not as a part of the proposed sale of Cloney, but as a long-existing intention, altogether disconnected from Cloney, and this remark was thrown in, not as an inducement for Francis to buy, but as a reason why he was willing to take from him £100 less than from any one else." Later the same case says: "The remark of John *McKeegan* that the plaintiff would get all of his property at his death was not put upon the event of the purchase of Cloney, or as dependent in any way upon the negotiations in reference to Cloney, but as a mere statement of what he, John *McKeegan*, had intended to do long since voluntarily, and without regard to any consideration moving him thereto."

But take plaintiff's testimony (which I think inadmissible under section 438 of Code 1912). She cannot rely on letter of July 31, 1911, as she says, when McAulay came to her house in 1911: "All matters relating to our marriage had been broken off, or I had refused his offer of marriage." The defendant introduced in evidence letters written by plaintiff to defendant, dated after July 29, 1911, and plaintiff announced in said letters

that she did not intend to marry McAulay, and asked that the matter be dropped, and the matter terminated, and by her testimony shows that in September, 1911, when another proposal was made, it was upon another and entirely different ground, that each was to own his or her separate estate, and neither was to have any rights in the estate of the other. This proposition was not accepted. The plaintiff's claim must be based, not on the letters, but what took place at her home on the night previous to the marriage and the morning of the marriage, as the previous proposition made in the letters had been refused, and could not be made the basis of the contract of marriage. "An offer that had been refused is no longer the basis of a contract between the original parties. No subsequent acceptance of it, unless the offer is renewed, will create any obligation." 7 Enc. of Law, 128; Hyde v. Wrench, 3 Beav. 334, 6 E. R. C. 139; Smith v. Taylor, 82 Cal. 533, 23 Pac. 220.

All of the testimony of the plaintiff as to what took place between her and McAulay is incompetent to establish the contract of marriage between them under section 438 of Code, and in addition to this such a contract is not binding under the statute of frauds, unless it is in writing and signed by the party to be charged therewith, and there is no such contract here.

In the case of Davidson v. Graves, Riley, Eq. 230, it is held: "In the second place, a parol promise in consideration of marriage is void; bonds and deeds executed in conformity thereto after marriage are merely gratuitous, and must, as voluntary securities and conveyances, be postponed to creditors.

* * * But a third objection is to my mind decisive of the whole case; all proof of a verbal promise before marriage is inadmissible, and cannot be heard. When the statute is pleaded or interposed, as an objection to hearing the proof, as in this case, it must first be decided on, and, if the case made or proposed to be proved is within the statute, the evidence is not heard." The rule is the same whether the agreement be for the marriage of the contracting parties or that one of them shall marry some other person. "The original contract relied upon was upon condition that the plaintiff in error would marry a certain man. That contract is claimed to have been changed by various conversations and dealings between the parties; but, whatever the terms of the final agreement, they were the outgrowth of the original contract that claimant should marry the man Diamond. However varied in terms, the promises all grew out of the agreement. No written evidence was offered by the claimant in proof of that contract. * * * The alleged promise, being oral, and given originally in consideration of marriage, was within the statute of frauds, and no action could be maintained upon it."

Austin v. Kuehn, 211 Ill. 115, 71 N. E. 842.

The appellant contends that by marrying McAulay she fully performed her part of the agreement, and the contract of marriage consummated, and the statute of frauds had no application. This contention cannot be sustained. Pomeroy on Contracts, under the head of "Specific Performance" (2d Ed., 111) says: "When a verbal contract is made in relation to or upon the consideration of marriage, the marriage alone is not a part performance upon which to decree specific execution. This rule, which is firmly established, is based upon the express language of the statute. A promise made in anticipation of marriage, followed by a marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision, which makes the writing essential. In fact, until a marriage takes place, there is no binding agreement independent of a statute. So that the marriage itself is a necessary part of every agreement made upon a consideration of it, which the Legislature has said must be in writing." Beach, in his Modern Equity Jurisprudence (section 622), says: "It is well settled that marriage is not an act of part performance which will take a parol contract out of the statute, for the statute expressly provides that a contract in consideration of marriage shall not be binding unless it is in writing."

I think the decree of his honor should be affirmed, and construe it to mean that the appellant has no interest in the property except by way of dower.

Judgment affirmed.

HYDRICK, J. I concur in affirming the judgment below, on the ground that the contract upon which the action was brought was within the statute of frauds. I do not think that plaintiff's testimony narrating the conversation which took place between her and the defendant in the presence of Mr. McAulay is obnoxious to section 438 of the Code of Procedure, as will appear by examination of the cases cited in the footnote to that section.

On Rehearing.

GARY, C. J. [2] When this case was heard by the Supreme Court, it was composed of five members—Mr. Justice WOODS being one of them—but the opinion was not filed until he had resigned for the purpose of accepting the office of United States Circuit Judge. The decision was rendered by an evenly divided court. The appellant's attorney filed a petition for a rehearing on several grounds, the first of which is that the court was without power to render the decision, for the reason that it was then composed only of four members. The following sections in the Constitution of 1895, together with the cor-

responding sections in the Constitution of 1868, are applicable to this question:

Constitution of 1895.

Section 2, art. 5: "The Supreme Court shall consist of a Chief Justice and four Associate Justices, any three of whom shall constitute a quorum for the transaction of business. * * *

Section 6, art. 5: "No judge shall preside at the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he may have been counsel or have presided in any inferior court. In case all or any of the justices of the Supreme Court shall be thus disqualified, or be otherwise prevented from presiding in any cause or causes, the court or the justices thereof shall certify the same to the Governor of the State, and he shall immediately commission, specially, the requisite number of men learned in the law for the trial and determination thereof."

Section 12, art. 5: "In all cases decided by the Supreme Court the concurrence of three of the justices shall be necessary for a reversal of the judgment below, subject to the provisions hereinafter prescribed."

Constitution of 1868.

Section 2, art. 4: "The Supreme Court shall consist of a Chief Justice and two Associate Justices, any two of whom shall constitute a quorum."

Section 6, art. 4: "No judge shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties may be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he may have been counsel, or have presided in any inferior court, except by consent of all the parties. In case all or any of the judges of the Supreme Court shall be thus disqualified from presiding in any cause or causes, the court or the judges thereof shall certify the same to the Governor of the state, and he shall immediately commission, specially, the requisite number of men learned in the law for the trial and determination thereof."

Section 12, art. 4: "In all cases decided by the Supreme Court, a concurrence of two of the judges shall be necessary to a decision."

In construing the foregoing sections from the Constitution of 1868, in the case of *Williams v. Benet*, 35 S. C. 150, 14 S. E. 311, 14 L. R. A. 825, the court said: "It is contended, however, that there cannot be a constitutional quorum without there is in existence the full number of members provided for by the Constitution. If this proposition be true as applied to the Supreme Court, we see no reason why it should not be true of every other body of which a number less than the whole is legally declared to be a quorum, and we think we may safely venture to say that such a proposition as to any other body has never been accepted and never could be accepted as correct, without paralyzing, to some extent at least, the arm of at least two of the great departments of the government. Such a proposition rests upon a fundamental misconception of the term 'quorum,' and the purposes for which it is used. The very purpose in providing for the transaction of business of any given body or tribunal by a quorum is to prevent the stoppage of the public business when a portion of the whole membership may from any cause fail to attend at the time appointed,

and whether such failure results from death or some temporary cause cannot affect the question. The mischief intended to be provided against is the failure of the whole number to attend, and we do not see how it can possibly make any difference whether such failure results from one cause or another."

Again, the court said: "The framers of the Constitution must be regarded as having contemplated the contingency that at some time all of the members of the Supreme Court would not be in attendance, and therefore, to provide for such a contingency, after declaring who should constitute the Supreme Court, they immediately afterwards, and in the same sentence, qualified this general declaration by providing that any two of the constituent members of the court should constitute a quorum, so that the court might proceed with its business just as if the court were full. Any other view would, it seems to us, completely nullify the provision for a quorum. There is nothing whatever in the Constitution indicating an intention that the provision for a quorum should only apply in case of a temporary absence of one of the members of the court, and, on the contrary, the language used is equally applicable where the failure of such member to attend is occasioned by death as where it results from some temporary cause. Such, as we have seen, is the accepted view in relation to the highest judicial tribunal in this country, where the language constituting it is practically identical with that which we are called upon to construe, and such, so far as we are informed, is the universally accepted view in relation to all bodies where provision is made for a quorum."

We desire to call special attention to the further language of the court in that case, that, "from the very words of this section (section 6), it is very manifest that its purpose was *not to declare or provide anything in regard to the necessary elements, constituting the Supreme Court.*" (Italics added.) It will thus be seen that section 6, art. 5, of the present Constitution was not intended to provide anything, with regard to the elements necessary to constitute the Supreme Court, for that had already been done in section 2; but its purpose was to prevent judges who are disqualified by reason of interest in the cause or relationship to parties from presiding, and to provide the manner of filling their places, and the places of those who, for any other reason, may not be able to sit.

The case just mentioned is conclusive of the question under consideration, unless section 29, art. 1, Constitution of 1895, requires us to adopt a different construction. That section is as follows: "The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where made directory or permissive by its own terms." It is

contended that, as the provisions of the Constitution must be deemed to be mandatory, the Supreme Court is without power to hear a cause or render a decision, when there is a vacancy caused by death, resignation, or temporary disqualification; but that, before the court can hear a cause or render a decision, it must certify the cause of disqualification to the Governor, and must postpone action until he has commissioned, specially, the requisite number of men for the trial and determination of such causes.

Section 29, art. 1, Constitution of 1895, however, must also be construed to be mandatory as to the provision in section 2, art. 5, of the Constitution, that any three justices of the Supreme Court shall constitute a quorum for the transaction of business. It will thus be seen that section 29, art. 1, of the Constitution, is not conclusive of the question under consideration, and that we are therefore at liberty to resort to other canons of construction.

At the time the Constitution of 1895 was adopted section 6, art. 4, Constitution of 1868 (which is practically identical with section 6, art. 5, Constitution of 1895), had already been construed by the Supreme Court in *Williams v. Benet*, 35 S. C. 150, 14 S. E. 311, 14 L. R. A. 825, and effect can be given to section 6, art. 5, Constitution of 1895, by adopting the construction therein placed upon section 6, art. 4, Constitution of 1868. Whereas, if we adopt the construction for which the appellant's attorney contends, it would render null and void the provision that any three justices of the Supreme Court shall constitute a quorum for the transaction of the business.

There is another reason why the construction for which the appellant's attorney contends should not prevail, to wit, it would render section 6, art. 5, of the Constitution, inconsistent with the provision in section 12, art. 5, of the Constitution, that: "In all cases decided by the Supreme Court the concurrence of three of the justices shall be necessary for a reversal of the judgment below. * * *" It will be observed that the concurrence of three justices is only necessary for a reversal of the judgment below.

The cases of *Florence v. Berry*, 62 S. C. 469, 40 S. E. 871, and *Hutchinson v. Turner*, 88 S. C. 318, 70 S. E. 410, 806, show that it does not require three justices to affirm a judgment, yet, if the views of the appellant's attorney should be accepted, it would be necessary for three justices to concur in affirming, as well as in reversing, the judgment below. It will thus be seen that, if section 6, art. 5, of the Constitution, should be given the force and effect for which the appellant's attorney contends, it would be inconsistent, not only with section 2, art. 5, of the Constitution, but also with section 12, art. 5, of the Constitution. Such a construction would be violative of the rule announced in *Delk v. Zorn*, 48 S. C. 149, 28 S. E. 466, that, "when two

sections * * * are inconsistent, effect will ordinarily be given to that section which is in harmony with other provisions, rather than to that which is inconsistent with more than one provision" of the Constitution.

The fact that section 6 of article 4, Constitution of 1868, was incorporated in the Constitution of 1895 as section 6, art. 5, after it had been construed in the manner hereinbefore stated, shows it was not intended that it should have the effect of rendering null and void section 2, which provides that three justices shall constitute a quorum for the transaction of business. The rule in such cases is thus stated in 8 Cyc. 739: "It is an established rule of construction that, where a constitutional provision has received a judicial construction, and it is afterwards incorporated in a new or revised constitution, it will be presumed to have been retained with a knowledge of that construction, and courts will be bound to adhere to it."

The next ground for a rehearing is that a decision cannot be rendered by an evenly divided court. It is only necessary to refer to the following language from the case of *Hutchinson v. Turner*, 88 S. C. 318, 70 S. E. 410, 806, to show that this ground is without merit: "When the Constitution was adopted, it was therein provided that the Supreme Court should consist of an even number of justices. And, as this was unusual, the framers deemed it advisable, in order to prevent confusion, to state the effect of a decision, when the justices were evenly divided in opinion, viz.: That the judgment below should be affirmed. This was merely the adoption of the rule which would have prevailed, even without that provision, especially when there was the further provision that, in all cases decided by the Supreme Court, the concurrence of three justices was necessary for a reversal of the judgment below. If the Constitution had failed to provide that a less number than the five justices composing the court should constitute a quorum for the transaction of business, then the appellant would have ground for contending that a decision could not be rendered when the justices are equally divided in opinion, as it could not be foretold whether the fifth justice would concur with the two justices in favor of a reversal, and thereby change the result. As any three justices are sufficient to constitute a quorum for the transaction of the business, a decision may be rendered when the court is composed of three members, two of whom favor affirming the judgment below, while the third is in favor of reversing it. The fact that a fourth justice participates does not change this result; the concurrence of three being necessary for a reversal."

As to the other grounds for rehearing, the court is satisfied that no material question of law, or of fact, has either been overlooked or disregarded. It is therefore or-

dered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

HYDRICK and WATTS, JJ., concur.

FRASER, J. I concur in the result. I think the Constitution requires a temporary appointment to fill the place of a justice who is disqualified in a particular case; but there is no provision for filling the place of a justice whose place is vacant, except section 11 of article 5, and that provides for filling his place for the unexpired term. That provision is as follows: "All vacancies in the Supreme Court or inferior tribunals shall be filled by elections as herein prescribed: Provided, that if the unexpired term does not exceed one year such vacancy may be filled by executive appointment." This vacancy exceeds one year. It is true that section 6 of article 5, provides: "In case all or any of the justices of the Supreme Court shall be *thus disqualified*, or be otherwise prevented from presiding in any cause or causes, the court or the justices thereof shall certify the same to the Governor of the state, and he shall immediately commission, specially, the requisite number of men learned in the law for the trial and determination thereof." The words "otherwise prevented from presiding" are general enough to cover all cases; but the specific words that immediately precede this general expression are disqualifications. The rule is well stated in Sutherland on Statutory Construction, § 268, as follows: "When there are general words following particular and specific words, the former must be confined to things of the same kind." It seems to me, therefore, that the general words refer to disqualifications.

This is not in conflict with the point decided in *Williams v. Benet*, 35 S. C. 153, 14 S. E. 311, 14 L. R. A. 825. That case, like this, was a case of a vacancy and it is authority on that point. It seems to me that the point in this case is the filling of a vacancy. I think that there is no authority to fill the place of Mr. Justice Woods (the unexpired term being more than one year), and, unless the number of justices should become less than a quorum, the remaining justices can continue to transact the business of the court. This construction gives effect to every word of the Constitution, and, I think, is in entire accord with well-established rules of construction. But, as I understand the question before this court, the exact question is, "Is it necessary to have the Governor fill the vacancy in order to authorize this court to hear and determine a case?" On this question, the court is unanimous in saying, "It is not necessary."

IN RE BROWN'S ESTATE.

BROWN et al. v. FRIERSON.

(Supreme Court of South Carolina. Oct. 21, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT—COLLATERAL ATTACK.

Where the probate court has jurisdiction to appoint an administrator, the appointment cannot be collaterally attacked.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 177-182, 1411; Dec. Dig. § 29.*]

2. EXECUTORS AND ADMINISTRATORS (§ 17*)—APPOINTMENT—PERSONS ENTITLED—"LEGAL REPRESENTATIVE."

Under Civ. Code 1912, § 3805, providing that persons are entitled to letters of administration in the following order, that is, first decedent's husband and wife, second, if there be no husband or wife or if they do not apply, then to the children or "legal representative," the guardian of minor children was properly appointed administrator as against decedent's brother, where the widow withdrew her application and asked that he be appointed; "legal representative" being defined as one who lawfully represents another in any manner whatever; any person who by operation of law stands in the place of and represents the interest of another.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4070-4079; vol. 8, p. 7704.]

Appeal from Common Pleas Circuit Court of Lee County; Ernest Gary, Judge.

In the matter of Brown's Estate. From an order appointing S. W. Frierson as administrator, J. Ellerbe Brown and another appeal. Affirmed.

The orders of the probate and circuit courts are as follows:

Order.

Whereas, an application in due form of law as appears by proceedings, recorded in the office of the Probate Court for the County of Lee in said State has been made to me by Hattie P. Brown to appoint S. W. Frierson guardian of the person and estate of Anna Linna Brown, L. V. Brown and Roddy M. Brown, minors, now residing in the County of Lee in said State, are entitled to a distributive share of the estate of Leonard V. Brown, late of the County of Lee in said State, and whereas, the said S. W. Frierson has filed his bond in this office as such guardian as required by law:

Now, therefore, for the better securing of said estate for the benefit of said minors and for their more careful maintenance and education I do hereby commit the tuition, guardianship and education of the said Anna Linna Brown, L. V. Brown and Roddy M. Brown to you the said S. W. Frierson charging you to maintain them in meat, drink, washing, lodging, clothing and such good education as may be fitting according to circumstances of interest of the said minors

during their minority, take charge of their estate, do such things as the guardian should and render a true and faithful account of the said estate and of your management thereof when thereunto duly required.

Given under my hand and seal this 10th day of December in the year of our Lord one thousand nine hundred and twelve and in the one hundred and thirty-seventh year of the Independence of the United States of America.

(Signed) John M. Smith (L. S.)
Judge of Probate for Lee County.

Order.

This matter comes on to be heard by me on appeal from the Court of Probate. I heard said appeal in open Court at Bishopville, but reserved my decision until this date. After hearing argument, pro and con, and after carefully considering the ground of said appeal, I am convinced that the order of the Judge of Probate in appointing S. W. Frierson, guardian, who is guardian of the infant children of the deceased, as Administrator of the estate of L. V. Brown, should be sustained.

I find that the Judge of Probate followed the order laid down in the statute and that he committed no error in appointing the said S. W. Frierson, who I find was the guardian and legal representative of the infant children of the said L. V. Brown as Administrator of the said estate.

The appeal is therefore overruled and the action of the Probate Court affirmed. Let a copy of this Order be certified to the Court of Probate for Lee County.

Dated Sumter, S. C., March 27th, 1913.
(Signed) Ernest Gary,
Presiding Judge in Third Circuit.

A. B. Stuckey and Marion W. Seabrook, both of Sumter, and D. W. Robinson, of Columbia, for appellants. L. D. Jennings and R. D. Epps, both of Sumter, and T. G. McLeod, of Bishopville, for respondent.

WATTS, J. This is an appeal from an order of John M. Smith, probate judge for Lee county, appointing S. W. Frierson as administrator of the estate of L. V. Brown, deceased. The appeal from this order was heard by his honor, Ernest Gary, at Bishopville, and his honor overruled the appeal and affirmed order of probate court. The record discloses that L. V. Brown was killed by a train of cars at Lynchburg, November 15, 1912; that he died intestate, leaving a widow, Hattie P. Brown, and three small children, aged six, four, and two respectively; that he left a small personal estate of the value approximately of \$500; that it will be necessary for administrator to bring suit against railroad for alleged wrongful killing. The record shows that Mrs. Brown, the widow, applied for letters of administration on November 20, 1912, and citation

duly issued returnable on December 5, 1912; that on November 25th she withdrew this petition, or attempted to do so by filing another petition, asking that S. W. Frierson be appointed administrator, and at the same time Frierson applied for letters of administration. Upon these two petitions a citation was issued returnable on December 10, 1912, at 11 o'clock a. m. Upon this day a petition was presented by the brothers, one J. E. Brown was the oldest half-brother of the deceased, and George O. Brown, the only brother of the deceased of the whole blood, asking for their appointment as administrators of the deceased's estate, and protesting against the appointment of Frierson. The widow and her children are the sole heirs and distributees of the estate of the deceased and sole beneficiaries, under the statute against the railroad, known as the "Lord Campbell's Act," and amendment thereto. Upon proper petition the probate court on December 10, 1912, duly appointed S. W. Frierson the general guardian of the minor children of the deceased, L. V. Brown, and his widow, and this petition was made by Hattie P. Brown, with whom the children lived; she being their mother. When the hearing was had for the appointment of the administrator of the estate, the probate court appointed Frierson administrator (the widow asked this) in preference to the brother and half-brother. The order of the probate court and circuit court should be set out in the report of the case. From order of circuit court, J. Ellerbe Brown and George O. Brown appeal and seek to reverse the same.

The appellants by their exceptions present the question as to who is the proper person entitled to administer under the statute, and contend further that Frierson's appointment as guardian of the minors was illegal, null, and void, and done for the purpose of circumventing the provisions of the statute law of the state, and done secretly and surreptitiously, after the time set forth for the hearing of the cause, without their knowledge or consent. The record shows that the children were minors, living with their mother, under the age of 14 years, and upon a proper petition presented to proper authority Frierson was adjudged by a court of competent jurisdiction a fit and proper person to be appointed guardian of the minor children, that he was duly appointed and qualified as guardian of the children, and thereby became their legal representative; that the proceedings appointing him as guardian have not been appealed from, or in any manner attacked by any direct proceedings against him to set them aside.

[1] There is no question but the probate court for Lee county had jurisdiction to make the appointment, and, having done so, the appointment cannot be attacked collaterally. Section 3605 of the Code of Laws, 1912, prescribes the order in which persons are entitled to letters of administration.

First comes the husband and wife of the deceased, with proviso as to power to revoke, etc. The second is as follows: "If there be no husband or wife of the deceased, or if they do not apply, then to the child or children, or their legal representatives."

[2] We think that this expression is broad enough to sustain the order appealed from. The widow applied for letters and withdrew her application and asked that Frierson be appointed; the children were minors, and Frierson was their guardian, duly appointed, qualified, and commissioned as such, and thereby became their legal representative, and entitled to administer in preference to class 3 or class 4, in which last class the full brother would have been entitled to the letters of administration. In 25 Cyc. 175, the term "legal representative" is defined: "One who lawfully represents another in any matter whatever; one who legally and lawfully represents another in any matter or thing of whatever nature or character it may be; any person, natural or artificial, who, by operation of law, stands in the place of, and represents the interests of another; any person or corporation having a beneficial interest in property, real or personal; one who takes under the statute of distribution; sometimes the term is used as synonymous with 'representative,' 'lawful representative,' or 'personal representative.'" This view is sustained by decisions of other states. *McLain v. Bedgood*, 89 Ga. 793, 15 S. E. 670; *Johnson v. Ames*, 11 Pick. (Mass.) 173; in *re Weeks' Estate*, 40 Ind. App. 139, 81 N. E. 107; *Mattox v. Embry*, 131 Ga. 283, 62 S. E. 202.

The exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

EBERLE v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Oct. 24, 1913.)

1. CARRIERS (§ 253*)—MILEAGE TICKETS—SUBSEQUENT TARIFFS—EFFECT ON TICKETS ISSUED.

Where defendant carrier, under schedules filed with the Interstate Commerce Commission, sold a mileage ticket to plaintiff, providing that tickets issued in exchange for mileage coupons would be honored for continuous passage to destination when presented in connection with the mileage ticket without limitation as to time, it could not by filing new schedules, providing that mileage tickets so exchanged would be honored only for continuous passage to destination commencing on the date stamped on the back thereof, which date should be that on which the tickets were issued in exchange for coupons, change plaintiff's contract so as to limit the time of use of tickets issued on his book, and the fact that such tickets were good for transportation in accordance with plaintiff's contract did not constitute a discrimination in violation of the interstate commerce act

(Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 8154]).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1011, 1012, 1013, 1016-1018; Dec. Dig. § 253.*]

2. APPEAL AND ERROR (§ 1062*)—INSTRUCTION—PREJUDICE.

Where plaintiff, in an action against a carrier for refusal to accept a mileage ticket for transportation, was entitled to a peremptory instruction that the ticket tendered was good, defendant was not prejudiced by an instruction that its agents could waive a stipulation in the contract with reference to limitation of tickets issued on mileage and leaving it to the jury to say whether they had done so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

3. DAMAGES (§ 91*)—PUNITIVE DAMAGES—TORTS.

Though a tort-feasor is not conscious of an invasion of the rights of another, yet if a tort is committed in such a manner or under such circumstances that the jury may find that a person of ordinary reason and prudence would have been conscious of it as such, it warrants the infliction of punitive damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

Appeal from Common Pleas Circuit Court of Hampton County.

"To be officially reported."

Action by A. S. Eberle against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Moore and J. W. Manuel, both of Hampton, for appellant. J. W. Vincent and George Warren, both of Hampton, for respondent.

HYDRICK, J. This appeal is from a judgment against defendant for damages for the unlawful and wanton invasion of the rights of the plaintiff, as a passenger, by one of defendant's ticket collectors. The action grew out of the following facts: On July 12, 1910, plaintiff purchased one of defendant's mileage tickets, the coupons of which were exchangeable for passage tickets, which, by the terms of the contract, were to be honored "when presented in connection with the mileage ticket." This mileage ticket was issued in accordance with the schedule of rates which had been filed with the Interstate Commerce Commission and published and was in effect at that time. Thereafter defendant filed with the Commission a mileage ticket contract, wherein the requirement as to the exchange of mileage coupons for passage tickets and the use thereof was changed, so that such tickets would "be honored for continuous passage to destinations commencing on date stamped on back of such exchange tickets, which dates shall be the dates on which such tickets are issued in exchange for coupons." This modification of the previous tariff went into effect September 21, 1910, and was effective on May 19, 1911, when defendant's ticket collector refused to honor a passage ticket from Char-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lotte, N. C., to Columbia, S. C., which plaintiff had obtained on October 15, 1910, by exchange of coupons from his mileage ticket, after the new mileage ticket contract had gone into effect. For reasons unnecessary to state, plaintiff decided not to use the ticket on the date of issue, which was stamped on the back of it. The ticket collector refused to honor it on the ground that it was out of date; passage not having been commenced on the date of issue.

Plaintiff testified in substance: "On deciding not to use ticket that day, went to defendant's agent at Charlotte and asked him to take it back and give me back the coupons. He refused, but said agent at Columbia would redeem ticket; saw agent at Columbia next day; said he had formerly redeemed such tickets but had not done so for some time, but that it would be redeemed if sent to Atlanta office; asked him if I could ride on it, and he said, 'Certainly I could.' On May 19, 1911, became passenger on defendant's road from Charlotte to Columbia and presented this ticket to ticket collector, who refused to honor it on the ground that it was out of date, and threatened to eject me unless I would pay fare in cash. He refused to hear or heed my explanation as to how I happened to have the ticket, and as to what defendant's agents had told me, and insulted me by telling me that I might have stolen it, and that I was lying in what I was saying about it, and that he would eject me if I did not pay my fare. On my refusal to pay and threat to forcibly resist expulsion from train, he contemptuously told me that he would pay my fare and make me a present of it. Under the circumstances I paid my fare in cash."

It appears from some of the allegations of the complaint, and testimony elicited, and the argument of plaintiff's attorneys, that they sought to bring this case within the principles of *Smith v. Railway*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708. But that case was different from this in at least two material particulars: First, in that case no question of any departure from the tariff made and filed with the Interstate Commerce Commission and published, as required by the act of Congress, or from the privileges therein and thereby contracted for, was raised by pleading or proof or presented to the circuit court and relied upon as a defense, and therefore no such question was properly before or decided by this court. Second, the contract in that case provided that the mileage coupons would be honored in exchange for passage tickets, which would be issued "in accordance with special tariffs and circulars of instructions," and that provision was one of the grounds of decision, but it does not appear that the plaintiff's contract contained any such provision.

[1] On the other hand, defendant's attorney contends that this case is within the act regulating commerce and the principles

of those cases which hold that the carrier cannot depart from the tariff filed and published, as required by that act, and the privileges and facilities therein granted and allowed.

Defendant's contention that the filing of a subsequent tariff had the effect of canceling and annulling the contract which it had made with the plaintiff is untenable. The case of *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 171, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, is relied upon to sustain that contention. But learned counsel has evidently overlooked the difference between the effect of an act of Congress and an act of the railroad company upon such contracts. In the *Mottley Case* the court held that an act of Congress, passed within the exercise of its constitutional power to regulate commerce, which made unlawful the contract which had theretofore been lawful, rendered it incapable of enforcement. But that is very different from holding that the railroad company can, by any act of its own, destroy the validity of its own valid contracts. Such a proposition cannot be sustained upon reason or authority.

It is true that, when a schedule of rates has been filed and published as required by the act, it has the force and effect of law, and, until changed in the manner prescribed by law, it cannot be departed from in favor of any passenger or shipper so as to give him any undue preference or advantage, or subject others to any unjust or unreasonable prejudice or disadvantage, or create any unjust discrimination. But it is equally true that, when a member of the public makes a contract with a carrier, which the act regulating commerce permits the carrier to make, and which is in accordance with the tariff in effect when it is made, the carrier cannot, by any act of its own, destroy or impair the validity of such contract. To hold otherwise would violate the fundamental principles of law and justice. The contract which defendant made with the plaintiff, in selling him the mileage ticket, did not violate either the letter or the spirit of the interstate commerce law. The sale of such tickets is not only not prohibited by the act but is authorized, in express terms, in section 22 (Act Feb. 4, 1887, c. 104, 24 Stat. 387 [U. S. Comp. St. 1901, p. 3170]). The authority to make such contracts carried with it, by necessary implication, the right and duty to perform them according to their terms; and it also implied the declaration of Congress that, in the making and performing of such contracts, no such discrimination would be created as the act was intended to prohibit.

In *Interstate Com. Com. v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, the court affirmed the right of carriers to sell "party rate" tickets at a lower rate than regular individual tickets on the ground that it was not an unjust discrimination in favor of the persons using them. That

principle was reaffirmed in *Texas & P. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 668, 40 L. Ed. 940, and in *Interstate Com. Com. v. Alabama M. R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414.

In this case no difference was made in plaintiff's favor in the rate. The only difference between plaintiff's contract and the one subsequently filed appears to be in the time when passage tickets must be used after having been issued. We are unable to see wherein carrying out the plaintiff's contract, as to that requirement, would have given him any such undue or unreasonable preference or advantage over other passengers as the act was intended to prevent.

Plaintiff's contract, having been made in accordance with and under the sanction of the law, was valid, and the subsequent filing and publication of a tariff containing a different contract cannot be allowed to have the effect of canceling and annulling the exchange requirement of his contract and substituting for it the one subsequently filed and published. It would be as sound in principle to hold that the company could by a subsequent tariff cut down the time within which the mileage coupons in the ticket which it sold plaintiff could be used from one year to three months and thereby confiscate those which had not been used at the end of three months as to say that it could in that way destroy or impair the validity of that part of the contract which provides that passage tickets obtained by exchange for coupons from the ticket will be honored at any time within the year when presented with the mileage ticket.

This case does not fall within the principle of the *Armour Packing Co. Case*, 209 U. S. 57, 28 Sup. Ct. 428, 52 L. Ed. 681, which dealt with a violation of the interstate commerce act by carrying out a contract for a rate for the transportation of property, after it had been changed by the filing and publication of a higher rate. The act not only does not sanction the making of such contracts but by necessary implication forbids it, because, if allowed, they could be used as a means of creating and continuing the very discriminations and inequalities in rates which the act was intended to prevent and thereby thwart its purpose. But the act expressly permits the sale of mileage, commutation, and excursion tickets, and, as we have seen, the permission is tantamount to a declaration that no unjust discrimination will be wrought thereby and carries with it the right and the correlative duty to perform such contracts according to their terms. It appears, therefore, that the ticket tendered by plaintiff was good and should have been honored, not because of any supposed waiver of any stipulation of the contract by the defendant's agents, as plaintiff's counsel attempted to show, but because it was issued

and presented in accordance with the terms of the contract. The *Aldrich Case*, 79 S. E. 316, recently filed, and the cases therein cited, show clearly that plaintiff could have acquired no right by virtue of anything that either of defendant's agents told him. No statement which they, or either of them, made to him gave his contract any more validity or vitality than it already had.

[2] Therefore, while the court erred in charging the jury that defendant's agents could waive the stipulation of the contract, and in leaving it to the jury to say whether they had done so, the error was favorable to defendant, because it afforded defendant an opportunity of escape from liability on the finding against the alleged waiver, when the plaintiff was entitled to have the jury instructed that the ticket was good and that it should have been honored. Therefore the error was not prejudicial.

[3] The only other question made by the exceptions is whether the court erred in refusing to charge defendant's second request, to wit: "If the jury shall find that defendant's agent on train threatened to eject plaintiff by mistake, under a supposed right, then they cannot give punitive damages; unless act was done with actual wrong intention and with such recklessness as to show malice or a conscious disregard of plaintiff's right, they cannot find any punitive damages." The request was not in accord with the principle laid down in *Tolleson v. Railroad Co.*, 88 S. C. 7, 70 S. E. 311, where it was held that, even though a tort-feasor might not be conscious of his invasion of the rights of another, yet, if the tort was committed in such a manner or under such circumstances that the jury find that a person of ordinary reason and prudence would have been conscious of it as such, it warranted the infliction of punitive damages.

Affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

HOOVER v. THAMES et al.

(Supreme Court of South Carolina. Oct. 14, 1913.)

CHATTEL MORTGAGES (§ 172*)—ACTION FOR POSSESSION OF PROPERTY—DEFENSES—COUNTERCLAIMS.

In a chattel mortgagee's action to recover possession of property which he sold the mortgagors, for the purpose of foreclosing, the mortgagors could set up a counterclaim for damages from false representations by the mortgagee concerning the property, and for breach of warranty.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 306-308, 310-315; Dec. Dig. § 172.*]

Appeal from Common Pleas Circuit Court of Hampton County; Rice, Judge.

"To be officially reported."

Action by J. R. Hoover against James F. Thames and others. From an order allowing an amendment to the answer, plaintiff appeals. Affirmed.

W. S. Tillinghast, of Beaufort, for appellant. W. B. De Loach, of Camden, and J. W. Manuel, of Hampton, for respondents.

HYDRICK, J. Plaintiff sold defendants a planing mill, and took their notes, secured by a mortgage of the mill, in part payment of the purchase money. Defendants having failed to pay the notes at maturity, and having refused to deliver the mortgaged property to plaintiff on demand, this action was brought to recover possession thereof for the purpose of foreclosing the mortgage.

The defendants' first answer was a general denial. Subsequently they moved for leave to amend their answer by setting up a counterclaim for damages resulting to them on account of alleged false and fraudulent misrepresentations of the plaintiff in the sale of the mill as to its condition and its fitness for the purposes for which they bought it, and for breach of warranty. From the order allowing the amendment, the plaintiff appealed.

The case is controlled by the decision in *Woodruff Machinery & Mfg. Co. v. Timms*, 93 S. C. 99, 76 S. E. 114.

Affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

UNION BUILDING & LOAN ASS'N v. McNALLY.

(Supreme Court of South Carolina. Oct. 23, 1913.)

BUILDING AND LOAN ASSOCIATIONS (§ 32*)—ACTIONS—COMPUTATION OF AMOUNT DUE.

In an action by a building and loan association on bonds secured by a mortgage, a bond cannot, in computing the amount due, be split into two loans, but must be treated as one loan, and the amount due be computed by calculating the interest on the same, with credits for all payments according to the laws of the state and the constitution and by-laws of the association.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Cent. Dig. §§ 48-59, 67; Dec. Dig. § 32.*]

Appeal from Common Pleas Circuit Court of Union County; R. W. Memminger, Judge.

Action by the Union Building & Loan Association against R. Lindsay McNally. From an order sustaining defendant's exceptions to the master's report, plaintiff appeals. Appeal dismissed, and cause remanded.

The following are the exceptions:

"Plaintiff appellant, for the purpose of appeal to the Supreme Court therefrom, excepts to the intermediate order or decree of his

honor Judge Memminger, herein, dated February 14, 1913, upon the following grounds:

"Because his honor erred therein:

"(1) In holding and deciding that the master could not split the loan evidenced by the six hundred (\$600) dollars bond into two loans, as he did, to wit, a loan of \$400 as of date May, 1901, and a loan of \$200 of date of the \$600 bond, and sustaining defendant's second and fourth exceptions to the report of the special master, and reversing the master in that particular.

"(2) In holding and deciding that the master, in ascertaining the amounts due plaintiff on the several bonds, must give the defendant credit for all payments as made by him; and sustaining defendant's tenth exception, which is as follows: 'Because the special master erred in not allowing proper credits for each and every item appearing upon defendant's passbook, which was in evidence, and uncontradicted and unquestioned,' whereas, he should have held, as contended by plaintiff, that defendant should not have credit in ascertaining the amounts due on the debts sued on, evidenced by the bonds set out in the case, for interest and premium, paid on the loan appearing on his passbook as made in May, 1901, and which was settled before the \$600 loan was made, an entirely different and ended transaction, the interest and premium on which said loan of \$400 in May, 1901, was \$2.50 per month; and was paid from June, 1901, to May, 1903 (inclusive) being for twenty-four (24) months, amounting to \$60, and was paid for the use of money, and on a debt entirely distinct from each and all of the debts sued on in this case, and was a finished and ended and settled transaction, in the settlement of which transaction defendant, or the one for whom he got the money, got credit, in the way of allowance of it as interest paid, on the loan.

"(3) In holding and deciding that in this case the defendant should, at the time of the first loan of \$200 (on September 10, 1900, on one share of stock redeemed) receive credit (\$225) for two hundred and twenty-five dollars, the amount of the stock payments made on the five shares of stock owned by him, which was assigned to the association as collateral at the date of the bond, as the withdrawal value of said five shares of stock, at that time by the rules and by-laws of the association; and in not holding and deciding that the withdrawal value of the shares of stock, so ascertained, should be applied respectively as credits on the loans and bonds evidencing said loans, for and by which the respective shares of stock were redeemed; and in not sustaining the special master in so holding and reporting; and in sustaining defendant's third exception to the report of the special master. This third exception of defendant's to the special master's report also raised the point that the withdrawal

value of the stock at the time of its application on the loan should be increased by allowing interest on the amount of the stock payments at the rate of 6 per cent., but this claim and feature in all the exceptions was withdrawn at the trial; and it is therefore considered that his honor in sustaining this exception did not mean to decide that such interest must thus be added in fixing the withdrawal value of the stock. And there was not a scintilla of evidence to support this part of the exception. The error being that his honor erroneously applied the principles and rules settled and laid down in *Bird & Co. v. Kendall*, 62 S. C. 178, 40 S. E. 142, and *Association v. Holland*, 65 S. C. 448, 43 S. E. 978, to this case, where the facts and conditions were very different, and required a modification of the general rules laid down in the latter case (*supra*), under the license given by the Supreme Court so to do, in the following language in said case: 'These rules are not intended to be exhaustive' but are sufficient for the determination of this case. In these cases, the withdrawal value of the shares assigned was less than the loan, and the face of the bonds evidencing the debts, and the application of the same to the debt, still left the borrowing stockholder a debtor to the association, according to the intention of the parties and the tenor of the borrower's written bond, which he signed, sealed, and delivered to the association; while in this case the application of the general rule laid down in that case would overpay the debt, and make the association a debtor to the stockholder, in opposition to and in violation of the tenor of the bond, which the borrowing stockholder solemnly executed and left with the association, wherein both declare that the stockholder is still a debtor to the association (the one by the execution and the other by the acceptance). In these cases, also, there was only one loan, and the borrowing stockholder who had assigned his stock to the association as collateral security did not, at any time afterwards, claim and exercise afterwards the right and privilege of borrowing on other of said assigned shares by way of redemption, and which only a stockholder could do, such privilege being allowed and concurred in by the association; while in this case the borrowing stockholder afterwards on as many as three occasions claimed and exercised such right and privilege as a stockholder, with the assent and concurrence of the association, until he had in succession redeemed each of his said five shares of stock by borrowing on the same by way of redemption, and on two of them exercised this privilege, with assent of the association, twice, which marked difference of facts and relations would seem to require a modification of the general rule laid down in those cases, and a different application of the retiring values of the several shares of stock to the

several debts made in the redemption of the same, as was done by the special master.

"Exception 4: In holding and deciding that defendant was entitled to credit on his bond for \$600 at its date, June 17, 1903, for the sum of two hundred and thirty-four (\$234) dollars, as the amount paid on the said three shares then redeemed, being the withdrawal value of the said shares so redeemed; and in sustaining defendant's fifth exception to the special master's report. The error being that if his honor was correct in sustaining defendant's third exception to the said report, and holding that defendant must have credit for the withdrawal value of the whole five shares of stock (\$225) on the bond for the first loan, for (\$200) two hundred dollars, at its date of the bond and assignment of the stock as collateral, on September 10, 1900; and, as under the rule of partial payments he would have to be allowed credit for all stock payments as made from that time to the making of the next loan, then to allow him credit at the time of the six hundred dollars loan and bond would be very certainly allowing him credit for the same stock payments (which fixes the withdrawal value of the shares in this case) twice. He certainly should not have credit on this bond for the withdrawal value already credited to him on a prior bond and loan; and it is equally clear that he should not here have credit for intermediate stock payment, which had in any way been credited to him before the (\$600) six hundred dollar loan and bond.

"Exception 5. In holding and deciding that defendant was entitled to and must have credit on the (\$200) two hundred dollar bond at its date, August 9, 1904, for ninety-two (\$92) dollars, the amount of stock payment to that time on and the withdrawal value of the one share of stock then redeemed; and in sustaining defendant's sixth exception to the said report of the special master. The error being that there would be a giving him credit twice for the withdrawal value of this share of stock, just as pointed out under exception 4 above."

Wallace & Barron, of Union, for appellant.
J. Ashby Sawyer, of Union, for respondent.

FRASER, J. This is an action by the plaintiff on three bonds executed by the defendant to the plaintiff, secured by a mortgage. Two of the bonds were for \$200 each, and the third was for \$600. The case was referred to the master, who made his report. There were exceptions to the master's report. After hearing argument, the presiding judge made the following order: "This matter comes before the court upon exception filed by the defendant, to the report of the special master herein. The special master was correct in saying that 'the legal way to ascertain the amount due would be to consider the bonds according to their faces and dates,' but the special master erred in under-

taking to split into two loans the six hundred (\$600) dollar bond. He should have simply taken the bonds as they appeared on their faces and dates and calculated the interest on same, giving credits for all payments, as made by the defendant, according to the rules as laid down by our Supreme Court in several recent cases, making the calculations according to the rules of partial payments, and giving credits on the bonds at their respective dates, for the withdrawal value of the stock assigned and surrendered, according to the constitution and by-laws of plaintiff corporation. Without passing on any of the exceptions, except those presenting the above questions, the exceptions raising the above questions are sustained; and the case is hereby referred to the master for Union county to make a calculation of the amounts due, if any, upon the several bonds sued on herein, and in accordance with the above-stated principles. R. W. Memminger, Presiding Judge. February 14, 1913."

There are five exceptions, one of which was abandoned at the hearing. There is a total misapprehension of Judge Memminger's order, and it is unnecessary to consider the exceptions separately. Let the exceptions be reported. The order, in short, holds that it was error to cut up the \$600 bond in two loans, and directs the master to make a new finding on the basis of the bonds as executed, allowing credits for payments and cash surrender value according to the law of this state, and the constitution and by-laws of the association. He decided nothing but that the bonds, as executed, should be the basis of calculation. To this there is no exception.

The appeal is dismissed, and the cause remanded for the purpose of carrying out the order of Judge Memminger.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

HUGGINS et al. v. PRICE.

(Supreme Court of South Carolina. Oct. 29, 1913.)

1. POWERS (§ 32*)—EXECUTION—POWER OF APPOINTMENT.

Where a gift of property in trust gave the beneficiary a power of appointment by her "last will and testament in writing authenticated in due form of law," such power cannot be executed except by will.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 104-109, 128-132; Dec. Dig. § 32.*]

2. WILLS (§ 740*)—FAMILY SETTLEMENTS—DISTURBANCE.

Where land was granted in trust for a woman and her heirs, the issue of her body, with power to her of appointment by will, and she sold part of the land, giving the proceeds to one of her sons, and distributed the rest of the property by her last will and testament to the other children, the other children, having accepted the benefits of the will, could not set aside the sale; the acts of the beneficiary con-

stituting a family settlement which equity will not disturb.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888-1895; Dec. Dig. § 740.*]

3. ESTOPPEL (§ 98*)—EQUITABLE ESTOPPEL.

Where property was granted in trust for a woman and her heirs, with a power to her of appointment by will, the heirs of one of her children cannot attack a conveyance of a part of the land where their parent was given the proceeds as his share of the property, the remainder being distributed by the beneficiary to other children, as such heirs could only claim through their ancestor, and are estopped by his acceptance of the proceeds.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. § 98.*]

Appeal from Common Pleas Circuit Court of Horry County; G. W. Ragdale, Judge.

"To be officially reported."

Action by John A. Huggins and others against Georgia Page Price. From a judgment for defendant, plaintiffs appeal. Affirmed.

Robt. B. Scarborough, of Conway, for appellants. H. H. Woodward, of Conway, for respondent.

PER CURIAM. This action for the recovery of possession of real estate, by agreement of the parties, was tried by the judge, without a jury, and resulted in a decree and judgment in favor of the defendant.

The plaintiffs sued in behalf of themselves and others, too numerous to be made parties, answering to the description of "the heirs of Susan E. Huggins who shall be the children or issue of her body." They claim under a conveyance embracing the land in dispute, made June 29, 1859, by Absalom Powell to James C. Powell, "in trust for and to the only use and benefit of the said Susan E. Huggins, wife of Evan Huggins, aforesaid, and in trust for and to the use and benefit of the heirs of the said Susan E. Huggins, who shall be the issue or children of her body, and to such other use or uses as the said Susan E. Huggins, at any time during her natural life, shall appoint, devise of, dispose of by her last will and testament in writing authenticated in due form of law, and the said Absalom Powell, for himself, his heirs, executors, administrators, and assigns doth hereby covenant to and with the said James C. Powell, his heirs, executors, administrators, and assigns, that he is lawfully seised in fee of the premises aforesaid, and that he has good right and title to sell the same, and that he will, his heirs, executors, administrators, and assigns shall warrant and forever defend the same, against the lawful claims of all persons whatsoever."

The defendant claims under a deed of conveyance made on October 30, 1902, by Susan E. Huggins to G. S. Price and C. S. Price.

[1] We cannot doubt that the circuit judge was in error in holding that a power was given to Susan E. Huggins to dispose of the property by deed. The power of appoint-

ment, devise, and disposition conferred on Susan E. Huggins was plainly limited by the words "by her last will and testament, authenticated in due form of law," and she could make no disposition of the land except by will. Hence, if nothing more appeared, the plaintiffs would be entitled to recover; but the facts agreed on make it equally clear that the circuit judge was well warranted in holding that the defendant is entitled to hold the land in dispute under a division in the entire tract, made by Susan E. Huggins, with the acquiescence of all her children.

[2, 3] Some time prior to 1902 Mrs. Huggins made a will, devising all the lands embraced in the trust deed; the portion now in dispute being devised to Tellie Huggins. Finding that Tellie Huggins, who was living out of the state, desired money instead of land, she destroyed this will, and on October 20, 1902, made another, by which she divided her lands, except the land in dispute, among her sons, charging each of them with certain sums to be paid to her daughters. On the next day she conveyed to G. S. Price and C. S. Price the land in dispute, which she had previously devised to Tellie Huggins, and sent to her son Tellie the purchase money. We infer from the record, as nothing appears to the contrary, that all the sons and daughters, on the death of their mother, accepted the provisions made for them in her will, which was manifestly intended by her to be setting off to them of a just share of the property embraced in the trust deed. A part of this plan of division and family settlement was given Tellie Huggins the benefit of the land intended for him by selling it and sending him the proceeds, according to his request. We think equity forbids that those who took, and now hold, the benefits of the plan adopted, and provision made, by the mother as a family settlement—a just distribution of the property among her children—should now repudiate it. They cannot take the shares allotted to them by their mother, and claim also that which was allotted to their brother Tellie Huggins. On the other hand, the children of Tellie Huggins have no right, because they can claim only through him, and he elected to have the land sold, and the money paid to him. We think the case comes fully up to the rule laid down in *Smith v. Tanner*, 32 S. C. 259, 10 S. E. 1008, where the court says: "Courts of equity have uniformly upheld and sustained family arrangements in reference to property, where no fraud, imposition, or overreaching appears, with a 'strong hand.' As is said in the text-writers: 'In family arrangements, an equity is administered in equity which is not applied to agreements generally.' Story's Eq. Jur. 132; Pom. Eq. Jur. 851; Trigg v. Read [5 Humph. (Tenn.) 529], 42 Am. Dec. 461; Bos-

sard v. White, 9 Rich. Eq. 483; Stockley v. Stockley, 1 Ves. & B. 30. And such arrangements will be held binding when, in cases between strangers, the like agreements would not be enforced. It is needless to go into the reason of this doctrine. It is sufficient to say that it is well established, and has often been applied, both in England and America."

On the ground that it would be inequitable to allow the plaintiffs to disturb a family settlement, the benefits of which they have enjoyed, the judgment of the circuit court is affirmed.

Affirmed.

GRESHAM v. ATLANTIC COAST LUMBER CORPORATION.

(Supreme Court of South Carolina. Oct. 24, 1913.)

1. LOGS AND LOGGING (§ 3*)—TIMBER DEEDS—TIME FOR REMOVAL.

Where a timber deed did not fix any time for removal, the timber must be removed within a reasonable time.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. INJUNCTION (§ 38*)—ISSUANCE OF INJUNCTIONS—RIGHT TO INJUNCTIONS.

In an action involving the right to timber on land, where plaintiff claimed that it had not been removed within a reasonable time, so that defendant had lost its rights thereto, and defendant maintained that it had begun to remove the timber within a reasonable time, a temporary injunction may be granted at the request of plaintiff to preserve the property in statu quo until the determination of their respective rights; it appearing that plaintiff did not desire the timber cut and removed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86-90; Dec. Dig. § 38.*]

3. LOGS AND LOGGING (§ 3*)—SALES—EXCEPTION—EFFECT.

When timber itself is excepted in a conveyance of land, it remains the property of the grantor, with right in so much of the soil as is necessary to sustain it, and consequently an exception, by a grantor of land, of the timber thereon which had been conveyed by her predecessor does not inure to the benefit of the grantee in the timber deed but to the grantor, who may acquire rights in the timber by the failure of the grantee to remove it within a reasonable time.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Common Pleas Circuit Court of Marion County; T. H. Spain, Judge.

Action by Annie Law Gresham against the Atlantic Coast Lumber Corporation. From an order dissolving a temporary injunction, plaintiff appeals. Reversed and remanded.

The pleadings and exceptions are as follows:

Complaint.

"The complaint of the above-named plaintiff respectfully shows to the court:

"First. That the plaintiff is a resident of the county of Marion, said state.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Second. That the defendant, Atlantic Coast Lumber Corporation, is a corporation duly chartered and organized under the laws of the state of South Carolina, with its principal place of business in the city of Georgetown, in the county of Georgetown, said state.

"Third. That heretofore, to wit, on the 16th day of December, A. D. 1898, plaintiff's predecessor in interest, C. C. Law, executed and delivered to one R. L. Montague a certain instrument of writing, styled and known as a 'deed and contract,' and commonly called a 'timber deed,' bearing date on said date, whereby the said C. C. Law purported to sell and convey unto the said R. L. Montague all the timber of every kind and description to 12 inches stump diameter and upwards, 12 inches from the ground at the time of cutting, then standing and being on that certain tract, piece, or parcel of land known as the Manning tract, Smith and Herring tract, Matheson tract, and the Godbold tract. The said lands are bounded and described as follows, to wit: Manning tract: North by T. G. Davis' lands, east by estate D. Leggette, south by C. C. Law, west by estate of Iseman. Smith and Herring tract: North by C. C. Law, east by the lands of D. C. Law, south by J. D. Williams, west by C. C. Law. Matheson tract: North by C. C. Law, J. D. Williams, and estate of D. Leggette, east by estate of D. Leggette, S. W. Altman, and S. P. Shaw, south by estate of D. Leggette, D. J. Atkinson, and S. W. Altman, west by C. C. Law and I. D. Williams. Godbold tract: North by Ebby Atkinson and J. W. Holliday, east by Ebby Atkinson and Jas. Jones, south by J. D. Dozier, west by Great Pee Dee river. Containing 3,119 acres, more or less, situated in the township of Brittons Neck, county of Marion, and state of South Carolina, together with certain timber rights, rights of way, privileges, and easements therein more specifically set forth, all of which will more fully appear by reference to said deed, a copy of which is hereto attached and made a part of this complaint and to which all necessary reference is craved.

"Fourth. That the plaintiff is now, and has been for a number of years, seised in fee and possessed of said described lands.

"Fifth. On information and belief that, by sundry mesne conveyances, all the right, title, and interest of said grantee, R. L. Montague, in and to the said timber, timber rights, rights of way, privileges, and easements mentioned and described in the said deed were acquired and are now held by defendant, Atlantic Coast Lumber Corporation, which, as this plaintiff is informed and believes, claims and asserts its rights to hold the same under and by virtue of a deed of conveyance executed and delivered to it.

"Sixth. That on or about the 16th day of March, A. D. 1912, the defendant herein,

against the will and without the consent of the plaintiff, and after notice and warning from her, forbidding the same, and in utter disregard of the rights of plaintiff, willfully and wantonly entered upon the aforesaid lands of the plaintiff with a force of men and teams and prepared and intended to operate and lay out roads and tramroads upon and over the said lands and began to cut, fell, and remove the said timber, both standing and fallen, therefrom; and that, as plaintiff is informed and believes, the said defendant is still continuing and threatens and intends to continue its said logging operations upon the said lands of the plaintiff. That the said defendant, over the protest of this plaintiff, and in utter disregard of plaintiff's rights, as hereinbefore alleged, has already willfully and wantonly cut and removed, or is about to remove, large quantities of timber from said lands to plaintiff's damage \$2,000.

"Seventh. That, by a proper construction of said deed and contract, it must be held to have imposed upon the said grantee, his heirs or assigns, the duty and obligation to begin the cutting and removal of the timber therein described within a reasonable time after the date thereof and continue the same without cessation until the said timber should have been cut and removed. That, although a period of more than 13 years has elapsed and expired, neither the said grantee nor his heirs and assigns nor the defendant herein commenced the cutting and removing of the said timber until the date above mentioned. And the plaintiff alleges that a reasonable time for said cutting and removing has long since expired and had expired long before the entry of defendants aforesaid; and the plaintiff alleges that neither the said defendant, Atlantic Coast Lumber Corporation, nor its predecessors or grantors, nor any one for it or them, have paid or tendered to plaintiff any interest on the said original purchase price.

"Eighth. That the value of the said timber constitutes by far the larger part of the value of the plaintiff's said land, and the cutting and the removal thereof would involve irreparable injury upon the plaintiff by wasting and devastating the freehold. That the operations of the said defendant thereon, if continued, would constitute a series of successive and repeated entries upon the land of the plaintiff and would entail upon the plaintiff loss and damage for which she could not obtain adequate redress at law, and same would involve a multiplicity of vexatious, harassing and expensive suits, and the plaintiff can therefore obtain adequate remedy for the same only in a court of equity.

"Ninth. That inter alia the said contract reads as follows: 'It is agreed that the time limit of this conveyance above set forth shall be 10 years from the time the second party

begins cutting and removing the said timber from the lands above described, but the first party agrees that the said time limit may be extended from year to year thereafter upon the payment by the said second party, his heirs, executors, administrators, or assigns, of interest on the original purchase price at the rate of 6 per cent. per annum—and this plaintiff alleges that, by a proper construction of said deed and contract, it must be held to have imposed upon the said grantee, his heirs and assigns, the duty and obligation to begin the cutting and removal of the timber therein described within a reasonable time after the date thereof; and the plaintiff alleges that such reasonable time had long since expired prior to any entry by defendants, or by the said grantee, his heirs or assigns, including the defendant herein, and that the said grantee, his heirs and assigns, including the defendant herein, have forfeited and lost all right, title, and interest in and to the said timber, all the timber rights, rights of ways, privileges, and easements, and the same have, by operation of law, reverted and revested in plaintiff, and that the entry upon the said lands by the said defendant should be permitted to continue their logging operations thereon, the same would amount to a series of repeated vexatious and harassing trespasses.

"Wherefore plaintiff demands judgment:

"First. That the said deed be adjudged to have required the grantee and his heirs and assigns, including the defendant, to commence the cutting and removal of the said timber within a reasonable time, and that said time may be decreed to have elapsed and expired prior to entry, and that it may be adjudged that the defendant has forfeited and lost all rights under the said deed by reason of the expiration of such reasonable time, and that the said defendant shall deliver up the same to be canceled.

"Second. That the defendant, its officers, agents, servants, and employes, and all persons claiming or acting for, through, or under it may be perpetually enjoined and restrained from entering upon the said lands of the plaintiff for the purpose of and from cutting or removing any of the timber, either standing or fallen, and from cutting or opening or laying out roadways or cartways thereon, or causing or suffering to be done or committed any other act or things looking to the exercise of any rights claimed under the said deed and contract.

"Third. That in the meantime, and pending the final determination of this action, the said defendant, its officers, agents, servants, and employes, and all other persons acting or claiming by or under it, may be enjoined and restrained from doing or committing, or causing or suffering to be done or committed, any of the acts or things aforesaid.

"Fourth. That plaintiff herein have judgment against said defendant for the sum of \$3,000 damages, and that said defendant be required to account for all timber cut by it.

"Fifth. For the costs and disbursements of this action and for such other and further relief as to this honorable court may seem just and equitable."

Answer.

"The defendant, Atlantic Coast Lumber Corporation, not waiving, but specifically reserving, its right to move to strike from the complaint herein certain irrelevant and redundant matter and to move to have such complaint made more definite and certain, and to answer over in case such motions shall be granted, answering the complaint:

"(1) Admits the truth of the allegations contained in paragraphs first, second, third, and fifth thereof.

"(2) Denies the truth of the allegation contained in paragraph fourth thereof, but, on the contrary, alleges, on information and belief, that plaintiff has neither title nor possession nor any right or interest in that portion of the lands described as the Smith and Herring tract, the Godbold tract, or any portion of the Manning tract except the 86.5 acres thereof, shown by a survey heretofore made by J. M. Johnson and by conveyance thereof to her by Mrs. Annie Law Early.

"(3) Admits that on or about the 16th day of March, 1912, this defendant entered upon a portion of the lands described in paragraph sixth of said complaint, which are owned by plaintiff, with men and teams, and prepared to lay out roads and tramroads and began to cut and remove the timber heretofore acquired by it therefrom, and that it intends, unless restrained by this honorable court, to continue logging operations upon said lands until the timber so acquired by it shall have been removed, but denies each and every other allegation in said paragraph sixth.

"(4) Admits that neither it nor its predecessors, nor any one for it or them, has paid or tendered the plaintiff any interest on the original purchase price, but denies each and every other allegation contained in paragraph seventh of said complaint, and, on the contrary, alleges that with the full knowledge of plaintiff it entered upon the lands in question during the early part of the year 1909 and in the exercise of its rights, under the contract set out in the complaint, commenced to cut and remove the timber therefrom in the usual and ordinary course of its business, and continued cutting and removing such timber during the entire year 1909, and for more than half of the year 1910, without objection or interference by plaintiff, and that, in the absence of any notice to the contrary or any intimation from plaintiff, it assumed that the time contemplated by the parties to the original contract in which it was to commence cutting was fixed

as in the month of January, 1909, and that it would be required to pay interest on the original purchase price if it had not completed its operations within ten years after that date.

"(5) Denies the allegation contained in paragraph eighth of said complaint.

"(6) Admits that the contract in question contains the language quoted in paragraph ninth of said complaint, but denies the truth of each and every other allegation therein contained.

"Further answering said complaint, this defendant alleges:

"(7) That, at the time of the purchase by R. L. Montague from C. C. Law of the timber in question, the said R. L. Montague was undertaking to acquire sufficient standing timber to warrant the organization of a large lumber manufacturing corporation, the location of which had not been determined upon, and that the said R. L. Montague was not then the owner of a sawmill within the state of South Carolina or elsewhere, and that this fact was then either known to or could have been ascertained by the said C. C. Law.

"(8) That, after the date of the said deed of timber contract, said R. L. Montague, with others, succeeded in interesting outside capital and in procuring the organization of Atlantic Coast Lumber Company, to which company the timber in question was in due time conveyed, and that the said Atlantic Coast Lumber Company, immediately upon its organization, commenced negotiations for acquiring a site for its manufacturing plant and soon thereafter procured and constructed large sawmills at Georgetown, S. C.

"(9) That, at the time of the organization of Atlantic Coast Lumber Company, it acquired timber holdings extending almost continuously from the tracts of timber described in the complaint to and beyond Georgetown, S. C., which fact, as defendant is informed and believes, the said C. C. Law and this plaintiff either knew or had opportunity to know, and that since its organization the said Atlantic Coast Lumber Company and its successors have been engaged, practically without interruption, in cutting and manufacturing its timber into lumber, and that in such operation they have adopted the customary plan of taking first that timber located nearest their mills and gradually advancing its operations into its more distant timber holdings without discrimination and without other consideration than the economical and profitable conduct of its business, and that in the exercise of the discretion of its officers it did not until the year 1909, in the usual conduct of its business, reach the timber of plaintiff.

"(10) That Atlantic Coast Lumber Company continued in business from the year 1899 to the year 1902, when it was placed in charge of receivers, and that, until the sale of the property of said Atlantic Coast

Lumber Company in 1903, such receivers were in charge of the property acquired under the contract described in the complaint, and that at such sale all of said property was acquired by the defendant, Atlantic Lumber Corporation.

"(11) That, when the contract in question was acquired by Atlantic Coast Lumber Company, its officers and directors, having sought legal counsel, were advised by attorneys of the highest legal standing that under the established law in force and effect in South Carolina at that time such contract was good and effective to convey the timber therein described in fee simple, and that the grantee therein, his heirs and assigns, acquired the right to cut the timber therein conveyed at such time in the future as might be most convenient without restriction or limitation of the time allowed for commencing to cut, and that the only limitation of the time for cutting contained therein was that, after once commencing to cut, all operations should be completed within a definite period of time specified in the contract, or such extension thereof as might be acquired by the payment of installments of interest provided for therein, and that, when this defendant acquired the property in question, it was advised to the same effect by counsel selected with due care and diligence and regarded by it as most highly qualified for ascertaining the legal rights of the parties to such contract, and that, acting upon such advice, the operations of Atlantic Coast Lumber Company and Atlantic Coast Lumber Corporation have been influenced by the understanding that timber held under such contract was held in fee simple until the recent opinion of the Supreme Court of this state in the case of A. W. Flagler v. Atlantic Coast Lumber Corporation, 89 S. C. 328, 71 S. E. 849.

"(12) That plaintiff and the said C. C. Law dealt with defendant's predecessor in interest and with defendant with full knowledge, and full opportunity of knowing, their plans in regard to their timber, their opportunities for speedily cutting and removing same, and the views which defendant held as to its rights under the contract in question, and that they must have known from the location of the timber sold that it would be quite a long while before the cutting thereof would be commenced.

"(13) That although this defendant commenced to cut the timber acquired under the contract described in the complaint during the month of January, 1909, and that although its operations were continued for considerably more than a year, plaintiff did not indicate to this defendant in any manner whatsoever that she took the view that defendant had not commenced to cut within such time as was contemplated by the parties to the contract for commencing to cut, or that she construed the contract in question and the conduct of this defendant thereunder as having resulted in the loss by this

defendant of any of the rights previously acquired under said contract.

"(14) That since the year 1909 this defendant has, at great expense to the knowledge of the plaintiff, made arrangements for the construction of a railroad from some point in Georgetown county, through the counties of Georgetown and Williamsburg, across Great Pee Dee river and into Marion county, and that, but for its ownership of this and other contracts covering timber in Marion county, such railroad would not have been constructed or this defendant would not have been instrumental in procuring the construction thereof.

"(15) That by reason of plaintiff's acquiescence in defendant's construction of the contract in question and its rights thereunder, and of the position assumed by this defendant and the large amount of money spent by it, relying upon such acquiescence, and by reason of the failure of plaintiff to notify this defendant that it was required within any definite or limited time to commence the cutting and removal of the timber in question, plaintiff is now estopped to take the position that the cutting was not commenced within a reasonable time."

Exceptions.

"First. Because his honor erred, it is respectfully submitted, in dissolving the temporary injunction herein in that said temporary injunction was and is essential to the preservation and protection to the rights of plaintiff pending the determination of the case on its merits.

"Second. Because his honor erred, it is respectfully submitted, in dissolving the temporary injunction herein, as its dissolution makes it possible for the defendant to cut and remove the timber which is the subject of the action pending a final hearing of the case on its merits and thus deprive plaintiff of the benefit of a favorable determination of the case.

"Third. Because his honor erred, it is respectfully submitted, in dissolving the temporary injunction herein in that the answer admitted that defendant intended to continue cutting and removing the timber, and the said dissolution will deprive plaintiff of the subject-matter of the action, to wit, the timber.

"Fourth. Because his honor erred, it is respectfully submitted, in dissolving the temporary injunction in that the dissolution was an abuse of discretion and deprived plaintiff of the right to a trial of the case on its merits and denies her the preservation and protection of her rights pending the trial of the case on its merits.

"Fifth. Because his honor erred, it is respectfully submitted, in dissolving the temporary injunction herein in that it appears from the face of the complaint that no entry was made upon the lands for the purpose of cutting and removing of the timber until

March, 1912, more than 13 years after the execution of the contract, which said period of 13 years plaintiff alleges was more than a reasonable time in which to begin cutting and removing the timber; and plaintiff was and is entitled to a temporary restraining order until the court shall determine what was a reasonable time in which the defendant should commence to cut and remove the timber.

"Sixth. Because his honor erred, it is respectfully submitted, in dissolving the temporary injunction herein in that it appears from the affidavits of John Richardson, Jr., produced by defendant, that defendant entered upon the premises in 1907 and laid out a right of way for a main line railroad, which was not a commencement to cut and remove the timber within the meaning of the contract.

"Seventh. Because his honor erred, it is respectfully submitted, in dissolving the temporary injunction herein in that it appears from the affidavit of John Richardson, Jr., produced by defendant, that defendant did not commence to cut and remove the timber until February, 1909, more than ten years after the execution of the contract, which said period was unreasonable.

"Eighth. Because his honor erred, it is respectfully submitted, in dissolving the temporary injunction as to the Manning tract in that it appears that plaintiff owns the timber thereon on the east side of the public road by reason of the exception of the timber in her deed to Annie Law Early; and that, in any view under the showing made to his honor, more than ten years had elapsed since the execution of the contract, which said time was more than a sufficient reasonable time in which to commence to cut and remove the timber.

"Ninth. Because the dissolution of the temporary injunction permits the defendant to utterly destroy the timber on the Matheson tract owned by plaintiff and her entire interest in the Manning tract, to wit, the timber, before the court can hear the case on its merits, and plaintiff will be thereby irreparably injured."

Mullins & Hughes and Henry Buck, all of Marion, for appellant. Willcox & Willcox, of Florence, and M. C. Woods, of Marion, for respondent.

DE VORE, Circuit Judge. This case was commenced by the service of the summons and complaint on the 4th of April, 1913, and, as appears from the complaint, is for the purpose of determining who is the owner of the timber on the lands described in the complaint and also for the purpose of securing an injunction restraining the defendant from cutting and removing the timber from the said lands until the true owner of said timber can be determined on the trial of the case upon its merits.

The complaint alleges in substance that the plaintiff is the owner of the timber and does not wish the defendant to cut and remove the same from the lands.

The answer of the defendant alleges in substance that it is the owner of the timber and wishes to cut and remove the same from the lands and intends to do so, unless restrained by the court. The defendant's claim, as appears from the record, is based on what is known as a "timber deed" or contract, dated December 16, 1898, made by C. C. Law, plaintiff's predecessor, in interest to R. L. Montague, and by sundry mesne conveyances, it is alleged, defendant acquired all the rights of Montague. The "timber deed" does not fix the time as to when the party who has the right to do so, under the "timber deed," shall commence to cut and remove the timber. The complaint alleges the defendant began to do so on the 16th of March, 1912, over protest of and notice from the plaintiff not to cut and remove the timber, as it had not commenced to do so within a reasonable time from the date of the Montague "timber deed," which is alleged to be more than thirteen years.

The record shows, on application of plaintiff, Judge Shipp, on the 30th of March, 1912, granted a temporary injunction restraining defendant from cutting and removing the timber; that on the 25th of January, 1913, on motion of the defendant, Judge Spain passed an order dissolving the temporary injunction of Judge Shipp. The appeal is from the order of Judge Spain, in so far as said order dissolved the injunction as to the timber on the Matheson tract of land, and also as to the timber on the Manning tract, on the east side of the road; it being conceded by plaintiff that the injunction as to the other land and the timber thereon ought to have been dissolved. The appeal is based on nine exceptions, only two of which (fifth and eight) will it be necessary to consider, as they in substance cover all the errors imputed to the circuit judge.

[1] As to the fifth exception: Since the cases of *Flagler v. Lumber Corporation*, 89 S. C. 328, 71 S. E. 849, and *McClary v. A. C. L. Corporation*, 90 S. C. 153, 72 S. E. 145, in which this court laid down the doctrine of reasonable time in a "timber deed" similar to the one involved here, there cannot be any doubt as to the application of that doctrine to the case under consideration.

[2] Did the defendant commence to cut and remove the timber within a reasonable time? The complaint alleges it did not. The answer of the defendant alleges that it did. This issue will have to be passed upon when the case is tried on its merits. The plaintiff now claims to be the owner of the timber in question and does not wish the defendant to cut and remove it. The defendant claims to be the owner and wishes to cut and remove the timber.

Under the above statement of facts, as ap-

pears from the record, the court would be safe in laying down, once for all, the following as a true and sound proposition, to wit: In a case where the title to standing or growing timber is the issue, and the allegations of the pleadings and the proof submitted at the hearing are such as necessitate a trial on the merits, in order to determine the ownership, either party applying therefor would be entitled to an injunction, restraining the other from cutting and removing the standing or growing timber, for the purpose of preserving same, until the true ownership can be determined by the proper judicial tribunal. This exception is therefore sustained.

[3] As to the eighth exception. The record shows, and about which there is no dispute, at the time of the conveyance from C. C. Law to Montague, there was a mortgage on the undivided five-eighths interest in the Manning tract of land. This mortgage was foreclosed and the master (Lucas) conveyed the land to Annie Law Early May 2, 1903. By agreement of Annie Law Early, owner of the five-eighths interest in the Manning tract, and the defendant, owner of the Montague interest in the timber, the timber was divided between them by arbitration. Annie Law Early got the timber on the Manning tract on the west side of the road, and the defendant got the timber on the east side of the road. Thereafter C. C. Law died, leaving a will, wherein he devised all of his property to his widow, Annie S. Law, now Annie Law Gresham, the plaintiff herein. Thereafter, on May 30, 1903, Annie S. Law conveyed all her interest in the Manning tract to Annie Law Early. The conveyance contains the following clause, to wit: "Saving and excepting from this conveyance, however, my right, title, and interest in that portion of said described land containing eighty-six (86.5) and five-tenths acres, as represented on a plat of J. M. Johnson, Jr., attached to deed to me from Annie L. Early of equal date herewith, and save and excepting also such timber on all of said land as has been heretofore conveyed to Atlantic Coast Lumber Corporation." Under this conveyance the timber did not pass to Annie L. Early. It therefore belongs either to the plaintiff or to the defendant. The very issue raised by the pleadings is: Who is the owner of the timber involved?

It was contended by defendant that the exception in the deed as above set out was for the benefit of the defendant, and not the plaintiff, grantor and had the effect of putting the title to the timber in the defendant. This position or contention cannot be sustained. For, "when timber itself is excepted in a conveyance, the timber remains the property of the grantor, with right in so much of the soil as is necessary to sustain it." *Knotts v. Hydrick*, 12 Rich. 314; *Wait v. Baldwin*, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551; *Steedman v. Weeks*, 2 Stroh.

Eq. 145, 49 Am. Dec. 660; *Wilson v. Alderman*, 80 S. C. 106, 61 S. E. 217, 128 Am. St. Rep. 865; *Rivers v. Lumber Corporation*, 81 S. C. 494, 62 S. E. 855.

Therefore what has been said in reference to the fifth exception applies with equal force to the eighth exception, which is also sustained.

For the reasons herein stated, it is the judgment of the court that the order of the circuit judge in so far as it dissolved the injunction as to the timber on the Matheson tract of land, and also as to the timber on the Manning tract on the east side of the road, be and the same is hereby reversed. Let the pleadings and exceptions be printed in the report of the case.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

HOLT et al. v. ZIGLAR et al.
(Supreme Court of North Carolina. Oct. 29, 1913.)

1. WILLS (§ 355*)—WILL CONTEST—VACATION—FRAUD—EFFECT.

Where a judgment in a will contest invalidating the will was set aside for fraud, the caveat filed against the will remained in full force and effect until the issue raised thereby was tried and a valid judgment rendered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 811-819; Dec. Dig. § 355.*]

2. WILLS (§ 424*)—PROBATE BEFORE CLERK—EFFECT.

The probate of a will before the clerk in common form is conclusive evidence of the validity thereof until the will is vacated or declared void by a competent tribunal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 914; Dec. Dig. § 424.*]

Appeal from Superior Court, Rockingham County; Cooke, Judge.

Action by Elizabeth Holt and others against S. B. Ziglar and others. Judgment for defendants, and plaintiffs appeal and defendant J. P. Fairies also appeals. Reversed on plaintiffs' appeal. Appeal of defendant dismissed.

See, also, 159 N. C. 272, 74 S. E. 813.

Plaintiffs' Appeal.

These are the issues submitted:

"(1) Was the judgment setting aside the will of Valentine Allen obtained by collusion and fraud, as alleged in the complaint? Answer: Yes.

"(2) Has more than three years elapsed since the decree of the November term, 1885, setting aside the will, and institution of this suit? Answer: Yes.

"(3) Has more than 10 years elapsed since the decree of the November term, 1885, setting aside the will, and institution of this suit? Answer: Yes.

"(4) Was Elizabeth Holt married after she became 21 years of age? Answer: Yes.

"(5) Is Elizabeth Holt's right to attack the decree of 1885, for causes set forth in the complaint, barred by the three-year statute of limitations? Answer: No.

"(6) Was Mary E. Bouldin a bona fide purchaser for value and without notice of the lands described in the deed from S. B. Ziglar and wife, Margaret Ziglar, to Mary E. Bouldin? Answer: No.

"(7) Was J. P. Fairies a bona fide purchaser for value and without notice of the lands conveyed in the deed from Mary E. Bouldin and husband to J. P. Fairies? Answer: No.

"(8) Was John Henry Carter a bona fide purchaser for value without notice, of the land described in the two deeds from Samuel Allen and wife to John Henry Carter? Answer: Yes.

"(9) Was John M. Galloway, trustee, a bona fide purchaser for value and without notice of the land described in the deed of trust from J. Ham Cardwell and wife, Ellen Cardwell? Answer: No.

"(10) Was the 900 acres of land mentioned in Valentine Allen's will divided into three equal shares, and a share each allotted to Samuel A. Allen, Margaret Ziglar and husband, and Ellen Cardwell and husband, and did said parties enter into possession thereof? Answer: Yes.

"(11) At the time of the death of Valentine Allen, what was the number of living children of Ellen Cardwell? Answer: Seven (7).

"(12) At the time of the death of Valentine Allen, what was the number of living children of Margaret Ziglar? Answer: Four (4).

"Did the children of Margaret Ziglar execute and deliver to Mary E. Bouldin a quitclaim deed for all their right, title, and interest in the real estate of Valentine Allen? Answer: Yes."

Upon the coming in of these issues, his honor rendered a decree, from which plaintiffs appeal.

Watson, Buxton & Watson, of Winston-Salem, and C. O. McMichael, of Wentworth, for appellants. Humphreys & Sharp, of Stoneville, and Manly Hendren & Womble, of Winston-Salem, for appellees.

BROWN, J. This case was before us at a former term (159 N. C. 272, 74 S. E. 813), which is referred to for a general statement of the case.

His honor, Judge Cooke, in accordance with that opinion, upon the admitted facts and record evidence in the case, instructed the jury in accordance with our views, and a verdict was rendered accordingly.

[1] The effect of the finding of the jury and the decree of Judge Cooke upon the first issue is to set aside the judgment of the superior court of Rockingham county, Novem-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ber term, 1885, in the case of Samuel A. Allen v. Margaret Ziglar, and others invalidating the will of Valentine Allen, and leaving the caveat to said will in full force and effect (Revisal, § 3137) until the issue thus raised is tried and a bona fide and valid judgment is rendered. This we think should end this case, as there is no exception arising under that first issue.

In our former opinion (159 N. C. 279, 74 S. E. 816) we said: "The only issue raised by the pleadings in this case is one of fraud and collusion in respect to the manner in which that will was set at naught."

In our view of the status of this case, it is not proper that we construe this will now.

All of the issues submitted, except the first, are set aside. So much of the judgment of the superior court as declares that "the decree entered in the suit of Samuel A. Allen, caveator, against Elizabeth A. Allen and others, disposed of at the November term, 1885, of the superior court of Rockingham county, was obtained and entered through fraud and collusion; that the last will and testament of Valentine Allen was properly proven and probated, according to law, before the clerk of the superior court and probate judge of the county of Rockingham on October 6, 1884, and was and is recorded in Book E of the Record of Wills of said county, at pages 289 et seq., and was offered in evidence in this cause," is affirmed. This ends this action, but it leaves the caveat proceedings of Samuel Allen of 1885 still pending for trial in the superior court of Rockingham county.

[2] The probate of the will before the clerk was in common form, but it is conclusive evidence of the validity of the will until it is vacated or declared void by a competent tribunal and may be offered in evidence. Rev. § 3128.

As we have held that the judgment entered in the caveat proceedings is fraudulent and void, it necessarily follows that the caveat proceedings have not terminated. It is still open to Samuel Allen, the caveator, to have the issue thus raised passed on by a jury, and all proper and necessary parties can be brought in that proceeding. *Holt v. Ziglar*, 159 N. C. 279, 74 S. E. 813.

This cause is remanded to the superior court of Rockingham county with instructions to enter a final judgment in accordance with this opinion. The entire cost of the action, as well as costs of this appeal, will be taxed against the defendants.

The judgment of the superior court, except as hereinbefore stated, is reversed.

Defendant's Appeal.

This is the appeal of the defendant J. P. Fairies in the above cause. It is improvidently taken, and must be dismissed.

As an assignee of Samuel Allen, this de-

fendant may be made a party to the caveat proceedings referred to in the other opinion.

Let costs of this appeal be taxed against defendant Fairies.

Appeal dismissed.

GARDNER v. NORTH STATE MUT LIFE INS. CO.

(Supreme Court of North Carolina. Oct. 29, 1913.)

1. INSURANCE (§ 132*)—BINDING SLIP—EFFECT.

The binding slip issued on an application for insurance is a mere written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer, or until the issue of a formal policy, and is subject to all the conditions of the contemplated policy, even though it may never issue.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. § 132.*]

2. INSURANCE (§ 132*)—BINDING SLIP—EFFECT.

When properly issued on an application for insurance, a binding slip protects the applicant against the contingency of sickness between its date and the delivery of the policy, if the application is accepted; but, if not, the binding slip ceases so instant to have any effect.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. § 132.*]

3. EVIDENCE (§ 405*)—PAROL EVIDENCE—INSURANCE POLICY—FALSIFICATION.

In a suit on a life policy, the insurer may show that the manual delivery of the policy was conditional, or it may prove fraud or other equitable matter to show that it never took effect as a contract; but, when the policy is once delivered and becomes effective, statements therein which, if falsified, will affect its continued validity cannot be contradicted with a view to avoid the insurance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1818-1824; Dec. Dig. § 405.*]

4. INSURANCE (§ 299*)—LIFE POLICY—FALSE REPRESENTATIONS.

Where an applicant for insurance falsely represented that he had not been intimately associated with any one suffering from any transmissible disease within the past year, such representation being material vitiated the so-called binding receipt, and the policy subsequently issued thereon, unless the insurer waived the same with full knowledge of the facts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 678; Dec. Dig. § 299.*]

5. INSURANCE (§ 255*)—FALSE REPRESENTATIONS—MATERIALITY.

Every fact which is untruthfully stated or wrongfully suppressed in an application for insurance must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk or in fixing the premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 548; Dec. Dig. § 255.*]

6. INSURANCE (§ 253*)—APPLICATION—REPRESENTATIONS.

Where, in an application for insurance, a fact is subsequently inquired about, or a question is so framed as to call for a true statement of such fact, or to elicit the information desired, the applicant is required to make a full and

fair disclosure thereof, or at least a substantial one.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 538-542; Dec. Dig. § 253.*]

7. INSURANCE (§ 256*)—FALSE REPRESENTATIONS—STATUTES—CONSTRUCTION.

Revisal 1905, § 4808, declares that all statements in an application for insurance shall be construed as representations merely, and not as warranties, and that no representation, unless material or fraudulent, shall prevent a recovery. *Held*, that a material misrepresentation under such section will avoid a policy, if it is calculated to influence the insurer in making the contract, or in estimating the degree or character of the risk, or in fixing the premium, if it is without knowledge of the falsity thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.*]

8. INSURANCE (§ 377*)—FALSE REPRESENTATIONS—WAIVER—KNOWLEDGE.

Where insured in his application falsely stated that he had not been intimately associated with any one suffering from any transmissible disease within the past year, when in fact he had nursed his wife and child through typhoid fever, of which disease he subsequently died, the insurer could not have waived such misrepresentation in the absence of a showing that it had knowledge thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 942, 966, 967, 975-997; Dec. Dig. § 377.*]

9. INSURANCE (§ 378*)—FRAUD—PARTICIPATION BY AGENT.

Where the agent of an insurance company wrongfully delivers a policy with knowledge of a materially false representation therein on which it was issued, he ceases in that transaction to represent the company, and acts in his individual capacity, participating in the fraud of insured, which vitiates the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.*]

10. INSURANCE (§ 378*)—POLICY—DELIVERY—FAITHLESS AGENT—KNOWLEDGE—IMPUTATION TO INSUREE.

Where an insurance agent, faithless to his trust, delivers a policy to insured with knowledge that insured is then suffering from his last illness, and has made a material misrepresentation in the application, the agent's knowledge will not be imputed to insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.*]

Appeal from Superior Court, Edgecombe County; Cline, Judge.

Action by Eula B. Gardner against the North State Mutual Life Insurance Company. Judgment for defendant and plaintiff appeals. Reversed.

This is an action to recover the amount of an insurance policy, alleged to have been issued by the defendant in March, 1912, on the life of John B. Gardner, in favor of the plaintiff, who was his wife. John B. Gardner died in March, 1912, shortly after he made his application for insurance, and the policy was delivered to him by defendant's local agent during his last illness; he being then sick with typhoid fever, which caused his death. The application contained a representation by him that he had not been intimately associated with any one suffering from any transmissible disease within the year before his death. At the time of the

application, and after the examination of the applicant by a physician, said agent issued what is called in the case a "binding receipt," one of the provisions of which is the following: "In the event this policy shall be approved by the medical director of the company, then the insurance applied for shall be deemed to relate back to and be in force from and after the date of this receipt, but not otherwise." And also the following provision: "That the company shall not incur any liability under this application unless the policy has been issued, delivered, and paid for while I am in good health." The issues and answers thereto by the jury will disclose the nature of the controversy, and sufficiently present the question upon which the opinion of the court rests. They are as follows: "(1) Did John B. Gardner represent in his application for insurance that he had not, at the time of his application, been intimately associated with any one suffering with any transmissible disease within the past year? A. Yes. (2) Had said Gardner, within the year prior to his application, been intimately associated with any one suffering with any transmissible disease? A. Yes. (3) Was said representation material to a contract of insurance between the said Gardner and the defendant? A. Yes. (4) Was the said Gardner sick with typhoid fever at the time that the policy in question was left with him by B. H. Howle? A. Yes. (5) Did the defendant manager at Rocky Mount (V. T. Lamb) ratify the act of Howle in issuing the 'binding receipt' and the delivery of the policy in pursuance thereof? A. Yes. (6) Did the policy in question, at the time it was left with said Gardner by said Howle, become a consummated contract of insurance between the defendant and the insured? A. Yes. (7) In what amount, if anything, is the defendant indebted to the plaintiff? A. \$1,000." The court set aside the verdict upon the sixth and seventh issues, and, having given judgment for the defendant upon those which remained, the plaintiff appealed, reserving her exceptions.

E. B. Grantham and F. S. Spruill, both of Rocky Mount, for appellant. Rouse & Land, of Kingston, for appellee.

WALKER, J. [1] This case has not been tried upon the real and decisive issue raised by the pleadings; but we will consider this question presently and in its order. A careful review of the evidence, the course of the trial and development of the case, the charge of the court and the issues, leads us to conclude that the jury disobeyed the instructions upon the sixth issue, and it may be clearly inferred that the trial judge set aside the verdict as to the sixth and seventh issues because of this fact. The jury were charged that, if it was found from the evi-

dence the representation in the application mentioned in the first three issues was material, they should answer the sixth issue, "No," or, if they found that the agent of defendant, V. T. Lamb, did not ratify the "binding receipt" (if it was void), and that John B. Gardner was sick with typhoid fever when he received the policy, they should answer the sixth issue, "No," even though they found that the representation was not material. This instruction was not followed by the jury. The false and material representation has something to do with the "binding receipt" and to the extent herein-after indicated. The effect of the "binding receipt" was correctly stated by Judge Cline, and it is thus defined in Vance on Insurance, p. 160: "The binding slip is merely a written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer, or until the issue of a formal policy. By intendment it is subject to all the conditions in the policy to be issued. These informal writings are but incomplete and temporary contracts—memoranda given in aid of parol agreements. Such memoranda usually fix all the essential provisions that are variable; but they are not ordinarily intended to include all the terms of the agreement, and always look to the formal policy that is expected subsequently to issue for a complete statement of the contract made. Hence, as heretofore stated, the contract evidenced by the binding slip is subject to all the conditions of the contemplated policy, even though it may never issue, and the same is true of other informal written contracts." *Lipman v. Insurance Co.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719.

In what has been said or what will hereinafter be said, it must not be understood that we are deciding whether, where a "binding slip" has been delivered to the applicant, the company, in the event of his death or illness occurring subsequently, but before the acceptance of the application, can arbitrarily or even unreasonably reject it or withhold its approval or the approval of the medical director, and thereby avoid its liability, under the clause in the binding slip requiring the approval of the application by the medical director of the company before the insurance shall take effect. This course was taken in *Grier v. Insurance Co.*, 132 N. C. 542, 44 S. E. 28; the policies having been delivered in both cases, the only difference in the two being that in *Grier's* Case there was no allegation of fraud or a false and material representation, while in this case there is. We are confining ourselves to a consideration of the false representation and its effect upon the later transactions. Nor do we pass upon the question whether the "binding slip" was actually delivered, as the jury have, by clear implication from their answer to the fifth issue, found as a fact

that it was, contrary to defendant's contention that it was not delivered.

[2] When properly executed, the "binding slip" protects the applicant for insurance against the contingency of sickness intervening its date and the delivery of the policy, if the application for insurance is accepted. If the application is not accepted in the proper exercise of the company's right, and the insurance, therefore, is refused, the "binding slip" ceases eo instanti to have any effect. It does not insure of itself, but is merely a provision against any illness supervening it, if there is afterwards an acceptance of the application, upon which it depends for its vitality. This view, which is the prevailing one, if there is anything to the contrary, is clearly stated by the Chief Justice in *Grier v. Insurance Co.*, 132 N. C. 542, 44 S. E. 28, where it is said that the risk of future illness, that is, after the date of the "binding receipt," is taken by the company, if it afterwards accepts the application, or the insurance becomes effective, and the insurance relates back to the date of the receipt, and, further, that the receipt of the premium acknowledged in the policy, and the recital of the fact that the policy was delivered while the insured was in good health, cannot be contradicted, in the absence of fraud or other sufficient equitable element, as they affect the validity of the contract of insurance, which cannot be impeached in this collateral way. This is sound doctrine, when confined within its proper limits, and not only is it such, but it is also eminently just.

[3] The company can show that the manual delivery of the policy was conditional, for this goes to the execution of the contract, or it may prove fraud or other equitable matter in the same way, for the purpose of showing that it never took effect as a contract, as in *Garrison v. Machine Co.*, 159 N. C. 285, 74 S. E. 821, *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768, and *Powell v. Insurance Co.*, 153 N. C. 124, 69 S. E. 12; but, when the policy is once delivered, and becomes effective as a contract, statements therein which, if falsified, will affect its continued validity cannot be contradicted with a view to avoid the insurance. The entire subject is fully discussed in *Grier's* Case, supra, and to some extent in *Kendrick v. Insurance Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592, and *Rayburn v. Casualty Co.*, 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548. See, also, *Joyce on Insurance*, § 64.

[4, 5] It became material to inquire whether the company, by its agent with competent authority, had ratified the execution of the binding receipt, as the policy itself was delivered to John B. Gardner while he was ill with typhoid fever, which resulted in his death; the application, which he signed, providing that it should be issued and delivered and the premium paid while he is in good health, in order to be binding upon the com-

pany. We will not stop to consider the question whether the evidence was sufficient to warrant the peremptory instruction of the court that V. T. Lamb had the requisite power to ratify, as the evidence may be changed at the next trial, and present the matter in a different aspect, rendering premature and futile any discussion of it at present, and, besides, this decision may cause it to be considered in a different way. Of course, an agent must have authority in order to bind his principal. This is axiomatic. 1 Joyce on Insurance, § 64. But, as we have intimated, the underlying question in this case, which affects both what is called the "binding slip or receipt" and the validity of the policy is whether the company, by itself or its duly authorized agent, has waived the benefit of the false representation made in the application, with full knowledge of the facts. If the representation made in the application was false and material, and the jury so found, and the company was ignorant of its falsity, it vitiates the so-called binding receipt and the policy, unless the company has in some way waived it by its conduct, and with full knowledge of the facts. "A false representation avoids a contract of insurance when material and wholly without reference to the intent with which it is made, unless it is otherwise provided by statute." Vance on Insurance, p. 269. We need not inquire whether this rule is too broadly stated by Mr. Vance, as it applies with the meaning intended by him to the facts of this case, and it has been stated by this court substantially in the same terms. Every fact which is untruly stated or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium. 16 Am. & Eng. Enc. of Law (2d Ed.) 933; Vance on Insurance, 284. This definition was adopted by us in *Fishplate v. Fidelity Co.*, 140 N. C. 589, 53 S. E. 354, and has since been approved several times, and is also the definition of other courts. *Bryant v. Insurance Co.*, 147 N. C. 181, 60 S. E. 983; *Alexander v. Insurance Co.*, 150 N. C. 536, 64 S. E. 432; *Annuity Co. v. Forrest*, 152 N. C. 621, 68 S. E. 139; *Ætna L. Ins. Co. v. Conway*, 11 Ga. App. 557, 75 S. E. 915; *Maddox v. Insurance Co.*, 6 Ga. App. 681, 65 S. E. 789; *Talley v. Insurance Co.*, 111 Va. 778, 69 S. E. 936; *Penn M. Life Insurance Co. v. M. S. & Trust Co.*, 72 Fed. 413, 19 C. O. A. 286, 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, 70; *Cooley's Briefs on Insurance*, p. 1953; *Vance on Insurance*, pp. 267, 269.

[§. 7] It may be stated as a general rule that where, in an application for insurance, a fact is specifically inquired about, or the question is so framed as to call for a true statement of the fact, or to elicit the information desired, reason and justice alike demand that

there should be a fair and full disclosure of the fact, or at least a substantial one. 3 *Cooley's Briefs on Insurance*, p. 2009 (d). Our case is not essentially different from *Alexander v. Insurance Co.*, supra, in which this court said: "The company was imposed upon (whether fraudulently or not is immaterial) by such representation, and induced to enter into the contract. In such case it has been said by the highest court that: 'Assuming that both parties acted in good faith, justice would require that the contract be canceled, and premiums returned.' *Insurance Co. v. Fletcher*, 117 U. S. 519 [6 Sup. Ct. 837, 29 L. Ed. 934]—"citing *Bryant v. Insurance Co.*, supra, as decisive of the question. Our statute (Revisal of 1905, § 4808) affirms this view, for, while it declares that all statements in an application for insurance shall be construed as representations merely, and not as warranties, it further provides that no representation, unless material or fraudulent, shall prevent a recovery, the meaning of which plainly is that a material representation shall avoid the policy, if it is also false and calculated to influence the company, if without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premium. *Bryant v. Insurance Co.*, supra. Our case is well within this rule. It is not necessary, as said in *Fishplate's Case*, that the act or conduct of the insured, which was represented by him in the application, should have contributed in some way or degree to the loss or damage for which the indemnity is claimed. Whether it was material depends upon how, if at all, it would have influenced the company in the respect we have just stated. The determining factor, therefore, in such case is whether the answer would have influenced the company in deciding for itself, and in its own interest, the important question of accepting the risk, and what rate of premium should be charged. The questions generally are framed with a view to estimating upon the longevity of the applicant, and any answer calculated to mislead the company in regard thereto should be considered as material. There are some contingencies that cannot be provided against; but the company is entitled to have a fair and honest answer to every question, which will enable it to exercise its judgment intelligently, and to have the necessary information as a basis upon which to make its calculations, although its best deduction therefrom may only approximate the actual result in the particular case. 3 *Cooley's Briefs in Law of Insurance*, p. 1952, 1953; *Ætna L. Ins. Co. v. Conway*, 11 Ga. App. 557, 75 S. E. 915. The applicant is required to act in the utmost faith in giving the information. *Ætna L. Ins. Co. v. Conway*, supra.

In life insurance, it is important for the company to know the individual history and characteristics of the applicant, his idio-

syncretisms, or the peculiarities of his mental and physical constitution or temperament, and his environment at the time of his application. In no other way could the risk or hazard be well determined, or the premium fixed. Is he weak in body or mind, and, if so, to what extent, and in what particular way, and what are his inherited traits or the mental and physical characteristics of his progenitors? The inquiry must be not only individual, but ancestral, and the investigation searching as to his past life and future intentions, as experience has shown, in order to make anything like a reliable estimate of the risk to be incurred. And his habits and surroundings are also to be known, considered, and weighed. Has he been exposed to any contagious, infectious, or transmissible disease, is a perfectly legitimate inquiry. Does he propose to change his residence, so that his exposure to climatic or other diseases will be greater, and the hazard correspondingly increased? These and many other questions of like kind any prudent man engaged in the business of life insurance would be more than likely to ask, and the answers to them would surely tend to shape the judgment of the underwriter and influence his decision in regard to the risk. Any insurance company that would issue a policy or contract for insurance upon any other basis and without proper inquiry would be so reckless as to forfeit the confidence of the public.

However it may be generally, in our case it appears that the applicant had been intimately associated with his wife, who was afflicted with typhoid fever, requiring 17 medical visits for treatment. He nursed his wife and a child in the same house afflicted with the same disease throughout their illness, and shortly afterwards was himself attacked by it, and died. There was ample evidence to show that typhoid fever is transmissible from one person to another in various ways—by flies and other insects, drinking water, milk, and other substances of a like kind, when infected by flies, which carry the fatal germs from the stools or excreta of the typhoid patient. It was testified that, when there is typhoid fever in a house or on the premises, it presents a very dangerous situation for those who occupy them or who visit there, as they are thereby brought in close contact with the germ-laden substances, and are more exposed to infection. A person physically able to resist or throw off the disease may escape, or he may be so fortunate as not to become the victim of the germ-bearers; but he is nevertheless in dangerous surroundings, where the chances of infection are greater than if he were more remote from the premises of the patient. There was also evidence that the application for insurance would have been rejected had the question been correctly answered. John B. Gardner knew, or rather must have known, at the time he answered the question,

that he had very recently been intimately associated with his sick wife as her nurse during her severe illness, and the company, if ignorant of the fact, was misled by his answer as to the truth of the matter. Under the charge of the court, which is sustained by our decisions, and was in accordance with the established doctrine, the jury found that the representation was false, and was also material, and there was evidence to support the finding. This being so, the question is, Did the defendant, with knowledge of the facts by itself or its agent, waive its right to insist upon this false statement, and thereby ratify the "binding slip"? If it did, then, the slip being valid, the company took the risk of the illness of the assured occurring subsequent to its date, and the policy was rightfully delivered by defendant's agent to Gardner, although he was sick at the time. *Grier v. Insurance Co.*, supra. If it did not thus waive its right, the next question will be, Did the agent deliver the policy, not knowing that the statement in the application was false, and being led thereby to believe that the slip was valid, and of itself bound him to deliver the policy, and was he influenced by this fact to deliver the policy? This all relates to the valid execution of the policy, and does not contradict or vary its terms.

[8] It will not be denied, we should think, that there can be no legal waiver of a right without a knowledge of the right which is claimed to have been relinquished. The doctrine is well stated in 29 Am. & Eng. Enc. of Law at p. 1093: "There can be no waiver, unless the person against whom it is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for their enforcement. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it."

[9, 10] If there was any fraudulent or collusive agreement between the agent and Gardner for the delivery of the policy in disregard of the company's rights, it would avoid the entire transaction, and defeat plaintiff's recovery, for fraud vitiates everything. In such case, the agent would be representing himself, and not his principal, and his authority to speak or act for him would cease, as the party claiming the insurance, and who assisted in the fraud, or was particeps criminis, cannot take advantage of his own or the agent's wrong. "A contract made by an agent under the influence of bribery (or fraud or collusion), or one made to the knowledge of the other party, in fraud of the principal, is voidable by the latter." *Tiffany on Agency*, pp. 229-326; *Sprinkle v. Indemnity Co.*, 124 N. C. 405, 32 S. E. 734. But the other party (here Gardner) must have had knowledge of the principal's right, and that the agent was defrauding his principal, or was disobeying instructions, or acting

without the scope of his employment, or he must have colluded with him, and thereby obtained something belonging to the principal without being legally entitled thereto. "An agent cannot be allowed to put himself into a position in which his interest and his duty will be in conflict, and, if a person who contracts with an agent so deals with him as to give the agent an interest against the principal, the latter, on discovering the fact, may rescind the contract, notwithstanding that it was within the scope of the agent's authority. Thus, a gratuity given, or promise of commission or reward made to an agent for the purpose of influencing the execution of the agency, vitiates a contract subsequently made by him, as being presumptively made under that influence." *Tiffany on Agency*, p. 229. Under such circumstances of fraud or collusion, notice to the faithless agent of Gardner's illness or any other vital fact would not be imputed to the company, his defrauded principal. *Tiffany on Agency*, pp. 262, 263; *Sprinkle v. Indemnity Co.*, 124 N. C. 405, 32 S. E. 734; *Bank v. Burgwyn*, 110 N. C. 267, 14 S. E. 623; *Stanford v. Grocery Co.*, 143 N. C. 419, 55 S. E. 815. The *Sprinkle* decision is very much in point, both as to the fraud of the agent and its effect upon the question of notice to the principal of his faithless conduct. The case, in this aspect, may be submitted to the jury, if the defendant so desires, and tenders a proper issue for the purpose.

We can now see how important it is to have additional issues or a modification of the present ones, except the first four of them, for in the light of the entire case—pleadings, evidence, charge, and verdict—neither the plaintiff nor the defendant was entitled to a judgment; the verdict having fallen short of presenting all the essential facts, and the court, therefore, being unable to determine the rights of the parties and pronounce judgment. As some confusion may arise if we retain any part of the verdict, for instance, as to the first four issues, we will set aside the entire finding, and let the parties begin anew, which will be in the nature of a repleader, though not technically so, and it is so ordered.

New trial.

WILSON v. SCARBORO et al.

(Supreme Court of North Carolina. Oct. 29, 1913.)

1. TRIAL (§ 330*)—INSTRUCTIONS—SUBMISSION OF ISSUES.

In a suit on a contract for the sale of timber, defendants alleged that a stipulation as to the manner of cutting was omitted from the contract by mutual mistake or by fraud of plaintiff inducing the mistake on defendants' part. There was no evidence of fraud, but the court submitted that question to the jury, over objection by plaintiff. The jury found that there was "fraud or mutual mistake," without designating which

of the two, and rendered a verdict for defendants. *Held*, that the verdict could not be sustained, since the jury might have found that there was fraud, and no mistake and still have made the same answer.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 777-781½; Dec. Dig. § 330; *Sales*, Cent. Dig. § 705.]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE—WRITTEN CONTRACT.

Where a written contract for the sale of timber contained no provision requiring plaintiff to deposit a certain sum or give his note as security for the faithful performance of the contract, it was error to permit parol proof of such an agreement as tending to materially vary and contradict it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1765-1845; Dec. Dig. § 441.*]

3. EVIDENCE (§ 442*)—PAROL EVIDENCE—WRITTEN CONTRACT.

Where a contract is not required to be in writing, and it is not intended that the written instrument shall state the whole of the agreement, the part resting in parol may be proved, provided it does not materially vary or contradict that which is written.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1874-1897; Dec. Dig. § 442.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where a contract for the sale of timber as claimed by defendant entitled plaintiff to suspend cutting if the market price of lumber so declined as to make further cutting unprofitable, an instruction on the issue whether plaintiff did suspend cutting and paying for defendant's timber after plaintiff had begun to cut the same in violation of the agreement, omitting all consideration of plaintiff's right to suspend in case the market price declined, was erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

5. LOGS AND LOGGING (§ 3*)—TIMBER CONTRACT—EFFECT.

A contract for the sale of timber with the right to enter the land and remove the same is in effect a conveyance of real property passing a present interest in the timber, defeasible as to all timber not cut within the time fixed by the parties, and hence after delivery is an executed and not merely an executory contract during the time the grantee is entitled to remove the timber.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3; *Contracts*, Cent. Dig. § 890.]

6. REFORMATION OF INSTRUMENTS (§ 19*)—GROUNDS—MUTUAL MISTAKE—FRAUD.

Where there was a mutual mistake in the execution of a written contract or a mistake of one of the parties brought about by the fraud of the other, equity, in an otherwise proper case, will reform the contract but not on the ground of ignorance or misapprehension of one of the parties as to any facts inhering in such contract, though such misapprehension might be ground for rescission.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 74-78; Dec. Dig. § 19.*]

Appeal from Superior Court, Wake County; Ferguson, Judge.

Action by W. S. Wilson against S. H. Scarboro and others. Judgment for defendants, and plaintiff appeals. New trial granted.

This action was brought to recover damages of the defendants for entering upon

land and unlawfully taking possession of and detaining certain timber thereon. The defendants "bargained and sold and conveyed" to the plaintiff certain timber described in the contract of conveyance, with the right and privilege to cut and remove the same within five years from April 5, 1909. While the contract does not so state, the defendants in their answer allege that plaintiff was required "to cut the timber continuously, after once beginning to cut, until the cutting of the same should be completed, unless while cutting the timber the price of lumber should decline, so that he could not cut the timber at a profit," and that said agreement was omitted from the contract by the mutual mistake of the parties or by the mistake of defendants and the fraud of the plaintiff, and that plaintiff further promised to put up a guaranty fund of \$1,000 or give a note for that amount to one James Moore, who held a mortgage on the land, to insure the full and faithful performance of the contract. This statement of facts, with the issues and answers thereto, will sufficiently explain the matters in controversy. The following verdict was rendered by the jury:

"(1) Did the defendants execute a contract with plaintiff to sell him the timber described in the complaint, as alleged therein? Answer: Yes.

"(2) Was there an agreement between the plaintiff and the defendants, before the execution of the written contract, that the plaintiff would cut the timber described in the complaint continuously, after once beginning to cut, until the cutting of the same was completed, unless while cutting the same the price of lumber should decline so that he could not cut the said timber at a profit, as alleged in the amendment to the answer? Answer: Yes.

"(3) If so, was such agreement to continuously cut such timber omitted from the contract by fraud of the plaintiff, or by the mutual mistake of the plaintiff and the defendants? Answer: Yes.

"(4) Did plaintiff, at the time of the verbal contract, agree to pay to the defendants the sum of \$1,000 as security or guaranty for the proper cutting of the timber described in the complaint and for the full performance of the contract between the plaintiff and defendants? Answer: Yes.

"(5) Did plaintiff, at the time of and contemporaneously with the execution of the written contract, agree with defendants that he would give to Mr. James Moore a note for \$1,000, which would be as satisfactory to the said Moore as a deposit of \$1,000 in money, as a guaranty for the performance of the terms of the contract between plaintiff and defendants, and that, failing to give such note to the said Mr. Moore, he would desist from cutting defendants' timber and

remove his mills from their lands? Answer: Yes.

"(6) Did plaintiff give such note to the said James Moore? Answer: No.

"(7) Did defendants waive the giving of such note? Answer: No.

"(8) Did plaintiff suspend cutting and paying for defendants' timber after he had begun to cut the same, in violation of his agreement with defendants? Answer: Yes.

"(9) Did plaintiff remove from defendants' lands timber cut thereon before paying defendants for the same? Answer: No.

"(10) Did plaintiff cut stumps higher than 24 inches, or did he leave logs lying in the woods, or timber in the tops of trees, or leave timber standing scattered over places partly cut over, in violation of the contract with defendants? Answer: Yes.

"(11) If plaintiff violated the contract in any or all of the respects mentioned in the preceding issue, what amount of damages in money did the defendants sustain thereby? Answer: \$6.75.

"(12) Did plaintiff negligently permit fire to be communicated to defendants' lands and thereby cause damage to defendants' timber, wood, undergrowth, etc.? Answer: No.

"(13) If your answer to the preceding issue shall be 'Yes,' what amount of damages did defendants sustain thereby? No answer.

"(14) Did defendants wrongfully and unlawfully refuse to allow plaintiff to re-enter upon their lands and to resume the cutting of their timber under said contract, after he had suspended the cutting of the same? Answer: No.

"(15) If your answer to the preceding issue shall be 'Yes,' what damage did plaintiff sustain thereby? No answer."

Judgment on the verdict for the defendants, and plaintiff appealed.

Armistead Jones & Son, Douglass & Douglass, R. N. Simms, and W. H. Lyon, Jr., all of Raleigh, for appellant. Jones & Bailey, of Raleigh, for appellees.

WALKER, J. (after stating the facts as above). [1] The defendants allege that there was a stipulation as to the manner of cutting the timber which was omitted from the contract by mutual mistake or by the fraud of the plaintiff inducing a mistake on the part of the defendants. But we do not find in the record any evidence of fraud; and as the jury, in answer to the third issue, have found that there was fraud or mutual mistake, without designating which of the two, we are unable to tell whether their answer was based upon the fraud or the mistake. The court submitted the question of fraud to the jury against an express prayer of the plaintiff that there was no evidence of fraud, and consequently we have an erroneous finding upon the third issue. The jury might have found that there was fraud and no mistake and yet, misled by the erroneous

ruling and instructions of the court, have given the answer, which is fully responsive to the issue. This error so permeates the entire case that it is sufficient of itself to require a new trial. It makes no difference that the alleged agreement was made, unless there was fraud or mutual mistake, for which the contract will be corrected and made to record the truth.

[2] There was also error in the rulings upon the fifth issue, as evidence was admitted, over plaintiff's objection, of the agreement as to the deposit of \$1,000 or the giving of a note of like amount to James Moore as a security for the faithful performance of the contract. It evidently tended to vary the contract materially and even to contradict it. It was proposed by it to show an oral agreement, not inserted in the contract, which, if broken by the plaintiff, would terminate the timber contract and divest the plaintiff of all rights thereunder.

[3] Where the law does not require the contract to be in writing and it was not intended that the written instrument should state the whole of the agreement between the parties thereto, but that a part thereof should rest in parol, the latter part may be proved, if it does not materially vary or contradict that which has been written but is consistent therewith. The rule is thus stated in Clark on Contracts (2d Ed.) at page 85: "Where a contract does not fall within the statute, the parties may, at their option, put their agreement in writing or may contract orally or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing and the whole constitutes one entire contract." Commenting on this passage in *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847, we said: "In such a case there is no violation of the familiar and elementary rule we have before mentioned (against varying or contradicting a written agreement), because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but, leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness the same as if all of it had been committed to writing." Numerous cases in this court sustain this rule. *Cobb v. Clegg*, 137 N. C. 153, 49 S. E. 80; *Walker v. Cooper*, 150 N. C. 129, 63 S. E. 681; *Type-writer Co. v. Hardware Co.*, 143 N. C. 97, 55 S. E. 417; *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847; *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510; *Basnight v. Jobbing Co.*, 148 N. C. 350, 62 S. E. 420; *Woodson v. Beck*, 151 N. C. 144, 65 S. E. 751, 31 L. R. A. (N. S.) 235. But the evidence admitted in

our case does not fall within the well-settled rule, as it essentially varies and directly contravenes the written contract, incorporating in it a clause which, in a certain contingency, would nullify or destroy it. This cannot be done. When parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or vary it; and this is so although the particular agreement is not required to be in writing, the reason being that the written memorial is considered to be the best and therefore is declared to be the only evidence of what the parties have agreed, as they are presumed to have inserted in it all the provisions by which they intended or are willing to be bound. *Evans v. Freeman*, supra; *Terry v. Railroad*, 91 N. C. 236. In *Evans v. Freeman*, supra, it was further said: "Numerous other cases have been decided by this court in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion that such evidence is competent where it does not conflict with the written part of the agreement and tends to supply its complement or to prove some collateral agreement made at the same time. The other terms of the contract may generally thus be shown where it appears that the writing embraces some, but not all, of the terms. *Twidy v. Saunderson*, 31 N. C. 5; *Manning v. Jones*, 44 N. C. 368; *Daughtry v. Boothe*, 49 N. C. 87; *Perry v. Hill*, 68 N. C. 417; *Willis v. White*, 73 N. C. 484; *Terry v. Railroad*, supra; *Cumming v. Barber*, 99 N. C. 332 [5 S. E. 903]." This court, in *Ray v. Blackwell*, 94 N. C. 10, and *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399, refused to apply the principle allowing the unwritten part of the contract to be shown because the oral evidence tended to contradict or vary the written part of the contract and not merely to add other consistent terms to it. In *Moffitt v. Maness*, supra, we were admonished that the rule against the admissibility of parol testimony to vary the terms of a written instrument has perhaps been relaxed too much, and that the farthest limit has been reached in admitting such testimony, beyond which it will not be safe to go. The court sounds the alarm and warns us against the dangers ahead. It is safer to trust in the writing (the memorial selected by the parties for preserving the integrity of their treaty) than to confide in human memory for the exact reproduction of the facts, for, says Taylor, J., "time wears away the distinct image and clear impression of the fact and leaves in the mind uncertain opinions, imperfect notions, and vague surmises." *Smith v. Williams*, 5 N. C. 426, 4 Am. Dec. 564. There was no attempt to reform the contract for fraud or mistake in this respect, and the fourth and fifth issues are not so framed.

[4] The instruction upon the eighth issue

left out of consideration that by the terms of the oral agreement, as it is stated by defendant, the plaintiff had the right to suspend the cutting if the market price of lumber had so declined as to make it unprofitable, and the jury were told instead that they should answer that issue affirmatively, if they found that there was a stipulation for continuous cutting, and it was omitted from the agreement by fraud of plaintiff or mutual mistake. If it was made and left out of the written agreement by fraud or mistake, the real inquiry then was whether the plaintiff had violated it by failing to cut continuously when in the then state of the lumber market it was profitable to continue the cutting.

[5] It will be well to notice one position taken by the defendant, which is that the contract is executory and not an executed contract of sale—a mere agreement to convey the timber and not a perfected conveyance of it. But we understand that the same rule applies to both executory and executed written contracts with regard to the competency of parol evidence to vary or contradict them. If the plaintiff has violated the contract as written by the parties, or as it should have been written, if there was fraud or mistake, he may not be able to recover, depending, of course, upon the nature of the breach and the particular terms of the contract. Looking at the verdict and eliminating the first eight issues, as to which there was error, we do not see that the plaintiff has committed any breach from which a forfeiture of his contract results. The jury have said that he did not remove any cut timber without paying for it. Apart from this alleged breach, which the jury have negatived, the important and dominating issues in the case are the first eight.

Our opinion, though, is that the contract is an executed one and not merely executory. We have so repeatedly held as to similar contracts in recent years. In *Lumber Co. v. Corey*, 140 N. C. 462, 53 S. E. 300, 6 L. R. A. (N. S.) 468, it was said: "This court has so recently and so fully considered the question as to the true construction of contracts substantially like the one now under review (which is substantially like the Wilson-Scarboro deed) that it would seem almost useless for us to add anything to what has already been said. We have decided that such a contract, which could be treated as in effect a conveyance, passes a present estate in the timber, defeasible as to all timber not cut within the limit of time fixed by the parties in their agreement. This is the true construction." And again in *Hawkins v. Lumber Co.*, 139 N. C. 160, 51 S. E. 852: "The true construction of this instrument (a contract for cutting timber within a fixed period) * * * is that the same conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed with-

in the time required by the terms of the deed"—and this statement of the law is approved in *Lumber Co. v. Corey*, 140 N. C. 467 [53 S. E. 300, 6 L. R. A. (N. S.) 468]. In *Bunch v. Lumber Co.*, 134 N. C. 116, 46 S. E. 24, it is said that the form of the instrument counts for little. "It is more a difference in form than in substance. In no event should we give a construction to the instrument which will confer any greater right or estate than is commensurate with the object and purpose of the parties as expressed in it. The spirit and letter of the contract exclude the idea that, when the time fixed by it expired, the defendant's assignor was to have any right, interest, or estate in the timber then standing on the land." And approving *Strasson v. Montgomery*, 32 Wis. 52, the principle is thus stated: "The former conveyance was of all the trees and timber on the premises, with the proviso that the vendee should take the same off the land within four years. * * * It is well settled, on principle and by authority, that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises." See, also, *Hornthal v. Howcott*, 154 N. C. 230, 70 S. E. 171, where the same doctrine was recognized and applied by this court, speaking by Justice Allen. It has also been held that growing trees are a part of the realty, and deeds and contracts concerning them are governed by the law applicable to that species of property. *Drake v. Howell*, 133 N. C. 163, 45 S. E. 539; *Hawkins v. Lumber Co.*, *supra*. We see, therefore, that this is an executed contract operating as a conveyance of the timber and a defeasible estate therein and of course is required to be in writing. It cannot be contradicted or varied, nor can it be proved by parol, but only by the writing duly executed.

We should perhaps notice another matter. A careful reading of the testimony has not convinced us that there is any evidence of a mutual mistake by the parties in writing their contract. A contract is the agreement of both parties and not merely the intention of one. Their minds must meet and be in accord upon one and the same thing at the same time. *Rodgers v. Bell*, 156 N. C. 378, 72 S. E. 817; *Elks v. Insurance Co.*, 159 N. C. 619, 75 S. E. 808. "Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the court proceeds not upon the understanding of one of the parties but upon the agreement of both. No principle is better settled." *Lumber Co. v. Lumber Co.*, 137 N. C. 431, 49 S. E. 946, citing *Brunhild v. Freeman*, 77 N. C. 128, *Prince v. McRae*, 84 N. C. 674, *Bailey v. Rutjes*, 86 N. C. 520, and other cases. It follows from this doctrine that no contract can

be altered or amended in any substantial respect, except by consent of both parties or by what may be equivalent thereto.

[8] If a court finds that there has been a mutual mistake, or its equivalent, viz., that there has been a mistake of one of the parties brought about by the fraud of the other, it will, in an otherwise proper case, reform the contract, but not otherwise. The undisclosed intention or understanding of one will not answer the purpose. "The mistake, to be relieved against in equity, must be one that is mutual, material, and not induced by negligence. It must be mutual, if the complainant wishes to have the instrument reformed and not simply set aside, because equity cannot undertake to reform on the ground of ignorance or misapprehension of one of the parties as to any facts, though it may rescind. It is essential that the mistake, to be relieved against in equity, must be an error on both sides. If, however, such ignorance or misapprehension was induced or fraudulently taken advantage of by the other party, relief will be administered, but obviously on different grounds." Bispham on Equity, § 191. "Equity will reform a written contract or other instrument inter vivos where, through mutual mistake or the mistake of one of the parties, induced or accompanied by the fraud of the other, it does not, as written, truly express the agreement of the parties." Eaton on Equity, § 618; Warehouse Co. v. Ozment, 132 N. C. 839, 44 S. E. 681; Pelletier v. Cooperage Co., 158 N. C. 403, 74 S. E. 112; Dameron v. Lumber Co., 161 N. C. 498, 77 S. E. 694; and same case at this term, 79 S. E. 607. The defendant's evidence in this case hardly conforms to the standard of proof required for a correction of written instruments. It tends to show a mistake in his own mind rather than one common to the parties—his own understanding rather than the agreement of the parties. It must have been the intention of both to write the contract as he now claims it should be and to insert in it the clause alleged to have been left out.

The judgment and verdict will be set aside, and a new trial granted.

New trial.

WILLIAM JAMES' SONS CO. v. CROUCH et al.

(Supreme Court of Appeals of West Virginia.
Oct. 7, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 342*) — COPY OF RECORDED GRANT—ADMISSIBILITY.

A copy of a grant of land by the commonwealth of Virginia, certified by the auditor of this state or the register of the land office of Virginia, showing no seal of the commonwealth thereon, nor anything indicating that it had borne such seal, when recorded, is admissible as evidence of title to the land, upon the pre-

sumption that the original is under seal, arising from the recordation thereof and the recital in the testimonium clause that the Governor had affixed the seal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1302-1314; Dec. Dig. § 342.*]

2. WILLS (§ 246*)—PROBATE—ADMISSION TO RECORD—COLLATERAL ATTACK.

Admission to record, by the clerk of a county court of this state, of a copy of a will probated in another state amounts to probate thereof, which cannot be collaterally drawn in question, nor set aside otherwise than in the manner prescribed by statute.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 582, 583; Dec. Dig. § 246.*]

3. PUBLIC LANDS (§ 186*)—ENTRY OF INDEFINITE DESCRIPTION — EFFECT — SUBSEQUENT GRANT.

An entry of land, general and indefinite in its description of the land claimed under it, and afterwards carried into survey and grant, relied upon as proof of an exception, from another grant, of land susceptible of inclusion by the description of the entry, but lying entirely outside of the lines of the survey and patent founded on the entry, may be treated by a jury as calling only for the land surveyed and granted, and as having been deemed by the surveyor to be identical with the survey and merged therein, and the land lying beyond the lines of the survey as not having been excepted.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. § 186.*]

4. GRANT OF PUBLIC LAND—SURVEY.

Quere, whether, to except an entry not specifically excluded by a grant with reservations, authorized by the act of June 22, 1788 (12 Henning's St. at Large, p. 646) the survey designating the entry must be produced.

Error to Circuit Court, Raleigh County.

Action by the William James' Sons Company against E. P. Crouch and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Dillon & Nuckolls, of Fayetteville, for plaintiffs in error. McCreery & Patterson, of Beckley, and T. N. Read, of Hinton, for defendant in error.

POFFENBARGER, P. Having introduced no evidence except certified copies of a certain grant, the defendants in this action of ejectment demurred to the plaintiff's evidence, and the court, being of the opinion that the evidence was sufficient in law to sustain a verdict for the plaintiff, overruled the demurrer, and rendered judgment for it upon the conditional verdict, fixing the location and boundaries of the land.

In support of their demurrer, the plaintiffs in error charge defects in the paper title of the plaintiff and insufficiency of the evidence to prove the land in controversy lies within the territory the title papers purport to cover.

[1] The title claimed by the plaintiff goes back to the De Witt Clinton grant, dated February 17, 1796. To establish this grant, the plaintiff produced a copy of the patent to De Witt Clinton, certified by the auditor of the state. As so certified, the patent appeared to bear the seal of the commonwealth

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of Virginia, but, in making the copy, a printed form was used on which the word "Seal" appeared, and it was not erased so as to make the copy conform to the record. The fact is, as shown by agreement, that the record of this patent shows no seal. To prove this, the defendants produced another copy certified by the auditor, and also two others of different dates from the land office at Richmond, Va., showing none.

Construing the statute as not having required it, the Virginia registers of the land office did not record the seals as parts of the grants, and this custom having prevailed for more than 200 years, during which thousands of grants were made and recorded, the courts of Virginia and Kentucky, once a part of Virginia, have given effect to this practical construction, and admitted copies of patents from the Virginia land office as evidence of valid title, notwithstanding the failure thereof to show the seals. The two constructions of the statute which it is supposed the officers considered, and the reasons which impelled them to accept the grammatical rather than the legal construction, are fully set forth in *Hedden v. Overton*, 4 Bibb (Ky.) 406, and *Coal & Iron Co. v. Coal & Iron Co.*, 101 Va. 723, 45 S. E. 291. The decision in *Hedden v. Overton* was approved and followed in *Sneed v. Ward*, 5 Dana (Ky.) 187, and by the United States Circuit Court of Appeals in *Robinson v. Dewhurst*, 68 Fed. 336, 15 C. C. A. 466, an action of ejectment originating in the United States Circuit Court for the District of West Virginia, and involving lands in this state. Although the statute seems to have required all grants by the commonwealth to be "entered of record at full length" by the register of the land office (Code of 1819, vol. I, c. 86, § 55, p. 334), the registers, deeming the seal to be no part of the grant, omitted it. Legally it is undoubtedly a part of the grant or patent and essential to its completion, the statute requiring such papers to be signed by the Governor and sealed with the seal of the commonwealth, but in a narrow, grammatical sense it is not a part of the patent, but only an appendage thereof. At least it was so regarded and treated, and, for that reason, it was not recorded. The adoption of this view was no doubt superinduced or impelled by the impossibility of producing upon the record books a facsimile of the state seal. The conclusion of the Virginia and Kentucky courts finds some support in the presumption in favor of the regularity of the acts of public officials. As certified, the patent itself declares the Governor had caused the seal of the commonwealth to be affixed. The statutory provisions, regulating the acquisition of land by grant from the commonwealth, were specific and positive as to the requisite steps. The patents were prepared by the register of the land office. On them he indorsed that the party in whose favor the patent was made

out had title to the land, and this indorsement was founded on the records of his office. The paper thus prepared and indorsed was delivered by him to the Governor, whose duty it was to sign it and affix to it the seal of the commonwealth. After this, it became the duty of the register to record it, and he had no authority to record it without the signature of the Governor and the seal of the commonwealth. The certified copy shows the patent in question was recorded, and presumptively the record thereof was made after the Governor had subscribed his name to it and affixed the seal, for the register had no authority to record it until it was so signed and sealed. Certain copies of grants certified by the auditor of this state, put in evidence, show seals, as if they had been copied from the original patents, and are relied upon as contradicting the statement that the register did not record the seals, but these copies were no doubt made on the printed forms used by the auditor, bearing seals, and so carry on their faces the error found in the copy of the Clinton patent. The statement of fact is taken from the Virginia and Kentucky cases, and is no doubt founded upon the result of actual investigation. The reasoning and conclusion of the Virginia and Kentucky courts are approved and adopted, and the certified copy held to be admissible as evidence of title, notwithstanding its omission of the seal. The presumption upon which this ruling stands is recognized in most jurisdictions, and generally applied under the circumstances disclosed here. 1 Taylor, Ev. § 149; 25 A. & E. Enc. L. 78; 11 Ency. of Ev. 656.

[2] The will of Oliver L. Phelps, probated in the surrogate's office of Ontario county, N. Y., on the 17th day of May, 1814, as constituting a link in the plaintiff's chain of title, was not proved in Raleigh county as an original will, but a copy thereof was admitted to record as an authenticated copy of the will as probated in Ontario county, N. Y., by the clerk of the county court of Raleigh county February 18, 1861. The copy was not authenticated in the manner prescribed by the state and federal statutes. The certificate of probate in Ontario county was not under seal, nor was the official character of the surrogate shown in the manner prescribed. Although the evidence of the probate of the will in New York was not sufficient to authorize probate of the copy in this state, it was admitted to record. Such admission was a judicial act. It was a sentence of probate, notwithstanding the error committed by the clerk in the acceptance of insufficient evidence. However erroneous and irregular, this probate cannot be ignored nor called in question otherwise than by direct attack upon it in the manner provided by law. *Norvell v. Lessueur*, 33 Grat. (Va.) 222; *Kirby v. Kirby*, 84 Va. 627, 5 S. E. 539; *Robinson v. Allen et al.*, 11 Grat. (Va.) 785; *Taylor v. Burnside*, 1 Grat. (Va.) 165; *Woof-*

ter v. Matz, 76 S. E. 131, 134; West v. West, 3 Rand. (Va.) 373; Vaughan v. Doe, 1 Leigh (Va.) 287; Wills v. Spraggins, 3 Grat. (Va.) 555; Parker v. Brown, 6 Grat. (Va.) 554. "After a will has been admitted to record, it cannot, with us, be controverted incidentally; as it frequently is in the English common-law courts, and sometimes (through the intervention of a jury) in their court of chancery, in consequence of the want of a court of probate in relation to wills of real estate. The sentence of our courts of probate cannot be drawn in question, unless in an appellate forum, except in the mode prescribed by our statute of wills." Malone v. Hobbs, 1 Rob. (Va.) 346, 39 Am. Dec. 263. The action of the clerk in admitting to record a will or an authenticated copy of one probated in another state has the same effect as if admitted by the county court. Code c. 77, § 26. To set aside the probate of a copy, the mode prescribed by section 25 of chapter 77 of the Code must be followed. McVey v. Butcher, 78 S. E. 891.

[3] De Witt Clinton conveyed his grant to one Oliver Phelps. The devisees of Phelps conveyed it to Andrew Kingsbury, as treasurer of the state of Connecticut, and his successors in office, for the use and benefit of the schools. On May 12, 1818, Kingsbury, as such treasurer, sold and conveyed it to Gideon Granger. The title of Granger was afterwards confirmed by a deed from Zechariah Seymour and James Smedley, trustees under the will of Oliver Phelps. Afterwards, Gideon Granger disposed of it to his descendants by his will. Later it was passed on to more remote descendants by the will of Francis Granger. There were also conveyances of undivided interests among the Grangers, and perhaps strangers were interested at various times, but all interests seem to have gotten back into the hands of Granger descendants. By a deed dated January 23, 1888, numerous persons by the name of Winthrop, Granger, Irving, and Pierson conveyed the land to Azel Ford. The introduction of this deed was objected to on account of a lack of evidence to establish the pedigrees or interests of some of the grantors. The objection did not specify the extent of this alleged defect, and the brief limits it to two persons, Charlotte R. Pierson and Bessie C. Pierson. Presumptively they are the Charlotte Ross Pierson and Bessie Chapin Rochester mentioned in the will of John A. Granger. The latter is described in the deed as having lately borne the name "Rochester," and a deposition taken for the purposes of another case and read in this one by agreement shows she was a granddaughter of John A. Granger. In view of the record of the title and this testimony, the objection is obviously untenable.

The Clinton grant is what is often called an "inclusive" one, or, more accurately, one reserving from its operation prior claims within its boundaries. It granted by metes

and bounds 130,000 acres, but excepted in general terms prior claims amounting to 128,000 acres. Many of these were specifically located by the plaintiff in its proof, but there are two old entries, claiming in the aggregate 36,356.5 acres, both antedating the Clinton grant, as to which there is controversy. One of these was made by Andrew Reid and John Stuart, November 1, 1794, for 31,356.5 acres, and the other by Andrew Reid, March 20, 1795, for 5,000 acres. Upon these two entries a survey was made and completed on the 7th day of April, 1796, calling for a combined acreage of 36,356.5 acres, the aggregate of the entries. On the 27th day of March, 1797, the land so surveyed was granted to Andrew Reid. The entries were very general in their description of the land, and, according to the testimony of two surveyors, are susceptible of an interpretation making them include about three times the quantity of land called for by them. As so construed, two surveyors were of the opinion that they included the land in controversy in this action, but they are positive the survey and patent made under entries do not include any portion thereof.

The entries were made prior to the date of the Clinton grant, which contains this provision: "But it is always to be understood that the survey upon which this grant is founded includes 128,000 acres of prior claims which have a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid and may be carried into grant or grants, and this grant shall be no bar in either law or equity to the confirmation of the title or titles to the same as before mentioned and reserved, with its appurtenances." Part of these entries was never carried into grant, but, if they were excepted as prior claims from the Clinton grant, that grant conferred no title to them. The title thereto remained in the commonwealth. Bryan v. Willard, 21 W. Va. 65; Patrick v. Dryden, 10 W. Va. 387, 416; Nichols v. Covey, 4 Rand. (Va.) 365. Under the statutory system of disposition of public lands, the entries were lodged with the surveyors as applications for the surveys, and were never transmitted to the register of the land office, nor recorded therein. Surveys made upon entries and plats thereof were required to be transmitted to the register of the land office and recorded. Thereupon it became the duty of the register to prepare the patents for execution by the governor. The entry was the basis for the survey, and the survey the basis of the patent. As the register of the land office did not make the survey, there was no occasion for recordation of the entries in his office. The entry was merged in the survey, and the survey in the patent. Both were mere preliminary steps to the execution of the patent, but they conferred rights in the nature of equities, determina-

ble by the courts of equity, when the statutory proceeding in the courts of law by caveat was not adopted. The caveat was a remedy provided by statute for determination of controversies between claimants for patents to the same land, or concerning conflicts of boundaries of entries and surveys. After the issuance of the patent, the remedy by caveat was not available, but fraudulent patentees of land in equity and conscience belonging to others were held to be trustees of the legal title for the benefit of the latter. These observations show the nature and office of the entry. It gave a claim upon the land, but it was an indefinite one. It was a mere memorandum to the surveyor, calling upon him for definite designation of the desired land by a survey. Not being a survey, it was necessarily indefinite and general, notwithstanding the requirement of the statute that the location should be made "so specially and precisely" as that others might be enabled, "with certainty, to locate other warrants from the adjacent residuum." In *Harper & Weston v. Baugh*, 9 Grat. (Va.) 508, the validity of entries was a subject of inquiry, and the substance of that decision is that the entry may be indefinite, but is void if unreasonably so. It was observed that a surplus of a few acres ought not to vitiate the whole entry, but if the whole of the boundaries were described by sensible objects, so that there could be no reason for one to yield to or control the other, the entry could only be good for so much as would be covered in common by surveys for the proper quantity made upon each of the boundaries. But if the boundaries were so extensive that surveys might be made on different parts of the boundary without covering any land in common, the entry would be good for none. Obviously, therefore, notwithstanding what is said as to the requirement of definiteness, the entries were nothing more than mere general indications of the location of the desired land, and were afterwards defined by the surveys. In this instance, the John Stuart entry was so defined in less than 18 months after it was made, the Reid entry in about 13 months. The date of the survey combining them was April 27, 1796. In February of the same year, the Clinton grant was issued, upon a survey made in May, 1795, less than a year prior thereto, about six months after the Stuart and Reid entry, about two months after the Reid entry, and nearly a year before the Reid survey. The men who made these surveys and entries, or their agents, were upon the ground in the wilderness in which the lands were at the time, and they embodied in the surveys their knowledge thereof and their understanding as to the descriptions of the two entries in question. Their work merged the entries in the survey, wherefore the jury could well have said the indefinite entries were intended to conform to the survey, and therefore extended only to

the limits thereof which are shown not to include the land in controversy.

[4] As this grant is founded upon entries made after June 2, 1788, it is suggested, but not decided, that, to claim the benefit of an entry, or show an exception thereof from a grant, under a general reservation, the survey on which the grant was made should be produced, showing designation of the entry thereon, for the act authorized grants only upon surveys, showing reservations of prior claims. It took no notice of entries merely lodged with surveyors, and was passed primarily, if not solely, to validate unauthorized surveys, then found in the land office, and confer rights to patents founded on them.

The act reads as follows: "Whereas, sundry surveys have been made in different parts of this commonwealth, which include in the general courses thereof, sundry smaller tracts of prior claimants, and which in the certificate granted by the surveyors of the respective counties are reserved to such claimants; and the Governor or chief magistrate is not authorized by law to issue grants upon such certificates of surveys; for remedy whereof, 1. Be it enacted by the General Assembly, that it shall and may be lawful for the Governor to issue grants with reservations of claims to lands included within such surveys, anything in any law to the contrary notwithstanding." (12 Henning's St. at Large, p. 646).

At the date of the Winthrop deed, some of the land originally conveyed to Clinton had been conveyed away to strangers. Accordingly the Winthrop deed granted to Azel Ford only such as remained, describing it as follows: "All the rest and residue of the De Witt Clinton grant of 130,000, which now belongs to the parties of the first part, or to which they have any title, legal or equitable." Asserting duty on the part of the plaintiff to show the location of the land sold, as a means of identifying and locating that remaining unsold, under the well-settled rule requiring a claimant, under a deed containing exceptions, to locate the exceptions, the briefs for the plaintiffs in error charge failure of the plaintiff below in this respect. The lands sold from the grant are not specifically located by the evidence, as were the prior claims excepted from the grant itself, but the testimony of a witness was introduced, showing his entire familiarity with the land and intimate knowledge thereof. He had been attorney and agent for the Grangers from the year 1870 to 1888, the date of their deed to Ford, and was thoroughly acquainted with the De Witt Clinton grant. As attorney for the Grangers, he had knowledge of all their transfers, and kept a list of the lands they had sold, and testified that he knew the tracts in controversy had never been conveyed by the Grangers. He had not only been their agent and attorney and kept a record of their sales of land, but had also abstracted

their title, bringing it down to their deed to Ford. Thus qualified, he said he knew the tract of land in controversy had never been conveyed away by the Grangers. Under the ruling on this question made in the recent case of *Winding Gulf Colliery Co. v. Campbell*, 78 S. E. 384, not yet officially reported, this evidence was admissible and sufficient to show *prima facie* that the land in controversy is no part of that previously sold and conveyed.

Having thus examined all the criticisms of the plaintiff's title and proof, and found them untenable, and seeing no defects therein, we think the ruling upon the demurrer to the evidence was proper, and accordingly affirm the judgment.

Affirmed.

CARPENTER v. HAYHURST et al.

(Supreme Court of Appeals of West Virginia.
Oct. 7, 1913.)

(*Syllabus by the Court.*)

WILLS (§ 302*)—ACTION—SUFFICIENCY OF EVIDENCE.

On the trial of an issue *devisavit vel non*, the only evidence in relation to the due execution of the will is the testimony of the two subscribing witnesses, both of whom prove the competency of the testator, and one of whom testifies that he wrote the will at testator's request and read it to him; that the other subscribing witness, who lived near by, was then sent for and came; that the three were present together in the room when testator and the two witnesses signed the paper. The other witness admits that he was called in to witness the will; that all three of them were together in the room; that a portion of the will was read to him; and that he signed it as a witness in the presence of the testator and the other witness; but he denies that he saw the testator or the other witness sign it or that he saw their names on the paper at the time he signed it. *Held*, that the verdict of the jury, which was against the validity of the will, was not supported by the evidence, and the court properly set it aside.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.*]

Appeal from Circuit Court, Marion County.

Suit in equity by Sarah Jane Carpenter against David Hayhurst and others. From judgment for defendants, plaintiff appeals. **Affirmed.**

Harry Shaw, of Fairmont, for appellant. Showalter & Frame and M. W. Ogden, all of Fairmont, for appellees.

WILLIAMS, J. Sarah Jane Carpenter brought a suit in equity against Rebecca Hayhurst and David Hayhurst, in his own right and as executor of William Hayhurst, deceased, attacking the will of said William Hayhurst, deceased. The chancellor directed an issue *devisavit vel non* to be tried by a jury. The trial of that issue resulted in a finding by the jury that the paper writing offered as the will of William Hayhurst,

deceased, was not his will. On motion of David Hayhurst the court set aside the verdict of the jury and awarded a new trial. To that order Mrs. Carpenter obtained this writ of error.

Testator left a widow, Rebecca Hayhurst, and two children, David Hayhurst and the plaintiff, Sarah Jane Carpenter. The will in question gives the wife the household goods absolutely and a life estate in all of testator's other personal property and in his lands and at her death the remainder in the lands to his son David Hayhurst, who is named as his executor, and the remainder in the personal property, subject to the payment of debts, to his daughter, Sarah Jane Carpenter.

The only question presented is: Did the court err in setting aside the verdict? The decision of this question calls for a consideration of the evidence.

The only witnesses who testified concerning the capacity of the testator and the facts and circumstances attending the execution of the will were T. H. Devault and R. B. Travis, whose names appear as subscribing witnesses thereto. Notwithstanding the bill attacks the will on the ground of testator's alleged incapacity and of undue influence exerted upon him by his son, David Hayhurst, there is no attempt to prove either of these allegations. On the contrary, both of the attesting witnesses say that on the day the will purports to have been executed he was of sound mind. The testimony of the two witnesses conflicts in many particulars, and counsel for Mrs. Carpenter insists that Travis contradicts Devault, and that his testimony proves that the requisite formalities for the due execution of the will were not observed; that the jury were the sole judges of the credibility of the witnesses and had the right to disbelieve Devault and believe Travis. But we do not understand the testimony of Travis to be a denial of the material facts testified to by Devault. True it does not corroborate Devault in the most important particulars and contradicts him on some immaterial matters; still it does not disprove that the testator signed the will in the presence of the two subscribing witnesses and that they signed it in his presence and in the presence of each other. Giving Travis' testimony full force and value, it only proves that he did not know, or does not remember, whether it was so signed and witnessed or not. Witness Devault is very clear and positive in his statements. He says he went to testator's house at his request, made some days or weeks before, and wrote the will as the testator had directed him and then read it over to him; that, before testator signed it, Mr. Travis was sent for and came to the house; that they were all three present in the room when he, at testator's request, signed his name for him, he

never having learned to write, and then assisted him to make his mark; that he then signed his name as a subscribing witness, and Mr. Travis immediately signed his name also as a subscribing witness; that they were all three present in the room at the signing and witnessing of the paper. The foregoing summary of Devault's testimony proves that all the legal requirements were observed in the making of the will and calls for a verdict in favor of its validity, unless those material facts are contradicted by Travis. Travis lived about a quarter of a mile from testator's house and admits that he was sent for and came to witness his will; that when he arrived testator and witness Devault were in the room; and that Devault had already written the paper. He also admits signing the paper as a witness, in the presence of Devault and the testator. He first says that Devault asked him to witness the will but on further questioning says he does not remember whether it was testator or Devault who asked him to witness it, but it is not material who made the request. *Freeman v. Freeman*, 76 S. E. 657; 40 Cyc. 1115. Being asked, "Who all signed the will?" he replied, "I do not know." He was then asked, "Who all did you see sign?" and replied, "I saw myself sign." He says he did not see Devault sign and did not see his name on the paper when he signed it himself; but, in answer to the very next question, he says he does not know whether he signed it first or last. He was asked whether he was looking out of the window when Devault assisted Hayhurst to make his mark, and replied, "I don't remember which way I was looking." He does not know whether he was in the room at the time it was done, but he does not say that it was not done in his presence. He may have been willfully unobservant, but his failure to see, when he was present and could have seen, does not amount to a contradiction of Devault, who says the act was done in the presence of the three. It being proven that all three were in the room together and that witness could have seen what was done by testator and the other subscribing witness, it is immaterial that he did not avail himself of the opportunity to see. 40 Cyc. 1123, and numerous cases cited in note. Moreover, this court has held that the testimony of a subscribing witness who seeks to impeach a will should be viewed with a great deal of suspicion. *Webb v. Dye*, 18 W. Va. 376, and *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

In view of the uncertain testimony of Travis, which does not deny the material facts proven by Devault, and which evinces both his lack of knowledge and memory as to what took place, and of the direct and positive testimony of witness Devault, who proves the due execution of the will, the jury had no right to find that the will had

not been duly executed. Their verdict was clearly against the evidence, and the court very properly set it aside.

The judgment will be affirmed, and the cause remanded for further proceedings.

GORE v. VINES.

(Supreme Court of Appeals of West Virginia.
Oct. 7, 1913.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 303*)—CONTRACT—ACCOUNTING.

Under a contract of partnership for a mercantile business one partner furnished the capital and the other his services as manager and a building for the business, the profits and losses to be shared equally; the capital was invested in goods and the partner furnishing the same was credited therefor on the books of the firm; each partner was charged on the books with what he took for his own use from the stock; goods were sold, and the stock was replenished by money and profits of the firm: *Held*, in a suit to settle the partnership affairs after the stock and building were destroyed by fire and the business thereby discontinued, that,

The capital furnished became partnership property and the loss of the goods fell not alone on the partner furnishing the capital, but it was proper to repay him the capital furnished, to the extent of the firm's assets remaining after a payment of the firm's debts, and to charge the other partner with half the loss of capital remaining, though the latter lost his services and building.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 700; Dec. Dig. § 303.*]

2. PARTNERSHIP (§ 329*)—CONTRACT—CONSTRUCTION AND EFFECT—ACCOUNTING.

Where a written contract of partnership either from its terms or by the acts and conduct of the parties is made to relate to a partnership business already existing at the time of the execution of the writing, transactions of the firm prior to the date of the contract as well as those subsequent to its date are properly cognizable in a suit for a settlement of the partnership affairs.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 782-786; Dec. Dig. § 329.*]

3. PARTNERSHIP (§ 344*)—ACCOUNTING—DECREE—SUFFICIENCY.

In a suit for the settlement of a partnership in which a partial loss of the capital furnished wholly by one partner is found but the amount thereof not definitely shown by reason of the uncertainty of the collectability of notes and accounts going to make up the assets applicable to a repayment of the capital furnished, a decree settling principles of the cause whereby the amount is to be ascertained and one-half thereof paid to the partner furnishing the capital by the other partner, on which future decree may follow, is not erroneous on the ground of indefiniteness as to the amount.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 813-818; Dec. Dig. § 344.*]

Appeal from Circuit Court, Mercer County. Action by L. W. Gore against O. P. Vines, administrator, etc. From a judgment for defendant, plaintiff appeals. Affirmed.

Hale & Pendleton, of Princeton, for appellant. Woods & Martin, of Princeton, for appellee.

ROBINSON, J. On the 15th day of September, 1908, Vines and Gore entered into a written agreement of partnership for the purpose of conducting a general retail mercantile business, whereby it was stipulated that the former was to furnish the sum of \$4,000, or goods to the value of that sum, and the latter was to furnish his services as general manager of the business, and also the building in which the business was to be conducted. The contract expressly provided that the parties were to share equally in all profits and losses arising from the business.

For many months prior to the execution of the written contract the parties had actually been conducting the business. The contract was indeed for the continuation of a partnership already existing. The ledger of the firm and the acts and conduct of both of the parties prove this clearly. The old business was not settled and a new one begun. Not even was an inventory made at the time of the execution of the written contract. But the business that had been done prior to the written contract was distinctly carried over into that done after the contract was made. Moreover, the writing itself in one particular evidences that it was to apply to a continuation of the business already existing between the parties. It says that Gore is to furnish the building "in which said mercantile business is now being conducted for the continuation of said business under the firm name aforesaid." And, pretty clearly from the record does it appear that the capital which had gone into the business prior to the date of the written contract had been furnished by Vines, and at that date the firm owed him on this account a sum which was so nearly \$4,000 that the parties in drawing up the writing could well estimate it at that amount as the capital to be furnished.

On the 13th day of December, 1908, the store was destroyed by fire. Thereafter the parties did not resume business. Each collected in money due the firm and paid out money on the indebtedness. All outside indebtedness of the partnership has been paid. In March, 1909, Gore brought this suit against Vines for a settlement of the partnership accounts. Vines died soon after the suit was instituted, and the cause was revived in the name of his administrator, who answered the bill. The court, rightly viewing the pleadings as making a case for reference, referred the cause to a commissioner to ascertain and report the status of the partnership affairs as between the parties. On the incoming of the report plaintiff's exceptions thereto were overruled, the report confirmed, and a decree in accordance therewith entered.

The decree finds that the firm is indebted to the estate of Vines, by reason of capital furnished by him, in the sum of \$3,417.90, and adjudges that his administrator recover the same from the firm. It further finds that the total assets of the firm is \$2,712.14,

and adjudges that such of the same as is in money in the hands of Gore be paid in satisfaction of the costs of the suit and the balance as far as collectable to the administrator of Vines on the debt decreed to his estate. The decree then provides that uncollected notes and accounts going to make up the assets of \$2,712.14 shall be collected and applied to the further payment of the debt decreed Vines' estate. As to this part of the assets the commissioner had reported that he had not ascertained how much was good and collectable. The decree in the end directs, that of whatever remains unpaid after the application of all the assets collected and collectable, one-half shall be paid by Gore to the estate of Vines, thus putting the loss of the partnership equally on the partners.

[1] From the decree plaintiff, Gore, has appealed. First, he insists that the firm should not have been charged with the capital which Vines put into the business. He contends that the loss of the stock of goods by fire must fall on Vines alone—that since Vines contributed the capital, the loss of the goods was his and not that of the firm. The record will not support this contention. Vines it is true contributed the capital for the goods, but the goods were purchased and dealt with as firm property. The written contract did not specifically provide that Vines should contribute simply the use of the goods to the firm. It meant that he should contribute to the firm the goods themselves. Naturally they would become partnership property, especially so since by the contract the partners were to share equally losses as well as profits. For if the goods were the absolute property of Vines, then when any of them were sold to a customer the money received for them, or the note or account made, would be the property of Vines and not that of the firm, except as to the mere profit represented therein. In this view, there could be no loss to Gore, as far as capital was concerned, for any bad debt made by him as manager. Yet the contract plainly meant that there might be. On the other hand the contract provided that plaintiff should contribute his services and the building, meaning in the very nature of things merely the use of the same, not absolute property therein. The parties themselves understood the contract as we interpret it. The goods were sold and replenished as partnership property. Profits from the business belonging equally to the partners were put into the stock. Why did plaintiff allow his share of the profits indiscriminately to go into a replenishing of the stock if Vines owned the stock? Each partner was charged on the books of the firm with what he took therefrom for the personal use of himself and family. The ledger of the firm shows that Vines was given credit for each item of capital furnished by him. Plaintiff was in charge of that book. It was made under his

guidance at least. He is responsible for its makeup. Why did he allow credit therein to Vines for money advanced for goods if the goods were not considered partnership property? Plaintiff seems to think that because he loses his services and the building Vines should lose the capital. Yet, though the books were under control of plaintiff, he made no charge thereon in his favor for either salary or rent. He construed the contract, while the business was continuing, just as the law interprets it. It is true that plaintiff introduced witnesses who testified that they heard Vines say while the business was going on that the goods were his. But the testimony along this line is so meager and uncertain that it can not properly prevail as against the legal import of the writing, and the acts and conduct of the parties themselves. The stock of goods was plainly partnership property. Any creditor of the firm could have subjected it to his debt. *Snyder v. Lunsford*, 9 W. Va. 223. We are by no means disposed to disturb the finding of the commissioner and the decree thereon in this behalf.

The written contract contains no terms or restrictions as to the ownership of the capital stock inconsistent with the construction which we approve. It simply says that Vines is to furnish the sum of \$4,000, or goods to the value of that sum, for the purpose of conducting the business. It does not stipulate that he is individually to retain the ownership of the capital furnished by him. The legal significance of the terms of the contract in this behalf is that Vines' contribution to the capital ceases to be his individually and becomes partnership property. "The capital, in whatever shape contributed, becomes at once the property of the firm and is no longer individual property. The phrase capital, or capital stock, conclusively excludes the idea of continued individual proprietorship." 1 *Bates on Partnership*, sec. 256.

Though plaintiff lost his services and his building, still he rightly owes to the estate of his former partner one-half of the loss on the capital contributed by the latter. "If there are no profits and the capital has been impaired or wholly lost, in dividing losses the deficit must be repaid like any other loss, for impairment of capital is a loss the same as any other, and is not to be reimbursed out of profits merely. That the capital has been contributed unequally and losses are to be equal makes no difference, or if the capital has been wholly paid by one partner, the other contributing services and skill, the latter who has lost his time owes to the former the same proportion of a loss of capital that he would be chargeable with had the losses not reached the capital, but had simply diminished the profits." 2 *Bates on Partnership*, sec. 813.

[2] Another contention of plaintiff is that a settlement of the partnership accounts

should not embrace the business done prior to the date of the written contract. But, as we have seen, the contract was made in relation to a business already existing. Clearly Vines had already furnished what the contract called on him to furnish as capital. All that he put in as capital was contributed long before the writing was made. Though to an extent indicating relation to future action, the writing in fact covered that already done, as well as that to be done. The settlement that has been made and upon which the decree is based properly embraces the whole of the transactions between the parties as partners. Plaintiff himself has recognized the business done before the date of the writing as belonging to the same partnership as that existing after the writing. In his collecting of accounts due the firm and his paying of debts due from it, he has handled all such business as belonging to one continuous partnership between him and Vines, without regard to the date of the written contract. In settling the business he has not undertaken to settle a partnership only beginning on the date of the writing. Then why should the court below have done so?

[3] Plaintiff further submits that the decree is so vague and indefinite that it should be reversed. He complains that it charges him with one-half the loss on the capital furnished by Vines before the value of the assets necessary to a computing of the amount of the loss has been definitely ascertained. The decree is that plaintiff shall pay one-half of that loss, the amount of which is contingent on the collectability of certain notes and accounts among the assets of the firm. True, the decree adjudges no specific amount to be paid on the score of loss by plaintiff to the estate of Vines. It does no more than to settle principles of the cause whereby plaintiff must pay to Vines' estate one-half of the loss on the capital. In this it is not indefinite and erroneous. When the amount is definitely ascertained and reported to the court, a further decree adjudging the amount against plaintiff may follow.

There is no error disclosed by the record, and the decree will be affirmed.

DAWKINS v. DAWKINS.

(Supreme Court of Appeals of West Virginia.
Oct. 7, 1913.)

(Syllabus by the Court.)

1. SUFFICIENCY OF PLEADING—DIVORCE.
 Quere: In a suit for divorce does good pleading require that the bill should set forth the specific facts relied on as showing the grounds for divorce?
2. DIVORCE (§ 37*)—DESERTION—JUSTIFICATION.
 The conduct of one spouse which will justify the other in leaving and breaking off the

matrimonial relations must be of such a nature as to be inconsistent with such matrimonial relations or render cohabitation unsafe.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 107-124, 136-138; Dec. Dig. § 37.*]

3. DIVORCE (§ 133*)—PROOF REQUIRED.

To justify a divorce from the bonds of matrimony the evidence of the facts showing grounds of divorce must be clear and convincing, else divorce should be denied.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 446-448; Dec. Dig. § 133.*]

Appeal from Circuit Court, Wood County. Action by J. W. Dawkins against Lucy N. Dawkins for divorce. From decree for defendant, plaintiff appeals. Affirmed.

R. E. Bills, of Parkersburg, for appellant.

MILLER, J. Plaintiff, a man then about thirty-five years of age, who had never been married, and defendant, a widow, about fifty-five years old, with three children, were married in June, 1902, and managed to live together until October, 1907, when separation took place by his leaving the home. This suit by him for divorce followed quite promptly after the expiration of three years from the day of separation.

Wilful desertion, adultery and cruel and inhuman treatment are charged in the bill, as grounds for divorce a vinculo, and there is some evidence tending in some slight degree to support these charges.

The offending spouse notwithstanding the grave charges against her graciously refrained from answering or making any defense to the bill, and allowed her complaining husband to have everything to his own liking, in both pleadings and proof, until on final hearing, he met foul weather, so to speak, by an adverse decision, the court below denying him any relief and dismissing his bill, wherefore his appeal.

There is no sufficient evidence to support the charge of adultery, only suspicious circumstances are shown, not amounting to proof of the fact. According to the testimony of plaintiff and his other witnesses, including two house servants, Mrs. Dawkins liked her beer, which she ordered freely on Saturday nights, and during the other days of the week is said to have "rushed the growler" frequently. The suspicious circumstances given in evidence are that she was seen drinking beer behind closed doors with several of her boarders, and to have been in a sitting room with one of them, on one occasion, with the door closed; and on one or two occasions when joyous and happy in her cups was seen to exhibit one of her absent husband's neckties, and to ask one of her favorite boarders, how he would like to stand up with her and wear that. But nothing criminal is shown nor any facts from which, under the circumstances, criminal conduct could legally be inferred.

[1] Desertion and cruelty are charged in

the bill in the most general terms. No facts are pleaded constituting desertion or cruel and inhuman treatment. The grounds for divorce specified in the statute are stated rather as conclusions of law, than specifications of the facts. There is contrariety of judicial decisions as to whether good pleading does not require that the bill or complaint should set forth the specific acts and conduct constituting the ground of divorce specified in the statute, and relied on. In some states the statutes control; in others the subject of the pleadings is uncontrolled, except by general rules applicable in all cases. In 14 Cyc. 669, the text is: "The complaint should aver the existence of the facts essential to constitute desertion or abandonment, as those offenses are defined in the particular state." Citing the cases in notes. In 7 Ency. Pl. & Prac. 76, it is said: "Desertion or abandonment is usually alleged in the terms of the statute. Under the codes, however, the practice is objectionable as alleging conclusions of law, and the safest course is to allege the separation of the parties and the facts which caused it with sufficient minuteness to show that the defendant abandoned the plaintiff without reasonable cause, and remained absent for the statutory period." Citing the cases. In Virginia one recent case, *Miller v. Miller*, 92 Va. 196, 23 S. E. 232, a suit based on alleged adultery, the Virginia court held a bill bad on demurrer which simply charged adultery without stating time, place and circumstances.

But we think it unnecessary to decide this question of pleading, for treating the bill as good and justifying relief, if proven, we do not think the evidence makes out a clear and certain case for divorce on any ground.

[2] Plaintiff, not defendant, left the matrimonial habitation. Plaintiff in his evidence would justify his going and convert his absence into desertion by her because of conduct justifying his going. "But," says Keezer on *Marriage and Divorce*, section 142, "the conduct of one party to justify the other in leaving must be of such a nature as to be inconsistent with the marital relation, or to render cohabitation unsafe." In *Reynolds v. Reynolds*, 68 W. Va. 15, 19, 69 S. E. 381, Ann. Cas. 1912A, 889, denying the husband cross relief based on absence because of alleged cruel and inhuman treatment, the evidence not clearly supporting his contention, we applied this rule. And as there said, justifiable cause which will excuse a husband or wife from leaving the other must be such as could be made the foundation of a judicial proceeding for divorce a mensa et thoro. Citing *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12; *Carr v. Carr*, 22 Grat. (Va.) 168, and *Harris v. Harris*, 31 Grat. (Va.) 13. By section 6, chapter 64, Code 1906, divorce a mensa is authorized for cruel

and inhuman treatment or reasonable apprehension of bodily hurt. True abandonment and desertion are also grounds for such separation. But to convert the separation of one spouse for cause into desertion by the other, because of cruel and inhuman treatment or reasonable apprehension of bodily hurt, the evidence must clearly show conduct of the offending party of such a nature as to be inconsistent with marital relations, or to render cohabitation unsafe.

[3] Outside of some alleged intemperate language towards plaintiff, the only evidence of cruel and inhuman treatment is that of the plaintiff himself, and as was said under the same circumstances, in *Tillis v. Tillis*, 55 W. Va. 198, 199, 46 S. E. 926, we think "that is too short."

Referring to the time of the separation, plaintiff says, "she ordered me out of the house and told me not to come back any more, and she was so quarrelsome that I could not live with her." Asked what lead up to this separation he answered: "Every time I would go into the house or around where she was at she was all the time calling me names and quarreling with me, and hit me with a spittoon and broke that over me, and hit me with a chair, and in fact the last few years we lived together she did not speak a pleasant word to me, and would not let me sleep in the same bed that she slept in, in fact she deserted me long before the month of October three years ago, on the day that we separated I went into the kitchen and found her standing in the pantry drinking beer with a man by the name of Ed Shaw and another man they called Joe I do not know his real name, when I went to the pantry door she ordered me out and called me a big bull, and told me to get out of the house and told me never to come back in it, I told her there was a man sitting at the table that wanted something to eat, and that somebody ought to wait on him, and that it was not right for her to drink beer with other men and neglect the home, she then went and got my clothing and threw it out into the front yard." In the next answer he professes to have done nothing to cause defendant "to do as you say she did on the day you separated." Witness had not said that defendant had hit him with the spittoon and chair on the day of the separation. His previous answer was intended as a statement of what had led up to the separation. No time, place or circumstance is given for the alleged assaults. Nor does it appear how long before the separation this all occurred, nor, does it appear, if made, that these assaults were not subsequently condoned or forgiven. Plaintiff is wholly uncorroborated by any witness, from a house of thirty boarders, regarding these assaults. One witness, who had been a servant in the house, swears, without reference to the particular time of

the separation, that defendant was very quarrelsome and would try to pick a fuss out of him, that in 1906, while she worked there, defendant said she wished plaintiff would leave and never come back, and apparently did everything possible to annoy plaintiff and make his life miserable, and that while she was there he had to prepare his own meals. The latter fact is not mentioned by plaintiff. What was witness there for, if not to prepare meals? Witness nowhere particularizes as to what the other things were which defendant did to make plaintiff miserable and his life unbearable.

Mrs. Bessie Hill, a next door neighbor, who claims to have witnessed the final separation in October, 1907, and the only witness sworn, besides plaintiff, to that transaction, says: "Q. Did you hear what was said by these parties just before they separated? A. I heard what was said out on the porch, Mrs. Dawkins gathered up Mr. Dawkins' clothing set them out on the porch, and cursed Mr. Dawkins, and told him to take them, leave, and never come back again, she cursed him very violently and used very bad language towards him, I did not hear much that Mr. Dawkins said, but that he was reasoning with her and told her that he had no place else to go, but she made him leave." Dawkins, himself, does not mention Mrs. Hill as a witness to the separation. He does not mention the fact that his wife swore at or cursed him on that occasion. According to his evidence quoted he really began any quarrel that ensued, and he differs from Mrs. Hill, as to what was done with his clothes. He said his wife threw his clothing into the front yard. According to Mrs. Hill she set them out on the porch.

Upon the whole record we are disposed to affirm the decree below, the evidence not being of that clear and convincing character justifying a court in dissolving the marriage bonds.

FREEMAN v. EGNOR et al.

(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913.)

(Syllabus by the Court.)

1. TENANCY IN COMMON (§ 49*)—OIL AND GAS LEASE—VALIDITY.

An oil and gas lease executed by one or more of several cotenants, while not binding on the others, is valid between the parties thereto, and binding on the interest of the lessor, even while the premises remain undivided.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 123; Dec. Dig. § 49.*]

2. EQUITY (§§ 196, 208*)—PLEADING—RELIEF AMONG CODEFENDANTS.

The general rule of chancery practice is that an answer to a bill can only pray for dismissal of the bill, and not for affirmative relief on new matter presented by it, that being a proper subject for a cross-bill; but, under our practice, there are certain exceptions to this, outside

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of answers under section 35, c. 125, Code 1906, and in such cases no special reply to such ordinary answer is necessary, and its matter is not taken for true under general replication. In such cases, relief may be given to the defendant on such ordinary answer against the plaintiff, but not against a codefendant. To affect him, resort must be had to a cross-bill, or an answer, under section 35, c. 125, in lieu of a cross-bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 450-454, 479, 480; Dec. Dig. §§ 196, 208.*]

3. EQUITY (§ 114*)—ADDING NEW PARTIES.

A petition filed by a stranger to a cause, asking relief against a defendant therein on new matter contained in such petition, must be filed by leave of court, and must make such defendant a party to it by proper allegation and process, unless waived by appearance or otherwise.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 275-279; Dec. Dig. § 114.*]

4. EQUITY (§ 114*)—ADDING NEW PARTIES—AMENDMENT TO BILLS.

Where a person files his petition, asking to be admitted as a party defendant in a pending suit in equity, in which no allegation is made naming or referring to him in any way, and no relief is prayed against him, and he is admitted as a party defendant, he does not in fact become a party to the cause until he has been made a party by some allegation in the bill as amended.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 275-279; Dec. Dig. § 114.*]

(Additional Syllabus by Editorial Staff.)

5. EQUITY (§ 427*)—PLEADING—RELIEF AGAINST CODEFENDANT.

To authorize granting one defendant relief against a codefendant, it is not enough that the latter be named as defendant in the bill; but the bill and the answer seeking relief, considered together, must sufficiently raise the issue between such defendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

Appeal from Circuit Court, Logan County.

Action by Charles H. Freeman against Martin Egnor and others. From a decree for plaintiff, defendant South Penn Oil Company appeals. Reversed and remanded.

A. B. Fleming, of Fairmont, Payne & Payne, of Charleston, and Charles Powell and Kemble White, both of Fairmont, for appellant. George M. McDermit, of Madison, and F. C. Leftwich, of Huntington, for appellee.

LYNCH, J. The plaintiff sued for partition of lands, claiming fee-simple interests therein. He and the defendant South Penn Oil Company also hold oil and gas leases on undivided interests of some of the numerous defendants, who derive title through John W. Egnor, their ancestor. The bill, though averring the existence of the leases, does not assail any of them or assert their invalidity in any respect. But defendants Morris and Adkins by answers, and S. J. Hyman and F. L. Doolittle by petitions, do assail the leases, and seek their cancellation as inoperative and void, because on undivided interests in the lands sought to be partitioned.

By their petitions, Hyman and Doolittle

asked to be admitted as parties defendant to the bill, not having theretofore been parties thereto. By the order filing the petitions, the court nominally admitted them as defendants; but they did not become parties by any amendment of the bill. Nor did the bill, or any other pleading except their petitions, name either of them as parties, or by averments show any interest whatever claimed by them in the lands. Nor did the Morris and Adkins answers or the Hyman and Doolittle petitions pretend to name any person against whom they claimed relief, or pray for process, or that the answers and petitions be remanded to rules for proceedings thereat, nor were they so remanded, nor did any person appear thereto for any purpose, except the plaintiff, who objected only to the filing of the petitions.

Nevertheless, the court entered an order canceling all the leases, without further pleading, assigning as the reason for its action the fact, not appearing otherwise than by the leases, that the leases were on undivided interests in the lands, and its conclusion that they were inoperative and therefore void. From this decree, final in all respects, because thereby the court ascertained and fixed the rights and interests of the parties in the lands, the South Penn Oil Company obtained this appeal.

Numerous errors are assigned by appellant, some of which we do not discuss, because, as we remand the case for other reasons, these will necessarily be corrected.

[2, 3] Were the pleadings such as to warrant cancellation of the leases? It will be readily conceded that, before a court can by its order or decree strike down property rights, it must first have jurisdiction, by proper process and pleadings, of the persons whose interests are affected. Did it in this instance have such jurisdiction? Of course, the appellant was named as defendant to the bill, to which it filed an answer, setting up and relying on the leases held by it. But, as stated, the bill in effect admitted the integrity of all the leases. At least, it challenged none of them for invalidity in any respect. It was to the bill, and to it only, that appellant was required, by the court's process, to appear and answer. Upon appearing thereto, and ascertaining that by no averments was its right questioned or prejudiced, it might properly have permitted a decree pro confesso against it, with the confident assurance that its rights could in no wise injuriously be affected thereby. It could with safety content itself with this course, with the further reasonable confidence that, if any one or more of the defendants should by answer or otherwise challenge the validity of its leases, the court, before granting relief by cancellation, would at least require notice thereof for appearance and answer. Besides, the plaintiff did

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not, nor does he now, by any pleading, claim any interest adverse to appellant's interests, or set up any interest now claimed by Morris and Adkins adverse to appellant's, and did not in any manner amend his bill by averments necessary to make Hyman and Doolittle parties thereto. These four defendants, therefore, by their answers and petitions alone, for the first time in this suit, set up such adverse claims.

[8] But, in order to grant one defendant relief against a codefendant, it is not enough that the latter is named as defendant to the bill, unless the bill and the answer seeking relief, considered together, sufficiently raise the issues between such defendants. *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287; *Dudley v. Buckley*, 68 W. Va. 630, 70 S. E. 376. See, also, *Hansford v. Coal Co.*, 22 W. Va. 70; *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733, 13 L. R. A. (N. S.) 408. The first two cases hold that, where the bill and answer do not raise such issue between codefendants, relief cannot properly be granted one defendant on an adverse claim against a codefendant except upon an answer plainly stating the grounds therefor, naming such defendant as a party to it, and praying process against him. The *Dudley-Buckley Case* says: "Notwithstanding the rights of a codefendant are clearly established by the proof taken on the pleadings between plaintiff and defendant, still no relief can be granted such codefendant unless relief for him is included in the prayer of plaintiff's bill, or unless he has himself answered and prayed for relief." Here, there was no such charge, prayer, or process.

[4] The petitions are also ineffectual for any purpose, for another reason. The plaintiff's bill makes no allegation naming or referring to Hyman or Doolittle, or showing in what respect either of them has any interest in the lands, and the bill contains no prayer for any relief against either of them. Such right or interest, if any, appears only from their petitions. They could not become parties, therefore, except by amendment of the bill. *Shinn v. Board of Education*, 39 W. Va. 498, 20 S. E. 604; *Shaffer v. Fetty*, 30 W. Va. 249, 4 S. E. 278. See, also, *Fowler v. Lewis*, 36 W. Va. 114, 14 S. E. 447; *Morgan v. Morgan*, 42 W. Va. 542, 26 S. E. 294.

Under the rulings of this court in *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. 1096, and *Miller v. Mitchell*, 58 W. Va. 431, 52 S. E. 478, the circuit court should have refused leave to file the second Adkins answer if objected to, or on motion should have stricken it from the file. But no such objection or motion appears in the record. However, as the answer was defective for reasons heretofore discussed, its presence now is not important. The court should, when the case is remanded, as it must be, grant leave to amend the said answers and petitions, upon request, to conform to the views herein expressed.

[1] The leases should not have been canceled upon the state of the pleadings. But are they void or voidable, solely because executed by some cotenants on their undivided interests in lands held in common with others not joining therein? We do not think they are. Of course, to be effectual in the sense that the lessee may enter on and operate the premises for the production of oil and gas, all the cotenants must join. A lease by one only does not warrant such entry and production. Those not joining may restrain the lessee from entering for the purpose of operating thereunder without their consent. Numerous cases so hold. One cotenant cannot authorize another to do what he himself cannot do; but he may authorize him to do, under any lease or other contract, what he may legally do in his own behalf. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933. Notwithstanding the cotenancy, each tenant has the same interest and property rights in common as his associates have, and may therefore lawfully grant, lease, and otherwise incur his individual interests. "An oil and gas lease executed by one or more joint tenants or tenants in common, while not binding on other joint tenants or tenants in common, is good between the parties, and is binding on their interests." This terse statement comprehends the law on this subject, and is approved and sustained, directly or indirectly, by the following cases: *Trees v. Eclipse Oil Co.*, supra; *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *McNeely v. South Penn Oil Co.*, 58 W. Va. 438, 52 S. E. 480; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223; *Sommers v. Bennett*, 68 W. Va. 157, 69 S. E. 690; *Garratt v. South Penn Oil Co.*, 66 W. Va. 587, 66 S. E. 741; *Ziegler v. Brenneman*, 237 Ill. 15, 86 N. E. 597; *Compton v. People's Gas Co.*, 75 Kan. 572, 89 Pac. 1039, 10 L. R. A. (N. S.) 787. The circuit court, therefore, erred in canceling the leases, for the reasons assigned by it, even had such action been warranted by proper pleading and competent proof.

Hence the decree complained of will be reversed, and the cause remanded for further proceedings in accordance with the principles herein announced.

FLEMING v. FAIRMONT & M. R. CO. et al.
(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 479*)—BONDS—PAST-DUE COUPONS—RIGHT OF HOLDER.

An action at law may be maintained and prosecuted to final judgment, by the owner, on past-due coupons, parts of corporate bonds, secured by mortgage, nothing therein expressly restricting such right, notwithstanding the provisions in the mortgage for sale, suit, or entry up-

on and management of the mortgaged property by the trustee on the request of one-third of the bondholders after default by the company in payment of the coupons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872-1874; Dec. Dig. § 479.*]

2. CORPORATIONS (§ 479*)—CORPORATE BONDS—RIGHT OF ACTION.

The common-law right to sue upon a bond is not affected by the remedies provided in the mortgage given for its security unless the provisions of the mortgage exclude such right in express terms or by necessary implication.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872-1874; Dec. Dig. § 479.*]

3. CORPORATIONS (§ 479*)—CORPORATE BONDS—RIGHT OF ACTION.

But execution on a judgment obtained in such action is not leviable on property covered by the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872-1879; Dec. Dig. § 479.*]

(Additional Syllabus by Editorial Staff.)

4. ACTION (§ 12*)—DEFENSE.

That a prospective judgment against a defendant in an action at law will be worthless is no defense.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 12.*]

Error to Circuit Court, Marion County.

Action by A. S. Fleming against the Fairmont & Mannington Railroad Company and others. Judgment for defendants, and plaintiff brings error. Reversed and rendered.

A. S. Fleming, of Fairmont, for plaintiff in error. Showalter & Frame, of Fairmont, for defendants in error.

LYNCH, J. The plaintiff brought his action before a justice and recovered judgment on overdue coupons detached from defendant's bonds, secured by mortgage on all its property then owned and thereafter acquired by it. On appeal the intermediate court dismissed the action; and upon further appeal the circuit court affirmed the latter judgment. Hence this writ of error.

It is agreed that, before action, the coupons were due and, although properly presented for payment, were unpaid. The plaintiff was therefore entitled to judgment and execution thereon, unless inhibited by some provision of the mortgage securing the bonds and coupons. The defendant cites sections 1 and 2 of article 5 of the mortgage as authority denying plaintiff's right to recover on the coupons.

[1, 2] But from these sections no intention appears, expressly or by implication, to preclude plaintiff from relief by the form of action adopted by him. To have this effect, the restriction must be clear and reasonably free from doubt. "The common-law right to sue upon a bond is not affected by the remedies provided in the mortgage given simultaneously and for the better securing of the bond unless the provisions of the mortgage

exclude this right in express terms or by necessary implication." For "the right to sue upon a written obligation admitted to be valid is of too high a character to be taken away by implication, especially if drawn from an instrument other than that which is given in direct and positive acknowledgment of the debt." *Manning v. Railroad Co.* (C. C.) 20 Fed. 838; *Nute v. Insurance Co.*, 72 Mass. (6 Gray) 174, 181; *Kimber v. Gunnell*, 126 Fed. 137, 61 C. C. A. 208; *Jones on Corp. Bonds*, § 340.

The purport of the whole article relied upon by defendant is to define the rights, duties, and remedies of the trustee and bondholders, should the mortgagor default in the payment of the bonds or interest. It provides what course each shall pursue, for enforcement of the lien, when such default occurs. It provides: First, that, should the mortgagor refuse or fail after demand to perform any of the covenants and stipulations in the mortgage or the bonds secured thereby, the trustee shall, upon the request of the holders of one-third in amount of the bonds and adequate security against costs, expenses, and liabilities, enter upon the mortgaged property, manage and operate it, collect the receipts, and apply the income, after deducting current expenses and costs, to the principal and interest of the bonds as the same become due; or, second, upon like default, request, and security, he shall sell the property and make application of the proceeds in the manner stated; or, third, upon like default, request, and security, he shall proceed to protect and enforce the rights of the bondholders under the mortgage by suits in law or equity. The instrument fully states the manner in which the trustee shall perform the duties so prescribed and then concludes immediately thereafter with the general statement: "It being understood, and it is hereby expressly declared, that the rights of entry and sale hereinbefore granted are intended as cumulative remedies allowed by law, and that the same shall not be deemed in any manner whatever to deprive the trustee or the beneficiaries under this trust of any legal or equitable remedy, by judicial proceedings, consistent with the provisions of these presents, according to the true intent and meaning thereof." The sole and manifest purpose of these provisions is to secure the subject-matter of the lien against illegal invasion, the effect of which would be its impairment as ample security for payment of the mortgagor's bonded indebtedness; and, in order to remove any possible excuse for misunderstanding of its terms and to afford reasonable assurance of the proper interpretation, the concluding clause in express terms declares the absence of any intent to deprive the bondholders of any existing legal or equitable remedies not inconsistent with the purposes, the subservance of which the section in its entirety comprehends.

The right of the plaintiff to maintain his action is sustained by many authorities. In fact, none are found upon this investigation denying it. *Railroad Co. v. Johnson*, 54 Pa. 127; *Montgomery v. Francis*, 103 Pa. 378; *Widener v. Railroad Co.*, 1 Wkly. Notes Cas. (Pa.) 472; *Batchelder v. Water Co.*, 131 N. Y. 42, 29 N. E. 801; *Manning v. Railroad Co.* (C. C.) 29 Fed. 838; *Kimber v. Gunnell*, 126 Fed. 137, 61 C. C. A. 203; *Dow v. Railroad Co.* (C. C.) 20 Fed. 260; 1 *Elliott on Railroads*, §§ 509, 514; 3 *Cook on Corp.* (6th Ed.) § 770; 5 *Thomp. on Corp.* (1st Ed.) §§ 6121-6125, 6210-6213; *Jones on Corp. Bonds*, §§ 55, 338-340a. See, also, *Welsh v. Railroad Co.*, 25 Minn. 314; *Guaranty Co. v. Railroad Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116; *Buel v. Railroad Co.*, 24 Misc. Rep. 646, 53 N. Y. Supp. 749. Mr. Jones, in the section of the work cited, says: "The fact that a railroad mortgage empowers the trustees, on the written request of the holders of bonds of a specified amount, after breach of the condition, to sell the property is no defense to a suit upon the bonds or coupons after they are payable. The bonds are the principal debt, and the mortgage is only an incidental security. The remedies at law and in equity do not clash and destroy each other but exist together. The mortgage might positively, or perhaps impliedly, take away from the bondholder his right of action at law upon the bonds or coupons; but the common-law right to enforce these obligations remains if not so taken away." In *Kimber v. Gunnell*, supra, it is held that a mortgage similar to that under consideration does not, "in the absence of an express stipulation or a statute to that effect, constitute any defense to any action at law against the mortgagor by each of the creditors upon the bonds or primary obligations thus secured." The court, in its opinion, observes: "The general rule is that, for a default in the payment of money at the time and place agreed upon, or for any other breach of a contract, an action at law may be maintained, and a judgment for damages may be recovered against the obligor. Of course the payee or obligee may stipulate away or agree not to exercise this right. But there is no such stipulation or agreement in the provisions of the trust deed to which counsel has challenged our attention or in any of the other numerous terms which this instrument contains. A statute may provide that the remedy at law upon the primary obligation shall be postponed until the security for the debt has been exhausted. But no such statute conditions the rights or remedies of the parties to this action. In the absence of any such agreement or any such statute, the ordinary right of action upon the unconditional promise of the defendant to pay the money loaned upon its bonds remained unimpaired, and it must prevail." Again it was said of such a mortgage in *Guaranty Trust Co. v. Railroad Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116: "There

is a subsequent provision in the deed of trust to the effect that neither the whole nor any part of the premises mortgaged shall be sold, under proceedings either at law or equity, for the recovery of the principal or interest of the bonds; it being the intention and agreement of the parties that the mode of sale provided by the mortgage 'shall be exclusive of all others.' This clause, however, is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings and oust the jurisdiction of the courts, which, as is settled by the uniform current of authority, cannot be done."

Nor does the clause of the mortgage following those above set forth contain any express or implied denial, by limitation or restriction, of plaintiff's right to maintain this action. It states that the intention of the instrument is "that no one or more holders of bonds or coupons shall have the right, in any manner whatever, to affect, disturb, or prejudice the lien of this mortgage by his or their action, except in the manner herein provided." The purpose of the clause, as gathered from its true intent and meaning, is to provide against any judicial proceedings by one or more bondholders owning less than one-third of the bonds, or by those holding such amount except upon notice to the trustee and the giving of adequate security, for either of two purposes—the appointment of a receiver or the foreclosure of the mortgage. Of course every provision of a mortgage must be construed in the light of its intentment. What the object to be attained is, is always a pertinent inquiry upon the construction of a written instrument. The apparent purpose sought, by the language quoted, is the prevention of petty interference by a few bondholders with the management of defendant's property and the conduct of its business, except in the manner authorized by the mortgage. The denial of the right in any manner whatever to affect, disturb, or prejudice the lien of the mortgage manifests such intention. If so, it is not within the province of the court, by construction, to enlarge the terms employed as a restriction for one purpose, so as to authorize other restrictions not impliedly within their plain intent and meaning.

[3] The termination of plaintiff's action in a judgment, even when followed by execution, cannot "affect, disturb, or prejudice" the lien of the mortgage. The property therein embraced is immune from levy. It cannot be disturbed. Nor can the operation of defendant's railroad be impeded as a result of any judgment obtained in this action, or any proceeding thereafter to enforce payment of the judgment, except in the manner permitted by the mortgage. 1 *Elliott on Railroads*, §§ 486, 509; 3 *Cook on Corp.* (6th Ed.) §§ 770, 772; 5 *Thomp. on Corp.* (1st Ed.) § 6124; *Jones on Corp. Bonds*, § 340; *Hospital v. Library Co.*, 189 Pa. 269, 42 Atl. 183; *Com. v. Railroad Co.*, 122 Pa. 306, 15 Atl. 448, 1 L. R. A. 225; *Trust Co. v. Steel Co.*, 33 Misc.

ep. 484, 68 N. Y. Supp. 915; *Kimber v. Gunnell*, 126 Fed. 137, 61 C. C. A. 203. The creditor does not thereby acquire a lien on defendant's property prior to the mortgage. When suing at law upon an overdue coupon and proceeding against the railroad company, the bondholder, as shown by the authorities cited, stands upon the same plane as any other creditor; and execution on a judgment in his favor can be levied only on property actually owned by the company and not upon that which has been conveyed to trustees by a mortgage or deed of trust duly executed and recorded. When it becomes necessary for him to reach the property held by the trustee, he must proceed against him not for his own benefit but as a bondholder and on behalf of all the bondholders as a class. What may be realized by such proceeding belongs to the whole class and must be distributed among its members pro rata. 5 *Thomp. on Corp.* (1st Ed.) § 6124; *Com. v. Railroad Co.*, supra. Nevertheless, nothing otherwise prohibiting, he is entitled to judgment and execution hereon. If property belonging to the defendant other than that already bound by the lien of the mortgage is available for levy under execution, he may levy upon it, but not otherwise. *Carr v. Le Fevre*, 27 Pa. 413; *Railroad Co. v. Johnson*, supra; *Com. v. Railroad Co.*, supra; *Bradley v. Railroad Co.*, 36 Pa. 141; *Trust Co. v. Steel Co.*, supra; *Thomp. on Corp.* (1st Ed.) §§ 6124, 6125; *Jones on Corp. Bonds*, § 340.

[4] The fact that a prospective judgment against a defendant in an action at law will be worthless is no defense to the action. *Kimber v. Gunnell*, supra.

Being therefore of the opinion that the judgment of the intermediate court of Marion county is erroneous, and that the action may be properly terminated here by judgment based upon the agreed state of facts, such judgment will be so entered for the amount of the coupons sued on, with interest thereon, and costs.

STATE, for Use of HUDSON, v. NASH et al.
(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913.)

(Syllabus by the Court.)

1. INJUNCTION (§ 239*)—ACTION ON BOND—EXPENSES ON TEMPORARY INJUNCTION.

Counsel fees paid for services in a suit in which a temporary injunction is awarded only as ancillary and incidental to the main relief sought, no effort being made to secure its dissolution until final hearing of the cause upon the merits, and other expenses not incurred on account of the injunction, are not recoverable in an action on the injunction bond.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 542, 543; Dec. Dig. § 239.*]

2. INJUNCTION (§ 239*)—ACTION ON BOND—EXPENSES ON TEMPORARY INJUNCTION.

In a suit to remove cloud upon plaintiff's title to land, and to enjoin defendant from tres-

passing thereon, and from taking steps to redeem his title from forfeiture to the state, a temporary injunction was awarded. *Held*, that injunction was only ancillary to the main purpose of the suit, which was to quiet title.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 542, 543; Dec. Dig. § 239.*]

Error to Circuit Court, Putnam County.

Action by the State for use of Mary Patton Hudson, against J. H. Nash and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Brown, Jackson & Knight and J. H. Nash, all of Charleston, for plaintiffs in error. Enslow, Fitzpatrick, Alderson & Baker, of Huntington, for defendant in error.

WILLIAMS, J. Plaintiff recovered judgment in the circuit court of Putnam county for \$500, in an action upon an injunction bond executed by J. H. Nash and Lewis Barnhart for the Iguano Land & Mining Company, in a suit brought by it in the circuit court of Putnam county against Mrs. Mary Patton Hudson and others, for the purpose of canceling her claim of title to certain land, as constituting a cloud upon said company's title thereto, and to enjoin her from trespassing on the land, and from taking any steps to redeem the title claimed by her, which had been forfeited to the state. The injunction, as prayed for, was awarded in vacation, and the bond sued on was given. No effort was made to get rid of the injunction until the final hearing of the cause on its merits, at which time the chancellor granted the prayer of the bill, and canceled Mrs. Hudson's claim to the land, as constituting a cloud upon the plaintiff's title, and perpetuated the injunction. Mrs. Hudson appealed from that decree to this court, and procured a reversal of it, and a dismissal of the plaintiff's bill, and hence this action upon the injunction bond.

[1] The judgment recovered is on account of fees paid by Mrs. Hudson to her counsel for services rendered in that cause. But she fails to distinguish how much, if any, she paid for services rendered in getting rid of the injunction. No effort was made to have it dissolved until the final hearing of the cause upon its merits. It was not a pure injunction suit, but a suit brought to remove cloud upon title, and the injunction was only ancillary or incidental thereto. Had it been a pure injunction suit, no doubt the whole of counsel fees would have been recoverable on the bond; the penalty of the bond being sufficient. It is well-settled law in this state that fees paid to counsel for services rendered in getting rid of an injunction are properly recoverable as damages in an action on the injunction bond. *Levy v. Medford*, 34 W. Va. 633, 12 S. E. 864; *Kloak Bros. v. Corvin*, 51 W. Va. 19, 41 S. E. 211; *Bank v. Graham*, 68 W. Va. 1, 60 S. E. 301; *Tully v. Taylor*, 67 W. Va. 585,

68 S. E. 379. But when injunction is not the sole relief sought, but is only ancillary and incidental to the main object of the suit, and no effort is made to procure a dissolution of the injunction until a final hearing of the cause upon its merits, and counsel fees are paid for entire services in the suit, they are not recoverable upon the bond. *Tully v. Taylor*, supra; 2 High on Injunctions (4th Ed.) § 1686; *Riddle v. Cheadle*, 25 Ohio St. 278; *Curry v. Amer. Freehold, etc., Co.*, 124 Ala. 614, 27 South. 454; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611.

[2] The chief purpose of the suit in which Mrs. Hudson was enjoined was to clear the Iguano Company's title to land of a cloud, and the prayer of the company's bill that she be restrained from committing trespass, and from taking further steps to perfect her claim by redeeming from the state a forfeited title, was only incidental. 2 High on Injunctions (4th Ed.) § 1686; *Tully v. Taylor*, supra; *Allport v. Kelley*, 2 Mont. 343; *Disbrow v. Garcia*, 52 N. Y. 654; *Moriarity v. Galt*, 125 Ill. 417, 17 N. E. 714. It does not appear that counsel rendered any services specially to get rid of the injunction, or that the same services which were rendered would not have been necessary, if no injunction had been awarded. The appeal to this court in that case was not to get rid of the injunction, which was only an incident in the case depending upon the question of title to the land, but was to procure a reversal of the decree which had adjudicated title to the land against Mrs. Hudson, and the injunction was dissolved as a matter of course when it was decided that plaintiff's title failed.

Counsel for defendants say that the fees were paid for services in this court, and they insist that fees paid counsel for services in the appellate court, after a temporary injunction has become merged in a final decree on the merits, are not recoverable on the injunction bond, that the conditions of the bond do not cover damages sustained after the court has pronounced its final decree, and 22 Cyc. 1050, and *Webber v. Wilcox*, 45 Cal. 301, are cited to support this proposition. The California case seems to support the text in Cyc.; but the court apparently rested its decision on the terms of the California statute fixing the conditions of the bond. It read: "Such damages * * * as such parties may sustain by reason of such injunction, if said court finally decides that said plaintiff was not entitled thereto." This language would seem to limit the conditions of the bond to the action of the court granting the injunction. The terms of our statute are broader, and do not so limit the conditions. Hence, if the suit were a pure injunction suit, and it became necessary for the defendant to appeal to this court in order to get rid of the injunction, we see no reason why he should not be allowed

to recover counsel fees for services in this court as well as in the court below, as damages in an action on the bond. *Bank v. Graham*, supra. The same would be true of fees paid in this court upon an appeal from an order dissolving, or refusing to dissolve, an injunction, even where injunction is only incidental to the main object of the suit.

Under the ruling of this court in *Tully v. Taylor*, supra, it was Mrs. Hudson's duty to prove that the fees were paid solely for services in procuring a dissolution of the injunction, as distinguished from fees paid for services in defending the principal issue, before she can recover them. Even granting that it is possible to make such distinction in this case, she has not attempted it. The cause was submitted to the court in lieu of a jury by agreement of counsel, and it appears from the court's judgment that it was rendered wholly on account of the \$500 attorney fees. But, notwithstanding this showing of the record, counsel for plaintiff insist that the judgment is sustainable on the ground that plaintiff has proven other items of damages equal to, if not exceeding, the amount of counsel fees. She proved that she paid out large sums of money for transcripts and printing of records on appeal, for surveying and platting the land in controversy, and for other things which, counsel say, she is entitled to recover. But these items of expense are not shown to have been paid on account of the injunction. Two suits were pending against Mrs. Hudson and others in the circuit court of Putnam county at the same time, both of which were appealed to this court. One suit was styled *Whitehouse v. Jones et al.*, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49, and the other, *Iguano Land & Mining Company v. Jones et al.*, 65 W. Va. 59, 64 S. E. 640, and the items of expense, which she proves aggregate \$629.70, relate to one or the other of these suits. But it appears that at least \$300.75 of that amount was paid on account of the *Whitehouse v. Jones* Case, and that no part of the remaining expenses are shown to have been incurred in getting rid of the injunction.

For the foregoing reasons, the judgment is reversed, and the cause remanded for a new trial.

MONROE, Special Commissioner, v. HURRY
et al.

(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913.)

(Syllabus by the Court.)

1. JUDICIAL SALES (§ 7*)—COMMISSIONER TO SELL LANDS—RIGHT TO SUE.

Without authority of the court appointing him, a special commissioner to sell land has no authority to institute and prosecute suits.

Such authority must be specifically conferred, or necessarily implied from some other power specifically given by decree.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. § 7.*]

2. JUDICIAL SALES (§ 7*)—COMMISSIONER TO SELL LANDS—RIGHT TO SUB—APPOINTMENT—CONSTRUCTION.

A decree or order in such suit substituting a special commissioner in place of one previously appointed, and who has defaulted in the performance of his duties, with direction "to do and perform all acts, duties and matters and things in and about said causes, required by the decrees and orders therein respectively, not already done and performed by said commissioner," constitutes no authority in the substituted commissioner to institute and prosecute a suit in equity against such former commissioner and the sureties on his official bond, where the only authority conferred on such former commissioner, after confirming his report of sale, was, out of the cash money in his hands, to pay the costs, and the residue to the parties entitled thereto, and as the purchase money notes fell due to withdraw the same from the papers, leaving certified copies, and to collect and pay over the same to the parties entitled thereto.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. § 7.*]

Appeal from Circuit Court, Preston County.

Bill by Robert W. Monroe, Special Commissioner, against James H. Hurry and others. Decree for plaintiff, and certain defendants appeal. Reversed, and bill dismissed as to such defendants.

William G. Conley, of Charleston, for appellants. J. Ben Brady, of Kingwood, for appellee.

MILLER, J. [1] The proposition contained in the first point of the syllabus we think fully supported by *Blair v. Core*, 20 W. Va. 265; *Clarke v. Shanklin*, 24 W. Va. 30; *Crockett v. Sexton*, 29 Gr. (Va.) 46; *Ronk v. Higginbotham*, 54 W. Va. 137, 144, 46 S. E. 128; 8 Va. & W. Va. Enc. Dig. 700; *Anthony v. Kasey*, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277. The reason for this rule is obvious, and the principles sustaining it are fully covered in the cases cited, and need not be repeated.

[2] The second point we think equally patent. While authority to sue the purchaser on his purchase money notes may be reasonably implied from authority to withdraw and collect the same, certainly no right to sue the former commissioner and the sureties on his bond can be deduced from that authority. Nor is there any general authority given in the language of the decree referred to from which such authority can reasonably be implied. In support of the proposition covered by this point of the syllabus it is argued that the bond of a special commissioner is required and given solely for the benefit of the parties entitled to the money distributable under the decree of the court, and that only such persons have right of action on such bonds. The authorities cited

and relied on by counsel for this contention are *Brooks v. Miller*, 29 W. Va. 499, 2 S. E. 219; *Lee v. Swepson*, 76 Va. 173; *Lloyd v. Erwin's Adm'r*, 29 Gr. (Va.) 598; *Hess v. Rader*, 26 Gr. (Va.) 746, 751. This proposition we need not and do not decide. *State v. Abbott*, 63 W. Va. 189, 61 S. E. 369, can hardly be regarded as opposed, for the question was not raised or distinctly decided in that case. It will be time enough for us to decide that question when it comes to us in a case fairly presenting it.

The many other points presented and argued in the briefs do not require consideration.

Because the bill improperly impleads *Dawson and Fortney*, sureties on the former commissioner's bond, and the decree appealed from includes a money decree against them in favor of plaintiff, for the amount in which their principal was adjudged to be in default, that decree must be reversed, and as to them, the only parties appealing, the bill will be dismissed, but without prejudice.

LEWIS v. YATES et al.

(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 37*)—SURVEYS—MONUMENTS.

A subsequent survey calling for lines of the older one is not a monument thereof, and the call therefor is only a circumstance, admissible under some conditions, as evidence of the location of the lines of the older survey.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

2. BOUNDARIES (§ 3*)—ESTABLISHMENT.

One or more monuments of a tract of land having been ascertained, the courses and distances are entitled to controlling effect in the location of others as to the identity of which the evidence is slight, circumstantial, and conflicting.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

Error to Circuit Court, Greenbrier County. Action by Cornelia A. Lewis against W. O. & James A. Yates. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

John Osborne, of Union, for plaintiff in error. Henry Gilmer, of Lewisburg, for defendants in error.

POFFENBARGER, P. The report of the decision on a former writ of error in this case, found in 62 W. Va. 575, 59 S. E. 1073, fully discloses its nature and character and the main features of the evidence, and settles the principles involved. On the new trial then awarded, there was another verdict for the defendants, on which judgment was rendered.

The argument submitted in support of the action of the court in refusing to set aside the verdict does not question the soundness of the principles enunciated and applied in the former decision. It abandons the argument in the former case founded upon conflict between the Patterson survey and the Banks survey lying to the northeast thereof, and the location of the Hamilton survey, as contended for on the former writ of error. It impliedly, if not expressly, admits the necessity, in the event of the adoption of the theory of the defendants, of either shortening lines of the Powell 470-acre survey, thereby reducing its quantity about one-half, or removing the Frogg and Wolfenbarger surveys a great distance to the southeast, contrary to the location thereof, as shown by monuments that are practically unquestioned.

The location of the irregular southern boundary line of the Patterson survey in accordance with the claim of the defendants, as controlling the location of the Powell 470-acre survey, is vigorously insisted upon. The Patterson survey lies east of the Powell survey, and is one of its monuments, or, at any rate, its northwest corner and southwest corner are called for as corners of the 470-acre Powell survey. The beginning point of the Patterson survey is its southeastern corner, where two hickories and poplars on a hillside are called for. The line runs thence S. 80 W. 52 poles to a black oak, white oak, and hickory, N. 54 W. 34 poles to a black oak, S. 80 W. 18 poles to a double maple, and S. 30 W. 30 poles to two white oaks, the southwest corner. The survey was made April 29, 1791. The two Powell surveys were made March 23, 1798. The 400-acre one is described as running with lines of the Patterson survey, above set forth, and calls for their courses, distances, and timber. On February 7, 1799, what is evidently a part of the Powell 400-acre survey was again surveyed for Harrison and Dixon. Their survey was estimated to contain 106 acres, and purports to run with this irregular southern boundary of the Patterson survey, calling for the same courses, distances, and timber. Though made about one year later than the two Powell surveys, it does not call for the Powell 470-acre survey, which corners on the Patterson 200-acre survey at the same point at which it claims to do so. Another Harrison and Dixon survey, calling for 205 acres, bears the same date as the one just described. According to its description, it adjoins the Patterson survey and the other Harrison and Dixon survey on the east, and comes out of the Powell 400-acre survey. These two Harrison and Dixon surveys, having a combined acreage of 311 acres, taken out of the Powell survey of 400 acres, have been located, and their location harmonizes with the contention of the defendants, if the northern line of the smaller one is identical with the southern boundary line of the Patterson survey. To make them coincide, however, it is necessary to

shift the Powell 470-acre tract nearly 100 poles west of the location given it by its southeastern line run from the corner of the Wolfenbarger tract, and nearly or quite 50 poles south, and thus shift the location of the Frogg and Wolfenbarger land to the south and west equal distances. Otherwise it would shorten some of the lines of the Powell 470-acre tract, one of them nearly 100 poles, and greatly reduce its quantity. The line called for between the northeastern corner of the small Wolfenbarger tract and the southwest corner of the Patterson, in the surveys of the 470-acre and 400-acre Powell tracts, is described therein as being 120 poles long. In the Harrison and Dixon survey, the distance from the small Wolfenbarger tract to what is therein called the corner of the Patterson survey is given as 26 poles. All of these inconsistencies and conflicts argue very strongly a mistake in the call of the Harrison and Dixon survey for the southern boundary of the Patterson survey, or a subsequent wrong location of the Harrison and Dixon survey.

The last-named survey was shown to have subsequently passed into the ownership of one Hayes, and in a deed from Nathan Henning to Chas. A. Stuart, purporting to convey the Powell 470-acre tract, it is described as beginning at two white oaks, corner to the Hayes land. This is one of the circumstances strongly relied upon in the brief for the defendants in error. In addition to this, it was shown in evidence that a small white oak was found at the point claimed by the defendants as the location of the southwest corner of the Patterson survey, bearing ancient marks on one side thereof, the side toward the corner as claimed by the plaintiff, and counting more than 100 years. One or more of the surveyors said the annulations indicated an age greater than that of the Patterson survey. There is no proof that this tree was marked as a corner tree, and it stands only 15 or 20 feet from the 120 pole line of the Powell survey, and may have been a tree marked for that line. Two witnesses testify that two trees stood at that point at one time, but no ancient marks on them are shown other than the one just mentioned. At another place at which a double maple is called for in the Patterson survey, and also in the Harrison and Dixon survey, some maple sprouts and an old rotten fallen maple tree were found, but, whether it was a double maple, or, whether a double maple ever stood at that point, is not shown, nor does it appear that the old fallen tree bore any marks. At the southwest corner of the Patterson survey, as located by the plaintiff, no tree was found which answers the description given in the survey. Near the southeast corner of the Patterson survey, as located by her, an old marked tree was found, and the ground corresponded well with that called for in the description. At the northwest corner of that survey, as she locates it, there was found

an old hollow Spanish oak or black oak, bearing an ancient mark, the age of which could not be ascertained on account of the decayed condition of the trees. The grant calls for a Spanish oak as that corner. South of that point, nearly on a line between it and the southwest corner as claimed by the plaintiff, another tree was found bearing an ancient mark. For the southeastern, northeastern, and northwestern corners of the location of the Patterson survey, as claimed by the defendants, nothing whatever was found indicative of the existence of monuments.

[1] The erroneous description, if it was such, in the deed from Nathan Henning and wife to Chas. Stuart, relating to the beginning corner, is not conclusive. In other words, if the Hayes corner was not the corner of the 470-acre Powell survey, granted to Wm. Donaldson, its erroneous designation as such in the Henning deed does not estop the plaintiff from showing the true location thereof. The deed purports to convey the whole of the Powell survey, and, with the single exception noted, calls for its courses, distances, and monuments. The distance called for in it from the northeast corner of the small Wolfenbarger tract to the southwest corner of the Patterson survey is 120 poles as in the original survey, and the deed described the land generally as being the land granted to Wm. Donaldson and containing 470 acres. As between the parties to that deed, the general description would prevail over a particular one, if it comported with the intention of the parties and the particular one did not, as is the case here. *Mylius v. Lumber Co.*, 69 W. Va. 346, 71 S. E. 404; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; *Smith v. Chapman*, 10 Grat. (Va.) 445; *Andrews v. Pearson*, 68 Me. 19; *Marshall v. McLean*, 3 G. Greene (Iowa) 363. Not being conclusive between the parties to the deed themselves, such mistake would certainly not conclude the grantee in favor of strangers. Manifestly this recital is nothing more than a circumstance bearing on the question of location, and entitled to only such weight as it may have under the rules of law governing the trial of issues of fact. It is supplemented by similar evidence found in the survey of the smaller Harrison and Dixon tract. The Patterson survey does not call for the Harrison and Dixon survey. The latter, being later, calls for the former. If, under some misapprehension, a tree was taken as the corner of the Patterson survey which was not in fact such corner, but only a tree in the line of the prior survey, such erroneous adoption of a line believed to be, and designated as, the line of the Patterson survey is not conclusive. In other words, the Harrison and Dixey survey is not a monument or call of the Patterson survey, and the adoption of a line for the former as a line of the latter, which in fact is not such line, amounts to no more than the conduct of strangers which, in the absence of ascertain-

ment of the true line of the Patterson survey, is a circumstance bearing on the issue and nothing more. Surveys of coterminous or neighboring tracts, made by the same surveyor, about the same time, or recently thereafter, are admissible in evidence in such a controversy as this. *McMullin v. Lewis*, 5 W. Va. 144; *Clements v. Kyles*, 13 Grat. (Va.) 468; *Overton v. Davison*, 1 Grat. (Va.) 211, 42 Am. Dec. 544. But such evidence does not reach the dignity, nor have the probative force of established monuments. It is merely circumstantial, and its admissibility has been denied when the coterminous or neighboring surveys were not made by the same surveyor and are many years subsequent in date. *Clements v. Kyles*, cited; *McMullin v. Lewis*, cited.

[2] Our analysis of the evidence and definition of its character show lack or failure of certain identification of any of the lines or corners of the Patterson survey, the location of which is relied upon by the defendants as the vital question in the case. Plaintiff's evidence as to identity of monuments is also inconclusive. The evidence submitted by the parties to sustain their respective contentions is about the same in character and quantity, in so far as it relates to the identification of monuments called for in the Patterson survey. That submitted by the defendant is supplemented by conduct of strangers and a recital in the Henning deed as mere circumstances, not in any sense conclusive nor strongly probative. If nothing else appeared, the verdict of a jury founded upon this evidence would be unimpeachable and beyond the power of disturbance by the trial court. But, to allow a verdict for the defendants to stand on such evidence, under the circumstances disclosed here, would permit the jury to disregard and ignore practically the only evidence indicating the true location with any degree of certainty. As has been shown, the location of the Patterson survey, as contended for by the defendant, disarranges the entire system of surveys and does violence to the calls of the Powell surveys. It would reduce the quantities of both, and shorten specific calls and distances. The location of the Wolfenbarger tract is well established. Its northeast corner is a fixed and certain monument of the Powell surveys. Giving effect to the call for course and distance from that corner, as the law requires, in the absence of an ascertained controlling monument, it fixes the southwest corner of the Patterson survey at about the point contended for by the plaintiff, and sustains the declared relation of that survey to the other Powell survey, the Frogg tract and Wolfenbarger tract, and its specification of quantity. An overwhelming preponderance of evidence in favor of the plaintiff is thus clearly shown, making it the duty of the trial court to set aside the verdict, on the request for such action.

For the most part, the court's rulings on instructions were correct. It erred, however, in refusing one instruction asked for by the plaintiff, and designated as No. 2. In effect, it would have been a direction to find for the plaintiff, for it would have required the jury to find the plaintiff entitled to so much of the 57-acre tract of land as lies within certain designated lines, run by course and distance from the northwest corner of the Patterson survey, as located by the plaintiff. As the evidence for the defendants was insufficient to sustain a verdict in their favor, for reasons already stated, it was the duty of the court to direct a verdict for the plaintiff, if asked to do so, or to give the jury a peremptory instruction to find for the plaintiff. Such is the character of the instruction the court refused. As there was some evidence tending to sustain the theories of instructions Nos. 2, 3, and 4, given for the defendant, the court properly overruled the objections to them. Evidence insufficient to sustain a verdict may, nevertheless, justify the court in giving instructions embodying the hypotheses it tends to establish. *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981.

For the errors noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

WILLIAMS and LYNCH, JJ., absent.

STATE ex rel. FORTNEY LUMBER &
HARDWARE CO. v. BALTIMORE &
O. R. CO.

(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913.)

(Syllabus by the Court.)

1. CONTEMPT (§ 66*)—REVIEW.

A judgment for contempt of a trial court, consisting of disobedience of its judgment, decree, or order, is not reviewable in the appellate court, if the trial court had jurisdiction of the cause in which it rendered, pronounced, or entered the violated judgment, decree, or order, and did not exceed its jurisdiction in doing so.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.*]

2. CONTEMPT (§ 66*)—REVIEW.

But, if such court had not such jurisdiction, or, having it, exceeded its powers in entering the judgment, decree, or order, its lack of jurisdiction affords ground for appellate jurisdiction to annul the judgment of contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.*]

3. EMINENT DOMAIN (§ 274*)—TAKING PRIVATE PROPERTY—INJUNCTION.

Equity has jurisdiction to enjoin the taking of private personal property for public use without payment of just compensation therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.*]

4. CONTEMPT (§ 29*)—PARTIES TO OFFENSE—CORPORATIONS.

A corporation may be a contemnor, and punishable as such by fine.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 86-90; Dec. Dig. § 29.*]

(Additional Syllabus by Editorial Staff.)

5. CONTEMPT (§ 63*)—CONDITIONAL JUDGMENT.

Conditional judgments of imprisonment may be rendered in contempt cases.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 195, 197-201; Dec. Dig. § 63.*]

Error to Circuit Court, Taylor County.

Action by the State on the relation of the Fortney Lumber & Hardware Company, against the Baltimore & Ohio Railroad Company, a corporation. Defendant was found guilty of contempt, and adjudged to pay a fine, and brings error. Writ of error dismissed as having been improvidently awarded.

B. F. Bailey, of Grafton, for plaintiff in error.

POFFENBARGER, P. Having been found guilty of a contempt of court, and adjudged to pay a fine of \$500, the defendant obtained this writ of error to the judgment.

The alleged contempt, disobedience of an injunction order, was one the court could punish summarily. Code, c. 147, § 27, cl. 4.

[1, 2] If the court had jurisdiction of the cause in the general sense of the term, and did not exceed its authority in awarding the injunction or rendering the judgment complained of, the writ of error to this court does not lie, for the statute giving power here to review judgments in contempt cases excepts those consisting of disobedience of judgments, decrees, and orders. Code, c. 160, § 4. While this section purports to except all cases of that kind, it must be read in connection with a general principle, authorizing appellate courts to entertain writs of error and appeals for the annulment of judgments rendered and decrees entered without jurisdiction. Want of jurisdiction in the trial court confers appellate jurisdiction. *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; *Clark v. County Court*, 55 W. Va. 278, 47 S. E. 162. Agreeably to the general rule observed in most, if not all, jurisdictions, the Legislature seems clearly to have intended not to give a right of review of judgments for contempt by disobedience to judgments, decrees, and orders, and there is good reason for withholding appellate jurisdiction in such cases. Interlocutory orders and decrees, such as preliminary injunction orders, are always correctible by the courts in which they are made, and in all important instances the law affords an appellate remedy for refusal to make such corrections. There may be an appeal from an order refusing to

dissolve an injunction or from an order appointing a receiver. In these instances, and some others, the aggrieved parties are not bound to await the final decree, and in others, not deemed to be of sufficient importance to warrant an appeal therefrom, the errors of the trial court are correctible by an appeal from the final decree. Having these remedies for the correction of interlocutory orders and final decrees, a party ought not to be permitted to attack such decrees by collateral or indirect methods, such as disobedience thereof, with a right of review of the judgments imposing the penalties inflicted by the court for disobedience. In requiring him to respect and obey the orders and decrees of the court, the law thus inflicts no hardship. It affords him a remedy for every abuse of authority, and there is no reason why he should attempt to take the law into his own hands and redress his own grievances. But this power of the court to compel obedience to its orders and decrees is subject to an important limitation. It must be within its own jurisdiction and powers. This does not mean that its decrees and judgments must be free from error, for a court having power to decree at all in a given cause may pronounce an erroneous decree without exceeding its powers. Error is not want of jurisdiction. *Coal Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225. A judgment for contempt of a void order or decree is a void judgment, and cannot be enforced. *Coal Co. v. Ritz*, cited. A contempt proceeding for violation of such an order may be prohibited. *Coal Co. v. Ritz*, cited. The existence of this remedy does not deny appellate jurisdiction, for there may be an appeal from a void decree or a writ of error to a void judgment. *Clark v. County Court*, cited; *McCoy v. Allen*, 16 W. Va. 724; *Monroe v. Bartlett*, 6 W. Va. 441; *Johnson v. Young*, 11 W. Va. 673.

Some of the decisions of this court may seem to be at variance with the views here expressed. Writs of error have been entertained in several cases similar to this, but the question of appellate jurisdiction, or rather the extent to which the appellate court has jurisdiction and the grounds thereof, seems not to have been discussed. In *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932, the jurisdictional question was not raised, and the court seems to have reviewed the judgment generally. However, the main questions discussed in that case pertained to the jurisdiction of the trial court. In *Ruhl v. Ruhl*, 24 W. Va. 279, this court seems to have based its appellate jurisdiction on proper grounds, and to have observed the distinction here made. In *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413, the court seems to have proceeded upon the theory of a want of jurisdiction, holding there was no authority in the court below to punish for contempt an act intended

to be prohibited by an injunction which had not yet taken effect, because the condition requiring bond had not been complied with. The distinction is somewhat nice and obscure, and both parties and the court at times may have failed to observe it, but it is obviously sound and embodies a wholesome principle.

[3] The relator in the contempt proceeding, the Fortney Lumber & Hardware Company, was the lessee of a certain lot in the city of Grafton, bordering on a certain street over which the plaintiff in error was about to construct its track, making a deep excavation. The bill for the injunction alleges purpose and intent on the part of the railway company, with the permission of the city, to widen the street so as to take a part of the leased lot and a portion of one of the buildings thereon. The purpose of the bill was to prevent this alleged taking of its property, to the extent of the threatened invasion of the leased premises and the buildings, as well as to prevent damages likely to result from the deep excavation to be made in the street. The railway company had not paid the lumber company any compensation for the desired portion of its lease and buildings, nor taken any steps whatever to have the same ascertained, secured, or paid. The injunction awarded upon the bill was served upon an agent of the company late in the evening. On the same night, after the service thereof, it entered upon the portion of the street in question, made the excavation, and laid its track. Thereupon, at the instance of the plaintiff in the suit, the court awarded a rule against the railway company, reciting the alleged contempt, and commanding it to appear and show cause, if any it could, why it should not be punished for disobedience of the order. It tendered an answer, denying knowledge of the injunction, and also its validity, on the ground of a defect in the affidavit to the bill. This the court rejected, deeming it insufficient, found the respondent guilty, and imposed the fine.

The allegations of the bill obviously made a case within the jurisdiction of the court. It set forth purpose and intent on the part of the railway company to take a part of the plaintiff's property without having first paid, or secured to be paid, compensation therefor. Ordinarily, private property proposed to be taken for public use is real estate, but personal property is as much within the constitutional guaranty as real estate. *Teter v. Railroad Co.*, 35 W. Va. 433, 14 S. E. 146; *Cooley's Cons. Lim.* 756 to 759; *Lewis, Em. Dom.* §§ 62, 413, 728. The building on the property which the bill alleged would be partially taken had been constructed by the lessee at its own expense, and with right of removal. In the brief lack of interest on the part of the plaintiff is charged and insisted upon, because there was a privilege of surrender in the lease. This position is untenable, for there had been no surrender,

nor any forfeiture or termination in any manner of the plaintiff's interest therein.

Whether there is lack of jurisdiction in the case of violation of an injunction by a person who had no notice of its existence, it is unnecessary to say, and we enter upon no inquiry as to that. The evidence adduced upon the subject of notice amply justified the finding of the court. The railway company had carried its work up to that portion of the street on which the plaintiff's property abutted at the time of the injunction order. Immediately thereafter, and in the nighttime, a large force of men was put to work on that section of the street, and the excavation and track laying completed. An agent of the plaintiff, on discovery of this procedure, accompanied by his attorney, sought the principal officers and agents of the company, as well as the foreman of the men engaged in the work, but was unable to find any of them. All the circumstances clearly indicate purpose and intent on the part of the company to complete the construction that night, regardless of the injunction, as well as knowledge of its existence. The manner in which the work was executed indicated anticipation of legal obstruction thereto and preparation for avoiding it. The agent to whom the copy of the order was delivered by the sheriff intimated his knowledge of the character and purpose of the paper, and he must have had knowledge of the extensive preparations for night work and the purpose thereof. Nevertheless, he failed to deliver the paper to the superintendent or any other officer or agent in charge of the work of construction. All the circumstances indicate purpose to rely upon lack of formal notice, notwithstanding the possession of actual notice.

[4] Lack of power and jurisdiction in any court to adjudge a corporation guilty of a contempt and punish it by fine is urged as ground for reversal. This position is clearly untenable. A corporation through its agents and officers has physical power to violate or disobey the orders of the court, notwithstanding its intangibility. Though the officers and agents are punishable for the act of disobedience, their liability does not preclude liability on the part of the corporation itself. Of course the corporation cannot be imprisoned. This is a physical impossibility, but it is possible and practicable to impose a fine upon it and enforce payment thereof. Accordingly, it has been held, consistently with reason and legal principles, that a corporation may be held guilty of contempt and punished therefor by fine. *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147; *People v. Pendleton*, 64 N. Y. 622; *United States v. Railroad Co.* (C. C.) 6 Fed. 237; *Cook, Corp.* § 755; 9 Cyc. 23.

[5] A charge of invalidity in the judgment on account of its conditional character is made in argument, but this is unavailing on

a writ of error for two reasons: If the judgment is void on account of its form, it is unenforceable, and there is no occasion for its reversal. In the second place, as the object of punishment in contempt cases is to compel obedience to the violated order, and to vindicate the dignity of the court, the court may forego the latter, and use its power to effectuate the former, and a conditional judgment is very well calculated to produce such result. If the condition is not performed, the judgment necessarily becomes absolute. If, on the other hand, it is performed, the judgment is satisfied. Punishment by fine is much milder than by imprisonment. What can be done in the latter case can certainly be accomplished in the former, and it is well settled that conditional judgments of imprisonment may be rendered in contempt cases. 9 Cyc. 62. At any rate, the court did not exceed its powers in rendering the judgment, and the question of jurisdiction is the only one open to us on this writ.

As the court had jurisdiction, the writ of error will be dismissed as having been improvidently awarded.

ELK COTTON MILLS v. GRANT. (Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 95*)—INJURY TO MINOR EMPLOYÉ—CHILD LABOR LAW.

The employment of a minor under the prescribed age in a factory, in disobedience of the statute prohibiting such employment, is negligence per se, and, if injury to such child proximately results from the employment, a right of action in its favor arises.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 141, 160; Dec. Dig. § 95.*]

2. MASTER AND SERVANT (§ 204*)—INJURY TO MINOR EMPLOYÉ—ASSUMPTION OF RISK.

The statutory prohibition against employing children under a prescribed age in a factory excludes the defense of the assumption by them of risks incident to such employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

3. MASTER AND SERVANT (§ 96*)—INJURY TO MINOR EMPLOYÉ—RIGHT OF ACTION.

In a suit by a child alleging injury as the result of his employment in a factory in violation of a statute prohibiting the employment in factories of children under a prescribed age, if the injury was not the result of the employment, but of some wholly independent cause disconnected from his employment, there can be no recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 157, 158, 162; Dec. Dig. § 96.*]

4. MASTER AND SERVANT (§ 228*)—NEGLIGENCE (§ 101*)—INJURY TO MINOR EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—DIMINUTION OF DAMAGES.

In such a case the defense that the child was guilty of such negligence as to prevent a recovery is also open to the defendant.

(a) Under the statute of this state, if the plaintiff is not guilty of such negligence as will

prevent a recovery, but is guilty of some negligence, the doctrine of diminution of damages may also be invoked.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 670, 671; Dec. Dig. § 228; * *Negligence*, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.*]

5. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—INFANTS—"DUE CARE."

The diligence required of a child of tender years is not to be measured by the ordinary care required of an adult; but due care in such a child is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 121-128; Dec. Dig. § 85.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 2221, 2222; vol. 8, p. 7643.]

6. DAMAGES (§ 216*)—PERSONAL INJURY—INSTRUCTIONS—EVIDENCE.

Where suit was brought for a personal injury to a child and on the trial, about 2½ years after its occurrence, the plaintiff testified in substance that by reason of the injury he lost his thumb and forefinger and about half of his right hand, that he could do a little work with that hand, that he was confined to the house for more than a week after he was hurt, and could do no work for two or three months, and that his injury still caused him pain at night, there was enough evidence to authorize a charge on the subject of pain and suffering, mental and physical, which he might have suffered in the past, and which he might suffer in the future.

(a) 'This is true although the witness added to the testimony above mentioned: "My hand does not hurt me now unless I hurt it in some way; my hand is not so easy to hurt."

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

7. GROUNDS FOR NEW TRIAL—No ERROR.

None of the grounds of the motion for a new trial which are not specially mentioned required a reversal.

(Additional Syllabus by Editorial Staff.)

8. NEGLIGENCE (§ 101*)—"CONTRIBUTORY NEGLIGENCE"—COMPARATIVE NEGLIGENCE.

The words "contributory negligence" are generally employed to express a degree of negligence which will preclude a recovery. In this state the words are commonly used to express negligence which will diminish, but not defeat, a recovery, under the doctrine of comparative negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Charlie Grant, etc., against the Elk Cotton Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

On January 18, 1912, Charlie Grant, by his next friend, brought an action to recover damages against the Elk Cotton Mills. After being amended, and after the sustaining of a demurrer to a portion of the petition, it alleged in substance as follows: The plaintiff, who was 11 years of age, was employed by the defendant in violation of the second section of the child labor law of 1906 (Civil Code 1910, § 8144), prohibiting the employment in any factory or manufacturing estab-

lishment of any child under 12 years of age, except under certain specified circumstances not involved in this case. On May 10, 1910, he was employed to carry waste from the spinning room of the mill, and the duties of his employment required him to go among the machines. While going through another room, he passed a machine called a finisher. He was a child of tender years, small for his age, and with less mental and physical capacity than the ordinary child of his years. He had been employed in the mill for only a short time; he had never been employed in a cotton mill before, and was unacquainted with the dangers of the machinery. In passing the finisher, he laid his hand on a rod to which a cog was attached, as he had seen other employes do, and as he had previously done with the knowledge of the defendant and its officers, agents, and employes. There were no proper safeguards to prevent injury from the machine. In some way his hand was drawn into the machine, and crushed, so that he lost his thumb and forefinger and part of his hand, causing pain and suffering, and decreased capacity to labor and earn money. These results are permanent. The defendant admitted the employment of the plaintiff, and alleged that it was at the special solicitation of his father, who was the boss of the spinning room, and had immediate control of the plaintiff; that there was no danger in a proper performance of the duties for which the plaintiff was employed; that it was unnecessary in carrying out waste to go through the room where the finisher was; and that the plaintiff had been warned to keep out of it. The other substantial allegations of the petition were denied. The jury found for the plaintiff \$2,000. The defendant moved for a new trial, which was denied, and it excepted.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. M. C. Tarver, of Dalton, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. By the Civil Code of 1910, § 3143, it is declared that no child under 10 years of age shall be employed or allowed to labor in any factory or manufacturing establishment in this state under any circumstances. By section 3144 it is declared that no child under 12 years of age shall be so employed, or allowed so to labor, unless it is an orphan, and has no other means of support, or unless a widowed mother or an aged or disabled father is dependent upon the labor of such child. In the latter event the father is required to file in the office of the company or establishment a prescribed certificate from the ordinary. A disobedience of the act is made a misdemeanor. Section 3149. Here the plaintiff was 11 years old. He was not an orphan, and there is no claim that he had a widowed mother or an aged or

disabled father dependent upon him. On the contrary, the defendant set up that his father was employed in the defendant's factory. Under these circumstances, the employment of the plaintiff was a violation of the law.

The child labor law was enacted for a useful purpose. It was intended to be obeyed. A violation of the statute by hiring the plaintiff, a boy of 11 years of age (and not within the excepted class), to work in the defendant's factory constituted negligence per se as to him, and authorized a recovery for a personal injury sustained by him as a proximate result of such employment. Where a statute prescribes an absolute duty for the benefit of a class of persons, the violation of the statutory duty resulting in injury to one of such persons authorizes a recovery without other negligence, and the expression "negligence per se" has quite generally been used to characterize such a breach of duty. It has often been so employed in this state. In 1 Thompson on Negligence, § 10, it is said that: "Where the Legislature of the state, or the council of a municipal corporation, having in view the promotion of the safety of the public, or of individual members of the public, commands or forbids the doing of a particular act, * * * the general conception of the courts, and the only one that is reconcilable with reason, is that the failure to do the act commanded, or the doing of the act prohibited, is negligence as mere matter of law, otherwise called negligence per se, and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill, so that, if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains to be done is to assess the damages." While a few cases have held that the violation of a statutory duty is only "evidence" of negligence, and not negligence per se, such decisions, though rendered by courts of high standing, will not bear the test of reason, and this court has frequently held to the contrary. *Atlanta & West Point Railroad v. Wyly*, 65 Ga. 120; *Louisville & Nashville R. Co. v. Hames*, 135 Ga. 67 (4), 68 S. E. 805; 1 Hopkins' Pers. Inj. (2d Ed.) §§ 18, 125.

[2] 2. The statutory inhibition under consideration necessarily excludes the doctrine of the assumption of risks of the employment, which might otherwise apply. To hold differently would be substantially to destroy the efficacy of the statute.

[3, 4] 3, 4. There remain the questions whether the violation of the statutory duty was the proximate cause of the injury, and whether the plaintiff was guilty of such negligence as to debar him from a recovery, or to lessen the recovery, under our statute. If the breach of a statutory duty in no way proximately causes an injury, its violation will not authorize a recovery. To illustrate by reference to suits against railroad com-

panies for personal injuries at road crossings: The law requires a railroad company to erect blow posts at a certain distance from public road crossings over its tracks, and requires the engineer to blow the whistle and slacken the speed in approaching such crossings. It has been held that a violation of these duties constitutes negligence per se as to one passing over such a crossing. If, however, an injury is not the result of the operation of the train at all, but results from some entirely different and disconnected cause, the violation of the duty would not authorize a recovery. It may be said that the mere failure to erect a blow post or to blow the whistle does not, along and of itself, injure one who may be on a crossing; but, if he be injured by reason of the company's failure to obey the law enacted for his protection, it is enough. Or suppose the company was negligent, but the injured person himself was guilty of such negligence as to debar him from recovery although the defendant was negligent, then he could not recover. This has often been recognized in suits against railroad companies, and it is generally true in other cases. The violation of the statutory duty is negligence per se. But if negligence, whether per se or otherwise, does not proximately cause the injury, there can be no recovery on account of it. Or if the injured person is guilty of such negligence as to preclude a recovery, there can be none.

[8] As has been more than once noticed in opinions of this court, the words "contributory negligence" are generally employed to express a degree of negligence which will preclude a recovery. In this state, unfortunately perhaps, those words are commonly used to express negligence which will diminish, but not defeat, a recovery, under the doctrine of comparative negligence, which is recognized here. But if the injured person causes the injury by his own negligence, or if the plaintiff by the use of ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. Civil Code 1910, § 4426.

In applying these principles to the child labor law now under consideration, and in considering the subject of proximate cause, the great objects of the statute should not be overlooked. It must be borne in mind that a leading purpose of the Legislature was to protect the children of the state of tender years, and to prevent the employment in mills, manufacturing establishments, and factories, with certain exceptions, of those under the prescribed age, whom the lawmakers regarded as so immature and indiscreet as to make it wrong to expose them to the dangers incident to such a place. The Legislature must have known that little children might not have the caution and prudence of older persons, and might yield to childish impulses in dangerous places, and, no doubt for this and other reasons, that body sought to prevent their being employed in places which it so considered.

Of course, it may be argued that the contract of employment did not crush the boy's hand, that the waste which he was employed to remove did not injure him, but that he was injured by a machine which he was not employed to operate. But such arguments do not conclusively show that the unlawful employment in the factory was not the proximate cause of the injury. The real question is whether the employment at that place, which was in itself negligence in law, was the cause of which the injury was the consequence. And in determining this, as well as whether the boy's own negligence was such as to preclude a recovery, his age is a matter to be considered. If the statute had been obeyed, would this have prevented the injury? Was there any causal connection between the disobedience of the law and the injury? Was there any intervening cause? Was his conduct such as to prevent, or, if not, then to diminish, a recovery? These are practical questions. If the plaintiff should frame a count upon this statutory negligence, and also one upon negligence under the general law apart from the statute, as to the latter count the general law would prevail.

In *Queen v. Dayton & Iron Co.*, 95 Tenn. 464, 32 S. W. 460, 30 L. R. A. 82, 83, 49 Am. St. Rep. 935, where it was claimed that a boy employed in a mine in violation of the statute jumped from a moving car, under the command of another employé whom he had been instructed to obey, and was injured, the Supreme Court of Tennessee held that such employment was negligence per se, and a recovery was sustained. It was said: "Of course, we do not hold that, if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with the employment, the company would have been liable in damages simply on account of the employment in violation of the statute. But we do hold that the breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment." In *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117, though a child was wrongfully employed, the injury resulted from the act of a third person who had come upon the premises to obtain wood, and who carelessly threw a stick of wood against the child, and it was held that the employment was not the proximate cause of the injury. These are illustrative cases. In the latter it was held that there was an independent intervening cause. There are other cases, cited below, in which it was held that the negligence or childish pranks of others in the same employment would not necessarily prevent the unlawful employment from being the proximate cause of the injury. When there is evidence tending to show that the injury results from the employment, though the child may have also been guilty of negligence in yielding to childish impulses, the questions of proximate cause

and of whether the negligence of the child is such as to prevent a recovery are generally for the jury. One or two courts have declared that, if the child employed in violation of the statute was injured by a machine which it had been hired to operate, proximate cause could be declared as matter of law. We will not consider at length the various cases on this subject. There is some conflict. A few of the decisions have confused the question of the existence of negligence on the part of the defendant or that of the plaintiff with the question of proximate cause, and there are some which are not satisfactory to us. But we believe we have followed the current of authority, and have based our decision on sound principles. See *Leathers v. Blackwell's Durham Tobacco Co.*, 144 N. C. 330, 57 S. E. 711, 9 L. R. A. (N. S.) 349, 364, et seq., and note, where *Rolin v. R. J. Reynolds Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335, 8 Ann. Cas. 638, is discussed; *Starnes v. Albion Mfg. Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602, 15 Ann. Cas. 470; *Marquette Third Vein Coal Co. v. Dielle*, 208 Ill. 116, 70 N. E. 17; *Morris v. Stanfield*, 81 Ill. App. 264; *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755; 4 Labatt on Master and Servant (2d Ed.) § 1571, and notes. The decision of the Court of Appeals in *Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068, is in general harmony with what is said above. We are not here called on to deal with the question whether proof that the child is in fact above the designated age will prevent the employment without filing the prescribed affidavit from being negligence per se.

[5] 5. The diligence required of a child of tender years is not to be measured by the ordinary care required of an adult; but due care in such a child is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation. *Western & Atlantic Railroad Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Civil Code 1910, § 3474.

[6] 6. The evidence authorized a charge on the subject of recovery for pain and suffering, mental and physical, which the injured boy had endured, and such as he might endure in the future. At the trial, nearly 2½ years after the injury, the plaintiff testified that, by reason of it, he lost his thumb and forefinger and about half of his right hand; that he could do a little work with that hand; and that he was confined to the house for more than a week after the injury, and thought it was two or three months later before he could do any work. He added: "My injuries hurt of a night; but my hand does not hurt now unless I hurt it in some way. My hand is not so easy to hurt." *Central Railroad, etc., Co. v. Lanier*, 83 Ga. 587, 10 S. E. 279; *Macon Railway, etc., Co. v. Streyer*, 123 Ga. 279, 51 S. E. 342.

[7] 7. The verdict was supported by the ev-

idencé. If there were any inaccuracies in the charge, they were not such as to require a new trial. It might have been fuller and more explicit; but there seems to have been no request to charge more fully, and, under the facts of the case, we do not think there should be a new trial.

Judgment affirmed. All the Justices concur.

LANG v. MONTGOMERY.

(Supreme Court of Georgia. Oct. 14, 1913.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 627*)—RECORD—DELAY IN PERFECTING APPEAL—DISMISSAL.

"Where it appears that the clerk of a trial court has failed to transmit to the Supreme Court, within the time prescribed by law, a bill of exceptions and transcript, and that the plaintiff in error or his attorney 'has been the cause of the delay, * * * by consent, direction, or procurement of any kind,' the writ of error will be dismissed." *Wheeler v. Crawford*, 135 Ga. 148, 69 S. E. 22; *Wilson v. State*, 124 Ga. 30, 52 S. E. 81; *Budden v. Brooks*, 123 Ga. 882, 51 S. E. 727; *Civ. Code* 1910, §§ 6185, 6186.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.*]

2. APPEAL AND ERROR (§ 627*)—DELAY IN PERFECTING APPEAL—DISMISSAL.

Accordingly, where a bill of exceptions was filed with the clerk of the trial court on October 11, 1912, but the bill of exceptions and transcript were not transmitted to the Supreme Court until November 13, 1912, because the plaintiff in error (who is also an attorney) held the papers in his office, as appears by the certificate of the clerk of the trial court, the bill of exceptions will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.*]

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action between J. M. Lang and K. W. Montgomery. From the judgment, Lang brings error. Writ of error dismissed.

Harris, Harris & Harris, of Rome, for plaintiff in error. J. G. B. Erwin, of Calhoun, for defendant in error.

HILL, J. Writ of error dismissed. All the Justices concur.

BURNEY v. JONES.

(Supreme Court of Georgia. Oct. 15, 1913.)

(*Syllabus by the Court.*)

CONTRACTS (§ 9*)—CERTAINTY—RIGHT TO ENFORCE.

Under the evidence there was no error in directing a verdict for the defendant.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

Error from Superior Court, Wilkinson County; K. J. Hawkins, Judge.

Action by J. S. Burney against W. A. Jones. Judgment for defendant, and plaintiff brings error. Affirmed.

F. Chambers & Son, of Macon, for plaintiff in error. Lindsey & Carswell, of Irwinton, for defendant in error.

LUMPKIN, J. This suit was for money had and received. A trade was made by the defendant to sell to the plaintiff a tract of land for \$1,500. Five hundred dollars was paid in cash, and notes for \$1,000 were given. Later a second sale was made by the defendant to the plaintiff of another tract containing 10 acres, for \$1,100. The plaintiff conveyed in part payment land owned by him at a valuation of \$600 (or, according to the defendant, \$400), and gave a note for the balance. Later he and the defendant agreed on a termination of the trade. According to the plaintiff's evidence, he gave up his bond for title and surrendered the land which he had conveyed to the defendant, while the defendant destroyed the plaintiff's notes and promised to give him "part of the money" which he had paid. Later the defendant conveyed the land which he had received from the plaintiff to a third party, who appears to have been an innocent purchaser, and who placed improvements on it. Hence there could be no recovery of it, and an agreement to pay plaintiff part of the money was too vague to be enforced. The facts did not authorize a recovery on the basis of money had and received, and, under the evidence most favorable to the plaintiff, there was no error in directing a verdict for the defendant.

Judgment affirmed. All the Justices concur.

TENNESSEE VALLEY FERTILIZER CO. v. STEVENS.

(Supreme Court of Georgia. Oct. 15, 1913.)

(*Syllabus by the Court.*)

1. ARREST (§ 49*)—BAIL PROCESS—DISCHARGE—ISSUES—EVIDENCE.

Where an action for the recovery of personality has been brought, and the defendant has been imprisoned under bail process, upon an application by him to be discharged under Civil Code 1910, § 5154, the questions of fact raised for determination are whether the defendant can neither give security nor produce the property, and whether the reasons for its nonproduction are satisfactory.

(a) To allege and prove that guano, which was the subject-matter of the action, could not be produced because it had been bought and placed in the ground as a fertilizer, is legitimate as showing a satisfactory reason for the nonproduction.

(b) Allegations and evidence for the purpose of showing that the action was maliciously brought by the plaintiff, and not bona fide to recover the property, were not relevant to the issue in such a proceeding.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 115-122; Dec. Dig. § 49.*]

2. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—BAIL.

The uncontradicted evidence fully authorized, if it did not demand, the order discharging the defendant on his own recognizance; and the judgment will not be reversed because the ruling in the respect indicated in the last subdivision of the preceding headnote may not have been accurate.

(a) In order that the order of discharge, based upon a petition containing allegations of malice and want of probable cause on the part of the plaintiff, may not be taken as adjudicating those facts, direction is given that the judgment be so amended as to strike from the petition for discharge such averment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by the Tennessee Valley Fertilizer Company against W. W. Stevens. Judgment for defendant, and plaintiff brings error. Affirmed.

M. E. Evans, of Warrenton, for plaintiff in error. E. P. Davis and M. L. Felts, both of Warrenton, for defendant in error.

LUMPKIN, J. Judgment affirmed, with direction. All the Justices concur.

HARRIS v. JONES.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)**1. FRAUDS, STATUTE OF (§ 32*)—PROMISE TO ANSWER FOR ANOTHER—SUBSTITUTION.**

An agreement between a creditor, his debtor, and a third person, whereby such third person, in consideration of the creditor's releasing the debtor, agrees to pay the amount of the debt to the creditor, and as part of the agreement the creditor releases his debtor and agrees that such third person shall be substituted for the debtor, is not within the statute of frauds. The debt is extinguished as to the debtor, and the third person becomes, by substitution, the debtor in his place. *Palmetto Manufacturing Co. v. Parker*, 123 Ga. 798, 51 S. E. 714.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 49; Dec. Dig. § 32.*]

2. INSTRUCTIONS APPROVED—VERDICT SUSTAINED.

The charges complained of were in substantial accord with the foregoing principle, and the verdict was supported by the evidence.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Action between W. I. Harris and R. T. Jones. From the judgment, Harris brings error. Affirmed.

J. A. Beazley, of Crawfordville, for plaintiff in error. J. W. Hixon and Colley & Colley, all of Washington, Ga., for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

EDWARDS et al. v. SAVANNAH & S. RY. CO.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)**EMINENT DOMAIN (§ 238*)—CONDEMNATION—APPEAL.**

An appeal from the award of assessors in a condemnation case must be entered in writing, and filed in the office of the clerk of the superior court where the award is filed, within 10 days from the time the award is filed. Civil Code 1910, § 5228. An appeal entered after 10 days from the filing of the award was not in time, and was properly dismissed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619, 658-660, 666, 668, 669, 671, 673, 674, 687; Dec. Dig. § 238.*]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Condemnation proceedings by the Savannah & Statesboro Railway Company against Sylvester Edwards and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. H. Smith, of Eden, for plaintiffs in error. Johnston & Cone, of Statesboro, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

DURRENCE v. WATERS.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)**1. APPEAL AND ERROR (§§ 11, 70*)—JUDGMENT ON DEMURRER—EXCEPTIONS.**

The losing party to a judgment on general demurrer is given the option to sue out a direct bill of exceptions, assigning error on the judgment, or to have certified and filed exceptions pendente lite. If the latter course be followed, the ruling on demurrer becomes a pendente lite ruling, which is reviewable only after the termination of the case, on exceptions taken to the final judgment rendered therein. Civil Code 1910, § 6138.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 39-48, 367-378, 386, 411; Dec. Dig. §§ 11, 70.*]

2. APPEAL AND ERROR (§ 13*)—WRIT OF ERROR—RIGHT PENDING MOTION FOR NEW TRIAL.

Where a plaintiff against whom a verdict has been rendered makes a motion for new trial, he cannot properly, while the same is pending and still undisposed of, bring to this court for review any ruling, order, or decision made by the judge during the progress of the case, or the judgment entered upon the verdict. *Kelly & Jones Co. v. Moore*, 125 Ga. 382, 54 S. E. 118.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 47, 1895; Dec. Dig. § 13.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by Mrs. M. L. Durrence against J. W. Waters, administrator. Judgment for de-

defendant, and plaintiff brings error. Writ of error dismissed.

H. H. Elders, of Reidsville, and Hines & Jordan, of Atlanta, for plaintiff in error. Way & Burkhalter, of Reidsville, for defendant in error.

EVANS, P. J. Writ of error dismissed. All the Justices concur.

STANLEY v. STEMBRIDGE.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 308*)—ACTION FOR DISPOSSESSION—EVIDENCE—RENT NOTE.

On the trial of an issue arising under a statutory proceeding to dispossess a tenant and a counter affidavit denying that the defendant held under the plaintiff (Civil Code 1910, § 5385 et seq.), where the evidence showed that the plaintiff had purchased the land and taken a conveyance from the former owner, and that another as his agent had entered into a contract of rental with the tenant who had not taken possession under the former owner, but the agent took a note for the rental in his own name and then assigned it to his principal "for value," such note and assignment were admissible in evidence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1314-1316; Dec. Dig. § 308.*]

2. LANDLORD AND TENANT (§ 308*)—ACTION FOR DISPOSSESSION—EVIDENCE—DEED.

Where an owner of land contracted with a tenant for a term of one year, and after the tenant took possession the owner conveyed the land to another, who, through an agent, made a new contract of rental with the tenants for the same term, on the trial of an issue arising under a statutory proceeding begun by the purchaser, after the end of the term, to dispossess the tenant, who refused to pay the rent or to surrender possession, and who in his counter affidavit denied holding under the plaintiff, the deed from the original landlord to the plaintiff was admissible in evidence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1314-1316; Dec. Dig. § 308.*]

3. LANDLORD AND TENANT (§ 298*)—ACTION FOR DISPOSSESSION—DEFENSE.

Under the facts indicated in the preceding headnotes, it would not prevent a recovery by the plaintiff for the defendant to testify merely that he had heard that his original landlord had sold the property, that he had thereupon given the note for rental to another, and that thereafter his original landlord had told him that she had not sold the place and would not do so, whereupon he paid the rent for that year to her and agreed with her to rent from her another year and remained in possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1276-1280; Dec. Dig. § 298.*]

4. LANDLORD AND TENANT (§§ 216, 217*)—ACTION FOR DISPOSSESSION—RECOVERY OF RENT—DEMAND.

Under the statutory proceeding for the removal of a tenant failing or refusing to pay rent or holding over beyond his term, there cannot be a recovery of double rent except after a demand for possession.

(a) Such a proceeding is not a proper method

of collecting single rent due by contract, prior to demand for possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 861-865, 866-868; Dec. Dig. §§ 216, 217.*]

5. LANDLORD AND TENANT (§§ 119, 216*)—"TENANT AT SUFFERANCE."

If a tenant for a year continues in possession after the expiration of his term, without any right so to do, he is a tenant at sufferance.

(a) If after the expiration of the term a demand for possession is made by the landlord and is refused, upon the trial of an issue arising in a proceeding under the statute for his summary dispossession, with a counter affidavit denying that the defendant holds under the plaintiff, the double rent recoverable for the time elapsing after the end of the term is double the value of the property for rent, not double the contract price applicable to the term.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 428-431, 861-865; Dec. Dig. §§ 119, 216.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6905, 6906.]

6. LANDLORD AND TENANT (§ 231*)—ACTION FOR DISPOSSESSION—EVIDENCE OF RENTAL VALUE—SUFFICIENCY.

Where the rental to be paid by contract during the term was a specific amount of cotton, and the only evidence as to the value of the place for rent after the expiration of the term was that it was worth a stated number of pounds of cotton per annum, with no evidence as to the value in money of the cotton, a verdict finding a stated sum of money as rent for the year covered by the term, and another sum as rent for the time elapsing after the expiration of the term, was not supported by the evidence, nor were charges of the court authorizing such a finding authorized by the evidence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 928-934; Dec. Dig. § 231.*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by G. M. Stembridge against H. E. Stanley. Judgment for plaintiff, and defendant brings error. Reversed.

On January 20, 1912, G. M. Stembridge made an affidavit, under the statute, alleging that H. E. Stanley was in possession as tenant of a described tract of land, the property of the affiant; that the tenant failed to pay the rent; that he rented the premises for the year 1911, the term expiring on December 31st; that the affiant had made demand for possession and it had been refused; and that he made the affidavit in order that a warrant might be issued to remove Stanley from the premises. A warrant was issued. Stanley filed a counter affidavit, alleging that he did not hold the premises either by lease, rent, or otherwise from the plaintiff. The case was returned to the superior court for trial. The evidence showed in brief as follows: Mrs. Stanley was in possession of the property and rented it for the year 1911 to Stanley for 1,000 lbs. of lint cotton. He went into possession about the 1st of January. In February Mrs. Stanley made a deed conveying the place to Stembridge, the plaintiff. J. E. Stembridge, his brother, acting as his agent, agreed to rent the property to

Stanley for the year for 400 pounds of lint cotton and took a note therefor, payable to J. E. Stemberge or order. The payee entered on this a written assignment to G. M. Stemberge "for value" and delivered it to the latter. Stanley remained in possession. When the note became due, he refused to pay it or to deliver possession at the end of the year. The only defense made by him was that he testified that after he had been in possession under his contract of rental from Mrs. Stanley about a month he heard that J. E. Stemberge had bought the place. He said: "I then went to see Mr. Gene [J. E.] Stemberge and told him that I heard that he had bought the place upon which I was living, and that I would like to rent it from him. He then agreed to rent me the place for 400 pounds of cotton, and I executed and delivered to him the rent note introduced by the plaintiff. A few days after this trade with Mr. Gene Stemberge, I saw Mrs. Stanley and told her about the transaction between Mr. Stemberge and myself. Mrs. Stanley then told me that she had not sold the place and did not intend to sell it. Mrs. Stanley demanded the rent from me in the fall of 1911, and I paid her the thousand pounds that I had agreed to. I went into possession of the place on or about January 1, 1911, as tenant of Mrs. Stanley, and did not turn the possession back to her before I rented from Mr. Stemberge. I am now in possession of her land, as I rented the place again from Mrs. Stanley for the year 1912." The jury found for the plaintiff \$72 as rent for 1911 and \$139.92 as rent for 1912. The defendant moved for a new trial, which was refused, and he excepted.

Sibley & Sibley, of Milledgeville, for plaintiff in error. Allen & Pottle, of Milledgeville, for defendant in error.

LUMPKIN, J. (after stating the facts as above.) G. M. Stemberge instituted a proceeding under the Civil Code of 1910, § 5386 et seq., to have Stanley removed from possession of certain premises. He alleged two grounds therefor: (1) That the defendant had rented the place for the year 1911 and failed and refused to pay the rent. (2) That the defendant held over beyond his term and refused to deliver possession. Demand for possession was alleged. The defendant filed a counter affidavit denying that he held by lease, rent, or otherwise under the plaintiff. After a verdict in favor of the plaintiff and the refusal of a new trial, the case was brought to this court.

[1] 1. In renting the place, Stanley dealt with J. E. Stemberge, a brother of the plaintiff, and gave to J. E. Stemberge a note payable to his order. The evidence showed that the land had belonged to Mrs. Stanley, who conveyed it to G. M. Stemberge, and that his brother was acting as his agent in making the contract of rental with Stanley. After

taking the note in his own name, the agent assigned it to his principal. Objection was made to the admission in evidence of the note on the ground that it was not made to G. M. Stemberge as landlord, but that he appeared to be the assignee thereof, which did not authorize him to proceed to dispossess Stanley by summary proceedings under the statute. The plaintiff contended that he was the landlord and that the defendant had failed to pay the rent. The rent note was admissible to show that the rent was unpaid, and that it was held by the plaintiff and was not outstanding in the hands of another. If there were no other evidence on the subject, it might not show a right of dispossession by summary process, though it would carry the right to collect the rent. But when accompanied by evidence that the plaintiff was the grantee of the title, and that the payee of the note was merely his agent, the note and assignment were admissible.

[2] 2. While the issue in such a proceeding is not one involving the validity of the landlord's title, where it appeared that the defendant had first rented the property from another and shortly afterward had made a contract of rental with the agent of the plaintiff, it was competent to show that in the meantime the original landlord had made a deed to the plaintiff, who thereupon assumed control, and through his agent made a new contract of rental with the defendant. The deed was properly admitted in evidence.

[3] 3. It was argued that, as Stanley first went into possession as tenant of Mrs. Stanley, he was estopped from denying her title or from attorning to another. This rule is generally correct as between landlord and tenant; but here Mrs. Stanley is not asserting any right or setting up any estoppel against Stanley. He seems to be trying to set up an alleged estoppel as between him and her in order to defeat the action of another from whom he later rented and to whom he failed to pay rent. In *Hodges v. Waters*, 124 Ga. 229, 52 S. E. 161, 1 L. R. A. (N. S.) 1811, 110 Am. St. Rep. 166, 4 Ann. Cas. 106, it was recognized that, where a person was in possession as tenant of one, he might nevertheless estop himself by contracting also with another claimant as his landlord, at least so far as to compel him to pay rent during the agreed term, though he might set up after its expiration that he held under the original landlord and that the person with whom he later contracted was not his landlord or entitled to the rent. See, also, in this connection, *Bullard v. Hudson*, 125 Ga. 393, 54 S. E. 132. But it has also been held, on a proceeding begun after the end of the term of rental, to dispossess one as a tenant holding beyond his term, or for failure to pay rent, that the latter may show that, pending the term, the landlord conveyed the property to another and thus destroyed his right to possession after the term had ended. *Raines v. Hindman*, 136 Ga. 450, 71 S. E. 738, 38 L. R. A. (N.

S.) 863, 24 Ann. Cas. 347; *Beall v. Davenport*, 48 Ga. 165, 15 Am. Rep. 656. Stanley seems to have been somewhat anxious to set up an estoppel against himself in favor of Mrs. Stanley, without showing any actual right on her part, in order to defeat the payment of rent to Mrs. Stanley's grantee, who, so far as this record shows, succeeded to her rights as landlord. *Morrow v. Sawyer*, 82 Ga. 226, 8 S. E. 51. A warranty deed from Mrs. Stanley to Stembridge was in evidence. There was no denial of its execution. Stanley merely swore that, after his trade with J. E. Stembridge in regard to the rental of the place, Mrs. Stanley told him that she had not sold the place and did not intend to do so. This bit of hearsay was not enough to relieve him from his obligation to pay the rent due to the grantee in the deed or surrender possession to him.

The decision in *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291, was cited as controlling the present case. There, however, on a proceeding to dispossess a tenant, he sought to set up against his landlord that there had been a conveyance of title before he rented the land, and that his landlord therefore had no title when the tenant made the contract of rental and entered into possession. There was a conflict in the evidence as to whether the landlord had ever parted with the title. The tenant was held to be estopped.

[4, 5] 4, 5. If the jury found in favor of the landlord, what was the measure of the recovery as to double rent? The rental was payable in cotton. For the year 1911 the agreed rental was 400 pounds of lint cotton, classed "good middling." The plaintiff testified that for the year 1912 he rented the place to another for 1,100 pounds of lint cotton but could not give possession because the defendant would not yield it, and that he thought the place was worth for rent 1,200 pounds of lint cotton. The presiding judge charged in effect that, if the plaintiff should recover, he could recover double the value of the agreed amount of cotton to be paid as rent for that year, and that for the part of the year 1912 which had elapsed before the trial the measure would be double the value of the place for rent for such fractional part of the year. It does not appear exactly when the demand for possession was made. It has been held that double rent only begins to run from the date of such demand, and that this form of procedure is not appropriate for the collection of single rent due under a contract. *Talley v. Mitchell*, 138 Ga. 392 (4), 397, 75 S. E. 465.

If the demand for possession was made after the term of rental had expired, from the date of such demand double rent could be collected. What would be its measure? On this subject it must be frankly confessed that some confusion has arisen in the decisions of this court. As early an authority as Lord Coke declared: "There is a great diversity

between a tenant at will and a tenant at sufferance, for tenant at will is always by right, and tenant at sufferance entereth by a lawful lease and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawful demise and after his estate ended continueth in possession and wrongfully holdeth over." Co. Litt. 57b. Other common-law authorities have followed this definition. Thus Blackstone says that: "An estate at sufferance is where one comes into possession of land by lawful title but keeps it afterwards without any title at all. As, if a man takes a lease for a year and, after a year is expired, continues to hold the premises without any fresh leave from the owner of the estate." 2 Bl. Com. *150. In 1 Taylor's *Landlord and Tenant* (9th Ed.) § 64, it is said that: "A tenancy at sufferance arises when a man comes into possession lawfully but holds over wrongfully after the determination of his interest, differing in this respect from a tenancy at will, where the holding is by the landlord's permission." It is immaterial here to notice a distinction which has been made as to whether the occupant has come into the estate by act of the law or by act of another party. See, also, 1 *Underhill on Landlord and Tenant*, 226 (§ 162) et seq.; 1 *Tiffany on Landlord and Tenant*, § 15 et seq. The definition of Blackstone, quoted above, has been adopted by this court, and it has been held that after the termination of the term of a tenant, if he holds over, he becomes a tenant at sufferance, unless something is done to change that status to some other, as, for instance, to turn it into a tenancy at will or for another period or term. *Godfrey v. Walker*, 42 Ga. 562, 574; *Smith v. Singleton*, 71 Ga. 68, 70; *Crawford v. Crawford*, 139 Ga. 394, 398, 77 S. E. 557, and citations; Civil Code, §§ 3697, 3700. In *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794, it was held, in a decision concurred in by the entire bench, that: "A tenant by the month whose term ends with the calendar year is, after the expiration of his term, a tenant at sufferance and continues as such until there has been some affirmative action by the landlord which has the effect of converting the tenancy into some other form."

What action will change a tenancy at sufferance into a tenancy at will, or whether under some circumstances nonaction might suffice, is not now before us. The expression sometimes used that a tenant at sufferance is in possession as a result of the laches or neglect of the landlord can properly mean no more than that, at the end of the tenant's rightful holding, the landlord has an immediate right to possession. If he obtains possession at once, there is of course no holding over or tenancy at sufferance. If he does not do so at once but allows some interval, though short, to elapse between the end of the term and taking steps to acquire posses-

sion, and the tenant continues to hold without right, this constitutes a tenancy at sufferance. We do not mean to say that the relation of landlord and tenant must have previously existed by contract in order that a tenancy at sufferance may arise; but we are now dealing with a case of that character.

Some statutes and some decisions have employed the expression "at (or by) sufferance" loosely, without an apparent appreciation of its legal significance, and sometimes as if it meant by permission. Where a statute has made use of the expression in an inexact sense, it is not surprising that the courts of the jurisdiction have at times fallen into a like careless or inapt method when dealing with such a statute. This class of statutes and decisions is illustrated by the law enacted in California and the decision in *Moore v. Morrow*, 28 Cal. 551. Moreover, an expression of Lord Coke to the effect that there could be no tenancy at sufferance against the King, but he that holdeth over in such a case is an intruder, as there is no laches to be imputed to the King, has apparently misled some judges.

If courts held that to create a tenancy at will there must be some laches or negligence of the landlord in a sense different from that mentioned above, they must inevitably fall into confusion. What sort of laches or negligence is requisite, and for what time, before a tenancy at sufferance commences? And, from the end of the tenant's term until this laches has ripened, what is the relation between the parties? It is not one of tenancy by contract, for the contract term has ended. It is not a tenancy at will, for that involves rightful possession, until the tenancy is terminated. It cannot be dealt with as a trespass, at least until after re-entry. The tenant has not the right to retain possession after the end of his term. Upon such termination, if he remains in possession without more, what is his status, if not that of a tenant at sufferance? The truth is that statutes and decisions which use the words "at sufferance" as if they involved some permission or recognition of a continued tenancy lose sight of the fundamental distinction between a tenancy at will and a tenancy at sufferance, namely, that in one the possession is rightful, in the other wrongful. Our own statute does not define a tenancy at sufferance or require any notice to make it a wrongful possession. It recognizes the distinction between such a tenancy and one at will and leaves the common-law definition of a tenancy at sufferance to stand.

In *Purtell v. Farris*, 137 Ga. 318, 73 S. E. 634, this court fell into the inadvertence of declaring that upon the termination of a tenant's term, if he failed or refused to de-

liver possession on demand, where there had been no laches by the landlord in making the demand, the tenant did not, by reason of his occupancy, become a tenant at sufferance. From what has been said above it will appear that this was contrary to the weight of authority and to previous decisions of this court and must yield to them. In the opinion in the *Purtell* Case it was said that in *Willis v. Harrell*, supra, there had been a delay of some years in instituting a proceeding to oust the tenant. In *Willis* Case, however, it was not held that this delay was necessary to create a tenancy at sufferance, but that such a relation arose after the expiration of the tenant's contractual term, and that the delay had not changed it, in the absence of anything further. It would be anomalous to hold that a landlord would be entitled to a summary remedy against a tenant wrongfully holding over, provided the landlord himself had been guilty of laches, but that he would be denied the remedy if he were diligent in seeking it.

In *Talley v. Mitchell*, supra, by the contract, as it appears in the record, the term of the tenancy was three years, expiring April 30, 1911. In 1909 the tenant refused to pay the agreed rent or to resign possession, claiming a reduction on account of a partial destruction of the premises by fire. The trial began on May 1, 1911, and ended the next day. It was held that the landlord was entitled, under the statute, to recover double the contract rate from the time of the demand for possession until the trial. It was not a case of holding after the expiration of the contractual term. Where the double rent recoverable is within the term, it is measured by double the contract rental. If it is wholly after the expiration of the term and based on the existence of a tenancy at sufferance, double the rental value is recoverable.

[8] 6. The evidence as to the value of the place for rent was stated in pounds of lint cotton. The court in his charge stated what was contended by the plaintiff as to its value in money. But there is not a word of evidence in the record on this subject. The jury found an amount in money. How they arrived at the amount, or on what the judge based his charge on that subject, is not apparent.

From what has been said it appears that a new trial must be granted. In some respects the charge of the court did not accord with the foregoing discussion. It would not be beneficial to take up separately each ground of the motion for a new trial. Except as indicated, the criticisms upon the charge and the objection to evidence were without merit.

Judgment reversed. All the Justices concur.

GREER et al. v. POPE et al.
(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 73*)—CONTRACTS ENFORCEABLE.

Courts of equity (or, in this state, a court exercising equitable jurisdiction) will not generally undertake to enforce the specific performance of a contract for personal services which are material or mechanical in character.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.*]

2. SPECIFIC PERFORMANCE (§ 73*)—CONTRACT ENFORCEABLE.

Courts of equity will not decree specific performance of contracts for personal services involving the exercise of skill, judgment, and discretion, continuous in their character, and running through a period of 99 years, thus requiring the protracted supervision of the court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.*]

3. TELEGRAPHS AND TELEPHONES (§ 16*)—LEASES—OPERATION AND EFFECT.

Where the owners of a telephone exchange and certain lines of poles and wires sold or leased for a term of 99 years a particular line, with ten telephones, and the wires, poles, etc., connected therewith, and agreed that for the period mentioned the parties to whom the agreement was made and their heirs and assigns should be accorded without fee or charge, full connection with the exchange, and upon all lines in the county then owned and operated by the parties making the covenant, and this privilege and right was declared to be binding upon the assigns and heirs of such covenantors, so that it should be operative against all purchasers holding under them, such agreement was not one in the nature of an easement, or one running with land, and did not bind a company which purchased the exchange and its connecting lines and property appurtenant thereto from a corporation to which they had been transferred by the covenantors.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 10; Dec. Dig. § 16.*]

4. TELEGRAPHS AND TELEPHONES (§ 16*)—LEASE—ACTION ON COVENANT—SUFFICIENCY OF EVIDENCE.

As to the corporation which was alleged to have been formed by the covenantors, and in which they "incorporated their telephone interests," there was sufficient evidence to submit to the jury the question of whether such corporation assumed or became bound by the covenant, and liable in damages for its breach.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 10; Dec. Dig. § 16.*]

5. SPECIFIC PERFORMANCE (§ 123*)—QUESTION FOR JURY—BREACH OF COVENANT—DAMAGES.

There being evidence to show that the covenantors conveyed the telephone exchange and property connected therewith and placed it beyond their power to carry out the covenant above recited, and that those holding by purchase under them refused to do so, there was enough to submit the case to the jury for the purpose of determining whether the covenantors were liable in damages in lieu of specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 397-399; Dec. Dig. § 123.*]

Error from Superior Court, Jasper County; Jas. B. Park, Judge.

Action by R. J. J. Greer and others against C. H. Pope and others. Judgment for defendants, and plaintiffs bring error. Affirmed in part, and reversed in part.

Greer and others filed their petition against C. H. Pope and C. H. Ballard, Jr., the Monticello Telephone Company, and the Southern Bell Telephone & Telegraph Company. It was alleged that on April 4, 1906, Pope and Ballard entered into a contract with Greer and others, by which, in consideration of \$275, the former transferred and conveyed to the latter, their heirs and assigns, a certain telephone line known as the "Winfred Line," extending from Monticello to Pittman's Ferry, together with ten telephones, wires, poles, franchises, permits, etc., "to have and to hold the same for and during the period of 99 years from the date of this indenture." The contract contained the following covenant: "It is further agreed that for the period aforesaid parties of the second part, their heirs and assigns, shall have and be accorded, without fee or charge, full connection with the Monticello Exchange, and upon all lines of the county of Jasper now owned and operated by the said C. H. Ballard, Jr., and C. H. Pope; and this privilege and right is hereby declared as binding upon the assigns and heirs of the parties of the first part, so that the same shall be operated against all persons holding under them; and the parties of the first part, their heirs and assigns, shall have the same privileges and rights for the same period upon the line hereby conveyed and transferred, which shall also be binding upon all persons holding under said parties of the second part." There were other terms which it is unnecessary to state. The plaintiffs, some of whom were the original purchasers, and some of whom claimed under original purchasers, sought to obtain specific performance, or in the alternative to recover damages from the defendants for an alleged breach of the contract. It was alleged that Pope and Ballard "incorporated their telephone interests" into the Monticello Telephone Company, and that subsequently that company sold and transferred its property to the Southern Bell Telephone & Telegraph Company, which took with notice of the contract between Pope and Ballard and the plaintiffs or their predecessors. The other material facts are stated in the opinion.

On the trial, at the close of the plaintiffs' evidence, the court granted a nonsuit, and the plaintiffs excepted.

W. S. Florence, of Monticello, for plaintiffs in error. Greene F. Johnson and A. S. Thurman, both of Monticello, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1, 2] 1, 2. The rule that specific performance of a contract (if within the power

of a party) will be generally decreed, whenever the damages recoverable at law will not be an adequate compensation for the nonperformance (Civil Code 1910, § 4633), is a statement of a general rule, but is not absolute and without exception. The codification of the general rule does not change this fact. Indeed, the expression that under such circumstances specific performance will "be decreed, generally," recognizes the existence of circumstances under which it will not be decreed. In 6 Pomeroy's Equity Jurisprudence (3d Ed.) § 757, is quoted a rule established by courts as to certain cases in which specific performance will not be decreed, as follows: "Although the contract is valid, and the defendant is able to do what he has undertaken to do, if, through the want of appropriate means and instrumentalities, the court is unable, while pursuing its ordinary modes of administering justice, either to render a decree or to enforce the decree when made, then the remedy will be refused." Among the illustrations given by the author of the second class of cases mentioned are contracts for personal services, and those the performance of which would be continuous, and would require protracted supervision and direction. Sections 759, 760.

In *Roquemore & Hall v. Mitchell*, 167 Ala. 475, 52 South. 423, 140 Am. St. Rep. 52, Mayfield, J., states the rule thus: "Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual; but where the contract stipulates for special, unique, or extraordinary services, or where the services to be rendered are purely intellectual and individual in their character, the courts will grant an injunction in aid of specific performance. * * * Courts of equity will decline jurisdiction to decree specific performance of contracts for personal services involving the exercise of special skill, judgment, and discretion, continuous in their nature, and running through an indefinite period of time." We will not enter into a discussion of the various contracts which have been held to be or not to be appropriate subjects for specific performance, or the modern exception which has been made in regard to railroad operating contracts, or the granting of an injunction to restrain the breach of negative provisions in a contract, or the like. The present case does not involve any of such matters. In regard to the general rule and the exceptions, see *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749, 753, and the full note thereto; *Electric Lighting Co. v. Mobile, etc., Ry. Co.*, 109 Ala. 190, 19 South. 721, 55 Am. St. Rep. 927, and note; *Roquemore & Hall v. Mitchell*, supra; *Western Union Telegraph Co. v. Pennsylvania*

Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627; *Pomeroy on Contracts*, § 303 et seq.

The general equitable rules on this subject have been recognized by this court. *Atlanta & West Point R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305; *Willingham v. Hooven*, 74 Ga. 233, 58 Am. Rep. 435; *Civil Code 1910*, § 5496. Such cases differ widely from those in which a decree is granted to compel specific performance of a contract to convey property, which can be carried out by one decree, and requires no extended supervision by the court, and no compulsory performance of personal services.

Tested by these rules, the remedy by specific performance could not be granted to the plaintiff, for at least two reasons: (1) Because the remedy could not be given by one decree, but would require supervision over the conduct of the defendants during the whole continuance of the lease or grant, which was for 99 years. The provision in the contract that certain parties (including some of the plaintiffs and certain persons under whom other plaintiffs claimed) should "have and be accorded, without fee or charge, full connection with the Monticello exchange, and all lines of the county of Jasper now owned and operated by the said C. H. Ballard, Jr., and C. H. Pope," evidently does not mean to grant a mere right to physically connect wires with poles, but contemplates that the parties granting such privilege will, through themselves or their employés, and by means of appropriate electrical appliances, make connections when required for the use of the telephones of the other contracting parties. It was not the grant of an easement, and cases in which injunctions have been issued to restrain the destruction of an easement, or of a right in the nature of an easement, have no application. The contract contemplated the rendition of services. It was to continue for 99 years. To hold that a court of equity would decree specific performance, and would continue to supervise the rendition of the services for the remainder of the term mentioned, and from time to time determine whether parties complaining were the parties entitled to the services under the contract, whether such services had been accorded without fee or charge, and whether, if connection was made, it was "full connection" with the exchange and upon all the lines owned by the parties named, would impose upon a court undertaking to administer equitable relief an impossible and intolerable burden.

Hitherto the case of *Jarndyce v. Jarndyce*, as reported by Dickens in *Bleak House*, has been considered as the typical illustration of the protracted exercise of jurisdiction over a case by a court of chancery. But

if the superior court, in the exercise of its equitable power, should undertake to decree the specific performance, for nearly a century, of the contract under consideration, and to supervise its proper execution during that time, the celebrated case mentioned would cease to occupy its bad pre-eminence.

(2) The contract provides for the performance of certain personal services which are material, and mechanical, and not peculiar or individual in character, and it is sought to compel specific performance of such services.

[3] 3. This was not the sale of property with an easement appurtenant or in gross. The agreement on the part of Ballard and Pope was that the other parties to the contract, their heirs and assigns, should have and be accorded, without fee or charge, full connection with the exchange mentioned and with other telephone lines owned and operated by them. As above indicated, this did not mean a mere physical connection, but contemplated the rendition of services and the use of electrical appliances customary for making what is known as a telephone connection. This was a personal covenant, and not a covenant running with the physical property, or following its ownership into the hands of others, even though the purchasers may have taken with notice of the contract. The Southern Bell Telephone & Telegraph Company purchased the exchange and other property from the Monticello Telephone Company. It does not appear that there was any merger of the companies. The evidence does not show that the purchasing company became obligated to the plaintiffs to perform the contract, though there was some evidence to the effect that for two months after the sale to that company it continued to do so, and that it had notice of the contract when it purchased. Unless the Southern Bell Telephone & Telegraph Company assumed to carry out the contract, or became legally bound to do so, it would not be liable. The mere agreement of Pope and Ballard that their personal covenant for services should be binding upon their heirs and assigns would not alone bind a purchaser from them, unless such purchaser bound itself. The Southern Bell Telephone & Telegraph Company neither having been a party to the original agreement nor having become bound thereby, a nonsuit was properly granted as to it. *Wallace v. Ann Arbor, etc., Ry. Co.*, 121 Mich. 588, 80 N. W. 572.

[4] 4. As to the Monticello Telephone Company the evidence is very meager. It was alleged by the plaintiffs that, after Pope and Ballard had made the contract with the plaintiffs, or those under whom they claimed, they "incorporated their telephone interests in the county of Jasper, and, after incorporating said interests as aforesaid, accepted and transacted business according to the

stipulations of said deed chargeable to said C. H. Pope, and C. H. Ballard, Jr., on the reservations in said deed to petitioners or their assigns." This allegation is admitted in the answer of the defendants. The charter of the company was not introduced in evidence, nor was the contract by which the corporation took over from Pope and Ballard "their telephone interests" shown. There was evidence to the effect that this company continued to perform the stipulations of the original contract until the sale to the Southern Bell Telephone & Telegraph Company, about September 2, 1909. While it is not very clear whether Pope and Ballard sold their property to the new company, or what were the terms of the contract by which the latter took possession, we think there was enough to authorize the jury to infer that the company assumed the obligations of Pope and Ballard to the plaintiff, and there is no evidence to negative this possible inference. *Wallace v. Ann Arbor, etc., Ry. Co.*, supra.

[5] 5. The evidence tended to show that Pope and Ballard had agreed that the parties with whom they contracted, and their heirs and assigns, should have and be accorded, free of charge, full connection with the exchange and certain other lines; that the plaintiffs had not been accorded such connection; and that Pope and Ballard and the company which they organized had put it beyond their power to furnish such services by selling their property to the Southern Bell Telephone & Telegraph Company. Damages were prayed in case for any reason specific performance could not be granted. We think there was enough in the evidence to require a submission of the case to the jury in so far as it sought to recover damages against Pope and Ballard and the Monticello Telephone Company. Civil Code 1910, § 4630. It was contended that the allegata and probata did not agree, and that the evidence showed a substantial compliance with the contract. We think there was enough for the jury to pass upon as to whether there was a breach of contract, with damages arising therefrom. It does not follow, in this equitable proceeding, that, if all of the plaintiffs may not show the same damage, there can be no recovery, if there has been a breach of the contract. By reason of the court's announcement that it was useless to go further in the introduction of evidence, the plaintiffs' counsel did not fully develop his case as to damages.

In accordance with what is said above, the judgment granting a nonsuit is affirmed so far as the Southern Bell Telephone & Telegraph Company is concerned, and is reversed as to Pope and Ballard and the Monticello Telephone Company in so far as it is sought to recover damages from them for a breach of the contract.

Judgment affirmed in part and reversed in part. All the Justices concur.

NEAL et al. v. NEAL et al.

(Supreme Court of Georgia. Oct. 15, 1913.)

*(Syllabus by the Court.)***PARTITION (§ 114*)—ATTORNEY'S FEES—ALLOWANCE—"EXPENSES."**

Where certain tenants in common file a petition for partition against their cotenants, who do not desire partition, but make no resistance, and the property, being incapable of division by metes and bounds, is sold under order of court, and the proceeds are brought into court for distribution, the applicants for partition are not entitled, in the absence of a statutory provision to that effect, to have fees awarded to their attorneys from the fund, thus requiring their cotenants to contribute to the payment of such fees.

(a) Civil Code 1910, §§ 5365, 5366, which provide that, if land is incapable of division by metes and bounds, it shall be sold by commissioners, under order of the court, and the proceeds shall be divided, "after deducting the expenses of the proceeding," do not authorize the award from the fund of fees for the attorneys representing the applicants for partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2590-2593; vol. 8, p. 7657.]

Error from Superior Court, Floyd County; John W. Maddox, Judge.

Application for partition by John M. Neal and others against James Neal and others. From a judgment denying the application, plaintiffs bring error. Affirmed.

Copeland, Hamilton & Hutchens, of Rome, for plaintiffs in error. Denny & Wright, of Rome, for defendants in error.

LUMPKIN, J. Certain tenants in common filed a petition for partition against their cotenants. The latter were opposed to a partition, and employed counsel to resist it if possible. No objections were filed, because the counsel employed concluded that there was no legal ground for so doing. The land was sold, and the proceeds amounting to \$9,100 were brought into court for distribution. The applicants for partition filed a petition to have fees awarded from the fund to the attorneys who represented them, alleging that such attorneys directed the proceedings, including the advertisement, report of the commissioners, and other work necessary to make the action legal. The matter was submitted to the presiding judge without a jury. He denied the application, and the applicants excepted. It has been said: "In the United States, attorney's fees are not ordinarily recoverable as costs. Therefore in suits for partition they cannot be recovered unless their recovery is specially and clearly authorized. General expressions in statutes authorizing the allowance of costs, or of costs and expenses, are not sufficient to support an allowance to any of the parties on account of necessary disbursements to obtain the services of attorneys." 30 Cyc. 298 (7); Jordan v. Farrow, 130 Ala. 428, 30 South.

338; Hutts v. Martin, 184 Ind. 587, 33 N. E. 676; Coles v. Coles, 13 N. J. Eq. 365; Butler v. Butler, 73 S. C. 402, 53 S. E. 646; Legg v. Legg, 34 Wash. 132, 75 Pac. 130; Lang v. Constance, 46 S. W. 693, 20 Ky. Law Rep. 502. There are authorities to the contrary; but we think these contain the sounder ruling. The statute of this state makes no provision in terms for the payment of fees of counsel in such cases. It declares that, if division of lands by metes and bounds cannot be made, the court shall order a sale by three commissioners. After the sale the commissioners are required to make a return, and the court shall order the proceeds to be divided, "after deducting the expenses of the proceedings." In several of the cases above cited, there were statutes providing for the payment of expenses; but this was held not to include attorney's fees. That the words "costs and expenses" do not necessarily include attorney's fees will be seen from the decision in Ball v. Vason, 56 Ga. 264, where that expression, used in a direction given by this court to a trial court in regard to distributing a fund, was held not to do so. The analogy sought to be drawn between this case and those in which diligent creditors, by equitable proceedings against a debtor bring a fund into court, in which others seek to share, is not sound. The allowance of fees provided by the statute (Civil Code 1910, § 5290) in cases where a fund is raised by process of garnishment rests on the same basis of reason as the equitable cases last mentioned, as will appear from the language of the code section cited, that the fund shall be paid over to creditors of the defendant according to priorities; "the expenses of the moving creditor being first paid pro rata by the judgment creditors receiving the benefit of his diligence." To require tenants in common who do not wish a partition to pay a part of the attorney's fees of those who do so desire is quite another proposition.

Judgment affirmed. All the Justices concur.

BELL v. VERDEL

(Supreme Court of Georgia. Oct. 15, 1913.)

*(Syllabus by the Court.)***1. PROCESS (§ 67*)—ACKNOWLEDGMENT OF SERVICE—EFFECT.**

On September 25, 1884, D. B. Verdel filed suit in the superior court on a promissory note against J. B. Bell, returnable to the March term, 1885. No service of the petition and process was made on the defendant, but three days after the adjournment of the March term the defendant signed the following: "Due and legal service of the within writ acknowledged. Copy, copy process, and all other further notice waived." At the next September term (no defense having been filed) judgment was rendered for plaintiff by default. Execution was issued on October 13, 1885, and thereafter in 1890, 1896, and 1901, the sheriff entered returns of nulla bona on the execution. In 1911 the administra-

tor of Verdel, with the will annexed, filed suit in the superior court to revise the judgment, alleged to have become dormant. The defendant having died, his administrator instituted separate suit to enjoin the scire facias proceeding, on the ground that the judgment was void ab initio, because it was rendered at the appearance term of the court, and the defendant was not afforded his day in court, and, if revived, the judgment would operate as a cloud on title. No demurrer was filed, but the answer set up that the plaintiff had a complete remedy at law. The hearing was had on the petition and answer, and certain evidence, whereby the case was presented as stated above. The judge dissolved the restraining order previously granted, and refused an ad interim injunction. The exception is to this judgment. *Held*, the acknowledgment of service by the defendant entered after the appearance term is not to be construed as an acknowledgment that the petition and process had been legally served on the defendant the requisite time before the appearance term.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 54, 161; Dec. Dig. § 67.*]

2. JUDGMENT (§ 17*)—RENDITION—VALIDITY.

The judgment rendered at the next ensuing term after the acknowledgment was void. *Harrell v. Davis Wagon Co.*, 140 Ga. 127, 78 S. E. 713.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. § 17.*]

3. JUDGMENT (§ 861*)—REVIVAL.

Being void, the judgment will not be revived under Civil Code 1910, § 5973 et seq.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1593; Dec. Dig. § 861.*]

4. INJUNCTION (§ 27*)—REVIVAL OF VOID JUDGMENT—DEFENSES.

Invalidity of the judgment could be set up by way of defense in the scire facias proceeding to revive the judgment (*Thomas v. Towns*, 66 Ga. 78), and there was no error in refusing the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 50, 51, 53; Dec. Dig. § 27.*]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action by O. F. Bell, administrator, against T. H. Verdel, administrator. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. C. Grogan, of Elberton, for plaintiff in error. Worley & Nall, of Elberton, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

WILLIAMS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

1. NUISANCE (§ 3*)—DEFINITION.

A nuisance is anything which worketh hurt, inconvenience, or damage to another.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

2. WATERS AND WATER COURSES (§ 126*) — SURFACE WATER—OBSTRUCTION—NUISANCE.

The petition in this case, properly construed, is an action for the recovery of dam-

ages resulting from the maintenance of a continuing nuisance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 139, 141, 142; Dec. Dig. § 126.*]

3. NUISANCE (§§ 10, 11, 42, 54*)—WATERS AND WATER COURSES (§ 126*)—ACTION FOR DAMAGES—INSTRUCTIONS—DAMAGES RECOVERABLE—NOTICE PRELIMINARY TO SUIT—PRESCRIPTION.

In such a case prescription does not run in favor of its maintenance, though damages for the maintenance cannot be recovered further back than four years from the bringing of the suit.

(a) It is error for the trial judge to charge the law applicable to an action for damages arising from the creation of a nuisance, where it appears that the action brought is one for the recovery of damages arising from a continuing nuisance, alleged to be maintained by the alienee of the one creating the nuisance.

(b) In the trial of an action to recover damages to land resulting from the maintenance of a continuing nuisance by the alienee of a railroad company, it was error for the court to instruct the jury that "if there has been any great overflow within the last four years prior to the bringing of this suit, and the plaintiff has been injured and damaged in consequence of increased overflow or diversion of the water, and this was done by any act of the railroad company, then the company would be liable for whatever damages he has sustained in consequence thereof." This charge restricted the finding of damages solely to those elements resulting from an increased overflow of water within a period of four years prior to the filing of the suit.

(c) In such a case the jury are not restricted to finding damages accruing on account of the "increased overflow" within four years from the bringing of the suit, but they may, if the evidence authorizes it, find whatever damages the plaintiff has sustained from the maintenance of the nuisance within the four-year period, whether it be from "increased overflow" or otherwise.

(d) If the action be against the alienee of the person creating the nuisance, it can only be maintained against such person after giving notice to abate the nuisance, and is for damages resulting from its maintenance, and not for its creation.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 41, 42, 101-103, 130; Dec. Dig. §§ 10, 11, 42, 54.* Waters and Water Courses, Cent. Dig. §§ 139, 141, 142; Dec. Dig. § 126.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by W. L. Williams against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. E. Mann and W. C. Martin, both of Dalton, for plaintiff in error. Maddox, McCamy & Shumate, of Dalton, for defendant in error.

HILL, J. Williams brought suit against the Southern Railway Company, to recover damages to certain described farm lands belonging to the plaintiff, and alleged to have been caused by the embankments of the railway company ponding the water on the land and causing the soil and sediment to accumulate in the ponds, and the resulting expanse of water to seep into the adjoining land of

the plaintiff, so as to damage and render it unfit for cultivation. The evidence tended to show that the embankment and culvert had been constructed, by the predecessor in title of the defendant, about 25 years previous to the filing of the suit, and that the defendant had maintained the embankment and culvert in practically the same condition they were in when constructed. The defendant in its answer averred, among other things, that it had the right by prescription to maintain its embankment and culvert as it now exists, with the consequent ponding of the water and the seepage caused thereby. The plaintiff's insistence was that the culvert and embankments had been constructed by the defendant's predecessor in title in such a way as not to drain, but to cause the water to pond and overflow the plaintiff's land, that the gradual filling in of the ponds by the soil and sediment caused the ponds to increase in size, and to damage a larger area of lands from year to year, and that the nuisance thus created by the defendant's predecessor in title was maintained by the defendant after it had become the owner of the railroad, and was in possession of it, and after being notified by the plaintiff to abate the nuisance. After the evidence was submitted to the jury, and the court had instructed them, a verdict was rendered for the defendant. A motion for a new trial was overruled, and the plaintiff excepted. In addition to the usual grounds of the motion for a new trial, the only assignments of error are as to the charge of the court. We will not consider each assignment separately, as, in the view we take of this case, the charge was not applicable to the case as made by the record. This suit was not brought to recover damages as in cases where a railroad company is liable on account of some affirmative or overt act of its own, but for maintaining a nuisance already created by its predecessor in title, to the damage and injury of the plaintiff. It is a suit for maintaining a nuisance after notice given to abate it, and to recover damages caused by reason of maintaining it.

[1] Our Civil Code, § 4458, declares that: "The alienee of a person owning the property injured may sue for a continuance of the nuisance; so the alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case there must be a request to abate, before action brought." A nuisance is anything that worketh hurt, inconvenience, or damage to another. Civil Code, § 4457.

[3] One who creates a nuisance to the hurt, inconvenience, or damage of another is liable in damages therefor, or his alienee on notice to abate the nuisance, and, upon his failure to do so, is liable to one who suffers damages caused by the maintenance of the nuisance. The building of a railroad embankment which has the effect of causing water to pond on one's land and to seep into his

adjoining land, so that the owner cannot cultivate or use it, is a nuisance, and the alienee of the person creating it, who after notice to abate fails to do so, is liable in damages to the person injured, and against the maintenance of such nuisance the statute of limitations does not run so as to bar a suit for its continuance or maintenance, if the suit is brought within four years. The court charged the jury that: "If there has been any greater overflow within the last four years prior to the bringing of this suit, and the plaintiff has been injured and damaged in consequence of increased overflow or diversion of the water, and this was done by any act of the railroad company, then the company would be liable for whatever damages he has sustained in consequence thereof." This charge restricted the jury to the finding of damages, if any, occurring within four years from the date of bringing the suit, and caused only from "increased overflow" or diversion of the water. The evidence for the plaintiff tended to show that the building of the embankment had occurred more than 20 years prior to the bringing of the suit to recover damages, and that practically no change had occurred in the condition of the embankment, culvert, and the quantity of water in the ponds within the four years from the time of bringing the suit. Under the charge objected to, there could be no recovery, although the evidence tended to show that the maintenance of the nuisance caused damage other than by "increased overflow" of water within the four years prior to the bringing of the action. The charge restricted the jury to a finding, if the evidence authorized it, of the damages accruing, if any, only for the "increased overflow" within the four-year period. Any damage caused by the maintenance of the nuisance within the four years was recoverable.

[2] We think that the petition in this case, properly construed, was an action for damages alleged to have accrued on account of the maintenance of a continuing nuisance, and not an action for damages arising from the creation of a nuisance. If the nuisance be continuing in character, and could and should be abated, a suit may be brought to recover damages for its maintenance. *Bonner v. Welborn*, 7 Ga. 296; *Phinzy v. Augusta*, 47 Ga. 266; *Gabbett v. Atlanta*, 137 Ga. 180, 73 S. E. 372; *Nalley v. Carroll County*, 135 Ga. 835, 70 S. E. 788. See *Ga. Ry., etc., Co. v. Tompkins*, 138 Ga. 596, 75 S. E. 664; *Central Ry. Co. v. English*, 73 Ga. 366 (2). In *Joyce on the Law of Nuisances*, § 57, p. 95, it is said: "And where, in the case of an alleged nuisance by a railroad by the maintenance of a culvert, the acts complained of, from which the nuisance resulted, were not a complete and permanent injury at the time the railway and culvert were erected, but became so by reason of the occurrence of future events, it was decided that, the nuisance being a constantly increasing

one, the remedy of the party injured was not lost by prescription." A person never can, by prescription or otherwise, acquire a right to maintain a nuisance. *Bonner v. Welborn*, 7 Ga. 296; *City Council of Augusta v. Lombard*, 101 Ga. 728, 28 S. E. 994.

Having held that the action in this case is one to recover damages for maintaining a continuing nuisance, and not one for creating a nuisance, and no question of easement being involved, the charge of the court was inapplicable under the pleadings and evidence, and it was error to instruct the jury as set out in the foregoing excerpt from the charge. On another hearing the charge of the court can be adapted to the rulings here made.

Judgment reversed. All the Justices concur.

HALL v. EDWARDS.

(Supreme Court of Georgia. Oct. 15, 1913.)

(*Syllabus by the Court.*)

1. CONTRACTS (§ 10*)—MUTUALITY—CONSIDERATION.

An oral agreement between A. and B. to purchase a tract of land, whereby A. is to pay for the land from the proceeds of a loan to be secured by him upon the joint security of a tract of land owned by him and the purchased tract, and take title to the purchased tract in his own name, and convey to B. a half interest when he is reimbursed for the purchase money from the rents, issues, and profits of the purchased tract, is deficient in mutuality and a nude pact.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 19-22; Dec. Dig. § 10.*]

2. SPECIFIC PERFORMANCE (§ 44*)—CONTRACTS ENFORCEABLE—REALTY.

If mutuality of contract and a consideration be supplied by a subsequent partial payment by B. to A., the former, never having been in possession of the land, is not entitled to specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 126; Dec. Dig. § 44.*]

3. TRUSTS (§ 77*)—RESULTING TRUST—CREATION.

A resulting trust, which arises solely from the payment of the purchase price, is not created, unless the purchase money is paid either before or at the time of the purchase.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 109; Dec. Dig. § 77.*]

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by W. W. Edwards against S. M. Hall. Judgment for plaintiff, and defendant brings error. Reversed.

John T. West, of Thomson, and E. P. Davis, of Warrenton, for plaintiff in error. Hawes Cloud, of Crawfordville, P. B. Johnson, of Thomson, and M. L. Felts, of Warrenton, for defendant in error.

EVANS, P. J. Plaintiff and defendant orally agreed to buy a tract of land. Both being without funds it was further agreed

that the defendant was to take title to the land in his own name, and, upon the security of the land purchased and another tract of land, which belonged individually to the defendant, to borrow a sufficient sum to pay the purchase price. The plaintiff was to move his sawmill on the land and manufacture lumber from the timber thereon for an agreed compensation, the net proceeds of which lumber was to be applied on the purchase price of the land; and the defendant was to look after the farm on the land, and, after deducting the expenses, the net proceeds of the farm was also to be applied to the purchase price. It was agreed that, when the rents, issues, and profits amounted to the purchase price, the land was to be divided between the parties, and the defendant was to make to the plaintiff a deed to a half interest. In pursuance of the agreement the defendant took the title to the land in his own name, and paid the entire purchase money from the proceeds of a loan procured by him on the joint security of this tract and another tract owned by him. After the deed was made to the defendant the plaintiff moved his sawmill on the land and sawed 167,000 feet of lumber, which was turned over to the defendant to be used in payment of the sum borrowed, except about one-fourth of the same, which was consumed in the expenses of operating the sawmill. The plaintiff also did certain repairing and building at a total cost of \$75, and paid to the defendant the sum of \$21.89 in cotton seed and \$5 in cash. About nine years after the original transaction the plaintiff filed a petition against the defendant, alleging the foregoing facts, and that the rents, issues, and profits of the land had been sufficient to reimburse the defendant for the purchase money, and praying an accounting from the defendant for all rents, issues, and profits of the land which may have come into his hands, for partition, and for other relief. The court overruled a demurrer to the petition, and the defendant excepted.

[1] The contract between the plaintiff and the defendant was a nudum pactum. It amounted to no more than that the defendant was to secure the money from the hypothecation of his own land, together with the tract to be purchased, and, after the rents, issues, and profits amounted to the purchase money, that the defendant was to make the plaintiff a deed to a half interest. The defendant did not advance any part of the purchase money. He was to be compensated for manufacturing the timber into lumber, the proceeds of which were to be applied to the purchase price of the land. He furnished absolutely no part of the consideration. Such a contract is deficient in mutuality, and is a nude pact. *Beall v. Clark*, 71 Ga. 818. The plaintiff's case is no better than if he had alleged that the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

promised to convey to him a half interest in a certain plantation belonging to the latter as soon as the rents, issues, and profits thereof should amount to a sum agreed to be the value of the plantation. A promise like this is a pure gratuity.

[2] If it be considered that mutuality and a consideration were supplied by the subsequent payments, then the contract will not be decreed to be specifically performed, because it rests in parol. The statute declares that specific performance of a parol contract as to land will not be decreed on account of partial payments, unless such partial payment is accompanied with possession of the land by the party making it, or there be possession of the land with valuable improvements. Civil Code 1910, § 4634. The plaintiff does not contend that he is in possession of the land.

[3] It is contended, however, inasmuch as the plaintiff paid to the defendant certain sums of money and did certain work upon the land after the title became vested in the defendant, under an agreement that the balance of the purchase money was to be received from the rents, issues, and profits, that upon an accumulation of an amount sufficient to reimburse the defendant a resulting trust arose. We do not think so. The Code declares that whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partly in another, a trust will be implied. Civil Code 1910, § 3739. A resulting trust which arises solely from the payment of the purchase price is not created, unless the purchase money is paid either before or at the time of the purchase. Trusts implied from the payment of the purchase money or a part thereof must result, if at all, at the time of the execution of the conveyance. *Long v. King*, 117 Ala. 423, 23 South. 534; *Butterfield v. Butterfield*, 79 Ark. 164, 95 S. W. 146, 9 Ann. Cas. 248; *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151; *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176.

The invalidity of the contract and the insufficiency of the petition were set up by demurrer, and the court erred in refusing to dismiss the petition.

Judgment reversed. All the Justices concur.

CALDWELL v. CALDWELL.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

DEEDS (§ 36*)—ESSENTIALS—EXPRESSED INTENTION—PRESENT ESTATE.

To constitute a conveyance of land there must be sufficient words showing an intention to grant a present estate.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 55, 56; Dec. Dig. § 36.*]

Error from Superior Court, Floyd County; Jno. W. Maddox, Judge.

Action by N. M. Caldwell, as administrator, etc., against Mrs. Nanny Caldwell. Judgment for defendant on a directed verdict, and plaintiff brings error. Reversed.

M. B. Eubanks, of Rome, for plaintiff in error. J. M. Hunt and Barry Wright, both of Rome, for defendant in error.

EVANS, P. J. The action was complaint for land by N. M. Caldwell, as administrator of J. W. Caldwell, against Mrs. Nanny Caldwell. It appears from the record that the locus in quo belonged to John W. Caldwell, and the plaintiff, as his administrator, was entitled to recover it, unless his intestate had conveyed it to the defendant. The paper relied upon as a conveyance of the property is as follows: "State of Georgia, Floyd County. This indenture, made this 16th day of August 1904, between J. W. Caldwell, of the one part, and Mrs. Nannie E. Caldwell, his wife, of the other part, for the consideration of love and affection [af] does will all the tract or parcel of land as follows: Twenty acres of land in the southwest corner of lot No. 52 in 22d. and third district of Georgia. I will that Mrs. Nannie E. Caldwell hold the pond and ginnery on said lot of land. Also twenty acres off of lot 21 in the southeast corner of said lot. I will the line of Mrs. Nannie E. Caldwell go to the railroad. In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year above written. [Signed] John W. Caldwell. Witnesses: B. C. Hucks. S. G. N. Cates, J. P." The court was of the opinion that such paper was an effective conveyance of the land therein described, which embraced the locus in quo, and directed a verdict for the defendant. Exception is taken by the administrator, on the ground that the paper under which the defendant claims title is not a deed, and is ineffective as a conveyance of title to the premises in dispute.

It may be that the maker intended to execute a deed of the land to his wife, but he signally failed in selecting apt words of conveyance. The office of a deed is to convey title in present, and this cannot be accomplished without the use of language indicating an intention to transfer title. The provision of Civil Code, § 4182, that no prescribed form is essential to the validity of a deed, does not dispense with the necessity of using language indicating an intention of the maker to convey a present estate in specific land to a named grantee. *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786. The maker of this paper did not use any word indicating an intention to convey a present estate to his wife. The words that he "does will" the land to his wife mean that he gives it to her at his death; it is the expression of a testamentary act. There is nothing in this paper which

can make it effectual as a conveyance of property; and as the defendant's title was dependent on this paper as a deed conveying title from her husband to herself, it follows that the direction of a verdict in her favor was erroneous.

Judgment reversed. All the Justices concur.

GUPTILL v. MACON STONE SUPPLY CO.
(Supreme Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§§ 112, 216*)—FORFEITURE OF LEASE—WAIVER.

A lease for ten years of a stone quarry contained a covenant that the lessee should pay a stated sum for each car of stone quarried, and that monthly settlements should be had. The landlord sued out a warrant to summarily dispossess the tenant, under the Civil Code, § 5385, on the ground of the tenant's failure to pay rent. The tenant filed the statutory counter affidavit. Thereafter the landlord accepted from the tenant rent that accrued, under the lease, subsequently to the institution of the summary process. Such acceptance operated as a waiver of the landlord's right to claim a forfeiture of the lease because of the tenant's arrears prior to the issuance of the summary process.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349, 861-865; Dec. Dig. §§ 112, 216.*]

Error from Superior Court, Monroe County; R. T. Daniel, Judge.

Action by O. F. Guptill against the Macon Stone Supply Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. L. Williams, Jr., of Macon, Elmer Burnham, of Kittery, Me., and Charles Cram, of Boston, Mass., for plaintiff in error. Persons & Persons, of Forsyth, and Hall & Hall, of Macon, for defendant in error.

EVANS, P. J. O. F. Guptill leased a stone quarry to the Macon Stone Supply Company for the term of ten years from August 19, 1911; the lessee agreeing to pay for the first 2,000 cars of stone shipped from the quarry the sum of \$1.25 per car, and for the stone thereafter shipped the sum of \$1 per car. The lease contained the following covenants: "Statements of the cars shipped and the amount due the lessor herein to be rendered by the lessee to the lessor on the first day of each month during the term of this lease, and monthly settlements to be made by the lessee with said lessor covering such amounts as may be due under the terms of this lease." "In the event the lessee herein shall, during the term of this lease, for any four consecutive months, fail to operate said quarry and to make payments specified herein within sixty days from the time same becomes due, then this lease, at the option of the lessor herein, may be declared null and void." On February 20, 1912, the landlord sued out

a dispossessory warrant against his tenant, on the ground of his failure to pay the rent on the premises as per agreement in the lease contract. The tenant made a counter affidavit, denying that the lease had expired, or that he had failed to pay the rents due the landlord under the terms of the lease. The proceedings were duly returned to the superior court for trial, which resulted in favor of the defendant. The court overruled the landlord's motion for new trial, and he excepts.

We do not find it necessary to discuss the various assignments of error contained in the motion for new trial, for the reason that the verdict was demanded by the evidence. The only material difference between the testimony of the contending parties related to the payment of four cars of stone quarried in September and October, 1911, amounting under the contract to \$5; the landlord contending that the tenant had failed to pay this amount, and the tenant contending that it had paid for all the stone quarried. The landlord testified that about the 14th or 15th of February, 1912, he demanded possession of the premises, on account of the failure to pay the \$5 claimed to be due for the preceding months of September and October; that on February 17th, and three days before the suing out of the warrant to dispossess, he accepted from his tenant amounts due for the months of November and December, 1911; that after the suing out of the dispossessory proceeding he had received all royalties on stone shipped from the quarry, due at the time of the trial, which occurred several months thereafter. The defendant introduced in evidence the letters in which these various remittances by it were made subsequently to the suing out of the dispossessory warrant, in each of which the remittances were stated to be in payment of royalties due on stone shipped during the various months for which the remittance was made, according to the lease contract. There was therefore no dispute that the landlord, notwithstanding his claim of a forfeiture resulting from a failure to pay a portion of the September and October rent, had received, since the institution of the summary proceeding to evict the tenant, rent subsequently accruing under the lease contract. Under such circumstances the landlord will be held to have waived his right to claim a forfeiture of the lease contract.

It is immaterial whether the landlord was undertaking to give effect to a contractual forfeiture, or was proceeding solely under the Civil Code, § 5385, which authorizes, at the instance of the landlord, the issuance of a warrant to dispossess his tenant who fails to pay rent when due. Under this Code section the landlord, after demand for the possession of the rented premises, may proceed to dispossess his tenant who has failed to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pay rent when due. In either instance after the institution of the statutory summary proceeding, the attitude of the landlord is that the tenant is no longer entitled to the possession of the premises by virtue of the lease contract. His action is voluntary. Instead of undertaking to collect the rent by distress, he proposes to evict the tenant as being no longer entitled to possession, on account of his failure to pay rent when due. Having voluntarily elected to treat his tenant as no longer entitled to the possession, his course must be consistent with this claim in the further progress of the proceeding which he has instituted. If he receives rent accruing subsequently to the issuance of the dispossessory warrant, and accepts it as being a payment under the original lease contract, he affirms that the lease contract is still in existence. By his own acts he admits the continuance of the lease, and waives any prior forfeiture. A landlord who recognizes a lease as a subsisting, operative contract should not, in equity or in good morals, be permitted to insist upon a past forfeiture, if there has been one. And it has been held, both in England and in this country, that a landlord by acceptance from his tenant of rent accruing after a breach of the condition in the lease, with knowledge that the breach had been committed, waives the right to declare the lease forfeited on account of the breach. *Dendy v. Nicholl*, 27 L. J. C. P. 220, 15 Eng. Rul. Cas. 783; *Kenny v. Sen Si Lun*, 101 Minn. 253, 112 N. W. 220, 11 L. R. A. (N. S.) 831, 11 Ann. Cas. 60, and cases cited in notes.

There is another substantial reason why the landlord should be deemed to have waived any forfeiture resulting from the tenant's failure to pay rent by accepting rents subsequently to his institution of his dispossessory process. By the Civil Code, § 5389, it is provided that, if the judgment goes against the tenant, it shall be for double the rent reserved or stipulated to be paid. It has been held that under this Code section the landlord, if entitled to recover possession of the premises, is also entitled to recover double the rent contracted to be paid accruing since the demand. If, after the institution of his proceeding, the landlord accepts subsequently accrued rent, if he be entitled to the premises, he would also be entitled to double the rent accruing since his demand, notwithstanding he may have received a part of the same from the tenant on the rent contract. The statute for the summary removal of tenants who fail to pay rent is for the benefit of landlords, and in derogation of common law, but should never be permitted as an agency to collect double rent against the tenant as a wrongdoer, after the landlord has received subsequently accruing rent under the contract.

Judgment affirmed. All the Justices concur.

WEST v. LOCKLEAR.

(Supreme Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

1. OVERRULING OF DEMURRER.

The demurrer was without merit, and was properly overruled.

2. INSTRUCTIONS — PAYMENT TO HUSBAND'S CREDITOR.

The controlling question in this case was whether a wife had paid money to the creditor of her husband with knowledge on the part of the creditor that it was her money. The charges on this subject, of which complaints were made, were not subject to the criticisms presented, nor do they furnish ground for reversal.

3. TRIAL (§ 256*)—INSTRUCTIONS—DUTY TO REQUEST.

If fuller instructions had been desired, they should have been requested. Under the pleadings and evidence, the contention that the court failed or omitted to give certain charges does not require a new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; *Dec. Dig.* § 256.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action between A. S. West and Dora Locklear. From the judgment, West brings error. Affirmed.

Maddox & Doyal, of Rome, for plaintiff in error. Denny & Wright, of Rome, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

DAVISON v. SIBLEY et al.

SIBLEY et al. v. DAVISON.

(Supreme Court of Georgia. Oct. 14, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 111*)—PROBATE OF WILL—ALLOWANCE FOR COUNSEL FEES.

An executor under a will probated in common form, who is called upon by heirs at law to probate it in solemn form, is entitled to an allowance of reasonable counsel fees out of the estate for such service, notwithstanding the will may be refused probate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 448-462; *Dec. Dig.* § 111.*]

2. EXECUTORS AND ADMINISTRATORS (§ 111*)—PROBATE OF WILL — ALLOWANCE FOR EXPENSES.

But if the executor in bad faith and in fraud of the rights of heirs attempts to probate a pretended will, he is not entitled to reimbursement from the estate for expenses incurred in his effort to defraud the heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 448-462; *Dec. Dig.* § 111.*]

3. EXECUTORS AND ADMINISTRATORS (§ 111*)—PROBATE OF WILL — ALLOWANCE FOR EXPENSES.

The good faith of the counsel of the executor is immaterial, as his right to compensation out of the estate is dependent upon the right of the executor to have an allowance

from the estate for reasonable and necessary expenses, incurred upon compliance with the demand of the heirs to probate the will in solemn form.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 448-462; Dec. Dig. § 111.*]

Error from Superior Court, Greene County; B. F. Walker, Judge.

Bill by James Davison, administrator, praying for instructions. From the decree, the administrator brings error, and S. H. Sibley and others file a cross-bill. Reversed on both bills of exception.

Geo. A. Merritt and James Davison, both of Greensboro, for plaintiff in error. Noel P. Park, of Greensboro, and Saml. H. Sibley, of Union Point, for defendants in error.

EVANS, P. J. A paper purporting to be the last will and testament of Reuben A. Credille was admitted to record as having been proved in common form, and letters testamentary issued to Florence Credille, the person nominated therein as executor. Certain children of Reuben A. Credille filed a proceeding requiring probate of the will in solemn form, and entered their caveat thereto. The executor employed counsel to probate the will per testes, and a long litigation ensued. The result of the first trial was in favor of the caveators, and the verdict was set aside by the Supreme Court. 123 Ga. 673, 51 S. E. 628. A second trial was had, which again resulted in a verdict for the caveators; and this verdict was upheld. 131 Ga. 40, 61 S. E. 1042. Administration was then had upon the estate of Reuben A. Credille, and the administrator brought a bill for direction, praying instructions, among other things, whether he should pay from the assets of the estate the fee of certain attorneys for services rendered to the executor in the litigation over the probate of the will in solemn form. The case was referred to an auditor, who reported, on this issue, that the services rendered by the attorneys were reasonably worth the sum demanded, and that the employment was in behalf of the estate, and not by the executor as an individual, though he was personally interested in the probate of the will. The auditor further reported that the executor had not acted in good faith in pressing the will for probate, and on this account he adjudged that the attorneys could not recover their fees from the estate. Exceptions of law and fact were filed to the auditor's report; and the court sustained the exceptions of law, disregarding as immaterial the exceptions of fact to the auditor's finding that the attorneys acted in good faith in representing the executor, but that the executor acted in bad faith in attempting to probate the will of Reuben A. Credille. The ruling of the court was that, independently of the good faith of the attorneys in representing the executor and of the bad faith of

the executor in attempting to probate the will, the attorneys were entitled to reasonable compensation for their services in the attempt to probate the will in solemn form, payable from the assets of the estate of Reuben A. Credille. A decree was taken in accordance with this ruling. The administrator excepts to so much of the judgment as sustains the exceptions of law, and the attorneys by cross-bill except to the dismissal of their exceptions of fact as immaterial.

[1] 1. We think that the executor's right to be compensated out of the estate for necessary expenses, incurred in an unsuccessful attempt to probate a will in solemn form, at the instance of an heir at law, after the will has been probated in common form, depends upon the duty of the executor in this respect towards the estate he represents. According to the English ecclesiastical law a will was proved in common form on the oath of the executor and without notice, but after it had been proved in common form the executor could be compelled to prove it in solemn form. This is spoken of as calling in the probate. This could be done at any time, unless there was unreasonable delay in making the application. Our statute, however, limits the time to seven years, and with this modification our statutes concerning the probate of wills in common and solemn form do not substantially differ from the old English ecclesiastical law. *Vance v. Crawford*, 4 Ga. 445; *Brown v. Anderson*, 13 Ga. 171; *Hoyle v. Hasted & Pearson*, 6 Eng. Ecc. Rep. 313.

Where an executor proves a will in common form on the oath of one of the witnesses, and heirs at law call upon him by an application in writing, duly served, to appear before the ordinary and show cause why the probate should not be set aside on the ground that the testator at the time of making the pretended will was not of sound mind or was under undue influence, etc., it is the duty of the executor to see that all persons interested are notified. *Evans v. Arnold*, 52 Ga. 169, 179. If the executor appears in obedience to the notice to prove the will in solemn form, the burden is upon him to make a prima facie case. *Peale v. Ware*, 131 Ga. 828, 63 S. E. 581. The practice in this regard is mentioned for the purpose of showing that the relation of the executor to the estate in the matter of the probate of a will in solemn form is different where the will has never been probated, and where it has been previously proved in common. In the former case he may be required to file the will, if in his possession, with the ordinary (Civil Code of 1910, § 3862), but he is not compelled to offer it for probate; while, in the latter case, having elected to probate it, and having qualified as executor, he is under a duty to prove it in solemn form when required by an heir within the statutory period. A probate in common form means something. An executor qualifying

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

under such probate is empowered to collect the assets and pay the debts of the testator. Purchasers under sales from him legally made will be protected, if bona fide and without notice. Such probate is conclusive upon all persons, not under disability, after the expiration of seven years. Civil Code (1910) §§ 3855, 3857. It would therefore seem to be the executor's duty to offer the will for probate in solemn form when called upon to do so by heirs, and to press the probate in good faith, and to make the necessary preparation for trial. The employment of counsel is a necessary incident to the duty imposed on the executor to probate the will in solemn form upon the demand of an heir; and it would be inconsistent with every principle of reason, law, and justice not to allow to the executor, out of the estate of the deceased, the expenses necessarily incurred by him in the faithful discharge of his duty. *Compton v. Barnes*, 4 Gill (Md.) 55, 45 Am. Dec. 115; *Phillips v. Phillips*, 81 Ky. 328. And see *Varner v. Goldsby*, 22 Ga. 302 and *Francis v. Holbrook*, 68 Ga. 829. If the will previously had not been admitted to probate in common form, and letters testamentary had not been granted thereon, a strong argument might be made against an allowance of counsel fees to the executor for an unsuccessful attempt to probate. See *Dodd v. Anderson*, 197 N. Y. 466, 90 N. E. 1137, 27 L. R. A. (N. S.) 336, 18 Ann. Cas. 738.

[2] 2. However, if the executor in bad faith undertakes to probate a paper which, because it is a forgery or was fraudulently procured, or the like, is not the last will of the deceased, he will not be allowed to charge the estate with the expense of counsel in his unsuccessful effort to set up a pretended will, notwithstanding it may have been previously probated in common form. That is to say, if the executor fraudulently undertakes to probate a pretended will, the expenses incident to his effort to defraud the heirs will not be charged against those whom he is endeavoring to defraud.

[3] 3. The good faith of the counsel employed, or their ignorance of the executor's fraudulent intent or purpose, is immaterial. Their right to be paid from funds of the estate of the deceased is not primary, but secondary. It is only when the executor may create a lawful charge against the estate that counsel may be compensated out of the assets of the estate.

Judgment reversed on both bills of exceptions. All the Justices concur.

BIGGS v. SILVEY et al.

(Supreme Court of Georgia. Oct. 15, 1913.)

(Syllabus by the Court.)

CANCELLATION OF INSTRUMENTS (§ 35*)—PARTIES.

A husband made a voluntary deed to his wife. Subsequently the wife and husband joint-

ly conveyed by deed the same land to certain persons, who were children and descendants of children of the husband by a former marriage, reserving a life estate to the grantors. This deed recited a valuable consideration and contained a covenant of warranty of title. The husband died, and the wife brought an action against the grantees to cancel the deed as being obtained by the fraud and coercion of her husband. She alleged that her husband's estate was without representation. Pending the suit and before the appearance term, an administrator was appointed on the estate of her husband, and the defendants pleaded his nonjoinder in abatement of the suit. *Held*, that the representative of the deceased husband was a necessary party, and, upon refusal of the plaintiff to make him a party, the suit will be abated.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 55-64; Dec. Dig. § 35.*]

Error from Superior Court, Wilkes County; B. K. Walker, Judge.

Action by S. A. Biggs against H. W. Silvey and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Sam L. Olive, of Augusta, and W. D. Tutt, of Elberton, for plaintiff in error. Saml. H. Sibley, of Union Point, for defendants in error.

EVANS, P. J. The plaintiff in her petition alleged that she intermarried with Terry P. Sherrer on March 11, 1877; that on June 15, 1892, her husband conveyed to her a certain tract of land containing 172 acres; that thereafter her husband became dissatisfied with the making of the deed and on the 14th of March, 1908, influenced and persuaded her to execute a deed to W. H. Silvey, Sarah K. Silvey, John W. Sherrer, William Francis Sherrer, James W. Sherrer, Mary Susan Sherrer, and Rebecca Jane Echols, children and descendants of her husband by a former marriage, upon an alleged consideration of love and affection to her husband and to the grantees as relatives by blood of her husband and affinity to her, and also in consideration that one of the grantees had been most attentive in serving and waiting upon her husband and herself for a number of years, and in further consideration of \$10 conveying 50 acres of the land, described by metes and bounds, to W. H. Silvey, and the remainder to the other named grantees, reserving a life estate to petitioner as long as she lives upon the property. Her husband joined with her in warranty of the title, and the deed was signed by both. Subsequently, on June 8, 1908, petitioner was further influenced and persuaded and coerced by her husband to sign a deed to W. H. Silvey to 50 acres of land conveyed to her by her husband. This deed recited that it was made by the husband and the petitioner of the first part and Hillary W. Silvey of the second part, and that for and in consideration of the sum of \$10 the party of the first part conveyed 50 acres of described land to the grantee in fee simple, with a reservation that "both the par-

ties of the first part hold the within 50 acres until after their death; then it goes to Hillary W. Silvey and his heirs." This deed contained a warranty of title and was signed by petitioner and her husband. Petitioner and her husband continued to live upon the land until his death in May, 1909. After the death of her husband, Terry P. Sherrer, she married again and has continued to live upon the land. She alleged that there was no administration upon her first husband's estate, and the grantees in the deeds from herself and husband were made parties defendant. She prayed for the cancellation of her deeds to the defendants. The defendants filed a plea in abatement on the ground that W. F. Sherrer, the duly constituted administrator of the estate of Terry P. Sherrer, was a necessary party defendant, praying that the suit abate because of his nonjoinder. The issue made by the plea was submitted to the court, without the intervention of a jury; and upon the hearing it appeared that letters of administration had been granted on the estate of Terry P. Sherrer to W. F. Sherrer, pending the suit, but prior to the appearance term. The court entered judgment sustaining the plea in abatement and dismissing the petition, "provided that, if the plaintiff shall within ten days file an amendment praying that" the representative of Terry P. Sherrer "be made a party defendant in said case, the plea shall stand overruled." Exception is taken to this judgment.

The single question presented by this record is whether the personal representative of Terry P. Sherrer is a necessary and indispensable party to the cancellation of the deeds jointly executed by petitioner and her husband, Terry P. Sherrer, to the defendant. The general rule is that a grantor is a necessary party to a proceeding to cancel his deed. *Kehoe v. Rourke*, 131 Ga. 269, 62 S. E. 185. It rests upon the fundamental doctrine that the law hears before it decides, and that before the rights of a party can be passed upon he must have his day in court. The plaintiff seeks to cancel the joint deed of herself and a deceased husband, and the latter's representative must be made a party, unless the special facts of the case prove an exception to the general rule. As reason for such an exception it is insisted that Terry P. Sherrer was not interested in the title, and that his joinder in the deed was a purely superfluous act. We do not think so. So far as the deed is concerned, it purports to be the joint act of herself and husband, and she will not be heard to deny that it is their joint act unless her comaker or his representative is given an opportunity to contest this issue. Besides, her husband warranted the title, and each of the deeds recites a valuable consideration, and his estate is directly interested in upholding them.

Much reliance is placed by the plaintiff on the case of *Ellesworth v. McCoy*, 95 Ga.

44, 49 (2), 22 S. E. 39, as sustaining the opposite view. An analysis of that case will show that nothing therein ruled contravenes our holding in this case. In that case a bill in equity was filed by the maker of a deed against two of the children of a deceased grantee; it was alleged that the deed had been procured by fraud and undue influence, and that these two children were in possession of and claiming the property conveyed; and the prayer was for an injunction against their conveyance of the property or otherwise interfering with it, for a cancellation of the deed, and for a recovery of the property. It was held that the plaintiff could proceed against these two defendants without making a party defendant a third child of the deceased grantee, alleged to have been in life three years before the bill was filed, but conceded, if still alive, to be a nonresident of the state. The ruling was put on two grounds: (1) That a conveyance to a deceased grantee, who leaves three heirs at law, may be set aside at the instance of the maker, as far as it affects two of them, without disturbing the rights of the third; and (2) that nonresidence and doubt as to the existence of the other child were sufficient to excuse the failure to make the third child a party. In that case the maker only prayed to cancel the deed in so far as it affected the two defendants. If she had a right to cancel the whole, she could waive that right in so far as it affected one of the claimants under the deed. But that is not this case. Here one joint maker is attempting to cancel the deed of her comaker; and, before she can do this, she must make the representative of such comaker a party to her action.

Judgment affirmed. All the Justices concur.

ODUM v. STATE. (No. 4,762.)

(Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 207*) — EVIDENCE — DYING DECLARATION.

The fact that a dying statement, not reduced to writing, was made by one in articulo mortis previous to a statement which was thereafter reduced to writing, does not render the prior oral statement inadmissible, provided it otherwise so complies with the requirements of law as to be competent testimony.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 439; Dec. Dig. § 207.*]

2. HOMICIDE (§ 215*) — EVIDENCE — DYING DECLARATION.

An objection to testimony as to an alleged dying declaration, upon the ground that the declarant had said, "I know the man, but I cannot call his name," and that therefore the declarant did not know the person who killed him, is not supported, when there is other evidence which clearly discloses the identity of the individual referred to by the declarant.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 451-456; Dec. Dig. § 215.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. INSTRUCTIONS ON DRUNKENNESS.

The charge of the court upon the subject of drunkenness is in accord with the provisions of section 39 of the Penal Code, and does not contain any expression of opinion by the court as to whether the defendant was in fact drunk or not. *Marshall v. State*, 59 Ga. 156.

4. VOLUNTARY MANSLAUGHTER.

The evidence authorized the charge upon the subject of voluntary manslaughter.

5. CRIMINAL LAW (§ 922*) — NEW TRIAL — HARMLESS ERROR—INSTRUCTIONS.

The instruction of the court, in answer to a request of the jury, that the jury might recommend the defendant to mercy, although they found the accused guilty of a felony, does not require the grant of a new trial, especially since the jury were distinctly informed that, if they returned a verdict of "guilty of voluntary manslaughter" with a recommendation of mercy, such recommendation would not have the effect of reducing the crime from a felony to a misdemeanor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

6. REFUSAL OF INSTRUCTIONS.

There was no error in refusing a request for instructions to the jury.

Error from Superior Court, Bibb County; *H. A. Mathews*, Judge.

Edward Odum was convicted of voluntary manslaughter, and brings error. Affirmed.

Jno. R. Cooper, of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

RUSSELL, J. Judgment affirmed.

BRITT v. STATE. (No. 5,192.)

(Court of Appeals of Georgia, Oct. 29, 1913.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 594*)—CONTINUANCE—ABSENT WITNESS.

A motion for a continuance because of the absence of a witness for the defendant in a criminal case should not be overruled, though there be other witnesses who will testify to the same effect as would the absent witness, when it is uncontradicted that his testimony is not only material but vitally important to the disproof of the defendant's guilt, and it is made to appear that all due diligence has been used to procure the presence of the witness, and that he is accessible to the processes of the court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

Error from Superior Court, Liberty County; *W. W. Sheppard*, Judge.

Jesse Britt was convicted of larceny, and brings error. Reversed.

Ben Way, of Hinesville, and Thomas & Gibbs, of Jesup, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, for the State.

RUSSELL, J. The evidence as to the identity of the hog is in conflict but the jury refused to accept the plea as to the mis-

taken identity of his hogship. We cannot say that the jury erred as to this, though it does not appear from the record that they, any more than we, saw the hog; this for the reason that the jury must judge as to the credibility of the witnesses, and the law will not permit us to do so. However, the case turned on whether the hog which the accused was charged with stealing was or was not Gabe Quarterman's hog, and, in view of the seriousness of the offense, we think the court should have postponed the trial of the case, so as to have enabled the defendant to produce witnesses as to his ownership, whose testimony was material to his defense. It is uncontradicted that subpoenas had been taken out for the witnesses several days before the trial and delivered to the deputy sheriff, whose duty it was to serve them. The defendant showed due diligence in endeavoring to procure the testimony, and his showing rebutted any conclusion that the postponement was sought merely for delay. It is true that the defendant had other witnesses who testified substantially to the same facts that he desired to prove by the absent witnesses, but, as we have several times held, the mere fact that the defendant has present a witness who will testify in substance the same thing as would a witness who is absent does not deprive the defendant of the right to have the absent witness present, if it plainly appears that he is accessible, and that the court can procure his attendance. The question is largely controlled by the materiality of the testimony of the absent witness. Continuances are always addressed to the sound, legal discretion of the court. If the fact which it is sought to prove by the absent witness is only collaterally involved, the discretion of the court in overruling the motion is broader than where the testimony proposed to be elicited from the absent witness goes to the very vitals of the case. In such a case the testimony of five witnesses who are present and who would testify to the same effect as the absent witness might not be a substitute for the sworn evidence of the single absent witness. The witnesses present might not be credible; they might even be subject to be impeached by proof of general bad character, while the witness who was absent might be one whose statement would be accepted without question by a jury. Again, though the witnesses present could not be impeached in any of the modes specifically prescribed by law for that purpose, they might be discredited by their interest; while the fact that the absent witness was wholly disinterested would go to his credit. In the present case the defendant's main witness among those who were present was his father, and in the conflict between the testimony of this witness and those who testified for the state, the jury would naturally minimize the tes-

timony of the witness, by reason of this relationship.

There is no merit in the other assignments of error; and, solely upon the ground that the defendant had shown such diligence as entitled him to the presence of the witness he had subpoenaed, to establish a point vital to his defense, the case should have been continued.

Judgment reversed.

RAINES v. STATE. (No. 5,108.)
(Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)

1. OBSTRUCTING JUSTICE (§ 16*)—RESISTING AN OFFICER—SUFFICIENCY OF EVIDENCE.

The evidence not disclosing that the accused forcibly resisted an officer while attempting to execute a lawful process, his conviction under section 311 of the Penal Code was not authorized.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 32; Dec. Dig. § 16.*]

(Additional Syllabus by Editorial Staff.)

2. OBSTRUCTING JUSTICE (§ 3*) — RESISTING AN OFFICER—ELEMENTS OF OFFENSE.

Neither threats alone, unaccompanied by any fear or apparent intention to execute them, nor the doing of an act which impedes, delays, or defeats the execution of the process with which the officer is armed, but without resisting him, is sufficient to constitute the offense of forcibly resisting an officer, in violation of Pen. Code, § 311.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 3-12; Dec. Dig. § 3.*]

Error from City Court of Houston County;
A. C. Riley, Judge.

Walter Raines was convicted of willfully obstructing an officer, and brings error. Reversed.

J. C. Smith, of Ft. Valley, and W. J. Wallace, of Knoxville, for plaintiff in error. R. E. Brown, Sol., of Ft. Valley, for the State.

POTTLE, J. [1] The accused was convicted under an accusation charging that he did knowingly and willfully obstruct and oppose one Sheats, a deputy sheriff, in serving and attempting to serve and execute a criminal warrant against Will Raines. The evidence shows that Sheats and one Rowell, a city marshal, went to the home of Will Raines for the purpose of arresting him under a criminal warrant. When they reached the house they informed two sisters of Will Raines that they had a warrant for his arrest, and received permission from the sisters to go in and search the house. Sheats went into the house, and Rowell remained outside. Sheats heard quarreling outside of the house, and immediately went out and found Rowell scuffling with the accused, who was a brother of Will Raines. The sisters were also attacking Rowell, and Sheats interposed and stopped the difficulty. The officers then

arrested the accused and started around to the front of the house. The accused said he had done nothing to go to jail for, and that he was not going to jail, and began to push and shove Sheats. When this occurred the officers had not found Will Raines and were still looking for him. The accused had said he would not allow the house searched, and started toward the house where Sheats was. Rowell grabbed him and pulled him back, whereupon both his sisters began to attack Rowell, and Sheats came out of the house to the assistance of Rowell. The officers did not find Will Raines, and did not go back into the house for any further search.

[2] It is well settled that proof of forcible resistance is necessary to sustain an indictment under section 311 of the Penal Code. "Neither threats alone, unaccompanied by any fear or apparent intention to execute them, nor even the doing of an act which impedes, delays, or defeats the execution of the process with which the officer is armed, but without resisting him, is sufficient to constitute the offense of obstructing legal process." *Hutchinson v. State*, 9 Ga. App. 62, 70 S. E. 352. See, also, *Davis v. State*, 76 Ga. 721. It is apparent from the evidence in the present case that whatever force was used by the accused in resisting Deputy Sheriff Sheats was either to prevent what the accused deemed an illegal arrest of his person, or to prevent him from being taken to jail after the arrest was made. In fact, the arrest of the accused was illegal. He had committed no offense. He objected to the house being searched for his brother, and started toward the house, saying that he would not permit the search to be made. This conduct on his part was not a violation of any criminal law, and therefore did not justify his arrest by Rowell. This being so, the accused had a right to resist the attempted detention of his person by Rowell. Nor did Sheats have any more authority to arrest the accused than did Rowell, and the accused had an equal right to resist him. There is nothing in the evidence to justify the inference that the force used toward Sheats by the accused was to prevent Sheats from continuing his search for Will Raines. On the contrary, the evidence demanded a finding that whatever force was used by the accused toward Sheats was for the purpose of preventing an illegal arrest of his own person by the officer. The officer was prevented from continuing his search, not so much by the conduct of the accused, as by his own conduct in making an illegal arrest of the accused, and he discontinued the search for Will Raines in order to incarcerate the accused in pursuance of the illegal arrest. The evidence did not authorize the conviction, and the motion for a new trial should have been granted.

Judgment reversed.

DUKE v. STATE. (No. 5,221.)

Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)
CRIMINAL LAW (§ 400*)—JUSTICES OF THE PEACE (§ 125*)—JUDGMENT—EVIDENCE—PANEL.

It not appearing that the original records had been lost or destroyed, or were otherwise inaccessible, it was error to permit parol proof of the contents of the defendant's plea in a civil case, and likewise error to permit a witness to state the judgment rendered in the proceedings. A plea of minority on the part of a defendant must necessarily have been in writing, and the announcement of a justice of the peace, in open court, that he will render judgment in a particular way, is *brutum fulmen* until the judgment is actually entered upon the docket. *Nashville, Chattanooga & St. Louis R. Co. v. Brown*, 3 Ga. App. 561 (1b), 60 S. E. 819.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400;* Justices of the Peace, Cent. Dig. §§ 551-554; Dec. Dig. § 125.*]

2. CRIMINAL LAW (§ 1129*)—MOTION FOR NEW TRIAL—REVIEW ON APPEAL.

Objections to the form of a criminal accusation cannot be considered upon assignments of error presented as grounds of a motion for a new trial. *Dublin v. Dudley*, 2 Ga. App. 763, 59 S. E. 84.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2964-2964; Dec. Dig. § 1129.*]

Error from City Court of Jackson; H. M. Fletcher, Judge.

Barney Duke was convicted of crime, and brings error. Reversed.

J. T. Moore, of Jackson, for plaintiff in error. C. L. Redman, Sol., of Jackson, for the State.

RUSSELL, J. Judgment reversed.

NOBLES v. STATE. (No. 5,224.)

Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)
1. CRIMINAL LAW (§ 918*) — NEW TRIAL — GROUNDS—CONDUCT OF JUDGE.

Although the trial judge has the right to examine witnesses, the utmost caution should be used to avoid impressing the jury by the examination; and when in a criminal case it appears that there is a probability that the circumstances, or the form of the examination, conveyed to the jury an intimation of the court's belief in the guilt of the accused, a new trial should be granted. When the questions as asked by the trial judge tend to discredit the witness or his testimony, or to suggest to the jury the inference that the court entertains an opinion unfavorable to the innocence of the accused, the effect may be as prejudicial to the defendant as the direct expression of an opinion, and places the case within the provisions of section 1068 of the Penal Code. Extreme anxiety to develop the truth as to facts which, if proved, will be peculiarly beneficial to one of the parties in the case and correspondingly detrimental to the other, can easily be mistaken by the jury for a manifestation of the judge's conviction that one party rather than the other should prevail. *Sharpton v. State*, 1

Ga. App. 542, 57 S. E. 929; *Brown v. State*, 11 Ga. App. 164, 74 S. E. 1002; *Murphy v. State*, 18 Ga. App. —, 79 S. E. 228.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2192, 2195, 2196, 2219-2224; Dec. Dig. § 918.*]

2. CRIMINAL LAW (§ 1166½*)—PREJUDICIAL ERROR—CONDUCT OF JUDGE—QUESTIONS.

The questions asked the state's witness by the trial judge, after the solicitor general and the defendant's counsel had both completed their examination of the witness, naturally tended to impress, unfavorably to the accused (though the trial judge did not intend that effect), those circumstances which indicated guilt, and perhaps further prejudiced the defendant by conveying the impression that the court believed much more could perhaps be proved against him if the witness could be induced to make the disclosure.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3128; Dec. Dig. § 1166½.*]

3. SUFFICIENCY OF EVIDENCE.

Except as above stated, there was no error in the trial. The evidence was sufficient to convict the accused on both counts, or to warrant a verdict of not guilty. *Flahive v. State*, 10 Ga. App. 401, 73 S. E. 536.

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Bob Nobles was convicted of a crime, and brings error. Reversed.

J. S. Adams, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

RUSSELL, J. Judgment reversed.

JENKINS v. STATE. (No. 5,171.)

Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)
1. INDICTMENT AND INFORMATION (§ 75*)—SUFFICIENCY—OMISSION OF WORDS—LARCENY.

This case, on the demurrer, is controlled by the decision of the Supreme Court in *Kimbrough v. State*, 101 Ga. 583, 29 S. E. 39.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 202-204; Dec. Dig. § 75.*]

2. CRIMINAL LAW (§ 1205*) — SENTENCE — STATUTE.

Section 175 of the Penal Code of 1910 defines larceny from the house, but fails to prescribe a punishment for that offense; and where one indicted under that section is convicted, he can object to the imposition of any sentence upon him, on the ground that this section of the Code prescribes no punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3268, 3270; Dec. Dig. § 1205.*]

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Will Jenkins was convicted of larceny from the house, and brings error. Reversed.

Pulliam Proffitt, of Elberton, for plaintiff in error. Boozer Payne and R. J. Ward, both of Elberton, for the State.

HILL, C. J. The accusation in this case was of the offense of larceny from the house, and a demurrer was filed thereto, on the ground that it omitted to allege that the property stolen from the house was taken therefrom "privately" by the accused. The demurrer was overruled by the trial judge, he holding that the accusation was good under section 175 of the Penal Code. This judgment is the subject of the first assignment of error.

The accused was convicted, and, when called upon by the court to know if he had any reason to offer why sentence should not be pronounced upon him, objected to being sentenced, on the ground that no penalty was prescribed by law for the offense set out and defined in the accusation under which he was tried and convicted. The court overruled this objection, and imposed a misdemeanor sentence. To this judgment the defendant excepted, and this exception constitutes the second assignment of error.

[1] 1. In *Kimbrough v. State*, 101 Ga. 583, 29 S. E. 39, it is held that "an indictment which charges the accused with entering a dwelling house and stealing therefrom valuable goods is, though the word 'privately' be omitted, a good indictment under section 178 [now 175] of the Penal Code." It is probably this decision which induced the trial judge's ruling. In the body of the opinion in that case it is said that if the indictment were framed under section 179 (now 176) of the Penal Code, and the word "privately" were omitted therefrom, it would seem to be subject to special demurrer on the ground that "the definition of the offense [in that section] makes privacy a necessary ingredient." The Supreme Court seems to have been of the opinion that in these two sections there are two different definitions of larceny from the house. The writer does not concur in this view. In his opinion there is one definition of the offense of larceny from the house, that contained in section 178 (now 175) of the Penal Code, and the following section prescribes a punishment. Indeed, the codifiers seem to have so construed it; the first section being headed "Larceny from the House," and the second section being headed "Punishment." In my opinion, an allegation in an indictment for larceny from the house that the property was taken and carried away from the house with intent to steal the same is equivalent to the allegation that the defendant took the property privately and with intent to steal. However this may be, this court is bound by the decision of the Supreme Court in *Kimbrough v. State*, and under that authority the trial judge properly overruled the demurrer to the indictment, which he held was based on the former of these two sections. Penal Code of 1910, § 175.

[2] 2. The objection made to the imposi-

tion of the sentence, that the section of the Code under which the accusation was framed did not prescribe any punishment for the offense, in view of the ruling in *Kimbrough v. State*, supra, seems to be meritorious. Technically speaking, the objection should have been made by motion in arrest of judgment, but any method by which the question raised is clearly presented to the court should be sufficient, and certainly if no punishment was prescribed by the statute on which the accusation was framed, and under which the accused was convicted, this was a legal reason why sentence could not be imposed upon him. Punishment for criminal offenses is prescribed by statute in this state, and if the statute fails to prescribe a penalty, the statute is ineffective because of that omission. In the *Kimbrough Case*, supra, while it was not expressly held (because the question was not presented), it is strongly intimated in the opinion, that section 178 of the Penal Code (now section 175) does not prescribe any punishment for the offense of larceny from the house. There can be no question as to this, if, as held by the Supreme Court in the *Kimbrough Case*, the two sections referred to contain different definitions of larceny from the house. It follows that the court had no authority to impose any sentence for a conviction under section 175.

We suggest, in view of the decision in *Kimbrough v. State*, supra, that either section 175 of the Penal Code should be repealed or amended, or that the word "privately" in section 176 should be stricken out; and until this is done, indictments or accusations for the offense of larceny from the house, in order that conviction can be followed by punishment, should allege that the property stolen was "privately" taken by the accused from the house.

Judgment reversed.

TAYLOR v. STATE. (No. 5,069.)
(Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 945*)—NEW TRIAL—
GROUNDS.

The discretion of the trial judge in refusing to grant a new trial on the ground of newly discovered evidence will not be controlled, unless it plainly appears that the evidence alleged to have been newly discovered would probably change the result. This rule is peculiarly applicable where the alleged newly discovered testimony in a criminal case relates to facts which are not vitally material to the issue of the defendant's guilt or innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

2. CRIMINAL LAW (§ 1152*)—APPEAL—FINDINGS ON MOTION FOR NEW TRIAL.

In passing upon a ground of a motion for a new trial in a criminal case, based upon alleged bias and prejudice of a juror against the movant, evidenced in part by expressions of

opinion previous to the trial as to the guilt of the accused, the judge of the trial court occupies the place of a trier, and his finding that the juror was competent will not be reversed, unless it is manifest that his discretion was abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.*]

3. VOLUNTARY MANSLAUGHTER—SUFFICIENCY OF EVIDENCE—NEW TRIAL.

The evidence authorized the conviction of the accused of the offense of voluntary manslaughter, and there was no error in refusing a new trial.

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Dawson Taylor was convicted of voluntary manslaughter, and brings error. Affirmed.

S. Holderness, Willis Smith, and J. L. Smith, all of Carrollton, M. U. Moaty, of La Grange, W. C. Hodnett, of Franklin, and W. C. Wright, of Newnan, for plaintiff in error. J. R. Terrell, Sol. Gen., of Greenville, for the State.

RUSSELL, J. Dawson Taylor was convicted of the offense of voluntary manslaughter, and he excepts to the judgment overruling his motion for a new trial. We have carefully examined the voluminous record and the various assignments of error, and we find no reason for a reversal of the judgment of the learned trial judge who presided in the case. The tragedy which resulted in a homicide had many circumstances which rendered it more than usually deplorable, but the evidence authorized the verdict, which has been stamped with the approval of the presiding judge. There is no ground for complaint in the conduct of the trial.

One of the defenses of which the accused seeks to avail himself, the conceded right of mutual defense as between brothers (*Mattox v. State*, 9 Ga. App. 293, 70 S. E. 1120), is inapplicable to the facts of this case because the evidence shows that if any attack was made upon Lee Taylor with metal "knucks," or other weapon, such assault was made not by Frank McWaters, who was shot and killed, but by Glenn McWaters, his son. If Lee Taylor was being assaulted with metal knucks, the defendant, his brother, would have had the right to intervene and use any necessary force in protecting him from injury, but there is no evidence that Frank McWaters was assaulting the defendant's brother with any weapon. The defendant may have been justified in shooting Glenn McWaters, but even if Frank McWaters was making an assault upon the defendant's brother (but not using any weapon), and the defendant shot and killed him, he cannot complain if he was only convicted of voluntary manslaughter.

The merits of the defendant's contention that he should have a new trial rests upon

two grounds: That of newly discovered evidence, and alleged bias on the part of certain members of the jury who tried the case.

[1] 1. Upon the hearing of the motion for a new trial, the movant tendered the affidavit of a niece of the deceased, who testified that she had refused to disclose the facts on account of her relationship. The young lady does not claim to have been a witness to the homicide. Her testimony relates merely to certain facts which would tend to discredit the testimony of witnesses who were introduced upon the trial and to a circumstance which would show that the deceased was perhaps very drunk at the time that he received the mortal blow. For this reason we think the trial judge could have disregarded the alleged newly discovered testimony as merely cumulative and impeaching. We do not say, however, that he did reject it solely upon this ground, for cases can be imagined where evidence might be so absolutely impeaching and directed to points of such vital importance in the case as that, with this evidence in the record, an entirely different result might be anticipated upon another investigation of the case, and the most important criterion in regard to newly discovered evidence we apprehend to be the reasonable probability of a different result being reached from that which has already been attained.

There seems to be some conflict as to whether Miss McNaughton's statement was that the deceased vomited a half gallon or more and as to how heavily laden this discharge was with whisky. We fail to see how this testimony could materially affect the result, or even why the result should be different if it should be conceded that the deceased was thoroughly intoxicated. Miss McNaughton's testimony as to the witness Lunsford is purely impeaching. It does appear from the alleged newly discovered testimony that the deceased, after vomiting, said that he wanted nothing done with the Taylor boys, as he and his son were to blame. We have no doubt the trial judge considered the statement of the deceased that he and his son were to blame, as well as a similar statement made to the witness Mobley, as merely the opinion of the deceased and a mere conclusion, without a statement of any fact from which it could be determined whether the right conclusion, in fact and in law, was reached. The deceased told Mobley that whisky and his temper overcame him and he became crazy. At best this would indicate only mutuality of intent to fight, and the accused was not convicted of murder, but only of voluntary manslaughter; and, certainly if the defendant violated the law, the fact that the particular party who was injured did not wish to see the law enforced against his assailant would be no reason why the law should not be vindicated. The fact

that this witness would testify on another trial that the ground was torn up as if there had been a scuffle might tend to discredit some of the testimony introduced at the trial now under review; but, since it is undisputed that there was a homicide, it would support the inference that the offense committed was that of voluntary manslaughter, rather than that of murder. There was other newly discovered testimony, but it tended merely to impeach various witnesses of the state who testified at the trial. The character of the deceased for violence could not be available, because it does not appear, even from the defendant's own statement, that the deceased was doing enough for that defense to be employed.

Nothing in support of the ground of the motion for new trial based upon newly discovered testimony is offered that will warrant even a suggestion that the trial judge abused his discretion in overruling this ground, and it does not appear that the newly discovered testimony would or should produce a different result. This being true, this court is controlled by the numerous decisions of the Supreme Court in which it is held that the discretion of the trial judge will not be controlled, in passing upon the ground of a motion for a new trial based upon newly discovered testimony, unless it appears that a different result would probably be reached upon another investigation, and that the trial judge abused his discretion in not granting a new trial.

[2, 3] 2. On the motion for a new trial the defendant introduced affidavits of numerous witnesses for the purpose of showing that two of the jurors were prejudiced and biased against the accused. According to this testimony one of these jurors said, previous to the trial, that the defendant ought to be convicted, and that if he (the juror) was on the jury he would be convicted; and the statement attributed to the other juror by a number of witnesses was practically to the same effect. In fact, the juror Crockett was alleged to have gone so far as to say that the defendant "ought to be hung," and he did not see any other chance for him. The witnesses attacking these jurors were properly

vouched for, and it appears that the defendant and his counsel were in ignorance of the existence of any bias in the minds of the jurors and had no reason to suspect that they had expressed themselves against the accused. However, each of the attacked jurors denied on oath the statements attributed to him and asserted that he was controlled solely by the evidence delivered upon the stand in the rendition of the verdict. In this conflict it was for the judge passing upon the motion to determine who swore truly, the witness who attacked the jurors or the jurors themselves. The credibility of the witnesses on the one hand and of the jurors on the other is a matter solely for his determination, and his conclusion is not reviewable.

In the attainment of justice nothing is more indispensable than that the minds of the jurors who are to pass upon the issue be perfectly impartial, but the law places upon the trial judge, and, we think, wisely, the responsibility of determining the competency of the jurors and clothes him with a discretion which will not be controlled, unless it is manifest that it has been abused. The decisions are uniform upon this point. We cannot say that in the present case the learned judge who presided at the trial erred. See, in this connection, *Costly v. State*, 19 Ga. 614, and the cases cited in *Vann v. State*, 83 Ga. 60, 9 S. E. 945; *Buchanan v. State*, 24 Ga. 286 (2); *Brinkley v. State*, 58 Ga. 296 (3); *Durham v. State*, 70 Ga. 265 (12); *Huff v. State*, 104 Ga. 521 (7), 30 S. E. 808; *Allen v. State*, 102 Ga. 619, 29 S. E. 470; *King v. State*, 119 Ga. 426, 46 S. E. 633; *Jones v. State*, 117 Ga. 710 (4), 44 S. E. 877; *Perry v. State*, 117 Ga. 719, 45 S. E. 77; *Hall v. State*, 124 Ga. 649, 52 S. E. 891; *Moore v. State*, 1 Ga. App. 728, 57 S. E. 956; *De Vane v. Atlanta, B. & A. R. Co.*, 4 Ga. App. 141 (5), 60 S. E. 1079; *Daniel v. State*, 11 Ga. App. 800 (4), 76 S. E. 162.

The finding of a trial judge that a juror who has been attacked for bias or prejudice is competent will not be reversed, unless it is apparent that he has abused the discretion which the law vests in him in such cases.

Judgment affirmed.

LATHAM v. FIELD et al.

(Supreme Court of North Carolina. Nov. 5, 1913.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—NONSUIT.

In reviewing a judgment of nonsuit the appellate court must consider the evidence in the most favorable view for the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3148, 3758, 4024; Dec. Dig. § 927.*]

2. PRINCIPAL AND AGENT (§ 92*)—POWER OF AGENT.

The acts of an agent within his authority, either express or implied, and those within the scope of his apparent authority, are binding upon the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 245, 246, 250-253, 592; Dec. Dig. § 92.*]

3. PRINCIPAL AND AGENT (§ 131*)—LIABILITY OF PRINCIPAL.

A principal is as liable for damages from acts performed through an agent as if he had done them himself.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 458-464; Dec. Dig. § 131.*]

4. PRINCIPAL AND AGENT (§ 193*)—LIABILITY OF PRINCIPAL—ACTIONS—EVIDENCE—JURY QUESTION.

In an action for breach of a contract for the sale of cotton, made through a third person, evidence on the question of the defendant's liability as principal held sufficient to go to the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 721½-726; Dec. Dig. § 193.*]

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by J. E. Latham against J. E. Field and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This case was before us at Fall term, 1912, and is reported in 160 N. C. 335, 76 S. E. 251. The facts, as they now appear, are somewhat different from those there stated. Plaintiff testified: That W. H. Field, one of the defendants, called at his place of business in April, 1908, and showed him some samples of cotton, stating that J. D. Turner would thereafter represent his firm in that territory as their broker, and he hoped defendants would send them some business through Mr. Turner. That about three weeks after the conversation, plaintiff ordered some cotton from the defendants through Turner, buying 100 bales of strict low middling from defendants through Turner, at 10½ cents per pound. Plaintiff paid for the cotton at that price, although it proved to be of a very low and inferior quality, below any known grade, and what is called in the trade "junk." The difference in value of the two kinds is 2 cents per pound, and the quantity 46.493 pounds. That he had no further communication with defendants, personally or by letter, after the time of the conversation until the cotton had been shipped and received. He ordered the

cotton through Turner, and at first wanted 200 bales, but Turner told him that he could only get 100 bales of the required grade, and that he had secured it from defendants. The cotton was shipped to defendants, Greensboro, N. C., "order notify J. D. Turner," and the bill of lading showed that the cotton was shipped by defendants to their own order, and indorsed by them. J. D. Turner drew the draft for the price, and plaintiff paid it at bank and took up the bill of lading. Draft was signed by Turner and drawn at Greensboro, N. C., and not by Field & Co. at their home in Cartersville, Ga., as if it had originated there. Cotton is very often shipped through the South to the order of a bank cashier or some clerk in a merchant's office. "As to whose name is on a bill of lading, that is a thing we don't look at. It is who is the shipper of the cotton and whose name is indorsed on the back that makes it negotiable." That he never found out what disposition was made of the proceeds of his payment for the cotton. That he paid the draft, and took the bill of lading to the railway company and got the cotton. He received the following letter confirming the trade:

"Our order No. ———. Greensboro, N. C., 5-11-1908. Messrs. J. E. Latham, Greensboro, N. C.—Dear Sirs: We hereby confirm the following sale made you this day: 100 bales cotton, grade, strict low middling, at 10½ c. per lb., landed at Group A, for shipment prompt, for the account of J. E. Field & Son. Remarks: Shipped by J. E. Field & Son, Cartersville, Ga. Yours truly, Jno. D. Turner, Jr.

"N. B. In any case of reference to this order, please give our order number, subject to Carolina mill rules."

On the cross and re-examination, plaintiff testified: "Mr. Latham, in June 19, 1908, you addressed a letter to Field & Co., which I have just shown you, and you told them about this offer you had received from the Riverside Cotton Mills of 10 cents? Answer: Yes, sir." Plaintiff did not address this communication to the defendants for the purpose of connecting them with the original sale, or for the purpose of getting some reply from defendants in order to connect them with the original sale. Plaintiff's reason for so writing the defendant was that cotton is sold in this territory, including Danville and all the territory around Greensboro, under what is known as the Carolina mill rules. These rules provide that when a shipment of cotton is received, if it is below grade as originally contracted for, it may be rejected by the buyer. Our position on this cotton all the time was that Field & Co. had not performed their contract; that they had shipped something we did not buy, and, so far as we were concerned, we rejected it. We were holding the cotton, waiting for them to replace the contract with the proper grade of cotton which

we had bought and which we had paid for. When he paid the draft drawn by Turner, for some \$4,600, he knew that the draft had been drawn in Greensboro. He knew that a draft drawn by Field & Co. on him would have originated in Cartersville, Ga. In the former trial he testified that the cotton shipped was very difficult to grade, but in his opinion it would average about strict low middling. Cotton that is full of dust and sand is not merchantable, and for that reason is not gradable cotton. When cotton is bought, it is customary to confirm it. In this instance no confirmation was sent to the defendants, for the reason that plaintiff received a confirmation from J. D. Turner. Plaintiff confirmed the purchase to Turner. It is customary in the cotton trade to confirm either to the vendor or his agent. The sample exhibited to witness is a sample of strict low middling cotton. The sale in controversy was confirmed to plaintiff by J. D. Turner for the account of the defendants. Cotton arrives several days later than drafts, and in this instance the draft was presented and paid by plaintiff probably seven days before the arrival of the cotton. Plaintiff had no opportunity to examine the cotton before he paid the draft. That is the usual custom in the trade. He paid the draft upon the faith of the contract he had with Mr. Turner as broker for J. E. Field & Son, and upon the fact that it was attached to the bill of lading showing J. E. Field & Son, of Cartersville, Ga., were the shippers of the cotton, and that J. E. Field & Son, in order to make the bill of lading negotiable, had indorsed it on the back. He would not have paid the draft unless the bill of lading had been attached. The paper shown him is the confirmation he received at the time he bought the 100 bales of cotton in controversy.

The bill of lading was introduced. It was of the standard form, issued at Cartersville, Ga., by the railroad company to J. E. Field & Son, and contained the following: "Shippers' order notify. Consignee, J. D. Turner, Jr."—and was indorsed by J. E. Field & Son and J. D. Turner, Jr. There was more evidence as to the damages, not necessary to be stated. At the close of the plaintiff's testimony, the judge ordered a nonsuit, upon defendants' motion, and plaintiff appealed.

Thos. S. Beall and King & Kimball, all of Greensboro, for appellant. Douglass & Douglass, of Raleigh, J. T. Norris, of Cartersville, and R. C. Strudwick, of Greensboro, for appellees.

WALKER, J. (after stating the facts as above). [1, 2] The nonsuit requires us to consider the evidence in the most favorable view for the plaintiff. Plaintiff contends that he acted upon the representation of W. H. Field that J. D. Turner was the broker of defendants, and therefore fully authorized to make contracts for the sale of cotton in their be-

half, and that he was dealing with Turner as agent, and not in his individual capacity, and relied upon the statement of W. H. Field that he could so deal in the future. The rule in regard to agency may be thus stated: A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable because the act of the agent is the act of the principal. For the acts of the agent, within the scope of his authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Mechem on Agency*, § 84. "The principal is bound by all the acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him; and this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in the matter, shall be bound by it. *Carmichael v. Buck*, 10 Rich. (S. C.) 332, 70 Am. Dec. 226; *Story on Agency*, § 127. "Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency, as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact." *Trollinger v. Fleer*, 157 N. C. 81, 72 S. E. 795; *Metzger v. Whitehurst*, 147 N. C. 171, 60 S. E. 907. These cases fairly illustrate this doctrine and define its limits. As to the liability of a principal acting through a broker, see 19 Cyc. 292. The court, in this case, when formerly here (160 N. C. 335, 76 S. E. 251), stated the duties of a broker and the nature of his agency.

[3, 4] The case may be considered in two aspects: (1) Was Turner in fact acting as defendant's broker in the transaction? (2) Did defendants, by W. H. Field, induce the plaintiff to believe that Turner had authority to represent them in selling their cotton, and thereby lead him to make the order for the 100 bales, he believing, and having reason to believe, under the circumstances, that

they were selling, not to Turner for himself, but through him to the plaintiff? If the jury should find that Turner was really acting as agent or broker for the defendants, they would be liable for the damages sustained by the plaintiffs, for the defendants would, in such case, be the principals, and the acts of Turner, though in his own name, would be imputable to them as much so as if they had acted for themselves, instead of by representation. The form of the transaction is not material. *Holt v. Wellons*, 79 S. E. 450 at this term. We think there was evidence to support either of these theories. In the first place, the plaintiff testifies, without qualification, that "he got the cotton from the defendants through Turner," and thus he did precisely what W. H. Field told him to do. It also appears that Turner told the plaintiff that he had succeeded in getting the cotton for them from defendants. In the letter of confirmation it is stated that "the sale was made for the account of J. E. Field & Son," and Turner opens his letter by saying: "We hereby confirm the sale, and request plaintiff, in case of any reference to the order, to give *our* order number." Plaintiff might well argue, and the jury be authorized to find, that Turner, by the use of this language, was not referring merely to himself, but to Field & Co., or to them, and to himself as their agent. Turner knew of the conversation that W. H. Field had with the plaintiff, for he was present, and it might reasonably be inferred by the jury that, as he had not disavowed his agency, or notified plaintiff to the contrary, up to the time of the purchase, he was acting for them in accordance with the understanding at the April meeting. The plaintiff testified that cotton is very often shipped to the order of a bank cashier or some clerk in a merchant's office. The name on the bill of lading is disregarded—they look for the shipper of the cotton and the indorsement on the bill. This was an explanation of the form of the bill of lading, and a reason why the request to notify J. D. Turner of the shipment did not necessarily disprove his agency, or establish the fact that defendants were dealing with him as a principal in the transaction and as a purchaser of the cotton, and its consignee, on his own account. If by the conduct of W. H. Field, or the defendants the plaintiff was reasonably led to believe that Turner was acting as their broker, and by reason thereof he dealt with him as such, relying upon such conduct and believing in good faith that Turner was acting as broker and not for himself, it would be the same as if he was, in fact, the broker of defendants in selling the cotton. The jury may consider whether Turner was in fact defendants' broker, and in the bill of lading they requested that he be notified individually of the shipment, merely for their convenience or in accordance with the custom, or

whether they thereby intended to deal with him individually, and not as their broker, or whether they used his name, meaning that he should be their broker, without regard to the fact that he was not addressed as such, and knowing that he had been so represented to the plaintiff. These are merely suggestions as to the different views of the evidence, and must not be taken as an intimation upon the weight or sufficiency of the same to establish either side of the case.

It would serve no practical purpose to further consider the evidence as bearing upon the question of an agency in fact or in law. It is sufficient to say that, as the case is now presented to us, there is evidence fit to be submitted to the jury and to warrant a finding thereon in favor of the plaintiff, under proper instructions from the court as to the law.

There was error in granting the nonsuit. It will be set aside, and a new trial is ordered.

New trial.

MOTT v. ATLANTIC COAST LINE R. CO.
(Supreme Court of North Carolina. Nov. 5, 1913.)

1. CARRIERS (§ 381*)—PASSENGERS—ACTION FOR EJECTION—SUFFICIENCY OF EVIDENCE.

Evidence, in a railroad passenger's action for wrongful ejection, *held* to show that plaintiff was ejected at a place forbidden by statute, and after the conductor had accepted and retained his ticket.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1473-1476, 1479-1482; Dec. Dig. § 381.*]

2. CARRIERS (§ 363*)—PASSENGERS—WRONGFUL EJECTION—RIGHT OF ACTION.

A railroad passenger who is ejected at a place forbidden by statute, at a point $3\frac{1}{2}$ miles from a station, and where no one lived, on the ground of nonpayment of his fare, may recover damages as for wrongful ejection.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1445, 1446; Dec. Dig. § 363.*]

3. CARRIERS (§ 355*)—PASSENGERS—WRONGFUL EJECTION.

A railroad passenger may recover damages for wrongful ejection where he was ejected for not paying his fare after the conductor had accepted and retained his ticket.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1416-1422; Dec. Dig. § 355.*]

Appeal from Superior Court, Columbus County; Ferguson, Judge.

Action by W. T. Mott against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for the wrongful ejection of the plaintiff from the defendant's train.

According to the plaintiff's evidence, he bought a ticket from the defendant's agent at Wilmington, N. C., on the 20th of April, 1905, for his passage from Wilmington to

Farmers, N. C., on defendant's road. That he boarded the train at Wilmington on that date, and before he reached Farmers he went to sleep, and did not get off the train there because he was asleep. That he had on that day been discharged from the hospital, and took the train to go to his father's, who lived at Farmers. After the train passed Farmers, the conductor came to him about the time the train reached Hallsboro station, and said: "Your ticket read Farmers. Why didn't you get off there?" That he told the conductor he was asleep, and did not know when he reached Farmers. Conductor told plaintiff that he would have to pay his fare or get off the train. The plaintiff told the conductor, "He guessed he would have to carry him until he met the next train, and bring him back to Farmers." When the train reached Whiteville, plaintiff got off, and bought a ticket from Whiteville to Cerro Gordo; got back on train to go to Cerro Gordo, where he lived. After the plaintiff boarded the train, the conductor came through to take up tickets. Plaintiff gave conductor his ticket bought at Whiteville; conductor punched it, and put it in his pocket. Conductor came back, and said, "Now, if you don't pay your fare from Farmers to Whiteville, I will put you off the train." The plaintiff refused to pay fare from Farmers to Whiteville. Conductor then said he would keep ticket for a part of fare from Farmers to Whiteville. Conductor had train stopped, and put plaintiff off train about $3\frac{1}{2}$ miles from Whiteville, where there were no houses, and no people living, and no depot or station. Plaintiff asked conductor to let him go in the baggage car and get his bicycle, in order that he might not be forced to walk to the next station, which the conductor refused to do. Plaintiff had to walk from where he was put off the train to Chadbourn, a distance of $3\frac{1}{2}$ miles. The plaintiff came to Whiteville the next day, and went to the railroad agent, and asked him if he had record of the ticket he bought the day before. It is 14 miles from Whiteville to Cerro Gordo. Plaintiff was not drunk, but had taken a drink. Plaintiff was the only witness offered in his own behalf. At the close of the plaintiff's evidence the defendant moved, under section 539 of the Revisal of 1905, for judgment as in case of nonsuit. Motion overruled. Defendant excepted.

His honor charged the jury, among other things: "If the jury find from the greater weight of the evidence that the plaintiff, after purchasing this ticket at Whiteville, got back on the same train at Whiteville, and gave the conductor this ticket for his passage on from Whiteville to Cerro Gordo, and the conductor took the ticket, and then demanded of the plaintiff his fare from Farmers to Whiteville, and the conductor stopped the train and put plaintiff off because he refused to pay his fare from Farmers to Whiteville,

then the defendant wrongfully ejected the plaintiff from his train, and you should answer the first issue, 'Yes.'" Defendant excepted. There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Geo. B. Elliott, A. C. Chalmers, and Davis & Davis, all of Wilmington, and Schulken, Toon & Schulken, of Whiteville, for appellant. Jackson Greer and Lewis & Lyon, all of Whiteville, for appellee.

PER CURIAM. There is ample evidence to sustain the plaintiff's cause of action, and we find no error in the trial.

[1-3] The verdict establishes the fact that the plaintiff was ejected from the train at a place forbidden by statute, and after the conductor had accepted and retained his ticket, and upon either ground the judgment should be affirmed.

No error.

CLARK, C. J. (concurring). The complaint alleges that on April 20, 1905, the plaintiff bought a ticket at Whiteville for Cerro Gordo, and was put off the train halfway between Whiteville and Chadbourn at a place where there were no houses or people living near by, and which was not a usual stopping place; that he had a bicycle in the baggage coach, which he asked to get, that he might ride to the next station, $3\frac{1}{2}$ miles off; that this was refused, and he had to walk to said station, where he got a conveyance to take him home to Cerro Gordo. These allegations were not contradicted by any evidence. The defendant relied on the defense set up in the answer that the plaintiff had bought a ticket that day at Wilmington on the same train to Farmers, 14 miles from Wilmington; that he did not get off at Farmers, and the conductor permitted him to go on 32 miles further to Whiteville, where he got off, and purchased the ticket to Cerro Gordo; that after the train left Whiteville the conductor demanded the fare from Farmers to Whiteville, and, being refused, he put the plaintiff off, stopping the train to do so.

The plaintiff's evidence is that when he got to Farmers he was asleep; but he admits that he was drinking some, and left a quart of liquor on the train when he was put off. He says that the conductor carried him on to Whiteville, because he insisted he should be carried on to meet the next train going back to Farmers. He further testified that the conductor took up his ticket from Whiteville to Cerro Gordo, punched it, and put it in his pocket, and then, after going a few feet, returned and told him that he must pay the fare from Farmers to Whiteville or he would put him off; that he had no money to do this, and the conductor put him off. The conductor says that he did not take up the ticket, but that he demanded full pay from Farmers to Cerro Gordo, and put him

off because it was not paid. The conductor says that he first discovered that the plaintiff had overpassed his station at Hallsboro, which was seven miles west of Farmers, but that he carried him on to Whiteville, and told him to get off there. .

The court charged the jury that, if "the plaintiff got off the train and bought a ticket of defendant's agent at Whiteville for passage to Cerro Gordo, that this was a new contract, which entitled the plaintiff to travel on defendant's train to Cerro Gordo, and that, if the jury should find from the greater weight of evidence that the conductor took up this ticket, and then afterwards demanded of the plaintiff his fare from Farmers to Whiteville, and, on his failure to pay the same, the conductor stopped the train, and ejected the plaintiff, the jury should answer the first issue, 'Yes.'" This seems to be the only controverted fact, and the jury responded, "Yes."

The defendant requires payment of fare in advance. Whether the plaintiff passed the station at Farmers because he was asleep, as he says, or because he was drunk or shamming, as the defendant contends, when the conductor ascertained at Hallsboro, the next station, as he says he did, that the plaintiff was still on the train, it was his duty then and there to require him to leave, and this controversy would not have arisen. That he permitted the plaintiff to ride to Whiteville, 32 miles beyond Farmers, constituted a debt from plaintiff to the company, unless, as the plaintiff seems to contend, this was done because proper notice was not given at Farmers, and the conductor allowed him to come on to meet the train going back to Farmers.

The defendant relies upon *Pickens v. Railroad*, 104 N. C. 312, 10 S. E. 556. In that case the court held that, when a passenger refuses to pay his fare, and the conductor is forced to stop the train at a station where it would otherwise not have stopped regularly, thus causing delay, the conductor may refuse the tender of the fare, unless it is made before the passenger puts him to the trouble of stopping. The court then adds: "When the passenger gets off at a regular depot, and gets a ticket, this constitutes a new contract, and will entitle him to passage—certainly if he tenders the money due for a passage up to that point, and according to some authorities without such tender." The defendant quotes *Manning v. Railroad*, 95 Ala. 392, 11 South. 8, 16 L. R. A. 55, 36 Am. St. Rep. 225, where the court held that the conductor was not required to accept the ticket unless the passenger tendered the back fare. On the contrary, in *Railroad v. Bryan*, 90 Ill. 126, the court held: "If the company could debar appellee from traveling on that trip for such reason, it could do so on any subsequent trip." But we do not need to pass on this point in this case, for the jury find that the conductor accepted the ticket.

The train was not stopped at Whiteville to put the plaintiff off as in the *Pickens* Case. On the contrary, he got off when the train stopped at the regular station, and bought the ticket which entitled him to be carried to Cerro Gordo, and the jury find that the conductor accepted the ticket. He was rightfully on the train, and hence his ejection was wrongful. The ejection was also wrongful, if it had otherwise been rightful, because the plaintiff was put off (his bicycle, which was in the baggage car, being also refused him) at a place which was not a "usual stopping place, nor near any dwelling house." This is forbidden by Rev. 2629. These facts are alleged in the complaint, and the testimony of the plaintiff to that effect is not controverted.

The Constitution, art. 4, § 8, gives this court "general supervision and control over the proceedings of the inferior courts." We should not, therefore, pass over without notice the fact that it appears in this record that the occurrence, which is the foundation of this action, took place April 20, 1905, and, though the summons was issued August 9, 1905, this appeal comes up from a trial in April, 1913, a delay of eight years. Such delays bring reproach upon the administration of justice, costs accumulate, and the memory of witnesses becomes dim. We recently had an appeal from that section of the state which had been pending 15 years; but in that instance there had been four trials. So far as the record shows, this case has remained on docket without action and accumulating costs for eight years. Judges of the trial courts should not permit causes to remain on docket, unacted on, for an inexcusable length of time. They should require causes to be tried or dismissed, unless there is good cause which cannot exist for such an unreasonable length of time.

No error.

STATE v. SPEAR.

(Supreme Court of North Carolina. Nov. 5, 1913.)

1. INDICTMENT AND INFORMATION (§ 191*)—CONVICTION OF LESSER OFFENSES.

A person indicted for the capital offense of burglary may be convicted of an offense under Revisal 1906, § 3333, providing that any person breaking or entering a dwelling house of another otherwise than by a burglarious breaking, or breaking and entering a storehouse or other building where personal property shall be, or breaking and entering any uninhabited house, with intent to commit a felony or other infamous crime, shall be guilty of a felony.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 265, 604-621; Dec. Dig. § 191.*]

2. BURGLARY (§ 3*)—OFFENSES—INTENT.

Under Revisal 1906, § 3333, providing that, "if any person shall break or enter a dwelling house of another otherwise than by a burglarious breaking; or shall break and enter a storehouse * * * or other building where any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

* * * personal property shall be; or shall break and enter any uninhabited house, with intent to commit a felony," he shall be guilty of a felony, the criminal purpose specified is not confined to the last substantive clause of the statute, but attaches to all of the clauses thereof, in view of the comma following the words "uninhabited house."

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 24-27; Dec. Dig. § 3.*]

3. BURGLARY (§ 47*) — VERDICT — CONSTRUCTION AND OPERATION.

A verdict finding accused guilty of house-breaking with no intent to commit a felony amounted to a verdict of acquittal, and accused should therefore have been discharged.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 121; Dec. Dig. § 47.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Forsyth County; Lane, Judge.

Walter Spear was found guilty of house-breaking without intent to commit a felony, and from a judgment of conviction entered on the verdict, he appeals. Reversed.

This was indictment for capital offense of burglary, tried before his honor, H. P. Lane, judge, and a jury at July term, 1913, of the superior court of Forsyth county. There was evidence on the part of the state tending to support the charge as made. Evidence contra on part of defendant. The court, among other things, charged the jury that on the bill of indictment and testimony they could render either of three verdicts: (1) Guilty of burglary in the first degree; (2) guilty of breaking and entering the dwelling house of another otherwise than by burglarious breaking (Revisal, § 3333); (3) not guilty. The jury rendered the following verdict: "We, the jury, find the defendant guilty of housebreaking, with no intent to commit a felony. The jury especially asks the mercy of the court." On the verdict there was motion to discharge prisoner as on verdict of acquittal. Motion overruled, and defendant excepted. His honor being of opinion that the verdict as rendered amounted to a conviction of the second offense under section 3333, Revisal, sentenced the prisoner to 12 months on the public roads, and defendant excepted and appealed.

Watson, Buxton & Watson, of Winston-Salem, for appellant. The Attorney General and T. H. Calvert, Asst. Atty. Gen., for the State.

HOKE, J. (after stating the facts as above). [1, 2] Section 3333 of the Revisal is in the following words, etc.: "If any person shall break or enter a dwelling house of another otherwise than by a burglarious breaking; or shall break and enter a storehouse, shop, warehouse, banking house, counting house, or other building, where any merchandise, chattel, money, valuable security, or other personal property shall be; or shall break and enter any uninhabited house, with intent

to commit a felony or other infamous crime therein; every such person shall be guilty of a felony, and imprisoned in the state's prison or county jail not less than four months, nor more than ten years." So far as the form is concerned, it has been held that under an indictment charging the capital crime of burglary a conviction may be had of the offense constituted and described in this section of the Revisal, and the question presented by this appeal is on the proper significance of the verdict rendered by the jury. This same law is in the Code of 1883, § 996, except that in the clause in section 996, "Or shall break and enter any uninhabited house; with intent to commit a felony or other infamous crime therein"—there is a semicolon between the words "uninhabited house" and the words "with intent to commit a felony," instead of a comma, the divisional pause in the present law. Construing the law as it appeared in section 996 of the Code, the court has expressly held that the "intent to commit a felony or other infamous crime" was an essential ingredient of the offense (State v. Christmas, 101 N. C. 749, 8 S. E. 361; State v. McBryde, 97 N. C. 393, 1 S. E. 925), and we are of opinion that a like construction should prevail in reference to the present statute. If the Legislature had intended that the criminal purpose specified should be confined to the last substantive clause of the statute, to wit, the "breaking into an uninhabited house," there was no occasion for a pause of any kind between these words and the criminal intent which follows; as a matter of strict interpretation a comma as well as a semicolon would serve to prevent such a meaning, and to attach the intent to all of the former clauses of the section. And if there were doubt about this as a mere matter of punctuation, the character of the offense and serious nature of the punishment would impel the court to its present conclusion. This section of the Revisal is grouped with the crime of burglary and other kindred offenses in which the technical "breaking" may be effected by lifting a latch or the turning of a knob, the house being otherwise closed (Clark's Criminal Law [2d Ed.] p. 262), and it cannot be that the Legislature had any purpose to make it a felony where a wayfarer or a neighbor had so entered an unlocked shop or warehouse, seeking shelter from a storm or other hindrance.

Again the first portion of this section is in the disjunctive, "If any one shall break or enter the dwelling house of another," the design evidently being to afford greater protection to the dwelling, and to hold such an entry a crime in itself, detached from the felonious intent in the later clause of the law, would make it a criminal offense to enter the dwelling of another for the most innocent purpose, even to make a social call. It is clear, therefore, that the present statute should receive the same construction as the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

former; that the crime is only committed when the houses designated are entered or broken into "with intent to commit a felony or other infamous crime therein," and the verdict of the jury, having negatived this, an essential feature of the crime, amounts to a verdict of not guilty.

[3] It was not controverted on the argument for the state that this was the proper construction of the statute, but it was insisted that the verdict of the jury was irresponsible and insensate, and, this being true, that the prisoner should be held for further trial on the present bill.

In Clark's Criminal Procedure, p. 486, it is said: "A verdict is not bad for informality or clerical errors in the language of it, if it is such that it can be clearly seen what is intended. It is to have a reasonable intentment, and it is to receive a reasonable construction, and must not be avoided except from necessity."

As far back as 7 N. C. 571, *State v. Jno. Arrington*, this principle was applied to a case where a defendant was indicted for horse stealing, and "the jury returned a verdict that the prisoner was not guilty of the felony and horse stealing, but guilty of a trespass. The trial court desired them to reconsider their verdict and say guilty or not guilty, and no more, and the jury thereupon retired and returned a verdict of guilty generally," and the Supreme Court on appeal ordered that the first finding of the jury be recorded as their verdict and the prisoner discharged, and in that case it was held, further, "that whenever a prisoner in term or effect, is acquitted by the jury the verdict as returned by them should be recorded." This decision was referred to in terms of approval in *State v. Godwin*, 138 N. C. 586, 50 S. E. 277, and was again directly applied in the subsequent case of *State v. Whisenant*, 149 N. C. 515, 63 S. E. 91. In the present case, the jury having expressly negatived the existence of any criminal intent on the part of the prisoner, and this, as we have seen, being an essential constituent of the offense charged, it must be held as the correct deduction from these decisions that the verdict is one of acquittal, and the motion of the prisoner for his discharge should have been allowed.

We have been referred to *State v. Hooker*, 145 N. C. 582, 59 S. E. 866, as an authority directly opposed to our present position, but an examination of that case will disclose that this is not necessarily true. In *Hooker's Case*, the defendant had been acquitted on an indictment for larceny of certain goods, and he was then tried on a bill for breaking into a store with intent to steal the goods, and was convicted. On appeal the question chiefly presented was whether the defendant's plea of former acquittal should be allowed by reason of the first verdict. The plea was held bad on the ground that these were two entirely separate and distinct of-

fenses, and the acquittal of one was therefore no bar to the prosecution of the other. Having rested the decision on that ground, there was no cause to further construe the statute, and the portion of the opinion saying that the words of the present statute "with intent to commit a felony or other infamous crime therein" should only apply to a breaking into an uninhabited house may "well be considered as obiter dictum." As an authoritative construction of the statute the position is not approved.

Reversed.

CLARK, C. J. (dissenting). Revisal, § 3269, provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same kind, or of an attempt to commit the crime so charged or of an attempt to commit a less degree of the same kind."

Revisal, § 3333 under the subtitle "Burglary" provides: "If any person shall break or enter a dwelling house of another otherwise than by a burglarious breaking; or shall break and enter a storehouse, shop, warehouse, banking house, counting house, or other building, where any merchandise, chattel, money, valuable security, or other personal property shall be; or shall break and enter any uninhabitable house, with intent to commit a felony or other infamous crime therein; every such person shall be guilty of a felony." It will thus be seen that this section denounces three distinct classes of offenses, which classes are separated appropriately by a semicolon. Each of these offenses is a lesser degree of the offense of burglary being found, as stated in the subtitle appropriated to that offense. *Clark, Cr. Law*, 269.

The jury for their verdict found the defendant "guilty of housebreaking, with no intent to commit a felony." This brings the offense exactly under the second class of offenses marked out in section 3333, in which no intent to commit a felony is required. *State v. Hooker*, 145 N. C. 581, 59 S. E. 866. The verdict distinguishes this offense from the first class of offenses in Revisal, § 3333, by its not being termed a "dwelling house," and distinguishes it from the third class of offenses, which embrace only breaking into "an uninhabited house with intent to commit a felony." The verdict is therefore clearly a conviction of the offense of breaking into a house without such intent, which constitutes the second class of offenses, above set out.

Under section 3269 this being a less degree of the crime, the defendant was properly convicted upon the evidence, under the charge for burglary. *State v. Fleming*, 107 N. C. 909, 12 S. E. 131. So it has been held that under an indictment for murder the conviction can be of murder in the first degree, of murder in the second degree, of man-

slaughter, of an assault and battery, or even of a simple assault. *State v. Fleming*, supra. Indeed under an indictment for burglary the prisoner can be convicted of larceny. *State v. Gresham*, 2 N. C. 13; *State v. Allen*, 11 N. C. 356. These decisions were at common law, and before the passage of our present statute. Revisal, § 3269.

Indeed this very case has already been decided in *State v. Hooker*, 145 N. C. 581, 59 S. E. 866, where the court held that the offenses charged in the second class of section 3333, under which this verdict comes, if the words "with intent to commit larceny" were inserted, they were "surplusage" because "unnecessary to be proven," and any proof offered of such intent was merely "irrelevant and harmless." It follows, therefore, that the jury, finding "no intent to commit a felony," cannot vitiate the verdict when the verdict would be good on a charge for this offense even if the indictment had contained those words and insufficient proof of intent was offered. This for the very simple reason that the offense of "breaking and entering a house" is complete without any felonious intent. It follows, therefore, that a verdict of "guilty of housebreaking," adding "with no intent to commit a felony," is simply finding every element that the subsection charges to constitute the crime. This addition to the verdict is the merest surplusage, and neither the judge below nor jury are chargeable with a miscarriage of justice in turning loose a man found "guilty of housebreaking." As construed by the court, it is no offense in this state to unlawfully and willfully "break and enter the dwelling of another otherwise than by burglarious breaking," or to "break and enter any other house where there is valuable property," without showing further that there was an intent to commit a felony therein, which is not easy to show, and which the law does not require to be shown. The statute as written, Revisal, § 3333, requires such intent only when there is the otherwise comparatively harmless act of breaking and entering an uninhabited house.

POWELL v. STRICKLAND.

(Supreme Court of North Carolina. Nov. 5, 1913.)

1. WITNESSES (§ 58*)—COMPETENCY—EVIDENCE BY HUSBAND—ALIENATION OF AFFECTIONS.

Revisal 1905, § 1628, requires every person offered as a witness to be admitted to give evidence, though he has an interest in the matter or event of the trial. Section 1629 prohibits the exclusion of a witness on account of interest in the event of the action. Section 1630 provides that the parties themselves and persons for whom the suit is brought or defended shall be competent to give evidence, provided that this section shall not apply to any action instituted because of adultery, or in any action for criminal conversation. Section 1636 makes

a husband and wife of a party competent to testify, provided that husband or wife shall not be rendered competent to give evidence "for or against each other in any criminal action" or in any proceeding brought in consequence of adultery, or for divorce on account of adultery, or any action of criminal conversation. *Held* that the husband was competent to testify, in an action by him for alienation of affections, as to his wife's adultery with defendant, she not being a party; the policy of the statutes being to make the husband and wife incompetent when the evidence of either will, in a legal sense only, prejudice the other.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 159½-162, 164; Dec. Dig. § 58.*]

2. STATUTES (§ 225*)—CONSTRUCTION—RELATED STATUTES.

Statutes which relate to the same subject should be construed together.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

3. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL FUNCTIONS—CONSTRUCTION OF STATUTES.

The Supreme Court cannot make the law, but can only construe statutes as they are enacted.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

4. HUSBAND AND WIFE (§ 333*)—ALIENATION OF AFFECTIONS—PROOF.

Adultery need not be shown by direct proof, in an action for alienation of affections, but may be shown by circumstances from which a jury may reasonably infer it.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1124; Dec. Dig. § 333.*]

5. HUSBAND AND WIFE (§ 333*)—ALIENATION OF AFFECTIONS—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for the alienation of the affections of plaintiff's wife, *held* to sustain a finding of adultery committed by defendant and plaintiff's wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1124; Dec. Dig. § 333.*]

6. TRIAL (§ 123*)—ARGUMENT OF COUNSEL—COMMENT ON WITNESSES—FAILURE TO TESTIFY.

Where, in an action for alienation of affections, the defendant's conduct with plaintiff's wife tended to point to improper relations, defendant's failure to testify in explanation thereof was a proper subject of comment by counsel and consideration by the jury on the question of improper relations.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 301; Dec. Dig. § 123.*]

7. HUSBAND AND WIFE (§ 326*)—ALIENATING AFFECTIONS—DEFENSES.

The consent of plaintiff's wife to her own defilement by defendant is not a defense to an action by the husband for alienation of affections.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1120; Dec. Dig. § 326.*]

8. HUSBAND AND WIFE (§ 334*)—ALIENATING AFFECTIONS—DAMAGES.

In an action by a husband for alienation of his wife's affections, the jury should consider, in awarding compensatory damages therefor, plaintiff's dishonor, the alienation of his wife's affections, and destruction of his domestic comfort, the suspicion cast on the offspring, humiliation, loss of consortium, etc.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1125; Dec. Dig. § 334.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig.-Key-No. Series & Rep'r Index

9. HUSBAND AND WIFE (§ 334*)—ALIENATION OF AFFECTIONS—PUNITIVE DAMAGES.

The jury in their sound discretion may award punitive damages, in an action for alienation of affections, if defendant's conduct be willful and wanton.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1125; Dec. Dig. § 334.*]

10. HUSBAND AND WIFE (§ 334*)—ALIENATION OF AFFECTIONS—EVIDENCE—PUNITIVE DAMAGES.

Evidence, in an action for alienation of the affections of plaintiff's wife, *held* to sustain an award of punitive damages.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1125; Dec. Dig. § 334.*]

Appeal from Superior Court, Franklin County; Cline, Judge.

Action by N. P. Powell against A. T. Strickland. From a judgment for plaintiff, defendant appeals. Affirmed.

The action was to recover damages for criminal conversation with plaintiff's wife and the alienation of her affections.

W. H. Yarborough and Spruill & Holden, all of Louisburg, for appellant. Bickett, White & Malone and W. M. Person, all of Louisburg, for appellee.

WALKER, J. [1] This appeal, in one aspect of it, involves the competency of a husband to testify as a witness in his own behalf to the adultery of his wife with the defendant; she, of course, not being a party to the record. It is well known that, at common law, parties to and persons interested in the event of an action were not permitted to testify, nor could the husband or wife testify for or against each other, except in certain cases not necessary to be mentioned. But this has been changed radically by modern legislation, under the wise and skillful leadership of Pitt Taylor, Lord Denman, and Lord Brougham, the law reformers of the last century, and the results of their work (14 and 15 Vict. c. 99; 16 and 17 Vict. c. 83) have become a part of the statute law of this country in one form or another. It would be vain and unprofitable to attempt any discussion of the authorities in other jurisdictions in regard to the true meaning and extent of this sweeping change in the law of evidence as it existed at the common law, because the statutes are so variant in their terms and phraseology that each must be considered and weighed according to its own peculiar tenor. Close examination of the cases elsewhere has led us, therefore, to conclude that little aid in the construction of our law can be derived from them. We therefore turn to our statutes, and former decisions construing them, for a solution of the question raised by the objection of defendant to the testimony of his adversary. By Revisal, § 1628, "incompetency" or disqualification to testify by reason of interest or crime is removed, and every person who is offered as a witness

shall be "admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to witnesses to wills." Section 1629 provides that no person shall be excluded as a witness on account of interest in the event of the action. By section 1630 parties themselves, and persons in whose behalf the suit or proceeding is brought or defended, shall be competent and compellable to give evidence, according to the practice of the court, in behalf of either or any of the parties to said suit or proceeding, provided, that the section shall not be considered to apply to any action or other proceeding instituted in consequence of adultery, or to any action for criminal conversation. Section 1636 makes husband and wife of any party to an action or proceeding competent and compellable to testify on behalf of any party to such action or proceeding; but nothing therein contained shall render husband or wife competent or compellable to give evidence for or against each other in any criminal action or proceeding or in any action or proceeding brought in consequence of adultery, or for divorce on account of adultery, nor in any action or proceeding for or on account of criminal conversation. We have omitted so much of the sections as are irrelevant to the case.

It was early held, in *Sumner v. Candler*, 92 N. C. 634 (opinion by Justice Ashe), that by section 342 of the Code of Civil Procedure, section 589 of the Code (being sections 1628 and 1629 of the Revisal of 1905), that a party to an action has become competent to testify in the courts because of those sections, the disqualification by reason of interest in the suit or its event having been abolished, and this, too, without any aid from the other two sections, and the question is whether, by the succeeding sections, this capacity to testify has, in any way, been qualified. Section 1630 was intended to provide that parties to actions should be competent and compellable to testify "for and against each other," and the proviso was inserted to prevent husband and wife from testifying "for or against each other" in suits to which they are parties, and which are based upon charges of adultery, or where the party for or against whom the testimony is given has a legal interest in the cause or its event, as will hereafter appear.

[2] We rest our decision upon the broad and practical view hitherto taken by this court with reference to the true meaning of these statutes, so as to execute the manifest intention of the Legislature, and open the doors to a certain class of evidence heretofore excluded or barred out, and relax the rigorous rules of the common law, which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

often worked injustice, if not oppression, by excluding the truth in deference to a mere sentiment. These sections should be construed together, as they relate to the same subject—the competency of witnesses. The trend of our decisions has been to admit the husband and wife as witnesses, unless, in a legal sense, they testified “for or against each other” within the meaning of the provisions to the sections, and it has been expressly held that a husband does not testify for or against his wife if she is not a party to the record, and has no legal interest in the action or its event, that is, no interest that can, by the rules of law, be affected thereby. A sentimental interest is not sufficient for the exclusion of the testimony of one of the spouses; but it must be a legal interest, and it has been further held that, where one is accused of adultery with the wife, who is not a party to the record, the husband is a competent witness to prove the adultery, as neither the evidence nor the judgment can thereafter be used against her. *State v. Wiseman*, 130 N. C. 728, 41 S. E. 884 (opinion by Clark, J.); *State v. Guest*, 100 N. C. 410, 6 S. E. 253; *State v. Parrott*, 79 N. C. 615; *State v. McDowell*, 101 N. C. 734, 7 S. E. 785. It is true that in those cases neither the husband nor the wife was a party to the record; but why is it any less against public policy, or any other reason which condemned this kind of evidence at common law, to admit it when the spouses are not parties than when only one of them is, and the other is not, legally affected by the evidence? The one tends just as much to cause dissension and discord between them as the other, and the mere fact that one of them is a party to the record, and the other is not, does not lessen the danger of an unhappy breach. If they are not testifying “for or against each other,” there is no reason grounded in public policy, as declared now by the statute, why they should not be heard. Suppression of the truth and exclusion of the light would be far more impolitic and dangerous to society and the public than the admission of such testimony. The Legislature seems to have thought so, and hence the radical change from the antiquated rule of the common law. The law was seeking after the truth, and at the same time retaining the real and essential principle of public policy, so far as necessary for the good of society in preserving peace and harmony in the family and the sacred confidences of the marriage state. But it was not deemed wise for the accomplishment of this purpose to exclude either spouse when the other is not a party to the record, and therefore not legally affected by it, or when neither is such a party.

[3] Examining the cases we have cited a little more closely, we find that in *State v. Wiseman*, supra, the wife and her paramour were indicted for fornication and adultery; a nol. pros. was entered as to the wife, and the husband permitted to testify against the

remaining defendant, and reference is made to Code, § 588 (Revisal, § 1636), as qualifying the husband and wife to testify, provided neither is allowed to be a witness “for or against the other” in the cases enumerated in the final clause of that section. In *State v. Guest*, supra, the wife pleaded guilty, and was then permitted to testify against the other defendant as to her adultery with him. In *McDowell's Case*, supra, the defendant was charged with bastardy, and the court held that, while the wife could not prove nonaccess, or formerly, impotency (*Barringer v. Barringer*, 69 N. C. 179), “she could testify to the criminal intercourse with defendant of which the child was the offspring, and now (since the enabling statutes), as she is not testifying for or against” her husband, she is a competent witness under section 588 of Code (Revisal, § 1636) to testify in any “suit, action, or proceeding, except as stated in the said section.” In *Parrott's Case*, supra, two were indicted for an affray, or a mutual assault and battery, in separate bills of indictment, and it was held that the wife of one of them was a competent witness for or against the other on his trial, as “the husband was in no legal sense interested in the result”; Chief Justice Smith, for the court, stating that they knew of no rule of law which excluded the husband, the conviction of White not being, in legal effect, the conviction of Parrott—and the same was decided in *State v. Mooney*, 64 N. C. 54 (opinion by Justice Settle), and for the same reason. See, also, *State v. Phipps*, 76 N. C. 203, cited with approval in *State v. Guest*, supra, as establishing the same general rule. In the *Phipps Case*, the court says: “The policy of legislation leading to this result is a matter for the (exclusive) consideration of the Legislature. The court can only declare the law as it finds it.” It cannot legislate or make the law. The policy as thus fixed by the only competent body may be very unwise and unsalutary; but our only duty is to submit to it.

We see, then, very clearly what this policy is, viz.: To exclude husband and wife when the evidence of either will, in a legal sense, prejudice the other, and that is not the case here. Neither the testimony of plaintiff nor the judgment in this action can possibly be used against the wife in a prosecution for the adultery. We believe that this single reason for the exclusion of husband and wife, only where the testimony of one will legally affect the other injuriously, permeates the entire body of law on the competency of witnesses, so far as the matrimonial relation is involved. But it has been expressly held, in *Barringer v. Barringer*, 69 N. C. 179, that the conclusion is irresistible from the language of the statutes, that husbands and wives are incompetent to give evidence only where they testify “for or against each other” in the class of cases specified in the proviso to Code of Civil Procedure, § 341 (Revisal, §

1836), and that, construing that section so as to give full effect to the enacting clause and the proviso, it applies to suits where they alone are parties, as well as to those where a third party is concerned, as in our case, with the restriction imposed by the proviso. And, to the same effect, is *Rice v. Keith*, 63 N. C. 319. The wife was excluded there because the case was governed by the law which existed before 1868; the court saying: "It is proper to call attention to section 341 of the Code of Civil Procedure, which establishes by express enactment the construction which the defendant contends should be placed upon the act of 1868. And from this we deduce an argument in favor of the conclusion at which we have arrived. The Legislature, in the act of 1868, has used language that leaves no room for doubt, and has introduced a new principle into the law of evidence. But, under the law as it existed before the passage of this act, the evidence of Mrs. Keith was properly rejected." See *Bradsher v. Brooks*, 71 N. C. 322. We need not assign reasons for the rule of exclusion at the common law, whether it was upon the ground of interest alone, when the testimony is in favor of the spouse, or marital bias, or public policy when it is against, or whether it was because they were considered as two souls in a single body (*qua sunt duæ animæ in carne una*), as Sir Edward Coke says (Coke on Littleton, 6 b), for which he has been accused of striking the first false note; nor need we combat the theory that it should be rendered impossible for husband and wife to speculate upon the other's dishonor, relying upon their own testimony to make or support a case. The full, final, and conclusive answer to all of this argument is, "*Ita lex scripta est.*" In *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666, evidence of this same character was admitted in a case for criminal conversation, and the court said "It was competent because it tended to show the relations between the plaintiff's wife and the defendant." The objection to the evidence was a general one, and the court overruled it, though incidentally remarking that, while the question was leading, it was, in this aspect, a matter addressed to the judge's discretion, and not reviewable here, as there was no abuse in its exercise. The court took it for granted that the evidence was otherwise competent, for there was not even any discussion of the question as to its competency under the statute, which was clearly involved in the case, and presented by the objection. If the judges had thought there was any doubt about it, they would not have passed it without some discussion.

But *Broom v. Broom*, 130 N. C. 562, 41 S. E. 673, is very much in point, and even goes beyond the necessities of this case. There, in a divorce suit, the wife was allowed to contradict two witnesses for the plaintiff (her husband), who had testified to her adultery; the court holding that she was

not thereby testifying "for or against her husband." It was also held that the prohibition as to the testimony of husband or wife in such cases is not absolute, but restricted to such testimony of the one which is "for or against the other," and this is said by the court to be a wise provision. We cite that case only to show that the testimony must be "for or against" the other spouse. In *Grant v. Mitchell*, 156 N. C. 15, 71 S. E. 1087, Ann. Cas. 1912D, 1119, a criminal conversation case, the wife was excluded because she proposed to testify against her husband, and the court (opinion by Justice Allen) laid stress upon the fact that the test is whether the testimony of the one spouse would be "for or against" the other, as this is the language of the statute. So it was held, in *McCall v. Galloway*, 162 N. C. —, 78 S. E. 429, that the competency of the spouses depended upon whether they were offered to testify "for or against" each other; Justice Brown saying: "The statute (Revisal, § 1636) removes this disability in certain actions, but specifies those actions in which she cannot testify, and as to the one under consideration 'on account of criminal conversation,' says: 'Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other, in any action or proceeding on account of criminal conversation.'" It was therefore held that declarations of the wife introduced "as against the husband" were incompetent. Her husband was a party, and for that reason her declarations as to his conduct were, in the sense of the statute, incompetent, as he had a legal interest in the action and its event. We, therefore, hold that plaintiff's testimony was competent. His counsel contended that it was harmless; but we do not think so, though it is not necessary to decide this question, having ruled with him upon the other view of the matter. It may, however, be said that his testimony was material, as he was forging the first link in the chain of circumstances. *Perkins v. Perkins*, 88 N. C. 40, and especially *State v. Raby*, 121 N. C. 682, 28 S. E. 490.

[4-6] The defendant contends that there is not sufficient evidence of the alienation of the wife's affections or of the adultery with defendant; but the jury must decide as to its sufficiency to establish the essential facts. If it is meant that there was no evidence to support the allegations, we think that there was some. It is not necessary to show the adultery by direct proof; but circumstances are sufficient for that purpose, if therefrom the jury can reasonably infer the guilt of the parties. *State v. Ellason*, 91 N. C. 564; *State v. Rinehart*, 106 N. C. 790, 11 S. E. 512; *State v. Chancy*, 110 N. C. 507, 14 S. E. 780; *State v. Poteet*, 30 N. C. 23; *State v. Waller and Hoifer*, 80 N. C. 401; *State v. Dukes*, 119 N. C. 782, 25 S. E. 786; *Burroughs v. Burroughs*, 160 N. C. 515, 76 S. E. 478. In this case, it appears by the evidence,

that defendant, a married man with a bad character, had been seen at the home of the woman, in the absence of her husband, with his hand familiarly on her person; that he went there several times, in the absence of her husband, and remained there for some hours during his visit; that the woman had gone to his store, after the hands had quit their work for the day, to see him, and left the store with him, on one occasion going out the back door; that the woman had declared that she no longer loved her husband, abandoned him and her children, and refused to live with him, and there were other facts of more or less weight tending to show their close intimacy and her infatuation. The jury have the right to conclude that the conduct of this married man and this married woman, under the circumstances, was not only very suspicious, but had all the earmarks of a guilty intercourse, when taken with the fact that the defendant refused to go upon the stand in his own behalf and explain them, for there was something requiring explanation. His failure to do so was the subject of fair comment (*Goodman v. Sapp*, 102 N. C. 477, 9 S. E. 483), subject to the judge's control, and this fact could be considered just as in any case where there is a failure to produce a witness shown to be cognizant of the facts. The mere failure to testify, standing alone and without reference to the circumstances, counts for nothing against a party, and the jury should presume nothing against him; but, when he is called upon to explain, the case is different. *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029, where the party's failure to testify was regarded as a "pregnant circumstance" against him. See, also, notes to above cases in the *Anno*. Edition.

[7-10] The consent of the wife to her own defilement is no defense to the action (21 Cyc. 1628; *Yundt v. Hartunft*, 41 Ill. 9; *Moore v. Hammons*, 119 Ind. 510, 21 N. E. 1111; *Sieber v. Pettit*, 200 Pa. 58, 49 Atl. 763), since the wrong relates to the injury which the husband sustains by the dishonor of his marriage bed, the alienation of his wife's affections, the destruction of his domestic comfort, the suspicion cast upon the legitimacy of her offspring, the loss of consortium, or the right to conjugal fellowship of his wife, to her company, co-operation, and aid in every conjugal relation, the invasion and deprivation of his exclusive marital rights and privileges, his mental suffering, injured feelings, humiliation, shame, and mortification, caused by the loss of her affections and the disgrace which the tortious acts of defendant have brought or heaped upon him, and which are proximately caused by said wrong (*Hale on Damages*, p. 99, and note; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; 21 Cyc. 1628, 1629), and for these results the plaintiff is entitled to

recover compensatory damages, as the authorities cited will show. He may also have added by the jury, in their sound discretion, a reasonable sum as punitive, vindictive, or exemplary damages, or smart money, for the willful and wanton conduct of defendant towards him, and these damages though not susceptible of proof at a money standard, may be fixed by the jury in view of all the facts and circumstances. Authorities *supra*, and *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Mathels v. Mazet*, 164 Pa. 590, 30 Atl. 434; *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607. There can scarcely remain a doubt as to the right of the plaintiff to have his compensatory damages, as to the right of the jury, in their discretion, to award punitive damages, under the aggravated circumstances disclosed by the evidence in this case.

The rulings and charge of the court were therefore correct, and no error in the trial has been discovered by us.

No error.

HERRING v. WALLACE LUMBER CO. et al.
(Supreme Court of North Carolina. Nov. 5, 1913.)

1. COVENANTS (§ 7*)—EXPRESS COVENANTS—ACCEPTANCE OF DEED CONTAINING COVENANTS BY GRANTEE.

The grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 6; Dec. Dig. § 7.*]

2. LOGS AND LOGGING (§ 3*)—COVENANT BY GRANTEE—PERSONS BOUND—ASSIGNEES.

Where a deed conveying standing timber contained a stipulation that the grantee would build a railroad over the grantor's lands, or, in case of failure to do so, pay a specified penalty, an assignee of the grantee's rights under the contract, with full notice and knowledge of its terms, was bound by the covenants therein, since, having received the benefits, it took them subject to the burdens incident thereto.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

3. CORPORATIONS (§ 487*)—ULTRA VIRES CONTRACTS—RELIEF.

Where standing timber was conveyed to a corporation at a reduced price in consideration of its covenant to build a railroad, which it repudiated on the ground that it was ultra vires, the grantor could recover the difference between the contract price and the actual value of the timber.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1898-1898; Dec. Dig. § 487.*]

4. JUDGMENT (§ 252*)—CONFORMITY TO PRAYER FOR RELIEF.

Where a corporation to which standing timber was conveyed at a reduced price in consideration of its agreement to build a railroad repudiated the agreement on the ground that it was ultra vires, the difference between the contract price and the actual value of the timber could be recovered, in an action where all the issuable and relevant facts appeared by the allegations and proof, though the prayer

for relief was for judgment for the stipulated penalty for failure to build the railroad, since the prayer for relief was not of the substance, and relief might be awarded according to the facts established.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

Appeal from Superior Court, Sampson County; Allen, Judge.

Action by A. R. Herring against the Wallace Lumber Company and the Cumberland Lumber Company. From a judgment for plaintiff, the Cumberland Company appeals. Affirmed.

The action was instituted to recover a stipulated penalty for failure to build a standard gauge railroad over lands of plaintiff and others from Wallace, N. C., to Delway, N. C.

On a former trial, and, again, on the present trial, there was allegation, with proof, to the effect that on July 8, 1908, plaintiff and other landowners in his neighborhood had bargained the lumber growing on their land to the defendant, the Wallace Lumber Company, and that the said company, in addition to the specified contract prices, had agreed to build over the lands of the grantors a standard gauge railroad to Delway, N. C., and had stipulated, further, that the road should be completed and ready for transportation by March, 1908; that the timber should be hauled out only on said railroad, and, on default in building said railroad, the company should forfeit and pay a sum equal to 10 per cent. of the value of the timber for the first year and 2½ per cent. for the second year, etc.; that subsequently the plaintiff, A. R. Herring, and wife executed their formal deed, conveying the timber to the Wallace Company, with privilege of removing the same within ten years, etc., with the right and privilege of ingress and egress, etc., and of constructing all roads and railroads and tramroads, etc., necessary and required for the proper cutting and removal of the timber, and, with the further intent to express the agreement between the parties, the deed in question contained the following provision: "That the said party of the second part shall construct and build a standard gauge railroad from Wallace, N. C., or a point thereabout, to Delway, N. C., the same to be completed and ready for use and transportation on or before March 15, 1908, and that the trees sold in this deed are not to be removed from the land except by said railroad. In case of failure to construct said railroad within the time specified above, then and in that case the said parties of the second part shall forfeit and pay to the said parties of the first part a sum equal to 10 per cent. of the purchase price of said trees, and for each year thereafter 2½ per cent. additional for five years, or until the ten years expire." It was further proved that the timber had been

sold to the company at a reduced price and below its actual value by reason of this provision as to constructing the railroad, and there was evidence tending to show the difference in amount. It further appeared that soon after the execution of this deed the Wallace Company conveyed and assigned to its codefendant, the Cumberland Lumber Company, the timber in question, together with "all the rights, title, and interest to all the standing timber and timber rights, together with all rights of way owned or controlled by the said party of the first part within the counties of Duplin, Sampson, and Pender, and all other rights, privileges, and easements conveyed and contained in the deeds hereinafter set forth, made, and executed to the said party of the first part, and a full description of said rights, easements, rights of way, timber, and timber rights, reference is hereby made to said deeds in the register's office in the said counties of Sampson, Duplin, and Pender"; the deed of plaintiff to the Wallace Company being one of those referred to in the latter instrument.

In their answers, filed separately, both companies deny any and all liability for the stipulated penalty, claiming that the building of a standard gauge railroad is not with the powers conferred by their charters, and also by reason of the inhibitive provisions of section 2598 of the Revisal.

At a former trial of the cause, the superior court judge having intimated an opinion against the right of plaintiff to make recovery, the plaintiff submitted to a nonsuit, and appealed. On such appeal, the ruling of the lower court was reversed, and it was held that, although the stipulation as to building a standard gauge railroad might be ultra vires, and this the court did not decide, when it was made to appear that the purchaser had by reason of such stipulation obtained the timber at a reduced price, if he took advantage of such a position, and the stipulation was avoided on that account, the vendor should be allowed to recover for the actual value of the timber sold; the proper measure of damages being the difference between the price paid and such actual value. See opinion of Associate Justice Walker, for the court, 159 N. C. 382,† to which reference is also made for a very full and clear statement of the facts relevant to the questions then presented. This opinion having been certified down, and it having been made to appear that the Wallace Company was no longer existent, having been dissolved in accordance with the provisions of law, the questions at issue recurred on the liability of the Cumberland Company, and in addition the facts admitted of record, the issues were submitted, and verdict rendered thereon as follows:

"(1) What, if any, is the difference between

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† 74 S. E. 1011, 42 L. R. A. (N. S.) 64.

the actual value of the timber conveyed by the plaintiff and the price paid as set out in the deed? Answer: \$900.

"(2) Did the Cumberland Lumber Company purchase from the Wallace Manufacturing Company the timber of the plaintiff, with notice of the railroad clause and forfeiture clause set out in the original contract and deed with the Wallace Manufacturing Company? Answer: Yes.

"(3) What amount, if any, are the defendants indebted to the plaintiff? Answer: \$900, with interest.

"(4) Is the plaintiff's cause of action set forth in his amended complaint barred by the statute of limitations? Answer: No."

There was judgment on the verdict, and the defendant, the Cumberland Lumber Company, excepted and appealed, assigning for error, chiefly, that, on the facts in evidence, the said company could not be in any way held for failure to construct the railroad.

H. L. Stevens, of Warsaw, for appellant. Geo. E. Butler, of Clinton, and R. L. Her-ring, of Delway, for appellee.

HOKE, J. (after stating the facts as above). [1] It is very generally held here and elsewhere that the "grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed." *Maynard v. Moore*, 76 N. C. 158, approved in *Long v. Swindell*, 77 N. C. 181; *Fort v. Allen*, 110 N. C. 191, 14 S. E. 635; *Bank v. Loughran*, 122 N. C. 673, 30 S. E. 17; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Easter v. Railway*, 14 Ohio St. 48; *Ga. So. Ry. v. Reeves*, 64 Ga. 492; *Spencer's Case*, 1 Smith's Lead. Cases (9th Amer. Ed.) pp. 222, 223.

[2] This deed, therefore, from plaintiff and wife to the Wallace Lumber Company, in section VII, contains affirmative stipulation that the grantee shall construct and build a standard gauge railroad to be completed, etc.; that the trees sold in this deed are not to be removed from the land except by said railroad, and, in case of failure, a pecuniary penalty of specified amount is collectible by the grantor, the plaintiff, and the defendant, the Cumberland Lumber Company, having taken an assignment of the entire contract, to wit, "All the rights, title, and interest to all the standing timber and timber, together with all rights of way, etc., and all other rights, privileges, and easements conveyed and contained in said deed," and, being in the present ownership and enjoyment of these rights, etc., must come under the obligations of the covenant, and be held responsible for the liabilities legally and necessarily incident to it. In *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787, reported also on a former appeal, 64 N. C. 1, defendant, the grantee of lands draining into a canal,

was sued for his pro rata of necessary repairs thereto on a covenant made by defendant's grantor. After holding defendant liable by reason of the covenant being one running with the land, the court, on page 641 of the second appeal, proceeded as follows: "Independently of this, however, there are two arguments which might be out of place in a mere court of law, but which a court of equity is entitled to notice, that must be considered conclusive of the question. (1) The consideration for the covenant was the grant of an easement which became appurtenant to the land, and passed with it to the defendant on his purchase. This easement he has accepted and enjoyed, and it is his only title to drain the land into the canal. The principle is generally conceded, and it is certainly equitable, that, when the benefit and burden of a contract are inseparably connected, both must go together, and liability to the burden is a necessary incident to the right to the benefit. 'Qui sentit commodum sentire debet et onus.' Notes to *Spencer's Case*, 1 Smith L. C. 143; *Savage v. Mason*, 3 Cush. (Mass.) 500; *Coleman v. Coleman*, 19 Pa. 100, 57 Am. Dec. 641." The principle is eminently sound, and has been approved with us in different cases and in other courts of recognized authority. *Younce v. Lumber Co.*, 148 N. C. 34, 61 S. E. 624; *Railroad v. Railroad*, 147 N. C. 268-385, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363; *Railway v. Bank*, 42 Neb. 469, 60 N. W. 886; *Smith et al. v. Rogers*, 14 Ind. 224.

[3] The present defendant, then, having taken over the contract, with full notice and knowledge of the terms, and being bound by its covenants to build the railroad, as far as this could be effected by agreement between the parties, has elected to repudiate the obligation, and, it having been fully established that this agreement to build the road over the land was allowed substantial effect in reducing the selling price of the timber, under the general equitable principle of *indebitatus assumpsit*, as stated in our former decision, the defendant should make good the loss which the plaintiff has suffered, to be properly admeasured by the difference between the contract price and the actual values. The rights of the parties have been properly adjusted under these principles, and we find no reason for disturbing the results of the trial. It has been repeatedly held in this state that these contracts, conveying standing timber, are contracts concerning realty, and must be so considered and dealt with in determining the rights of the parties, and, this being true, several of the authorities heretofore cited are to the effect that the covenant in question here is one running with the land (*Norfleet v. Cromwell*, supra; *Ga. Ry. v. Reeves*, supra; *Burbank v. Pillsbury*, supra), and as such binding on the present owner to the extent that the same is lawful whether with or without no-

tice. See, generally, on this subject the well-considered case of *Wiggins v. Pender*, 132 N. C. 628, 44 S. E. 362, 61 L. R. A. 772. But, it having been clearly established that the Cumberland Company has taken an assignment of the entire contract, with full notice and knowledge of its terms, we rest our decision on the principle that this company, having accepted the benefits of the contract, must also come under its burdens and the legal liabilities incident to them.

[4] We are not unmindful of the fact that the suit was instituted to collect the penalty, and that this is the specific prayer for relief; but, all of the issuable and relevant facts having been made to appear both by allegation and proof, the relief may be awarded according to the facts established, and the prayer for relief is not of the substance. There is no error, and the judgment in plaintiff's favor must be affirmed.

Affirmed.

STATE v. FOGLEMAN.

(Supreme Court of North Carolina. Nov. 5, 1913.)

1. WITNESSES (§ 262*)—RECALLING WITNESSES—DISCRETION.

Permitting or refusing the recalling of witnesses for further examination on matters already gone into rests in the discretion of the trial court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 797, 899, 904, 1165; Dec. Dig. § 262.*]

2. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—WARNING JURY AGAINST SYMPATHY.

Charging that, while the prisoner's parents had a right to come in and manifest an interest in his defense, the jury in making up their verdict have no right to consider them, when considered with the statement just preceding that deceased's wife and defendant's parents had been before the jury, and appeals had been made to take into consideration, in making up the verdict, their feelings and the effect it would have on them, and that deceased's wife had a right to come in and manifest an interest in the prosecution, and with the statement just following, "You are sworn to decide this case according to the evidence, and not according to sympathy or feeling for anybody," is not a reference to the testimony of the parents but a proper warning of the jury against being influenced by sympathy for either side.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

3. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—STATEMENT OF DEFENDANT'S CONTENTIONS.

Complaint may not be made of the trial judge having stated one of the contentions of defendant's counsel; it not appearing that it was an incorrect statement or that it prejudiced defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

4. CRIMINAL LAW (§ 1038*)—APPEAL—OBJECTIONS FOR REVIEW—INSTRUCTIONS.

That complaint may be made on appeal of the trial judge having incorrectly stated a con-

tention of defendant's counsel, counsel must at the time have called it to the court's attention.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

5. HOMICIDE (§ 178*)—EVIDENCE—INCRIMINATING OTHERS.

A charge that is not allowable when one is charged with crime to show by circumstances or insinuations that some one else killed deceased is proper.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 307-309; Dec. Dig. § 178.*]

6. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—BIAS OF WITNESSES.

The charge that it is the duty of the jury in considering the testimony of defendant's parents to consider their relationship and partiality to him, and the effect a conviction would have on them, and then ascertain as best they can what influence that would have on the truthfulness of their testimony, and then give to the testimony of each that weight and effect to which under all the circumstances the jury think he is entitled, is proper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.*]

7. CRIMINAL LAW (§ 786*)—INSTRUCTIONS—INTEREST OF DEFENDANT.

A charge which, after merely giving the history of legislation on the right of a defendant to testify in his own behalf, proceeds: "But * * * the law imposes on the jurors the duty of carefully scrutinizing his testimony and, after considering it, to determine as best they can what influence his interest in the result of the prosecution will have on his testimony, and then give to his testimony that weight and effect which under all the circumstances you * * * think it is entitled to. If you think he told the truth, it is your duty to give to his testimony the same weight and effect you would to the testimony of any disinterested witness"—is correct.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. § 786.*]

Appeal from Superior Court, Guilford County; Peebles, Judge.

John Fogleman was convicted, and appeals. Affirmed.

John A. Barringer and W. P. Bynum, both of Greensboro, for appellant. The Attorney General, for the State.

CLARK, C. J. The defendant was convicted of murder in the second degree. The homicide occurred in Greensboro on the night of April 9, 1913. The deceased and the prisoner had been drinking and just before the homicide were arguing and tussling. The deceased was crossing the street near an electric light, the prisoner following closely behind, when, as several testified, the latter, taking a pistol from his right hind pocket, fired it at the deceased, who walked on a few steps and fell. This the prisoner denied. The wound was on the left side of the head near the back. The prisoner was engaged in business in the city, and the officers, being unable to find him the next morning, went out to his father's house about 6 miles from town and found him in the woods about 300 or 400 yards from the house. He had a

bedquilt and overcoat with him and was getting up from the quilt. This was between 11 and 12 o'clock. The prisoner testified that he was near the place of the homicide at the time of the shooting and heard the shot but denied that he fired it. He admitted that he had been indicted several times for retailing; that the shooting took place about 10 days after the last trial, and a number of such cases were still pending against him. There was evidence tending to show that the deceased was supposed to be a detective.

[1] The first exception is that, after a witness had been examined by the state and cross-examined and then again examined by the state and stood aside, the counsel for the prisoner asked permission to examine the witness on matters which had already been gone into by counsel on both sides, and the court "declined to allow the question as a matter of discretion." This was in the discretion of the court. *State v. Groves*, 119 N. C. 822, 25 S. E. 819; *State v. Jimmerson*, 118 N. C. 1173, 24 N. E. 494; *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357; *Olive v. Olive*, 95 N. C. 486; *Pain v. Pain*, 80 N. C. 322. In the latest case (*In re Abee*, 146 N. C. 273, 59 S. E. 700) the court said that the recalling of witnesses for further examination is a matter resting in the discretion of the trial judge and is not subject to review.

The prisoner excepted to the following charge: "The prisoner's mother and father had a perfect right to come in the courthouse and manifest an interest in his defense. But you have no right in making up your verdict to take them into consideration at all." This, however, must be read in connection with the context.

[2] The court just before this had said: "The wife of the deceased has been before you as an exhibit, and the mother and father of the prisoner have been before you all they could, and appeals have been made to you to take into consideration their feelings in making out your verdict, and the effect it would have upon them. Mrs. Tucker (the wife of the deceased) had a perfect right to come into the courthouse and manifest an interest in this prosecution." And, just after the paragraph above excepted to, the court said: "You are sworn to decide this case according to the evidence and not according to sympathy or feeling for anybody at all." The court was not referring to the testimony which had been given by the father and mother of the prisoner but was properly warning the jury against being influenced in their verdict by sympathy for either side. As Chief Justice Merrimon said: The "judge is not a mere moderator but he is an integral and essential part of the court and should see that justice is impartially administered."

[3,4] Exception 3 is because the judge stated one of the contentions of the prisoner's counsel. It does not appear from the case on appeal that this was an incorrect

statement or that it prejudiced the prisoner. It has been held that, if the court does not correctly state such contention, it is the duty of counsel at the time to call the matter to the attention of the court or it will not be considered on appeal. *Jeffress v. Railroad*, 158 N. C. 215, 73 S. E. 1013; *State v. Cox*, 153 N. C. 638, 69 S. E. 419.

[5] Exception 4 is to the following charge: "It is not allowable, when one man is charged with a crime, to show by circumstances or insinuations that some one else killed deceased." The charge was correct. It is not a question of some one else killing him but whether the prisoner killed the deceased or not.

In *State v. Lambert*, 93 N. C. 623, it was held that evidence cannot be admitted to show that a third party had malice to the deceased, a motive to take his life, opportunity to do so, and had threatened to do so. In that case *State v. Davis*, 77 N. C. 483, to the same effect is quoted.

[6] The prisoner further excepts because the court charged the jury: "When you come to consider the testimony of his father and mother, it is your duty to consider their relationship to him, their partiality to him, and the effect that it would have on them to have him convicted, and then ascertain as best you can what influence that would have upon the truthfulness of their testimony, and then give to the testimony of each one that weight and effect which under all the circumstances you think he is entitled." We find no error in this instruction. It calls fairly to the attention of the jury the attendant circumstances which might bias their testimony and left the jury to judge what weight and effect they should give it.

[7] The last exception is that the court charged the jury: "When you come to consider the testimony of the prisoner, you must remember that prior to 1881 the law did not regard the testimony of a man charged with a crime as fit to go before the jury, but they found that there were some very hard cases, and in order to obviate any trouble of that sort in 1881 the Legislature very properly passed a law allowing anybody charged with a crime, even though a conviction would forfeit his life, to go upon the witness stand and testify in his own behalf." This was merely the history of the legislation on this subject, and the court added immediately: "But at the same time the law imposes upon the jurors the duty of carefully scrutinizing his testimony and, after considering it, to determine as best they can what influence his interest in the result of the prosecution will have upon his testimony, and then give to his testimony that weight and effect which under all the circumstances you and your conscience think it is entitled to. If you think he told the truth, it is your duty to give to his testimony the same weight and effect you would to the testimony of any disinterested witness." This instruction is correct. *State*

v. Byers, 100 N. C. 512, 6 S. E. 420, and cases there cited, and citations to that case in *Anno. Ed.*

No error.

WALKER, J. (concurring in the result). I think the opinion of the court in this case states the correct rule with respect to the credit a jury should give to a witness likely to be biased by his interest in the cause or his relation to it or to the parties when it says: "The prisoner further excepts because the court charged the jury: 'When you come to consider the testimony of his father and mother, it is your duty to consider their relationship to him, their partiality to him, and the effect that it would have on them to have him convicted, and then ascertain as best you can what influence that would have upon the truthfulness of their testimony, and then give to the testimony of each one that weight and effect which under all the circumstances you think he is entitled.' We find no error in this instruction. It calls fairly to the attention of the jury the attendant circumstances which might bias their testimony and left the jury to judge what weight and effect they should give it." This, as I understand the law, and have always understood it, is substantially the correct rule. It provides against undue influence upon the jury by bias and at the same time gives to the testimony of the interested witness its proper weight, if not thus influenced, and also subjects it to further examination and scrutiny by the jury, as regards any other circumstance, such as character, demeanor, opportunity for knowledge, and so forth, which may be calculated to strengthen or weaken it, so that finally the jury, upon full consideration of them all, may intelligently consider the testimony and extract the truth from it. I also concur in this statement, when referring to the defendant's own testimony: "The law imposes upon the jurors the duty of carefully scrutinizing his testimony and, after considering it, to determine as best they can what influence his interest in the result of the prosecution will have upon his testimony, and then give to his testimony that weight and effect which under all the circumstances you and your conscience think it is entitled to." I do not assent to the qualification of it in these words: "If you think he told the truth, it is your duty to give to his testimony the same weight and effect you would to the testimony of any disinterested witness." If the jury find that a witness has told the truth, they should, of course, decide according to his testimony, without the necessity of any comparison with others. The truth is what they are required to find. If it is meant that, if they find that the witness was not influenced by his natural bias, they should give his testimony the same weight and effect as the testimony of the other witnesses who are dis-

interested and impartial, and that is what I suppose is meant, it is clearly erroneous, because, his bias removed, the interested witness may still not be entitled to the same weight as the others, as they, by their greater intelligence, knowledge of the facts, demeanor in the witness box, and so forth, may have entitled themselves to the greater confidence of the jury and their testimony to greater weight.

We had better follow the long line of precedents established by this court throughout many years and adopt the first rule stated in the opinion without the added qualification. *State v. Nash*, 30 N. C. 35; *State v. Nat*, 51 N. C. 114; *Flynt v. Bodenhamer*, 80 N. C. 205; *State v. Byers*, 100 N. C. 512, 6 S. E. 420; *Hill v. Sprinkle*, 76 N. C. 353; *State v. Vann* (at last term) 77 S. E. 295; *State v. Graham*, 133 N. C. 652, 45 S. E. 514; *Hernon v. Railway*, 162 N. C. —, 78 S. E. 287; and numerous other cases decided by us to the same effect.

The qualification of the rule, though, as made by the court below was in favor of the defendant, and he therefore cannot complain.

BROWN, J., concurs in this opinion.

BARNES v. NORTH CAROLINA PUBLIC SERVICE CO.

(Supreme Court of North Carolina. Nov. 5, 1913.)

STREET RAILROADS (§ 87*)—DRIVING ANIMALS NEAR TRACK—LIABILITY OF COMPANY.

One who drives a horse close to a street car cannot recover from the car company for injuries occasioned by the fright of the horse at the usual and customary operation of the car; this being particularly true where the driver, though able to turn down another street, fails to do so.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 181, 182; Dec. Dig. § 87.*]

Appeal from Superior Court, Guilford County; Shaw, Judge.

Action by W. W. Barnes against the North Carolina Public Service Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

John A. Barringer, of Greensboro, for appellant. Taylor & Scales, of Greensboro, for appellee.

CLARK, C. J. On May 31, 1912, the plaintiff in a buggy was driving a horse on Church street in Greensboro. Riding with him was a boy, leading a young, unbroken colt in the rear of the buggy by a halter. The street car of the defendant was on its regular run on said street. When the car had reached a point about 75 yards south of the intersection of North Davie street with said Church street, the motorman on the car and the plaintiff saw each other; they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 79 S.E.—56

being then about 150 yards apart. The plaintiff drove on, he says, about 75 yards further towards the car; the horse and colt showing signs of fright at the approaching car, and becoming more frightened as it drew nearer. The motorman did not stop the car, or slacken speed, and, when it came abreast of the buggy, the colt jumped upon one of the rear wheels of the buggy, and upset it, throwing the plaintiff to the ground, whereby he was injured. There was no collision of any kind. There was nothing unusual about the car, which was running at the usual rate of speed, and making no noises except that necessarily incident to the operation of street cars.

[1] The plaintiff testified that after the horses became frightened he continued to drive towards the car, and even started to drive across the track directly in front of it. He further testified that the colt was unbroken and skittish, and that he would have known it would be frightened by the car if he had thought about it; that there were cross streets near where the accident happened which he could have turned into after his team became frightened, but did not do so because he thought he had as much right on Church street as defendant's car.

Upon this evidence his honor properly allowed the motion to nonsuit. It appears from the plaintiff's own evidence that he was not injured by reason of any negligence on the part of the defendant's motorman, but by reason of his horses becoming frightened by a street car operated in the usual method. It is true that he had as much right on the street as the car; but the car had as much right as he did. It was serving the public in the usual and ordinary manner and without any unnecessary noise. The plaintiff should not have driven further in the direction of the car after he saw that his team was frightened, when he could have turned out in the bystreet. The injury was caused by his own want of care, and not by any want of care on the part of the defendant.

In *Doster v. Street Railway*, 117 N. C. 661, 23 S. E. 450, 34 L. R. A. 481, the court said: "Where a horse is being driven or is running uncontrolled along the highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed," in the absence of a collision. The court further said: "The plaintiff voluntarily exposed himself, his buggy, and his mule to the risk of any accident which might be caused by the animal taking fright at the usual noise incident to running a street car by electricity; there being no testimony tending to show that the motorman wantonly or maliciously made unnecessary noise for the purpose of scaring the animal."

There is no suggestion in the complaint,

or the testimony, that the motorman in this case wantonly or maliciously ran the car to where the plaintiff was. In the *Doster Case* the plaintiff waved the motorman to stop the car, and called to him to do so, and finally got out of his buggy, and held the bridle of his horse. In the present case the plaintiff made no motion of any kind, nor gave any signal for the car to stop, but drove on towards the car.

The rule laid down in *Doster v. Street Railway*, *supra*, that a street railway company is not liable for an injury resulting from horses being frightened by the noises or appearance of the car when operated in the usual manner has been cited and approved. *Everett v. Railroad*, 121 N. C. 520, 27 S. E. 991; *Dunn v. Railroad*, 124 N. C. 257, 260, 32 S. E. 711; *Miller v. Railroad*, 128 N. C. 37, 38 S. E. 29. "Railroad companies running their trains in a lawful and usual manner are not responsible for damages occurring to travelers along the road in consequence of their team taking fright at the noises ordinarily made by the operation of such trains." 2 *Thompson, Neg. par.* 1908; 2 *Shearman & Redfield, Neg.* (6th Ed.) § 485; *Morgan v. Railroad*, 98 N. C. 247, 3 S. E. 506; 36 *Cyc.* 1487, 1488, 1490; *Clark on Street R. R.* (2d Ed.) 114. The reason of the rule is thus stated in *Doster v. Street Railway*, 117 N. C. 663, 23 S. E. 450, 34 L. R. A. 481: "People who pay their money in the reasonable expectation of being carried expeditiously are not to be delayed by every person who ventures to test the nerve of a horse or a mule by driving it along the same street on which a company runs its street cars by electricity. Where persons subject themselves to such risks, and no collision with the moving car ensues, injuries caused by the conduct of frightened animals are deemed in law to be due directly to their own want of care."

A condition might occur in which a street car should halt for a moment, as if, for instance, it should suddenly come around a corner, frightening a horse, and the motorman can see that by halting a moment the driver may be given an opportunity to turn around, and drive off in safety. In this and other conceivable cases it would be negligent for the motorman not to stop his car a brief period to give the driver of the conveyance an opportunity to save himself. But nothing of this kind occurred in this case.

The plaintiff testified that he was 150 yards from the car when he first saw it, and after seeing it he continued to drive towards it a distance of 75 yards before the accident occurred. Both car and plaintiff were traveling towards the point where North Davie street crosses Church street. The plaintiff should not have expected that the car should stop and wait till he might get to Davie street and turn down it. He should have given way for the car, for he knew that his animals

were frightened. He could have turned back, or could have turned down a side street. The car could not have done this. Nor, as it was engaged in a service for the public, should the plaintiff have expected that the car should stop, when he had ample opportunity to do so himself, and avoid the injury. The proximate cause of his injury was his own conduct. *Strickland v. Railroad*, 150 N. C. 4, 63 S. E. 161.

We need not consider the evidence as to the nature of the plaintiff's injuries, which were serious. There was certainly *damnum*, but not *injuria*. The plaintiff was not injured by a collision with the defendant's car, but by the colt overturning his buggy, and throwing him out. The colt was frightened when the defendant's car was where it had a right to be, in the public service, and was being operated in the usual manner. The colt was frightened because the plaintiff did not choose to turn down one of the bystreets, but drove on probably 75 yards towards the car, which was frightening his team more and more as he approached it. The car was not running unusually fast. Indeed, it appears that the plaintiff was going at the same speed, as each moved 75 yards after the plaintiff and motorman saw each other.

There is a wide distinction in many respects between a street car and an automobile. The street car is engaged in a public service, and running regular schedules, which it owes a duty to the public to observe. It is running on a regular track, and cannot turn out, nor can it stop without losing its schedule. The noises it makes are not as calculated to frighten teams as an automobile, and the streets on which the street cars are to be found are well known to drivers, who can avoid them, whereas, an automobile may be met with anywhere and unexpectedly. A street car runs slower, and makes frequent stops. For these and other reasons, the statute has prescribed the speed limit of automobiles, and the duties of chauffeurs on meeting people whose teams are frightened. Chapter 107, Laws 1913.

The judgment of nonsuit is affirmed.

STATE v. SHELTON.

(Supreme Court of North Carolina. Nov. 5, 1913.)

1. CRIMINAL LAW (§ 730*)—TRIAL—REMARKS OF JUDGE.

The remark of the judge that defendant could deny it, made in reply to the unsound argument of defendant's counsel, in addressing the court as to the incompetency of a conversation between defendant and his wife, with whose murder he was charged, that this kind of evidence was analogous to that prohibited by *Revisal 1905, § 1831*, and that if witness did not state the truth as to the conversation, the wife being dead, there would be no one to deny it, was not improper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693; Dec. Dig. § 730.*]

2. WITNESSES (§ 128*)—CONVERSATION BETWEEN DECEASED AND DEFENDANT—CRIMINAL CASE.

Revisal 1905, § 1831, prohibiting evidence of a party in interest against the executor or administrator of a decedent as to a conversation or transaction with decedent, has no application to criminal cases, so as to prevent the state introducing evidence of a conversation between defendant and one whom he is charged with murdering.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 553-555, 562-564, 570; Dec. Dig. § 128.*]

3. HOMICIDE (§ 340*)—HARMLESS ERROR—INSTRUCTIONS.

The charge on burden of proof to show willful, deliberate, and premeditated killing, and on reasonable doubt, being full and clear, the use of the words "beyond a reasonable doubt," instead of properly "to the satisfaction of the jury," in the charge to find guilty of murder in the second degree, "if you find * * * beyond a reasonable doubt that defendant previous to the time he killed * * * was so intoxicated as not to be able to form a specific intent, and to deliberate and premeditate, but was not insane, * * * so as not to know the difference between right and wrong, and with a deadly weapon slew * * * with notice," was not of sufficient importance to warrant a new trial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

4. HOMICIDE (§§ 150, 238*)—INTOXICATION REDUCING DEGREE—BURDEN OF PROOF.

While the burden of proof is on the state at all times to prove the willful, deliberate, and premeditated killing, yet defendant claiming that at the time of and immediately before the homicide he had been rendered, by drunkenness, incapable of forming a deliberate and premeditated purpose to kill, has the burden of proving it, not however beyond a reasonable doubt, but only to the satisfaction of the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 275, 501; Dec. Dig. §§ 150, 238.*]

5. HOMICIDE (§ 340*)—HARMLESS ERROR—INSTRUCTIONS.

Where there was no sufficient evidence that at the time of the homicide defendant was in such a mental condition, brought about by excessive drinking, as to render him incapable of committing deliberate and premeditated murder, error in instructing as to the burden on him to show such condition is harmless.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

6. HOMICIDE (§ 28*)—INTOXICATION REDUCING DEGREE.

Where the purpose to kill was deliberately and premeditatedly formed when sober, imbibing intoxicants to whatever degree or extent in order to carry out the design will not avail to reduce the murder to the second degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 44, 45, 46, 133; Dec. Dig. § 28.*]

7. HOMICIDE (§ 238*)—INTOXICATION REDUCING DEGREE—EVIDENCE.

Evidence, in a homicide case, held insufficient to show that at the time of the killing defendant was so drunk as to render him utterly incapable of forming a deliberate and premeditated purpose to kill, but rather to show that he had for months been deliberating and premeditating the murder, and that any drinking by him on the day of the killing was to assist him to execute his purpose.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 501; Dec. Dig. § 238.*]

Appeal from Superior Court, Rockingham County; Lane, Judge.

Walter Shelton was convicted of murder in the first degree, and appeals. Affirmed.

P. T. Stiers, of Reidsville, and C. O. McMichael, of Wentworth, for appellant. Attorney General Bickett and Assistant Attorney General Calvert, for the State.

BROWN, J. The defendant offered no evidence, and the case was tried upon that introduced by the state. This evidence tends to prove these facts: The defendant was the husband of Lula Shelton. It is evident that they lived unhappily together. About two weeks prior to Christmas, 1912, the wife refused to live with the defendant any longer on account of his conduct, and she went to the home of her mother. On Christmas eve defendant went there and pointed a pistol at his wife and told her he would kill her if she did not live with him. He then asked for his overcoat, and, as he was about to leave, said to his wife's sister that he intended to kill his wife when she put her foot off the lot, and instructed her to tell his wife. There is no evidence that he was so drunk on this occasion that he was irresponsible and did not know what he did and said. About ten days before the homicide, defendant told one Adkins he was going to kill his wife because she would not live with him, and he told at different times numerous other witnesses that he was going to kill his wife, and the whole Trent family, being the family of his wife; that she had sworn to lies on him. On the 24th day of March, 1913, the wife was at the home of Mrs. Jennie Black in Reidsville. She was sitting in a room with several other people, when the defendant came in, walked up to his wife, and started to put his hand in his pocket. His wife threw up both hands and started towards him, when he pulled out his pistol and shot her twice. The wife fell and died in seven or eight minutes. A sister of the defendant then pushed him towards the door, and he went out into the yard, where he was arrested by two men, and as he was being led away he said: "I did what I said I was going to do, what I wanted to do. I put three balls in her, and I will go to the electric chair for it." He repeated this statement afterwards to other witnesses.

The exceptions to the evidence are without merit and are not of sufficient importance to require discussion.

[1,2] The third exception relates to a remark of the judge. Counsel for the defense, in addressing the court as to the incompetency of a conversation between the defendant and his wife, maintained that this kind of evidence was analogous to that prohibited by section 1631 of the Revisal; that if the witness Effie Trent did not state the truth about the conversation, her sister Lula Shelton being dead, there would be no one to

deny it. The judge remarked from the bench and in the hearing of the jury that the defendant could deny it, and to this remark the defendant excepts. The exception ought not to be sustained. Section 1631 has no application whatever to criminal cases. The conversation between the husband and the wife in which he threatened to kill her was entirely competent. The judge was simply replying to an unsound legal proposition that was being argued by the counsel for the defendant, and his remarks were in no way improper. He subsequently in his charge warned the jury that they could not consider to the prejudice of the defendant the fact that he did not go upon the stand and testify as a witness.

[3,4] The exception chiefly relied on by the defendant is to the following extract from the charge of the court: "If you find from the evidence beyond a reasonable doubt that the defendant, previous to the time he killed his wife, if you find he did kill her, was so intoxicated as not to be able to form a specific intent and to deliberate and premeditate, but was not insane, by reason of it as before explained to you, so as not to know the difference between right and wrong, and with a deadly weapon slew his wife with malice, you will find him guilty of murder in the second degree." His honor erred in using the words "beyond a reasonable doubt" in that connection, but we do not think the error was very material and of sufficient importance to warrant another trial. The burden of proof is on the state at all times to prove the willful, deliberate, and premeditated killing, and his honor so instructed the jury very clearly; but, where the defendant claims that at the time of and immediately before the homicide he had been rendered incapable of forming a deliberate and premeditated purpose to kill by reason of drunkenness, the burden is on him to prove it, not beyond a reasonable doubt, but to the satisfaction of the jury. The charge of the court upon the burden of proof and the doctrine of reasonable doubt is so full and clear that it would scarcely have been misunderstood. His honor said: "This defendant not only pleads not guilty to this charge against him, but, when he comes into this court and put upon his trial, is presumed to be innocent of any crime. This is no mere idle presumption to be disregarded at will, but is a fundamental principle of the law of this state, and applies in this case, as in all other trials for violation of the criminal laws. And a defendant is covered with this presumption of innocence until the state by competent evidence rebuts such presumption, and, before you can return a verdict of guilty against this defendant of any degree of crime, the state must have satisfied you of his guilt, and that to the exclusion of every reasonable doubt. That is the burden that is upon the state in this case. I repeat, to prove the guilt of this defendant

beyond a reasonable doubt before you can convict him of any degree of homicide."

[5] We are further of the opinion that the charge was harmless error for the reason that there is no sufficient evidence in the record that at the time of the homicide he was in such a mental condition, brought about by excessive drinking, as to render him incapable of committing deliberate and premeditated murder.

State v. Murphey, 157 N. C. 614, 72 S. E. 1075, is a leading case on this subject, and the question is fully discussed by Mr. Justice Hoke. In that case it is stated that there was evidence that at the time of the killing "the mind of the prisoner was so affected, at the time, by voluntary drunkenness, that he was incapable of committing murder in the first degree." In the opinion the learned judge says: "It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many causes in this state and on indictments for homicide. The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime. In Clark's Criminal Law, p. 72, this limitation on the more general principle is thus succinctly stated: 'Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence.' Accordingly, since the statute dividing the crime of murder into two degrees, and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the killing was deliberate and premeditated, these terms contain, as an essential element of the crime of murder, a purpose to kill previously formed after weighing the matter (State v. Banks, 143 N. C. 658, 57 S. E. 174; State v. Dowden, 118 N. C. 1148, 24 S. E. 722), a mental process embodying a specific definite intent, and if it is shown that an offender, charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose, he should not be convicted of the higher offense. It is said in some of the cases, and the statement has our unqualified approval, that the doctrine in question should be applied with great caution. It does not exist in reference to murder in the second degree, nor as to manslaughter. It has been excluded in well-considered decisions where the facts show that the purpose to kill was deliberately formed when sober, though it was executed when drunk—a position presented in State v. Kale, 124 N. C. 816, 32 S. E. 892, and approved and recognized in Aszman v. Indiana, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33. And it does not avail from the fact that an offender is, at the time, under the influence of intoxicants, unless, as hereinbefore stated, his mind is so affected that he is unable to form or entertain the specified purpose referred to."

Wharton sums up the matter by saying that "a person who commits a crime while so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree. The influence of intoxicants upon the question of the existence of premeditation, however, depends upon its degree and its effect on the mind and passions." Homicide (5th Ed.) p. 811.

All the authorities agree that to make such defense available the evidence must show that *at the time of the killing* the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill.

[6] As the doctrine is one that is dangerous in its application, it is allowed only in very clear cases, and, where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense.

In the rulings of the court and the charge to the jury the defendant has had the full benefit of his plea of insanity, which was very properly repudiated by the jury, as there is as little evidence to support that as there is the plea that his mind and reason at the time he slew his wife were so completely dethroned by intoxication that he could not be guilty of a willful, deliberate, and premeditated murder.

[7] The evidence that the defendant formed and expressed to several different persons at various times, extending over a period of two months, the settled purpose to kill his wife, is overwhelming. On Christmas eve, 1912, he sought his wife, pointed a pistol in her face, and told her he would kill her if she did not live with him. There is no evidence that on these occasions he was drunk and did not know what he was doing. None of the witnesses who were present at the homicide say that defendant was drunk, and one of the witnesses, Moricle, said he had seen defendant under influence of whisky, but on this occasion "he looked like a sober man."

Witness Adkins testifies to a conversation ten days before the homicide, in which defendant told him he intended to kill his wife because she would not live with him. "At the time of the conversation I could not say whether Shelton was drunk or not. He had had a drink. He drank right much when he was not at work. He was not at work at this time. It had not been long since he quit work. I saw him about once a week, and he was always drinking."

Witness Tally testified that defendant told him that he intended to kill his wife; that he saw him the afternoon of the homicide, and "his condition seemed to be all right." Witness further said: "I have known Shelton eight or ten years. Sometimes he was drink-

ing, sometimes he was not. You could call him drunk, but he was going. Sometimes for two or three days he would drink, sometimes he would not. He seemed to be sober on the day of the homicide."

Witness Walker testified that he had conversation with defendant the morning of the homicide. "I am not able to tell what his condition was." Witness further stated that defendant before that had come to the store drunk; he generally came in drinking, and witness asked his brother to keep him out. Witness further testified that the defendant a few hours before the killing had asked witness, "If you were going to kill yourself, where would you shoot?" "I told him I had never thought of such a foolish thing. A few hours before the killing, I had told my wife that I believed Shelton was crazy."

Witness Michael testifies to hearing defendant say on the evening of the homicide that he had done what he aimed to do, and, on the subject of habits, he said: "I have known Walter Shelton four years. I live in the same neighborhood with him. I have heard of his drinking habits for the last two years. His general reputation in the neighborhood is that of a drinking man. On the evening of the killing, he was as sober as I usually saw him."

Witness Myrick testifies: "I have known Walter Shelton about 15 years and lived in Reidsville practically all the time Walter has. He drank a good deal. Sometimes he would act kinder foolish. I have heard about his knocking a fellow in the face with a beer bottle. The evening of the homicide he looked like he was drunk."

Thomas Lebas testified as follows: "During Christmas week Shelton made a statement to me. He said he had a wife and was going to kill her, and I says: 'Walter, do you know you are going to get in trouble? There will be another Allen case.' He said he was going to kill her. I asked him what for. He said because she would not live with him. I asked him if she was a nice lady. Said, yes, she was a nice lady, and give me that to understand right then. I told him to go home; he was drunk. Said he was not drunk, and he was not going home, either. I saw him on the day of the homicide, about 75 or 100 yards, before and after. He was going up the opposite side from where I was standing with his right hand in his right coat pocket. I just noticed him going along. I did not pay much more attention to him. He was walking right pertly as usual, and I talked there about three minutes, when Miss Effie Trent came running down the street and said her sister had been shot. I ran to the house as soon as I could get there, and found her on the bed shot and dying. She lived about six or eight minutes after I got in the house. I saw Shelton against the front fence along the street. I took hold of him

one time when he was about to get away. He was drinking some, not drunk. He stayed a little intoxicated most of the time. I don't say the tenth or eleventh notch. That would be pretty good speed."

This is the entire evidence relating to the condition of the defendant. In our opinion it falls to show that at the time of the homicide the defendant was so drunk as, in the language of Justice Hoke, "to render him utterly incapable of forming a deliberate and premeditated purpose to kill." It tends rather to prove that the defendant had been for two months deliberating and premeditating the murder of his wife, and that, if he was drinking at all on the day of the homicide, it was to assist him to put his deadly purpose into execution.

We have given this case a very careful examination, and are constrained to conclude that there is no error.

BOARD OF GRADED SCHOOL COM'RS OF CITY OF WINSTON v. BOARD OF EDUCATION OF FORSYTH COUNTY.

(Supreme Court of North Carolina. Nov. 5, 1913.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 19*)—SCHOOL FUNDS—RIGHT TO PARTICIPATE.

Revisal 1905, § 4116, as amended by Pub. Laws 1913, c. 149, provides that the county board of education shall apportion the county school fund to the various school districts, first, however, reserving a fund sufficient to pay the county superintendent's salary and the expenses of the board, and that it may also reserve a fund for building, repairing, and equipping schoolhouses, to be used as directed in section 4124. Section 4124 provides that the building of all new schoolhouses shall be under the control and direction of and by contract with the county board of education, and that the board shall pay not exceeding one-half of the cost thereof out of the fund set aside for building under section 4116. *Held* that a graded school district under the control and supervision of graded school commissioners is entitled to share in the building fund under the conditions prescribed in section 4124, which should be enforced reasonably and not arbitrarily; that section not limiting the fund to schoolhouses under the control of the county board of education, but to schoolhouses the building of which is under its control.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 16, 34-37; Dec. Dig. § 19.*]

2. STATUTES (§ 219*)—AIDS TO CONSTRUCTION—EXECUTIVE CONSTRUCTION.

It being by statute the duty of the State Superintendent of Public Instruction to construe the school law, his construction thereof, though not binding on the courts, is entitled to high consideration.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.*]

Appeal from Superior Court, Forsyth County; Cooke, Judge.

Controversy between the Board of Graded School Commissioners of City of Winston and the Board of Education of Forsyth County, submitted without action. From a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment for plaintiff, defendant appeals. Affirmed.

This is a controversy submitted without action to construe sections 4116 and 4124 of the Revisal of North Carolina. The plaintiff is a corporate body, and has complete control and supervision of the public schools of the city of Winston. The defendant is a corporate body, and has control of the public schools of Forsyth county. Section 4116 of the Revisal, as amended by chapter 149, Public Laws of North Carolina 1913, provides that the County Board of Education, after first reserving a fund sufficient to pay the salary of the county superintendent and the expenses of the county board of education, may reserve a fund for building, repairing, and equipping schoolhouses in counties where the school fund exceeds, as it does in Forsyth county, \$25,000, a sum not greater than 7½ per cent. of the school fund for said county. The only question presented is whether or not the defendant has authority, under section 4124, to appropriate money from the building fund to the plaintiff to be used in the erection of a school building in the city of Winston. It is admitted that the plaintiff has received from the defendant its just per capita apportionment as provided in section 4116 for maintaining schools, and that the city of Winston pays more than half the school taxes of Forsyth county levied by the General Assembly. Judgment was rendered in favor of the plaintiff, and the defendant excepted and appealed.

Hastings & Whicker, of Winston-Salem, for appellant. Manly, Hendren & Womble, of Winston-Salem, for appellee.

ALLEN, J. The ninth article of the Constitution is devoted to education, and it is declared in the first section of the article that, "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." This language is taken from the ordinance of Congress of 1787, passed for the government of the Northwest Territory, and was substantially adopted in the Constitution of Ohio, and was considered in Board of Education v. Minor, 28 Ohio St. 211, 13 Am. Rep. 233, in which case the court says: "The three things so declared to be essential to good government are 'religion,' 'morality,' and 'knowledge.' These three words stand in the same category, and in the same relation to the context; and if one of them is used in its generic or unlimited sense, so are all three. That the word 'knowledge' and the word 'morality' are used in that sense is very plain. The meaning is that true religion, true morality, and true knowledge shall be promoted by encouraging schools and means of instruction. The last named of these three words, 'knowledge,' comprehends in itself all that is comprehended in

the other two words, 'religion' and 'morality,' and which can be the subject of human 'instruction.' True religion includes true morality. All that is comprehended in the word 'religion,' or in the words, 'religion and morality,' and that can be the subject of human 'instruction,' must be included under the general term, 'knowledge.' Nothing is enjoined, therefore, but the encouragement of means of instruction in general knowledge—the knowledge of truth. The fair interpretation seems to be that true 'religion' and 'morality' are aided and promoted by the increase and diffusion of 'knowledge,' on the theory that 'knowledge is the handmaid of virtue,' and that all three—religion, morality, and knowledge—are essential to good government."

The ideal citizen, then, under the Constitution is "the wise man and endowed with knowledge" leading to a clean, upright life, and to a just conception of true religion. One of the means to this end is the establishment of a "general and uniform system of public schools," which is enjoined upon the General Assembly by section 2 of article 9. This system as outlined in the Constitution, standing alone, does little more than excite and stimulate the desire for knowledge, and is inadequate to enable the citizen to reach the higher heights. It was to be expected, then, in a government founded upon the will of the people, by men who believed that unlimited knowledge leads to true morality and true religion, and that these are necessary to good government and the happiness of mankind, that some provision would be made for higher education, as has been done in the sections relating to the University, and that there would be nothing to discourage those living in thickly settled communities, where property valuations are higher, from incurring obligations, in addition to those imposed by the General Assembly for the system of schools for the entire state, in order that better educational facilities might be furnished to their children, and we, therefore, find no prohibition in the Constitution preventing a community, which pays a special tax for graded or other schools, from sharing in the equitable division of the tax for schools levied by the state.

[1] It was upon this principle that it was held in Greensboro v. Hodgins, 106 N. C. 182, 11 S. E. 586, that it was the duty of the county authorities to apportion to a graded school district a part of the school fund levied by the state, but that such district was only entitled to a just and equitable part, and not necessarily to as much as it paid. The authority to make this apportionment, approved by the Supreme Court, is found in section 4116 of the Revisal, as amended by chapter 149 of the Laws of 1913, and as the same statute enjoins the duty upon the county board of education to reserve a fund for building and repairing schoolhouses in the county, there would seem to be no good rea-

son for permitting graded schools to participate in one part of the fund and excluding them from the other.

The defendant contends, however, that while the board of education is required to reserve a building fund in section 4116 of the Revisal, the disposition of the fund is regulated by Revisal, § 4124, in which it is said: "The building of all new schoolhouses shall be under the control and direction of and by contract with the county board of education. * * * All contracts for buildings shall be in writing and all buildings shall be inspected, received and approved by the county superintendent of public instruction before full payment is made therefor"—and that as the graded school of Winston is under the control of a board of commissioners and not of the board of education, the plaintiff has no right to any part of the fund reserved for buildings. In other words, the argument of the defendant is that under section 4124 of the Revisal, all school buildings erected from the reserve fund provided for in section 4116 must be under the control of the board of education, and as the graded school buildings of Winston are controlled by a board of commissioners, and not by the board of education, the graded school district is not entitled to share in the building fund. The two sections are parts of one statute, designed to establish a uniform system of public schools, and the language used should be understood with reference to the context, and in that sense which will make the two harmonious and consistent, and a construction of section 4124 should not be adopted, except from necessity, which would deprive the plaintiff of a benefit conferred by section 4116. No such necessity exists. Section 4124 does not say that all "new schoolhouses" shall be under the control of the board of education, but that "the building of all new schoolhouses" shall be under its control, and that "all contracts for building" shall be in writing and approved by the county superintendent, thereby conferring authority upon the board of education and the county superintendent to exercise reasonable supervision over the contract for the building, and over its performance, but it is silent as to the control of the building after it has been erected. We are therefore of opinion that there is no conflict between the two sections, and that the plaintiff is entitled to share in the building fund reserved by the defendant, under the conditions prescribed in section 4124, which should be enforced reasonably and not arbitrarily.

[2] This construction accords with the opinion of the State Superintendent of Public Instruction, whose duty it is, by statute, to construe the school law, and while his construction is not binding on us, it is entitled to high consideration. In his notes and decisions on the School Law, he says: "The city

schools are entitled to their equitable part of the building fund. They pay their part of it, and in the apportionment of the building fund, just as in the apportionment of the other part of the school fund, they are entitled to be treated exactly like any other public school district of the county. The fact that these districts are operated under a special charter does not prevent them from being public school districts entitled to all the rights and privileges of other school districts in the distribution of the common public school fund, including the building fund. The fact that they issue bonds and levy taxes for better buildings and equipment ought to entitle them to more consideration, instead of less, by the county board of education, in the distribution of the county building fund, and certainly ought not to cause them to be discriminated against by excluding them from sharing in that fund, which they helped to pay, because they are willing to assume an additional burden of taxation to get better houses and equipment than the county and the regular school district can afford to provide. They should be encouraged rather than discouraged in such commendable efforts."

For the reasons given, the judgment is affirmed.

Affirmed.

STATE v. WILKERSON.

(Supreme Court of North Carolina. Nov. 5, 1913.)

1. CRIMINAL LAW (§ 782*)—CRIMINAL PROSECUTIONS—BURDEN OF PROOF—"PRIMA FACIE."

While under the express provisions of Pub. Laws 1913, c. 44, the possession of more than one gallon of spirituous liquors is prima facie evidence that it is kept for sale in violation of that act, this merely authorizes, and does not compel, the jury to convict on evidence of possession alone and unsupported, nor does it change the burden of proof, since "prima facie" means "at first," "on the first appearance," "on the face of it," or "so far as can be judged by the first disclosure presumably," and hence it was error for the court, after charging that possession made a prima facie case, to add that it then was the duty of accused to go forward and satisfy the jury by the greater weight of the evidence that he did not have the liquor in his possession for the purpose of sale.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. § 782.*

For other definitions, see Words and Phrases, vol. 6, p. 5549.]

2. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

On a trial for having possession of liquor for sale, where the court charged that proof of possession of the liquor made a prima facie case and required accused to show by the greater weight of the evidence that he did not have possession thereof for the purpose of sale, an instruction that, if the jury had a reasonable doubt concerning the facts as to his possession and the purpose thereof, they should acquit did

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not cure the error; it being confusing and contradictory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

3. INTOXICATING LIQUORS (§ 140*)—CRIMINAL OFFENSES—ILLEGAL POSSESSION.

A person who, in good faith, purchased liquor in Virginia, where it was lawful to buy it, as agent for other persons who sent him there for the purpose of buying it for them, and brought it into this state, did not violate Pub. Laws 1913, c. 44, making it unlawful to have possession of intoxicating liquors for the purpose of sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 150; Dec. Dig. § 140.*]

4. INTOXICATING LIQUORS (§ 238*)—CRIMINAL PROSECUTIONS—QUESTION FOR JURY.

Where, on a trial for having possession of intoxicating liquor for the purpose of sale, the evidence tended to show that accused purchased the liquor in another state as agent for other persons who sent him there for the purpose of buying it for them, and who gave him the money with which to pay therefor and paid him for his services, and that he brought it within the state for the purpose of distributing it to them, his intent, and whether the transaction was a sale, were questions for the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. § 238.*]

5. INTOXICATING LIQUORS (§ 169*)—CRIMINAL OFFENSES—PERSONS LIABLE.

A person who purchased intoxicating liquor in another state, where it was lawful to sell it, as agent for other persons, and brought it within the state to distribute it to such persons, did not violate Revisal 1905, § 3534, providing that, if any person shall unlawfully and illegally procure and deliver spirituous or malt liquors to another, he shall be deemed to be the agent of the seller and guilty of a misdemeanor.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

6. INTOXICATING LIQUORS (§ 223*)—CRIMINAL PROSECUTIONS—INDICTMENT—VARIANCE.

Under an indictment charging that accused had possession of whisky contrary to statute, treated on the trial as charging a violation of Pub. Laws 1913, c. 44, making it unlawful to have possession of intoxicating liquors for the purpose of sale, accused could not be convicted of violating Pub. Laws 1911, c. 133, making it unlawful for any corporation, club, etc., to maintain any place where intoxicating liquors are received, kept, or stored for sale, distribution, etc., since the allegations and the proof must correspond.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 263-274; Dec. Dig. § 223.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Vance County; Cline, Judge.

Zip Wilkerson was convicted of an offense, and he appeals. Reversed.

The defendant was arrested upon a warrant issued by the recorder of Vance county and based upon the following affidavit of M. N. Parrish: "M. N. Parrish, being duly sworn, complains and says that at and in said county on or about the 28th day of April, 1913, Zip Wilkerson did unlawfully and willfully have in his possession eleven

and one-half gallons of whisky for sale, contrary to the statute in such case made and provided, and against the peace and dignity of the state. [Signed] M. N. Parrish."

He was tried before the recorder, convicted and appealed to the superior court. The evidence at his trial in the latter court tended to show that defendant had been employed by 10 men near Henderson in Vance county, who were customers at his store, to go to Virginia and buy for them 10 gallons of whisky, one gallon for each man. He agreed to do so if they would pay him \$2.50 for the service. Each of them gave him \$2 to pay for the whisky and 25 cents for buying and hauling it. He hauled for the public and kept a horse and buggy and also a wagon for the purpose. He went to Virginia in his buggy, bought the liquor there with the money, and was hauling it back for delivery to them when, on the way to his home, he was arrested by the officer with the whisky in his possession. He bought a gallon for himself and had in his wagon, at the time of the arrest, 11 gallons of corn liquor in 3 kegs and 2 bottles. The gallon which he bought for himself was for his personal use and not for sale, nor did he know that any of the other persons for whom he bought the liquor intended to sell it or any of it. He received only 25 cents from each man for buying and hauling it.

Upon this evidence, which in the main was the testimony of the defendant himself, at least the material parts of it, the court charged the jury that, if they found, beyond a reasonable doubt, the defendant had in his possession more than one gallon of spirituous liquor at the time of his arrest, and he was not a druggist and had no medical depository, the law made it prima facie evidence of the violation of the act passed by the General Assembly in 1913, known as the "Search and Seizure Law" (that is to say, if those facts had been proven to them beyond a reasonable doubt, that statute puts upon the defendant the duty of going forward and satisfying the jury by the greater weight of the evidence that in fact he did not have the liquor in his possession for the purpose of sale), and further that if he bought the liquor as above set forth, and it was taken while in his possession before the bulk was broken or there had been any distribution among the men for whom he bought it, then, as matter of law, he was guilty of violating the act of March 3, 1913, known as the "Search and Seizure Law," and they should convict, but, if they had a reasonable doubt about it, they should acquit. The jury returned a verdict of guilty. Judgment was entered thereon, and defendant appealed.

Henry T. Powell and T. M. Pittman, both of Henderson, for appellant. Attorney General Bickett and T. H. Calvert, of Raleigh, for the State.

WALKER, J. (after stating the facts as above). [1] The defendant was charged with a violation of the act of 1913, it being chapter 44, entitled "An act to secure the enforcement of the laws against the sale and manufacture of intoxicating liquors," ratified March 3, 1913. The act makes it unlawful for any person, firm, association, or corporation, other than druggists or medical depositories, duly licensed, "to have or keep in his, their or its possession for the purpose of sale, any spirituous, vinous or malt liquors," and makes proof of any one of certain facts prima facie evidence of the violation of the act, and among others it is provided that "the possession of more than one gallon of spirituous liquors at any one time, whether in one or more places," shall constitute such prima facie evidence of the fact that it is kept for sale in violation of the act. Having clearly before us the nature of the particular charge against the defendant, the law alleged to have been violated, and the proof offered in support of the charge, we are prepared now to consider the objection urged by the defendant's counsel to the charge of the court. The jury were instructed that the fact of his having in his possession more than one gallon of the liquor made out a prima facie case against the defendant. If the court had stopped here and not qualified this instruction, it would have been correct, but it did not do so but went beyond the terms of the statute and the law when it further charged that it *then* was the duty of the defendant "to go forward and satisfy the jury, by the greater weight of the evidence, that he did not have the liquor in his possession for the purpose of sale." In this further instruction we think there was error.

The defendant, as we have shown, is charged, under the act of 1913, with unlawfully having spirituous liquor in his possession for the purpose of selling it, and nothing else, and proof of the possession of more than one gallon of such liquor is made prima facie evidence of the unlawful act, which is that it is held by him for the purpose of sale, an act forbidden by the general law. It is not made unlawful for a person to have more than one gallon of spirituous liquor in his possession, but it is criminal to have possession of that quantity for the purpose of sale; and while the bare possession of so much may, in itself and as a fact, be innocent, it is yet made prima facie evidence of guilt under the statute, as in *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626. But it is only evidence, and, while it has the added force or weight of being prima facie, the latter means no more than that it is sufficient for the jury to convict upon it alone and unsupported, if no other proof is offered, but upon the whole evidence, whether consisting of the mere fact of possession or of additional facts, the jury are not bound

to convict but simply may do so if they find beyond a reasonable doubt, or are fully satisfied, that the defendant is guilty. Prima facie means at first; on the first appearance; on the face of it; so far as can be judged by the first disclosure presumably. These are the definitions of the law, as we learn from the books. Black's Dict. (1st Ed.) 539. The jury are no more required to convict upon a prima facie case than they are to acquit because of the presumption of innocence. They must judge themselves as to the force of the testimony and its sufficiency to produce in their minds a conviction of guilt. In civil cases, the rule is the same (with a difference in the quantum), as prima facie evidence only carries the case to the jury and does not entitle the party in whose favor it has been offered to a verdict as matter of right.

Referring to this rule, as applied to civil cases, and the presumption, or prima facie case, arising under the maxim *res ipsa loquitur*, which presents one of the strongest of such cases, the Supreme Court of the United States has recently said: "In our opinion *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions." *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815. The court cites with approval the numerous cases decided by this court on the same subject. *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493; *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Lyles v. Carbonating Co.*, 140 N. C. 25, 52 S. E. 233; *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298; *Board of Education v. Makely*, 139 N. C. 31, 51 S. E. 784; *Overcash v. Electric Co.*, 144 N. C. 572, 57 S. E. 377, 12 Ann. Cas. 1040; *Winslow v. Hardwood Co.*, 147 N. C. 275, 60 S. E. 1130.

Justice Hoke says for the court in *Furniture Co. v. Express Co.*, 144 N. C. 644, 57 S. E. 460: "It may be well to note here that, in using the terms 'prima facie' and 'presumptive,' the terms do not import that the burden of the issue is changed, but that on the facts indicated the plaintiff is entitled to have his cause submitted to the jury under a proper charge as to its existence or nonex-

istence and the effect of any presumption which may attach, as indicated in the cases"—citing several of the cases to which we have already referred.

It may therefore be taken as settled in this court, at least, and we believe the same may be said of most, if not all, of the courts, that *prima facie* or presumptive evidence does not of itself establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of the issue, which always remains with him who holds the affirmative. It is no more than sufficient evidence to establish the vital facts without other proof, if it satisfies the jury. The other party may be required to offer some evidence in order to prevent an adverse verdict or to take the chances of losing the issue if he does not, but it does not conclude him or forestall the verdict. He may offer evidence, if he chooses, or may rely alone upon the facts raising the *prima facie* case against him, and he has the right to have it all considered by the jury; they giving such weight to the presumptive evidence as they may think it should have under the circumstances. The defendant is not required to take the laboring oar and to overcome the case of the plaintiff by a preponderance of evidence is what we said in *Winslow v. Hardwood Co.*, *supra*, and substantially the same thing was said in the other cases we have cited. This is undoubtedly the rule in civil cases, and it applies with greater force to criminal cases where the defendant has the benefit of the doctrines of reasonable doubt and the presumption of innocence. How can we say that *prima facie* evidence, or that which is apparently sufficient, excludes all reasonable doubt of guilt and by its own force overcomes the presumption of innocence? The bare statement of the proposition is sufficient to show its fallacy. It would destroy the presumption of innocence and take away the protection of the other rule as to reasonable doubt. The presumption of innocence attends the accused throughout the trial and has relation to every essential fact that must be established in order to prove his guilt beyond a reasonable doubt. *Kirby v. U. S.*, 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 809. He is not required to show his innocence; the state must prove his guilt. No valid conviction can be had in law which is based solely upon *prima facie* evidence as conclusive and foreclosing the verdict, or which even casts upon the defendant the burden of showing his innocence by the greater weight of the evidence. We know of no such rule, and it finds no warrant in the language of the statute. The decisions are all the other way, when rightly interpreted.

In a case very similar to this one, the court held that the jury must consider all the circumstances, whether introduced by the state or the accused, in connection with the evidence proving the possession of the liquor, taking into account as well the presumption

of the defendant's innocence. *State v. Cunningham*, 25 Conn. 195. But directly to the point, and one which exactly fits this case, is the case of *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, where the court thus sets forth, with great force and clearness, the limitations upon the power of the Legislature to create such presumptions, their extent and scope, and the rights of the defendant notwithstanding them: "It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the Legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. See cases cited in 103 N. Y. 143 [8 N. E. 484, 57 Am. Rep. 705] *supra*. The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved must not be merely and purely arbitrary or wholly unreasonable, unnatural, or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It in substance enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory *prima facie* evidence were contradicted. The case of *Commonwealth v. Williams*, 6 Gray [Mass.] 1, supports this view."

In *Board of Excise v. Merchant*, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705, the court in dealing with this very question says that, by the presumption or *prima facie* case arising by statute from possession of the liquor, "the burden of proof is not even really changed," and then adds that the case must be submitted to the jury, notwithstanding the presumption, upon the evidence, whatever it is, "with the burden still resting upon the prosecution to establish the guilt"; the offense in that case being an unlawful sale of liquor.

It is also stated as law in *Black on Intoxicating Liquors* that "the Legislature has undoubtedly a very extensive power in re-

spect to fixing or modifying the rules of evidence to be applied by the courts. The exercise of this power, however, in relation to criminal proceedings is subject to certain important limitations, among which are the following: (1) The Legislature, in enacting rules of evidence, must not usurp judicial functions; (2) such rules must not be of the nature of *ex post facto* laws, or illegally retroactive in their operation; (3) they must not deprive the accused of his constitutional right to be confronted with the witnesses against him; (4) the Legislature cannot compel a defendant to furnish evidence against himself; (5) nor deprive him of his right to a trial by jury; (6) it would be unlawful to make any given fact or state of facts *conclusive* evidence of guilt in negation of the common-law presumption of innocence. The rules of evidence in prosecutions under the liquor laws have frequently been the subject of legislative attention, and the changes made have sometimes shown a wide departure from common-law principles. All such statutes, which for the most part are designed to facilitate convictions by admitting presumptive or indirect proof of certain facts, must be brought to the test of constitutional principles such as those above enumerated. If found to be in violation thereof, they are not defensible on any ground of public policy or the welfare of the community. As a rule, however, these acts have been so framed as to escape constitutional objection. Thus a provision that, in prosecutions for the common selling of intoxicating liquors, delivery in or from any building or place other than a dwelling house shall be deemed *prima facie* evidence of a sale is constitutional and valid. This neither conclusively determines the guilt or innocence of the party who is accused nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. And the same is true of a statute providing that whenever an unlawful sale of liquor is alleged, and a delivery proved, it shall not be necessary to prove a payment, but such delivery shall be sufficient evidence of sale. So if a law enacts that, where a person is seen to drink intoxicating liquor on the premises of one who has simply a license to sell liquor for consumption off the premises, it shall be *prima facie* evidence that the liquor was sold by the occupant of the premises with the intent that it should be drunk thereon."

This court has fully sustained this principle and approved these authorities by citing and relying upon them in *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626. It was held in *Barrett's Case* that, notwithstanding the statute expressly declares that the possession of more than a gallon of spirituous liquor shall be *prima facie* evidence of the purpose to sell it, it is, at last and in its essence, but evidence of guilt and not conclusive or determinative of defendant's guilt even by itself and unexplained.

It further holds that there is no shifting of the burden to the defendant, but it rests upon the state to establish the accusation of the bill of indictment beyond a reasonable doubt. It will be observed that in our case the court placed the entire burden upon the defendant to show his innocence, for the instruction to which exception was taken is that the statute requires him to satisfy the jury by the greater weight of the evidence that in fact he did not have the liquor in his possession for the purpose of sale, whereas according to all the authorities, and especially in *Barrett's Case*, the burden is on the state throughout the trial.

[2] The defendant profited little or nothing by the subsequent charge that, if the jury had a reasonable doubt about the facts recited by the court, being those which the defendant must prove by the greater weight of the evidence, they should acquit. This, to say the least of it, was very confusing, if not contradictory. What advantage did he gain by the charge as to reasonable doubt, after the jury had been told that there was a presumption against him and he must "satisfy them by the greater weight of evidence" of his innocence? It deprived him of the presumption of innocence and practically eliminated the benefit of the doctrine as to reasonable doubt by so weakening it that it amounted to nothing; and all of this was done under a statute (act of 1913) which merely establishes a *prima facie* case for the state sufficient, it is true, to carry the case to the jury, with the right to convict, but leaving in full force the doctrine of reasonable doubt and also the presumption of innocence, for a man, even under our present laws, may have more than a gallon of liquor in his possession for a perfectly lawful and innocent purpose. It is not the possession that is unlawful but the forbidden purpose for which it is held.

[3, 4] The Attorney General admitted that there was error in the charge, under the decisions in *State v. Barrett*, 138 N. C. 645, 50 S. E. 506, 1 L. R. A. (N. S.) 626, *State v. McIntyre*, 139 N. C. 600, 52 S. E. 63, *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002, *State v. Dunn*, 158 N. C. 654, 74 S. E. 359, and *State v. Mostello*, 159 N. C. 461, 74 S. E. 578, but he argued that what defendant did and proposed to do with the liquor, in law, constituted a sale, by his own admission on the stand. We do not assent to this position. It was lawful to buy the liquor in Virginia, and if he made the purchase there, acting solely and in good faith as agent for the other persons who sent him there for the purpose of buying it for them, he would not be guilty of selling liquor if he had delivered it. It was so decided in *State v. Whisenant*, 149 N. C. 515, 63 S. E. 91, as we think where it appeared that the defendant, as agent, had ordered some whisky for the prosecuting witness, which was to be shipped from another state, where our laws did not operate, and when it

arrived he delivered it to the witness. It was held, if defendant acted bona fide, that he was not guilty, although he ordered the whisky as agent and received the money for it, and it was further said to be a transaction of interstate commerce. Under either view, defendant could buy liquor for another, as his agent, if he acted in good faith and was not concealing, under the guise of an agency, a transaction which was in fact a sale. If liquor can thus be ordered through an agent from another state, without violating the law, if done bona fide, why cannot the agent go into that state in person and buy it, where it can be lawfully sold, and then transport and deliver it himself? An agent may also receive at least a fair compensation for his services, provided the money is paid to him strictly as such and not as any part of the price for the liquor. His intent and the true nature of the transaction were questions for the jury, under a proper charge from the court. *State v. Allen*, 161 N. C. 226, 75 S. E. 1082, supports this view directly, and the facts were much like those in this case. *State v. Johnston*, 139 N. C. 641, 52 S. E. 273, is not in point, for there the jury found that the prosecuting witness, Brown, had paid the price of the liquor, which was fixed by the defendant beforehand. There was no agency. He was not buying for another but selling to him.

[5] Nor is the defendant indictable under Revisal, § 3534, as he procured the liquor in Virginia, where it was lawful to sell it. *State v. Smith*, 117 N. C. 809, 23 S. E. 449; *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89. The case of *State v. Smith*, just cited, seems to be decisive of the point here raised and, we think, is fatal to the judge's charge. It is there held that it is no more unlawful to buy through one's agent than to buy directly himself, and the agent, when he buys lawfully, is just as innocent as his principal would be if he had bought himself; the real question being whether there was a bona fide agency or a sale in disguise. It is a question of intent, without regard to the fair appearance of the transaction. What is it, in fact or in substance and legal effect, is the question, and in this view, which is the true one, we are forcibly reminded of what Justice Ruffin observed in *State v. Gilbert*, 87 N. C. 527, 42 Am. Rep. 518, with regard to an indictment for carrying a concealed weapon. He said the offense of which the defendant is charged forms no exception to the general rule that to constitute a crime there must be a criminal intent, and the court perceived no good reason why it should be. "The law is a wholesome one, and its constant enforcement according to its true spirit and intention meets the desires and expectations of every well-disposed and peaceable citizen; but some care should be used, lest by pushing its requirements too far it may result in a reaction of sentiment against it."

[6] If it be said that defendant is guilty under Acts of 1911, c. 133, known as the "Club Act," it is quite enough to say that he was not indicted, nor was he convicted, under that law, and he has not had any opportunity to defend himself against any such charge. The Attorney General concedes that he is charged only with violating the act of 1913, and the judge below so expressly charged the jury. Besides, if the indictment had been framed upon the acts of 1911, c. 133, there is no fact made presumptive or prima facie evidence by it, and the charge would, if possible, be more erroneous than if confined to the Acts of 1913, as it should be. It may be, as argued by counsel, that upon the evidence in this case the jury would be warranted, under proper instructions, in convicting the defendant of the offense created by the Acts of 1911, c. 133, if he had been charged with a violation of that act. We need not give any opinion on that question, it not being raised on this record, as there is no allegation upon which such a conviction could be based and no reference whatever to the act. The allegations and proof must correspond. It would be contrary to all rules of procedure and violative of his constitutional right to charge him with the commission of one crime and convict him of another and very different one. He is entitled to be informed of the accusation against him and to be tried accordingly. *State v. Ray*, 92 N. C. 810; *State v. Sloan*, 67 N. C. 357; *State v. Lewis*, 93 N. C. 581; *Clark's Cr. Proc.* 150. We think that there is evidence sufficient to sustain a conviction upon the present indictment, but the jury must be so guided by the court as to find the facts essential to establish his guilt. The question here is as to the bona fides of the defendant. Was he really acting solely in the capacity of agent when he purchased the liquor, or was that a mere pretense, under cover of which he was violating the law by selling liquor or having it for sale? The case should have been submitted to the jury in this aspect, with the burden on the state to make out its case to their full satisfaction. If defendant was acting honestly and not deceptively, he had the right to buy liquor in Virginia, where it was lawful to sell to him, and to return to this state with it for the purpose of making delivery to the parties for whom he bought it, and if this was all it would not constitute a sale of the liquor or the possession of it with the unlawful purpose to sell, within the meaning of the Acts of 1913. *State v. Allen*, 161 N. C. 226, 75 S. E. 1082. The possession of the liquor, though, would carry the case to the jury. The rule as to the legal effect or significance of prima facie evidence has long prevailed in this and other courts, and we are not aware of any decision of this court which has stated it or has implied it otherwise than is done in this case.

There was error in the charge of the court

in the respect pointed out, for which another trial is ordered.

New trial.

ALLEN, J. (concurring). I believe in the enforcement of the prohibition law, as I do in the enforcement of all law, but I cannot agree to convict of one offense when the defendant is charged with another, because intoxicating liquors are the subject of investigation.

The Search and Seizure Law (chapter 44, Laws 1913, § 2) says: "It shall be unlawful for any person to have or keep in his possession for the purpose of sale, any spirituous, vinous or malt liquors."

The charge in the warrant is that the defendant "did unlawfully and willfully have in his possession 11½ gallons of whisky for sale." The warrant follows the language of the statute, and there can be no doubt that the defendant was charged with a violation of the act of 1913. But, if there is any doubt about the charge against the defendant, there is none as to how he was tried, because the presiding judge, in his charge to the jury, said: "Gentlemen of the jury, the defendant, Zip Wilkerson, is indicted here, charged with the violation of an act passed by the General Assembly in 1913, known as the Search and Seizure Law. He is charged in the bill as having in his possession for the purpose of sale more than one gallon of liquor." He then charged the jury as to the effect under the act of 1913 of the prima facie case made by the possession of more than one gallon of intoxicating liquors, and of this charge the Attorney General, who prosecutes in behalf of the state, says in his brief: "Under the decisions of this court there was error in this instruction. *State v. Barrett*, 138 N. C. 645 [50 S. E. 506, 1 L. R. A. (N. S.) 626]; *State v. McIntyre*, 139 N. C. 600 [52 S. E. 63]; *State v. Dowdy*, 145 N. C. 432 [58 S. E. 1002]; *State v. Dunn*, 158 N. C. 654 [74 S. E. 359]; *State v. Mostella*, 159 N. C. 461 [74 S. E. 578]." All of these cases, cited by the Attorney General to show that the charge of his honor was erroneous, were concurred in by the chief justice.

It is certain, therefore, if the rule upon which the opinion of the court rests was adopted in an ill-advised moment to accord with a highly technical conception of the doctrine laid down by a text-writer and is a more metaphysical proposition, it has been reiterated time and again, with the consent of all the members of the court, and as it has been used at least twice (*State v. Barrett*; *State v. Dowdy*) for the conviction of those charged with violating the prohibition law, it is hardly fair or legal to change it now to enable the state to convict under one statute, when he is charged under another.

The defendant has not been charged with an offense under the Club Act of 1911, nor

has he been tried under that act, and there is no contention that he was tried according to law, as heretofore declared by this court, under the Search and Seizure Law of 1913.

It should be kept in mind that neither life, nor limb, nor liberty, nor property has any security or abiding place except by adhering to the Constitution, and that it provides that "in all criminal proceedings every man has the right to be informed of the accusation against him"; that "no man shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment," etc.; that "no man ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land"; and that if a citizen can be tried in the superior court before a jury, and when he has been tried illegally, can be convicted here, without a jury, of another and different charge, the safeguards of the Constitution amount to nothing.

CLARK, C. J. (dissenting). The warrant in this case charges that the defendant "did unlawfully and willfully have in his possession 11½ gallons whisky for sale." There is no reference to any particular statute. Upon the defendant's own evidence he had in possession 11 gallons of whisky for which he had been paid in advance and which in return for the money he was to divide out among 10 men. Upon this the judge should have simply told the jury that, if they believed the defendant's testimony, he was guilty. Anything that he said other than this was simply surplusage, harmless, and immaterial, for upon the defendant's own testimony the verdict of guilty was correct and should be sustained.

We can pass by, for the present, the exception to the judge's charge on the effect of a prima facie case: If the instruction was erroneous, it was harmless, for upon the defendant's own showing the judge should have charged the jury to find him guilty. On the stand the defendant testified that he had in his possession 11 gallons of whisky in 3 kegs; that for a fee of \$2.50 he went to Virginia and bought this whisky in bulk; that he brought it back to North Carolina and was going to divide and deliver it to the 10 men who had "chipped in" \$2.50 each to buy it with, when he was arrested. The possession of the whisky and his purpose in having it are thus admitted.

State v. Johnson, 139 N. C. 641, 52 S. E. 273, is exactly in point. There Johnson agreed to go from Charlotte to Salisbury and get half a gallon of whisky, bring it back to Charlotte, and deliver it to Brown, who before he left Charlotte paid him \$1, the purchase price of whisky. Brown, J., said: "We think the facts set out in the special verdict plainly disclose an agreement or contract to

deliver to Tom Brown half a gallon of whisky entered into the city of Charlotte on July 15th, by the defendant and a receipt of the agreed price, also a delivery of the whisky next morning, in pursuance of the agreement. These facts constitute a sale of liquor upon the part of the defendant within the prohibition territory." This is exactly the case here. The defendant received the money from the other parties to go to Virginia where he got the whisky in bulk and brought it back for the purpose of dividing it and delivering it to the several purchasers, according to contract. If, as the court said in *State v. Johnson*, supra, "these facts constitute the sale of liquor" after the delivery, then unquestionably having it in possession for such purpose is having it "in possession for sale."

Therefore, taking defendant's testimony as true, the question is when a number of persons have raised a fund and put it in the hands of an agent to buy whisky, and he has such whisky in his possession, to be afterwards divided out by him to them in proportion to the money that each had paid in, whether this is having it in possession for an illegal purpose.

The identical question was raised in *State v. Colonial Club*, 154 N. C. 177, 69 S. E. 771, 31 L. R. A. (N. S.) 387, Ann. Cas. 1912A, 1079, and the court there held by a vote of three to two that this did not constitute "having liquor in possession for the purpose of sale." The Legislature at the first ensuing session enacted (Laws 1911, c. 133) that such a condition should constitute having liquor in possession for an illegal purpose and a misdemeanor. That is conclusive of this case.

Chapter 133, Laws 1911, provides as follows (leaving out the verbiage which is not pertinent to this defendant): "Any corporation, club, association, person or persons that shall directly or indirectly * * * in any manner aid in keeping * * * a club room or other place [here a buggy] where intoxicating liquors are received, kept, or stored, for barter, sale, exchange, *distribution or division*, among the members of any such club or association or aggregation of persons by any means whatever, or that shall act as *agents in ordering, procuring, buying*, storing, or keeping intoxicating liquors for any such purpose shall be guilty of a misdemeanor." Upon the defendant's evidence he was an agent in procuring intoxicating liquor for sale or division among the aggregation of persons who furnished him the money for that purpose. He was therefore guilty of a misdemeanor under said chapter. He had in the language of the warrant "unlawfully and willfully in his possession 11 gallons of whisky" and was guilty of a misdemeanor under that chapter. It was mere surplusage to charge further that he had it for sale. It is true that the title of the act is "To prohibit the sale or *handling* of intoxicating liquors by clubs or *associations*." But the body of the act as above stated is broader and makes

it a misdemeanor for any agent to procure intoxicating liquor for distribution or division among the members of any aggregation of persons.

There is no question of interstate commerce involved as in *State v. Whisenant*, 149 N. C. 515, 63 S. E. 91 (if indeed the latter case is law since the passage of the Webb-Kenyon Act). The whisky was not ordered from a Virginia house. When the whisky was delivered to the defendant in Virginia he received the full title to the property. Under his contract made in North Carolina and to be performed in North Carolina, he took the whisky home with him, and it was found in his possession in this state, and he admitted that he had it for the purpose of division among the 10 men who had paid him the money, which act was to be done here. It makes no difference that they paid him in advance. The sale was not completed until a division among the aggregation of persons for whom he had bought the whisky. No one of them had any title or ownership in the whisky till such partition should be made, and he had it in possession for the unlawful purpose of a sale by means of such division. There could be but one inference from the evidence, and the judge might well have charged the jury that if they believed the evidence to return a verdict of guilty. *State v. Railroad*, 149 N. C. 508, 62 S. E. 1088.

In *State v. Herring*, 145 N. C. 418, 58 S. E. 1007, 122 Am. St. Rep. 461, the court held (Hoke, J.) that taking orders and procuring whisky to be thereafter delivered to the parties who had furnished the agent with the money for such purchase made the defendant guilty of a sale if the whisky was delivered. It follows that, if the whisky is intercepted before the division and delivery, such agent is guilty of "having it in possession for sale."

In *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89, the court held (Walker, J.) that under Rev. 3534, it was a misdemeanor for any one "to procure for, or deliver spirituous liquors to, another, and that such agent was punishable even though he had no interest in the sale other than as agent of the purchaser, and that his acting solely as agent for the buyer was no defense."

It follows that upon the defendant's own testimony he was guilty of a misdemeanor both under Rev. 3534, and Laws 1911, c. 133. It is therefore unnecessary to review the charge of the court as to the effect of prima facie evidence. It is certain that the judge's charge was correct under the uniform rulings of this court until a very recent period when the court, in what may be well termed an ill-advised moment, changed its former clear ruling to accord with a highly technical conception of the doctrine laid down by a text-writer. It may well be doubted if any jury has ever been impaneled in North Carolina which would be affected by the difference in the formula, whether that formerly in use, or that which is now considered more

correct, is used. In this day, when the American Bar Association, and the demands of a practical age, and indeed the opinion of all the leading courts, are in favor of abolishing useless distinctions which can be of no use in the better administration of justice, it is unfortunate that stress should be laid upon this. It would be well to return to the older and more logical formula, or at least to hold that the variance is immaterial, for the difference can never be understood or appreciated by a jury whose object should be simply to ascertain the real facts of the controversy submitted to them.

But, whatever may be said in favor of the change which has been made, the failure to use it was absolutely immaterial in this case, for upon the defendant's own testimony he is guilty of a misdemeanor embraced within the terms of the warrant, "the unlawful possession of the 11 gallons of whisky." The defendant testified that he had it in possession, undivided, for the purpose of division and distribution. The judge charged the jury that they must find beyond a reasonable doubt the facts, which he recited and which under the statute would "constitute prima facie evidence," and added that, "if they found those facts beyond a reasonable doubt, then the duty was on the defendant to go forward and satisfy the jury by the greater weight of the evidence that he did not have such liquor in his possession for the purpose of sale." This was the long-recognized and logical method of expressing to the jury the legislative meaning of a prima facie case. There is no logical ground to contest its correctness. It can only be criticised as a metaphysical proposition. The Legislature must be presumed to use words in their ordinary sense, and usual acceptation. "Prima facie" is thus defined in Webster's International Dictionary: "Evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted."

There is nothing in the Constitution which consecrates this or any other technicality or formula. The repetition of an error which has been found injurious or unnecessary does not make it any less harmful. *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677, had been repeated countless times and endured for 70 years. But it was founded in error and like other errors was fated to pass away. *Mial v. Ellington*, 134 N. C. 1, 46 S. E. 961, 65 L. R. A. 697. The same is true of many other decisions which have been reversed. Most technicalities that prove harmful are abolished by legislation, because the courts are slower in reforms of this kind. In the present case the formula used by the judge below is in accordance with that which was recognized throughout this state till a very short time ago, and no harm but great good would follow a return to our former rulings on that subject. The public policy of a state is expressed by the lawmaking power, and the

sole object of the courts should be to construe and execute the law in the spirit in which it was enacted. The only way to enforce the law is to enforce it, and in its integrity.

In this state the defendant made the contract to furnish 10 men with whisky; in this state they paid him the money for it; in this state he had the whisky ready to divide and deliver to them. Is there no law yet that makes possession of whisky under these circumstances "unlawful and willful" as charged in this warrant? To small avail is the act of the General Assembly of 1908 and its approval on a referendum, and to small avail are the acts of Congress and the subsequent acts, both state and federal, curing all defects discovered by the courts if this transaction can escape the condemnation of the law. There was one who said he could "drive a coach and six through any act of Parliament." It seems that legislators and Congressmen are still unable to use language effectively to express their meaning when that language is subjected to the critical eyes of courts.

THOMPSON v. THOMAS.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. VENDOR AND PURCHASER (§ 233*)—BONA FIDE PURCHASER—FAILURE TO RECORD—EFFECT.

A deed is not valid as against a junior deed to a purchaser for a valuable consideration which is first registered.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 563-566; Dec. Dig. § 233.*]

2. VENDOR AND PURCHASER (§ 235*)—FAILURE TO RECORD—EFFECT.

Under Rev. 1905, § 980, providing that no conveyance of land shall be valid as against creditors or purchasers for a valuable consideration but from the registration thereof, registration is not required as against a subsequent deed, made without a valuable consideration.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 567-569, 571-576; Dec. Dig. § 235.*]

3. DEEDS (§ 68*)—RECORDING—EFFECT.

A deed by a grantor who did not have sufficient mental capacity to execute it was void, and was not rendered valid by its registration prior to the registration of an earlier deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 149-155; Dec. Dig. § 68.*]

Appeal from Superior Court, Davidson County; Long, Judge.

Action by Maggie H. Thompson against Charles B. Thomas. Judgment for plaintiff, and defendant appeals. Affirmed.

Jno. T. Perkins, of Morganton, and Emery E. Raper, of Lexington, for appellant. F. C. Robbins and Walser & Walser, all of Lexington, and Justice & Broadhurst, of Greensboro, for appellee.

CLARK, C. J. This is an action to recover two lots in Thomasville, N. C. The plaintiff and defendant are half brother and sister,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and, moreover, their mothers were sisters. Both claim title to the property under conveyance from the widow of their father, who was the mother of the defendant. The plaintiff claims under two deeds bearing date January 28, 1909, each deed reciting a consideration of \$1, and both probated April 11, 1912, after the death of the grantor, and recorded the next day. The defendant claims under a deed from his mother, Sallie L. Thomas, for both lots, dated and registered August 14, 1909, reciting a consideration of \$1, and "other considerations accepted." She died in 1912, leaving her son, the defendant, her sole heir. The jury upon issues submitted to them found that the deeds to the plaintiff dated January 28, 1909, were duly executed and for a valuable consideration, and that the plaintiff did not procure their execution by fraud. The jury found that at the time of the execution of the deed of August 14, 1909, by Sallie L. Thomas to Chas. R. Thomas, the defendant, she did not have sufficient mental capacity to execute said deed, and that it was made without valuable consideration.

There was a great mass of evidence on both sides, and numerous exceptions to the admission of evidence and to the charge. None of the exceptions, however, present serious questions of law for the consideration of the court. The contest was almost entirely one as to the facts, and was settled by the jury upon issues properly submitted. It can be of no service to discuss well-settled propositions of law, nor to develop more fully the voluminous evidence upon what must have been a very unpleasant controversy between near relatives.

[1-3] The deed to the plaintiff executed January 28, 1909, was not registered until April 12, 1912, and would not be valid against the junior deed to the defendant, executed and registered in August, 1909, if the grantee in the latter deed had been a purchaser for a valuable consideration and the grantor had been competent to execute a deed. But the jury having found that the latter deed was without valuable consideration, the statute would not apply. Rev. § 980. Besides the jury further found that the grantor, at the time of the execution of the deed of August 14, 1909, did not have "sufficient mental capacity to execute said deed." It was therefore void, and registration could not give it validity. The defendant was sole heir to his mother, but the jury having found that her deed to the plaintiff was executed for a valuable consideration, and that its execution was not procured by fraud, the plaintiff is entitled to recover the premises.

Upon consideration carefully made of all the exceptions and of the entire evidence, we think that the matter has been determined by the jury under the superintendence of the careful and able judge, who committed. No error.

CROSBY et al. v. WIGGINS LAND CO. et al.
(Supreme Court of South Carolina. Oct. 28, 1913.)

QUITCLAIM DEED — CANCELLATION — MISREPRESENTATIONS.

Plaintiffs, in a suit to cancel their deeds conveying the remainder in land after expiration of a life estate for misrepresentation of the grantee, *held* entitled to recover.

Appeal from Common Pleas Circuit Court of Colleton County; Geo. E. Prince, Judge.

Action by M. J. Crosby and others against the Wiggins Land Company, R. G. Wiggins, and others. From a judgment for plaintiffs, R. G. Wiggins appeals. Affirmed by equally divided court.

Padgett, Lemacks & Moorser, of Walterboro, for appellant. Howell & Gruber, of Walterboro, for respondents.

FRASER, J. Edward O'Quin, now dead, owned a plantation in Colleton county, known as the "Carn Farm." In 1888 he conveyed it to Mrs. "Mary A. Padgett and her children." On the record the following entry appears: "On 5 & 9 lines the words heirs erased before signing." The grantees treated the deed as a conveyance in fee, and through several conveyances the timber was conveyed to the Thayer Lumber Company. Subsequent to that conveyance, the land was conveyed to Mr. Geo. Fletcher. Mr. Fletcher, finding the land unprofitable, tried to sell the land to Mr. R. G. Wiggins. Mr. Wiggins had the title examined for this sale, and the investigation showed that Mr. Fletcher had only an estate for the life of the children of Mrs. Padgett. Mr. Wiggins told Mr. Fletcher that if he would get a quitclaim deed from the heirs of Edward O'Quin he would buy the land, as that would give him title to the land and the timber. Mr. Fletcher told Mr. Wiggins that he did not claim the timber, but he would try to get the quitclaims and that Mr. Wiggins could make out of it anything he could. Mr. Fletcher conveyed the land to the defendant Wiggins Lumber Company, for which Mr. Wiggins was the agent, and the heirs of O'Quin conveyed the reversion to J. R. Paschall, at the suggestion of Mr. Wiggins, and Paschall conveyed to Wiggins. Mr. Fletcher's price was based upon his idea of the value of the land. The inducement to Mr. Wiggins to buy was that he would thereby get the timber as well as the land. The Thayer Lumber Company paid for the timber \$2,500. Mr. Fletcher paid \$2,250 for the land, and \$95 to attorneys for the titles and securing the quitclaims, and sold it to Wiggins Lumber Company for \$2,500. It is estimated that on account of increased values of land and timber the timber is now worth about \$4,000 and the land about \$3,000. Mr. Wiggins had the quitclaim deeds prepared by his attorney, and the deeds were carried to Mr. W. J. Fishburne of the then firm of Fishburne

& Padgett, in order that he might have them executed. Mr. Fishburne was about to go away on a trip and turned over the papers to his copartner, Mr. Padgett, in order that he might procure the execution of them. Seven of the heirs of Edward O'Quin executed quitclaim deeds. There was no money paid for those deeds to the heirs of Edward O'Quin.

This action is brought by the heirs of Edward O'Quin to set aside these deeds, on account of mistake of fact and fraud. The circuit decree was in favor of plaintiff. From this Mr. Wiggins appealed on the ground that the preponderance of the evidence was against the finding.

There is conflict of testimony as to what Mr. Fishburne told Mr. Padgett and what Mr. Padgett told the heirs of Edward O'Quin. Mr. Fishburne says he told Mr. Padgett of the defect and that the deeds were a mere matter of form. Mr. Padgett testified that he has no recollection of this and is sure that he did not so understand Mr. Fishburne, but that he merely told them that the deed was to enable Mr. Fletcher to sell his land and that the deeds would back up what their father had done. It is a pleasure to state that no fraud is alleged against Mr. Fishburne or his partner, Mr. H. R. Padgett. Memory is unreliable, and a witness may, with perfect honesty make a statement that is not in accordance with the facts. Mr. D. L. Smith, one of the witnesses to the deed of Mrs. Mary Crosby (one of the O'Quin heirs), said that Mr. Padgett told Mrs. Crosby that the deed was "a mere form to cure the defect." The grantors state that Mr. Padgett told them, "There is nothing in it for you or against you." Subsequently Mr. Fishburne said he regarded the deeds as merely formal. It is entirely probable that Mr. Fishburne, who knew what the defect was, and who considered the absence of the words "heirs" as purely formal, should have told his partner, and the partner should have told the O'Quins, and then, the whole subject being new to him, he has forgotten.

It will be observed that the theory of the appellant and his attorneys still is that these deeds are merely formal. Are they merely formal? It appears that they are not. Appellant speaks of the omission of the word "heirs." The word was *not omitted*. It was stricken out, and so important was it that attention was called to it before the deed was executed. It certainly was not inadvertent. The O'Quins may not have known it, and did not, but they had a substantial right, which was a fee in reversion, after the expiration of the life estates. The whole estate is estimated at about \$7,000 and advancing in value. What Mr. Fletcher needed was a conveyance of this interest. A life estate is roughly estimated at one-half of the whole. The O'Quins were asked to convey about \$3,500 worth of property for nothing, and to

make the conveyance without an hour for reflection or investigation. The deeds are spoken of as quitclaims. In one sense they are, in that there is no warranty clause. *Rapalje & Lawrence Law Dictionary*: "Quitclaim is a release or acquitting of a man for an action that he (the releasor) hath taken or might have against him." Popularly it may be taken to be the relinquishment of an uncertain claim. The usual words of a quitclaim, "remise, release and forever quitclaim" are not in the deeds. They are straight conveyances of "all my right, title, and interest in Carn Farm." Besides that, the consideration for which these deeds were executed did not exist. There was no money consideration. Two other considerations are set up: (1) To enable their neighbor to get what he thought he had bought. (2) To sustain their father's deed. When they found that the deeds did not and were not intended to sustain the deed of their father, but really to defeat it as to the most valuable portion, they have brought this action to undo what they did under a mistake. The statement of Jacob O'Quin does not have the effect the appellant claims. Jacob O'Quin said, in a conversation with his neighbor, "If it wasn't for one party trying to beat the other, that he (Jacob) would not have anything to do with it." It was a high and noble purpose to convey away rights to sustain the supposed deed of their father, but quite another to do what would deprive a bona fide purchaser of his title under that deed. There is also quite a difference between making a conveyance to enable a neighbor to get what he thought he had purchased, and making a conveyance to enable a stranger to get what he did not purchase.

Was there fraud? There was. *Rapalje & Lawrence Law Dictionary*: "Fraud is used in many senses, but the point common to all of them is pecuniary advantage gained by unfair means." The pecuniary advantage here was that Mr. Wiggins would get the timber for which he was not to pay. The unfair means was to secure deeds to the property of great value, under the statement that the deeds were merely a formal proceeding to cure an omission. It makes no difference that the attorneys were honest and not conscious of the advantage. Indeed, the more honest and reputable they were, the more likely were they to secure the advantage. As a matter of law, the principal is responsible for the acts of the agent, and the agent is charged with the knowledge of the principal. Combining therefore the act of the agent with the knowledge of the principal, can it be doubted that it was unfair to send to the O'Quins, people of little education, at the hands of highly honorable gentlemen, deeds already prepared for immediate execution, and state that the result desired was to help their neighbor and sustain their father? We think not, and find that there was fraud.

It is said, however, that this suit is really in the interest of the Thayer people, and that, by reason of a contract between the Thayer people and the heirs of O'Quin, the Thayers will get the land. It is said that, where equities are equal, the courts will not interfere; that if these deeds are affirmed the Thayers will lose the timber for which they have paid, but if they are canceled Mr. Wiggins will practically lose the land for which he has paid. The contract between the Thayers and the O'Quins is not before the court for enforcement, and we can make no finding as to its validity. Suppose, however, that that contract is binding; the equities of the parties are not equal. Mr. Wiggins would not undertake the purchase until he found that by this plan he could get the timber for which he was not to pay, and thereby defeat the right of the Thayers to the timber. The Thayers did not move in the matter until they found that their timber was in danger. The purpose to defeat another is fraud. See *Lowry v. Pinson*, 2 Bailey, 324, 23 Am. Dec. 140; *Magovern v. Richards*, 27 S. C. 286, 287, 3 S. E. 340; *Gerald v. Gerald*, 28 S. C. 444, 6 S. E. 290. The purpose to protect yourself is not. Whether the means by which they seek to protect is or is not fraudulent is not before this court. There was no abuse of discretion in requiring appellant to pay the costs and disbursements of this suit.

The judgment appealed from is affirmed.

GARY, C. J., concurs. HYDRICK and WATTS, JJ., concur in the result.

HILLER v. BANK OF COLUMBIA.

(Supreme Court of South Carolina. Oct. 29, 1913.)

1. BANKS AND BANKING (§ 154*)—DEPOSITS—SET-OFF—BURDEN OF PROOF.

A bank seeking to charge against deposits due a depositor money paid on the depositor's debt without his authority must plead and prove that the depositor ratified such payment by adopting it for his own use, and, in the absence of an appropriate pleading, evidence of such a ratification is inadmissible.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. § 154.*]

2. BANKS AND BANKING (§ 154*)—DEPOSITS—ACTION—EVIDENCE.

In an action by depositor to recover the balance of an account kept in her name as an individual where the bank sought to set off payment of checks signed by her as administratrix, in which capacity she kept another account, her husband's will, under which she was acting, is inadmissible in evidence, where it appeared that the moneys in both accounts belonged to her individually.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. § 154.*]

3. APPEAL AND ERROR (§ 1053*)—REVIEW—INSTRUCTION—CURE OF ERROR IN ADMISSION OF EVIDENCE.

In an action by depositor for the balance of an account kept in her name as an individ-

ual, where her husband's will was improperly admitted in evidence upon the theory that moneys kept by her in account as administratrix belonged to his estate, the error was not cured by the charge in which the court properly concluded that the moneys in the account as administratrix belonged to her individually, where his remarks as to that matter might not have been understood by the jury as a charge to them, being prefaced by the statement that what he was saying was not so much for the jury as for the benefit of counsel in case he erred.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

4. APPEAL AND ERROR (§ 1050*)—REVIEW—PREJUDICIAL ERROR.

In an action by a depositor for the balance of an account kept by her individually, where it appeared that she had another account in her name as administratrix, although all the money belonged to her as an individual, the improper admission of her husband's will on the theory that the latter account did not belong to her absolutely, and hence the bank could not set off as against the individual account the payment of checks signed as administratrix, is prejudicial to the bank.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

5. TRIAL (§ 192*)—INSTRUCTIONS—CHARGE ON FACTS.

A charge is not improper as a charge on the facts merely because it does not state hypothetically facts which are admitted.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

6. TRIAL (§ 145*)—ACTION FOR DEPOSIT—INSTRUCTIONS.

Where a customer carried two deposits in a bank, one as administratrix and one individually, the funds in both of which were her individual property, and authorized her agent to sign her name to checks on the administratrix account, and the bank, by directions of the agent, charged checks signed as administratrix to the individual account, an instruction in an action for the balance on that account, which withdrew from the jury the question whether the course of dealing between the parties justified the bank in believing the agent within his powers in directing the checks to be charged to the individual account, was improper; there being some evidence the plaintiff had at a previous time carried two accounts, on both of which the agent was authorized to draw.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 323, 341; Dec. Dig. § 145.*]

7. APPEAL AND ERROR (§ 215*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—OBJECTIONS—NECESSITY.

No advantage can be taken of a charge which misstated the issues where it was not made the ground of objection below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

8. TRIAL (§ 191*)—INSTRUCTIONS—CHARGE ON FACTS.

A charge which assumes a disputed question of fact is improper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

9. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

Where a depositor carried two accounts, one as administratrix and one individually, both however being her individual property, an in-

struction, in an action for a balance on the individual account to which the bank had charged checks signed as administratrix, being directed so to do by the depositor's agent, who was authorized to sign checks on the administratrix's account, that defendant could not recover unless it proved that the checks were signed by the depositor herself was improper as ignoring the issue of the agent's authority, real or apparent, to direct the checks to be charged to the individual account.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

10. PRINCIPAL AND AGENT (§ 119*)—LIABILITY OF AGENT—BURDEN OF PROOF.

A principal who would escape liability for the acts of his agent done within the apparent scope of the agency, on the ground that the agent's authority was limited, has the burden of proving the limitation and notice thereof to the third party.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 391-401; Dec. Dig. § 119.*]

11. TRIAL (§ 256*) — INSTRUCTIONS — REQUESTS.

Where the charge is desired on a special phase of the case, it must be brought to the attention of the court by request to charge, and, in the absence of an appropriate request, the giving of a mere general charge is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 623-641; Dec. Dig. § 256.*]

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

"To be officially reported."

Action by Nannie E. Hiller against the Bank of Columbia. From a judgment for plaintiff, defendant appeals. Reversed.

See, also, 92 S. C. 445, 75 S. E. 789.

D. W. Robinson, of Columbia, for appellant. Frank G. Tompkins, of Columbia, for respondent.

HYDRICK, J. A short time after her husband's death, in 1904, plaintiff collected a policy of insurance on his life, which was payable to her, in her own right, and deposited the money in the defendant bank to her credit as "Nannie E. Hiller, Adm'x." Her husband left a will of which she was executrix, and, after his death, she continued a mercantile business in which he had been engaged, though she was not authorized to do so by the will. Her brother-in-law, John G. Hiller, was her agent in the management of the business. He made deposits to her credit on her said account at bank and, in doing so, signed her name in the indorsement of checks payable to her order and signed her name to checks on said account. She also drew checks on said account. She testified that at first she drew all the checks herself but later she gave him authority to sign her name to checks. She also said that, in signing her name, he tried to imitate her signature, and the testimony showed that it was difficult for even an expert in handwriting to distinguish them.

On April 19, 1910, plaintiff deposited \$200 in the defendant bank to her credit as "Nan-

nie E. Hiller," without "Adm'x" added. Some time in June thereafter a number of checks were presented at the bank, signed "Nannie E. Hiller, Adm'x," payment of which would have overdrawn that account. The bank was about to return them unpaid, when John G. Hiller happened to go into the bank, and, on his attention having been called to the matter, he directed the bank to charge them to Mrs. Hiller's personal account, saying that it was all hers—her business. This was done, and the amount to plaintiff's credit was thereby exhausted, except 13 cents, about which there is no controversy. The bank having refused, on demand, to pay Mrs. Hiller the \$200 so deposited by her, she brought this action to recover said sum. The defense was that the money had been paid out on checks drawn by her or her authorized agent. The defendant attempted to show that the checks which had been charged to her personal account were signed by the plaintiff herself, and the evidence was conflicting as to whether she or John G. Hiller signed them. She admitted that she signed one for \$55.20, which paid for a bale of cotton bought at the store, but denied signing the others. The one she admitted signing did not have "Adm'x" after her signature. The others did. A number of handwriting experts testified that, in their opinion, she signed most, if not all, of them. The bank contended further that the course of dealing between it and plaintiff and John G. Hiller, with the knowledge and acquiescence of plaintiff, had been such that it was justified in obeying his directions to charge the checks to her personal account. In support of that contention, besides the other testimony showing the general course of dealing, it introduced testimony to the effect that on a former occasion plaintiff had two accounts at the bank, and John G. Hiller was allowed to draw checks on both.

[1] Defendant also sought to show that the "Adm'x" checks which had been charged to plaintiff's personal account were drawn to pay her own debts for the purpose of asking that, as both funds were held by her in her own right, it be allowed to set off said checks against the amount to her credit on the personal account. The court excluded the testimony and ruled out the defense on the ground that it had not been pleaded in the answer. In this connection we may dispose of the exceptions based upon that ruling.

On the first appeal (92 S. C. 445, 75 S. E. 789) this court said with regard to that defense: "To avoid misunderstanding, we refer to another point not properly made by the appeal. When the depositor has not assigned his demand against the bank by check or otherwise, the right of the depositor to demand his balance is subject to the right of the bank to set off against the balance any debt due by him to the bank; and this right

of the bank extends to a demand of the bank for money paid out on the depositor's debts without his authority, if the depositor subsequently ratifies the payment by adopting it for his own benefit. *Lowrance v. Robertson*, 10 S. C. 8; 27 Cyc. 838; *Crumlish's Adm'r v. Central Imp. Co. et al.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872, note. But the burden would be on the bank of properly pleading and proving such defense. This subject is referred to in the exceptions, but the defense was not alleged in the answer, nor was evidence on the point offered." Notwithstanding the plain declaration of the court that the defense had not been pleaded, and that it could not avail defendant, unless pleaded, no effort appears to have been made to obtain leave to plead it. Therefore there was no error in excluding the evidence offered to prove it.

[2] Previous to the first trial, the defendant had set up in its answer the defense that plaintiff had mingled her own funds with those of her husband's estate in her account at the bank and had drawn them out from time to time. On plaintiff's motion this defense and all the allegations of the answer relative to the will of plaintiff's husband and his estate, and the mingling of the funds thereof with plaintiff's own funds, were stricken out; and on the former appeal it was held that there was no reversible error in striking out those allegations because the undisputed evidence made only one issue, to wit, whether the money deposited by plaintiff, which, according to the undisputed evidence, was her own, had been drawn out by her or by her authorized agent, and that that issue was raised by the allegation of the answer that it had been so drawn out. Notwithstanding this ruling, on the second trial in the court below the plaintiff was allowed, against the objection of the defendant, to introduce her husband's will, and her attorney was allowed to argue therefrom to the jury that she had two funds in the bank, one of her husband's estate and one of her own; and the court refused to charge defendant's request that the will was not material to the issues in the case, and that it gave plaintiff no authority to carry on the mercantile business for five years after her husband's death.

The will was improperly admitted, because, on the second trial as on the first, the undisputed evidence was that the money deposited in both accounts belonged to plaintiff in her own right. Therefore the admission of the will could only confuse the issue.

[3] It might have been held that the error in admitting it was cured by the charge, because the court correctly concluded and held that there was no testimony that any estate money was deposited in the "Adm'r" account, if it were clear that the jury understood that holding as an instruction to them. But, in the beginning of what is set out in

the record as the charge, his honor said: "What I shall say in the beginning is not so much for the jury as it is for the benefit of counsel in the case, in the event I err in saying it." Upon consideration of his honor's subsequent remarks on the subject, it is by no means clear that he intended any of them as instructions to the jury, or that the jury would have been warranted in accepting and acting upon them as such. And it was not until he came to the point in his remarks where he said that he thought it was his duty to submit only one question to the jury that we can say with certainty that he was addressing his remarks to the jury.

[4] We have often held that the admission of testimony which is merely irrelevant will not be ground for the reversal of a judgment, unless it is made to appear that it was prejudicial; and we are loath to disturb a judgment upon such grounds. But, under the circumstances above stated, we are not prepared to say that the error was not prejudicial, especially as the court refused to charge defendant's request with regard to the relevancy of the will and the absence of authority therein to plaintiff to continue the mercantile business after her husband's death.

[5] We do not agree with appellant that his honor charged on the facts, when he said to the jury: "And she says she opened one on this side, called individual account; she would have had the right to say to John G. Hiller: 'You may check on this administratrix account. You may draw checks on it and sign my name to them, and the bank is authorized to pay those checks; but you cannot sign checks on this individual account. I alone shall draw checks on that.' If she did that, she did what she had the right to do." The facts stated were all admitted or undisputed, and we have frequently held that the trial judge does not violate the inhibition against charging on the facts, when he states admitted or undisputed facts as a basis of applying the law. It would sound absurd, even to an intelligent layman, to hear a trial judge stating hypothetically, in his charge to the jury, facts which are admitted or undisputed. In prohibiting judges from charging on the facts and from stating the testimony, the purpose of the lawmakers was to prevent the judge from becoming a participant, directly or indirectly, in the decision of disputed issues of fact.

[6] But we think his honor erred when he further said, in the same connection: "And if John G. Hiller was authorized to draw on this account, and instead he drew on this account, he did what he had no right to do, and if the bank paid the checks, they did what they had no right to do." The last sentence of this instruction eliminated from the consideration of the jury the contention of the bank that the course of dealing between the parties had been such as to justify the conclusion that Hiller was acting

within the scope of his authority when he directed the checks in question charged to plaintiff's personal account. It also withdrew from their consideration the knowledge or lack of knowledge of the bank of the limitation of the authority of Hiller to draw checks on only one account, which, in view of the testimony of the previous course of dealing, was an important element in determining whether the bank's defense should be sustained.

The rule is that the principal is responsible for the acts of his agent done within the scope of his authority, real or apparent. An agent is clothed in law with all the authority which his principal holds him out as having, or knowingly allows him to hold himself out as having. Therefore if the plaintiff, by her course of dealing with the bank, through Hiller, held him out as having the authority which he exercised, or knowingly allowed him to exercise such authority and acquiesced in it, and if the circumstances were such that a reasonably prudent person would have concluded therefrom that he had such authority, the bank was justified in obeying his directions, and its defense should be sustained. *Welch v. Clifton*, 55 S. C. 568, 33 S. E. 739; *Blowers v. Railway*, 74 S. C. 221, 54 S. E. 368; 31 Cyc. 1331-1335. The testimony, especially that which tended to show that, on a previous occasion, two accounts had been kept, and Hiller drew on both, with the knowledge and acquiescence of plaintiff, made an issue of fact whether the bank was justified in its course, and the court invaded the province of the jury in charging that it had no right to do what it did, under the facts stated in the hypothesis. *Bulst Co. v. Mercantile Co.*, 73 S. C. 48, 52 S. E. 789.

[7] The court erred in stating the bank's contention to the jury, saying: "The bank contends that these ten checks (the 'Adm'x' checks which had been charged to plaintiff's personal account) were on this account called individual account, not to be drawn on by John G. Hiller at all, but by Nannie E. Hiller." The bank's contention was not that said checks were drawn on the personal account but that, notwithstanding they were drawn on the "Adm'x" account, they were drawn by Mrs. Hiller herself; and, as there was not enough money to her credit in that account to pay them, she must be held to have intended that they should be paid out of the other account. With one exception, the checks showed on their face that they were drawn on the "Adm'x" account. The bank further contended that it was within its rights in obeying Hiller's direction to charge the checks to plaintiff's personal account. This error would not, however, be ground for reversal of the judgment, because it was the duty of defendant's attor-

ney to pay attention to the charge and to call attention of the court to the error in stating his contentions. We have frequently held that if counsel sit by and allow the court to misstate the issues or their contentions, without calling attention to it and asking that it be corrected, they will not be allowed to take advantage of it on appeal.

[8] But the instruction was further erroneous in that it involved a charge on the facts, in so far as the court said of the individual account, that it was "not to be drawn (on) by John G. Hiller at all but by Nannie E. Hiller." Whether John G. Hiller had authority to draw on that account was, as we have seen, an issue of fact which was exclusively for the jury.

[9] We think also that his honor narrowed the issue too much when he told the jury that the bank must prove that "the ten checks in issue drawn upon it (the individual account) were drawn rightly, to wit, drawn by Nannie E. Hiller." This instruction left out of view this very material feature of the defense that, even if the checks were drawn by John G. Hiller, still if he had authority, real or apparent, to direct the bank to charge them to Mrs. Hiller's personal account, the bank had the right to do so. His authority to draw the checks on the "Adm'x" account was admitted, and they were so drawn, so that the question whether the plaintiff drew those checks herself was not the sole question at issue, nor was a finding that she did not draw them herself conclusive of the bank's defense.

[10, 11] Appellant contends that his honor erred in charging that, when plaintiff proved that she put the money in the bank, the burden was upon the bank to show that it was rightly paid out. As a general proposition that was a correct statement of the law, and from the context it appears that the court had in mind only the general rule in such cases. It is true, as contended by appellant, that, when a general agency is shown, the burden is upon the principal who would escape liability for the acts of his agent done within the apparent scope of the agency, on the ground that the agent's authority was limited, to prove the limitation and notice thereof to the other party. *Whaley v. Duncan*, 47 S. C. 147, 25 S. E. 54; *Lowry v. Railroad Co.*, 92 S. C. 43, 75 S. E. 278; 31 Cyc. 1644. But, as the principle for which appellant contends arose out of a special phase of the case, it should have been brought to the attention of the court by a request to charge.

Judgment reversed.

GARY, C. J., and FRASER, J., concur. WATTS, J., was absent at the hearing and did not participate in the decision of this case.

CHATTANOOGA & C. I. RY. CO. v. MORRISON.

(Supreme Court of Georgia. Oct. 15, 1913.)

*(Syllabus by the Court.)*1. EXECUTORS AND ADMINISTRATORS (§ 122*)
—TEMPORARY ADMINISTRATOR—RIGHTS TO SUE.

Where an instrument was propounded as a will, and a caveat was filed thereto, and pending the ensuing litigation on the issue of *devisavit vel non* a temporary administrator was appointed under Civil Code 1910, § 3938, such temporary administrator could file an equitable petition to enjoin a railroad company from unlawfully taking possession of a strip of land forming part of a tract left by the decedent, and constructing its road and operating the same, without first acquiring the right to do so.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 494-495½; Dec. Dig. § 122.*]

2. EMINENT DOMAIN (§ 275*) — REMEDY OF LANDOWNER — INJUNCTION — RAILROADS — SUFFICIENCY OF EVIDENCE.

Under the evidence there was no abuse of discretion in granting an interlocutory injunction.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 769-773; Dec. Dig. § 275.*]

3. INJUNCTION (§ 147*)—APPLICATION FOR INTERLOCUTORY INJUNCTION—HEARING—PRACTICE.

While generally at the hearing of an application for an interlocutory injunction the testimony is introduced by means of affidavits, the rule is not inflexible; and, where witnesses are present, without objection on their part, for the purpose of testifying, the presiding judge may, in his discretion, allow them to be examined orally; due care being taken that no injustice is worked thereby.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 320-322; Dec. Dig. § 147.*]

(Additional Syllabus by Editorial Staff.)

4. EXECUTORS AND ADMINISTRATORS (§ 129*)—CONTRACTS—OPERATION AND EFFECT.

A beneficiary's agreement that a railroad company may, pending condemnation proceedings, construct its railway across the land in which she has an interest is not conclusive upon her as administratrix of the estate where she is not the sole beneficiary.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 533-536; Dec. Dig. § 129.*]

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by Elizabeth Morrison, administratrix, against the Chattanooga & Chicamauga Interurban Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Payne, of Chattanooga, Tenn., for plaintiff in error. R. M. W. Glenn, of La Fayette, for defendant in error.

LUMPKIN, J. The Chattanooga & Chicamauga Interurban Railway Company was proceeding to construct its railway through a tract of land. Elizabeth Morrison, as temporary administratrix of Mattie Thomas,

decedent, appointed under the statute pending litigation growing out of the propounding of an instrument as the will of the deceased and a caveat filed thereto, filed her equitable petition, seeking to enjoin the defendant from further trespassing upon the land, and praying to recover a judgment for the damages already done. The defendant admitted that it was proceeding to construct its railway across the land, but denied the right of the temporary administratrix to prosecute this action. It also contended that it had entered upon the land with the consent of the heirs of the decedent, including Elizabeth Morrison, and that it had begun proceedings to condemn a right of way, but they had been suspended with the consent of such parties until the litigation in regard to the will should be concluded. It further set up estoppel by reason of expenditures incurred with the knowledge of the plaintiff.

[1] 1. The first question which arises is whether the plaintiff had the right to file a proceeding to enjoin the taking of possession of a part of the land left by the decedent and the laying of its track thereon, if the evidence justified the finding that this was unlawful. By Civil Code 1910, § 3935, it is declared that the ordinary may, at any time, grant temporary letters of administration upon any unrepresented estate, for the purpose of collecting and taking care of the effects of the deceased. Section 3938 requires that a bond be given for double the amount of the personal property belonging to the estate. Section 3937 declares that a temporary administrator may sue for the collection of debts or personal property of the estate. Section 3938 provides that, pending an issue of *devisavit vel non* upon any paper propounded as a will, temporary letters of administration may be granted, unless the will has already been admitted to probate in common form, and letters testamentary have been issued.

Without discussing the various forms of special administration which were permissible under the common law, it will be seen from the above summary of the provisions of our Code that it is contemplated that there will be a permanent administration, but that provision in made for a temporary appointment, in two instances: First, where there is an unrepresented estate; and, second, pending an issue of *devisavit vel non*. In construing the power of an administrator so appointed, and its limitations, the purpose of the appointment is to be kept in view; and it must also be remembered that in this state real estate as well as personalty is subject to the payment of the debts of the decedent, and may be administered for that purpose, when necessary. As early as 1858, in the case of *Johnson v. Brady*, 24 Ga. 131, it was held that, "A temporary administrator, finding the assets of the estate of his intestate involved with other es-

tates, and likely to be seized and sold, and the proceeds applied contrary to law, ought to ask an injunction until the affairs of the estate can be investigated, and conflicting claims adjusted." In *Reese v. Burts*, 39 Ga. 565, it was held that a temporary administrator might file an affidavit of illegality to an execution proceeding to sell the intestate's land. *McCay, J.*, said: "We see no reason why the temporary administrator is not, in this state, bound to protect the real as well as the personal estate of the deceased from illegal interference. Land is assets for the payment of debts, in this state, and it is the duty of the administrator to keep it from strangers for that purpose." In *Langford v. Langford*, 82 Ga. 202, 8 S. E. 76, it was held that a temporary administrator had no right to distribute any portion of the intestate's estate, or to agree to sell and distribute the real property thereof, "nor can he interfere with the realty for any purpose except to preserve and protect it." See, also, *Ewing v. Moses*, 50 Ga. 264; *Mason v. Atlanta Fire Co.* No. 1, 70 Ga. 604, 607, 608, 48 Am. Rep. 585; *Barfield v. Hartley*, 108 Ga. 435, 33 S. E. 1010. He cannot institute an action to recover land alleged to belong to the estate and held adversely thereto. *Banks v. Walker*, 112 Ga. 542, 37 S. E. 866; *Ward v. McDonald*, 135 Ga. 515, 69 S. E. 817.

It will thus be seen that, while a temporary administrator cannot sue to recover land held adversely to the estate, or for mesne profits thereto, or maintain similar actions, and there is a distinction between his powers in regard to realty and personalty, it has been recognized that, under certain circumstances, he may take proper action to protect and preserve real estate against unlawful seizure or sale or illegal interference. In the present case, if it be conceded that the defendant was unlawfully proceeding to enter upon the land forming a part of the estate of the decedent and to appropriate a portion of it, to the damage of the estate, without condemning it in accordance with the law, who should stop such illegal action if not the temporary administrator? If certain persons claiming to be the heirs of the deceased should apply for an injunction, the defendant would reply that they have no title until it has been determined that the deceased died intestate. If the persons named in the alleged will as legatees should proceed, it will be said that they had no title until the will had been probated. No permanent administrator, either with the will annexed or based on intestacy, has been appointed. If the temporary administratrix cannot preserve the estate from unlawful seizure by the railroad company and use for a right of way, then it is without protection.

The case falls within the authorities above cited so far as the preservation of the status is concerned. But so far as the petition seeks to go further and recover damages on

account of what has already been done, we think it is not sustainable.

[2] 2. Having determined that the plaintiff was a proper party to institute and maintain the suit for an injunction, did the presiding judge abuse his discretion in granting it? It was contended by counsel for the defendant that all of the heirs of the decedent had agreed to allow the defendant to enter upon the land without having first condemned it, and that the defendant had begun proceedings for the purpose of condemnation, but they had been postponed until the result of the litigation in regard to the will should be known. If the will should be set aside, as it does not appear that the decedent left any children or descendants of children, her husband would be her heir. Civil Code 1910, § 3930. While there are some general expressions on the part of witnesses for the defendant that all parties in interest agreed, it does not appear that the husband of the decedent did so, or was notified of the condemnation proceedings. Again, it appears that the land in controversy was included in the residuary clause of the alleged will, and it was alleged by the plaintiff that the legacy thereunder would have to be abated in order to pay expenses of administration, funeral expenses, and the like.

[4] The agreement, on the part of the plaintiff as an individual, for the defendant to enter upon the land would not be conclusive upon her in her representative capacity, if she were not the sole beneficiary. Moreover, her agreement provided that the proceeding to condemn the land should be instituted within a limited time, or the consent should go for naught. There was evidence tending to show that while it was technically begun, it was postponed by the defendant, though the plaintiff, through her husband, was asking that it proceed. If it was not a valid proceeding, it would not meet the requirements of the agreement. If it was a valid proceeding, the defendant could not cause it to be delayed and insist on going forward with the construction and operation of its road upon the land in the meantime, although other legatees named in the will consented. Without discussing the evidence at length, there was enough to authorize the presiding judge to grant the injunction.

[3] 3. The only other point for determination is one of practice. The presiding judge, on the hearing of the application for an interlocutory injunction, over objection by counsel for the defendant, allowed certain witnesses, sworn on behalf of the plaintiff, to be examined orally, in lieu of requiring their testimony to be reduced to the form of affidavits. There was no objection by the witnesses on the ground that they could not be compelled to attend such a hearing by compulsory process; nor did any of them decline to make affidavits, so as to raise the

situation provided for by section 5918 of the Civil Code of 1910. When such a question is raised by a witness, we will deal with it as may seem proper in the light of his objection. Here the witnesses for the plaintiff were present, and the sole objection to admitting their oral evidence came from the defendant. The defendant was permitted to cross-examine them, and did so. If it had no right to do this, it was accorded a privilege of which it cannot complain. No evidence offered by the defendant, by affidavit or otherwise, was rejected. No application was made to require affidavits to be filed, and it does not appear that the defendant was taken by surprise, or that he asked for further time to rebut such evidence; nor was it shown that any injury was done to it. We fail to see how the defendant was hurt. Generally such hearings have been by affidavits. But there is no inviolable sanctity about an affidavit as against oral evidence. It is a matter of practice. And where the witnesses are present, at least, and not objecting, we think the presiding judge has a discretion as to whether he will hear affidavits or oral testimony. Indeed every one who has presided as a judge on the circuit bench will doubtless recognize the fact that not infrequently the truth can be reached by a few pertinent questions, though it may be beclouded and obscured in pages of carefully prepared affidavits. It requires more time to hear oral evidence; but it is more important to learn the truth than to save time. Of course the power should be justly used so as not to entrap or work a hardship upon either party. Justice is the object to be obtained, and it should be reached by just means.

In *Boyce v. Burchard*, 21 Ga. 74, and *Hester v. Exley & Keller*, 130 Ga. 460, 60 S. E. 1053, the rejection of certain evidence was affirmed, but oral evidence and affidavits were treated on the same basis. See, also, 7 Encyc. Ev. 1358; *Davis v. Covington and Macon R. Co.*, 77 Ga. 322, 2 S. E. 555; 22 Cyc. 942; *Bish. Eq.* (8th Ed.) 16; Civil Code 1910, § 5406; *Rogers v. Rogers*, 103 Ga. 763; 30 S. E. 659; *Robertson v. Heath*, 132 Ga. 310, 64 S. E. 73.

Judgment affirmed. All the Justices concur.

WALKER v. WOOD. (No. 4,646.)

(Court of Appeals of Georgia. Oct. 7, 1913.
On Rehearing, Oct. 31, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 485*) — ATTORNEY'S FEES—UNSWORN DENIAL—SUFFICIENCY.

An obligation in a promissory note to pay attorney's fees if it is collected through an attorney at law is conditional, and for that reason an unsworn denial by the defendant that the statutory notice was given is sufficient,

in a suit upon such a note where attorney's fees are claimed.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1542-1554; Dec. Dig. § 485.*]

2. JUDGMENT (§ 358*)—VACATION.

Where such an answer was erroneously stricken, it was error to overrule a motion, made during the term, to vacate a judgment in the plaintiff's favor which included attorney's fees.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 696, 701; Dec. Dig. § 358.*]

3. BILLS AND NOTES (§ 534*)—ATTORNEY'S FEES—JUDGMENT.

The stipulation in the note sued on for the payment of attorney's fees being conditional, the plaintiff was not entitled to a judgment for attorney's fees as upon an unconditional contract in writing. *Turner v. Bank of Maysville*, 13 Ga. App. —, 79 S. E. 180.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by G. B. Wood against C. N. Walker. Judgment for plaintiff, and defendant brings error. Affirmed conditionally on rehearing.

R. W. Crenshaw and Samuel D. Hewlett, both of Atlanta, for plaintiff in error. H. L. Graves, of Atlanta, for defendant in error.

RUSSELL, J. Judgment reversed.

On Rehearing.

An unconditional judgment of reversal was entered in this case. Upon a motion for a rehearing, counsel for the plaintiff in the court below indicates his willingness to abandon his claim for attorney's fees, and, in view of the fact that the defendant's answer was properly stricken in so far as it undertook to set up a defense to the recovery of the unconditional part of the note, consisting of the principal and interest due thereon, we now direct that the judgment of the court below may be affirmed, provided the plaintiff will, within 10 days after the remittitur is filed in the court below, write off the sum awarded as attorney's fees. If this should not be done, the judgment will stand reversed.

Affirmed with condition.

MANNING v. STATE. (No. 5,223.)

(Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 723*)—TRIAL—MISCONDUCT OF SOLICITOR GENERAL.

The language of the solicitor general in concluding the argument for the state was improper, highly inflammatory in character, and calculated to prejudice the jury against the defendant, and was not warranted by the evidence. The trial judge should have declared a mistrial, or have strongly admonished the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury that the language was improper, and that they should disregard it in their deliberations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1674, 1676; Dec. Dig. § 723.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

R. T. Manning was convicted of violating the prohibition law, and brings error. Reversed.

T. E. Hightower, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

HILL, C. J. On the trial of one for the offense of selling liquor, the solicitor general, in closing his argument, used the following language: "These blind tigers are running around all over the country, sending souls to hell, and have no respect for Jesus Christ or woman, and you ought to stop that kind of stuff. Everything you hear is people all over the country talking about blind tigers, and I ask you not to tolerate this stuff, and I ask you to help me convict them." The attorney for the accused objected to this language, and moved the court for a mistrial. Unquestionably the language used by the solicitor general was improper, and the court should have declared a mistrial, or should have admonished the jury that the language was improper, and not to regard it, or give it any weight in their deliberations. The case is a close one on the evidence, and for this reason we more readily grant a new trial. It was not a fair inference, from the evidence, that the defendant was a "blind tiger," as defined by the Supreme Court. Only one sale was proved, and that by a witness who probably had ill will towards the accused.

Judgment reversed.

MOBLEY v. STATE. (No. 5,184.)
(Court of Appeals of Georgia. Oct. 30, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 67*)—LABOR CONTRACT ACT—PROSECUTION FOR VIOLATING LABOR CONTRACT ACT—BURDEN OF PROOF.

In a prosecution for a violation of section 715 of the Penal Code, generally known as the "labor contract act," the burden is upon the state to show that the hirer alleged to have been damaged has in fact sustained a loss capable of definite computation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

2. FRAUD (§ 68*)—MASTER AND SERVANT (§ 67*)—PROSECUTION FOR VIOLATING LABOR CONTRACT ACT.

The "labor contract act" was not designed to afford machinery for the collection of debts by criminal prosecution but was intended to apply only to cases where punishment should be inflicted upon those who obtained money, or other advance of value, by fraud and with the intent to cheat and damage the opposite party to the contract. It is axiomatic that, where no loss is shown to have been sustained by a

person alleged to have been defrauded, the act alleged to be fraudulent is not punishable as a crime.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 76; Dec. Dig. § 68;* Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

3. MASTER AND SERVANT (§ 67*)—PROSECUTION FOR VIOLATING LABOR CONTRACT ACT—SUFFICIENCY OF EVIDENCE.

The conviction in this case was wholly unauthorized.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

Error from City Court of Millen; Thos. L. Hill, Judge.

Jule Mobley was convicted of violating the Labor Contract Act, and brings error. Reversed.

C. B. Garlick, of Waynesboro, for plaintiff in error. W. Woodrum, of Millen, for the State.

RUSSELL, J. The record in this case to our minds develops a remarkable state of facts. In saying this we, of course, accord to the testimony in behalf of the prosecution the same preference which the judge (who tried the case without a jury) gave it and disregard entirely the defendant's showing before the jury so far as in conflict with it. The defendant was charged with a violation of the "labor contract act" (Acts of 1903, p. 90), embodied in sections 715 and 716 of the Penal Code, and on trial before the presiding judge, without a jury, was adjudged guilty and sentenced to serve 12 months upon the chain gang, without any alternative. A review of the evidence shows that the accused had contracted to serve as a farm laborer, or share cropper, with the prosecutor for 12 months from January 1, 1913, to January 1, 1914. He worked from January 1, 1913, until May 10, 1913, and during that entire period, according to the testimony of the prosecutor himself, received the sum total of \$11.20, \$10 of which was paid him in December, 1912, at the time the contract was made, and \$1.20 being the sum paid in May, 1913, upon which the prosecution in the case at bar is based. The defendant was one of three share croppers with whom the prosecutor contracted at the same time, and, though the prosecutor contracted with each separately, it appears that the three were to jointly cultivate, in corn and cotton, in return for one-half of the crop they might by their labor produce, 70 acres or more on the prosecutor's plantation. According to the testimony the contract of the prosecutor with the defendant, as with each of his collaborators, made each of them what is ordinarily known as "croppers," and, as a legal result of this relation, the title to the crop was fixed in the prosecutor as landlord. Tolbert and Alonzo Wright, the two persons who, according to the testimony of the prosecutor, severally contracted with him to cultivate the two tracts of land jointly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with the accused, so far as appears from the record, continued in service, and no complaint is made that they were not still laboring at the time of the trial.

The testimony does not show that the defendant did not work faithfully, barring lost time (probably caused by bad weather), during the four and a third months of his service under the contract, but the prosecutor testified: "On the 10th day of May he got \$1.20 in money from me, of the value of \$1.20. He told me he wanted the money, and I let him have it because he was working on a share crop with me. I would not have loaned the money if he had not been working with me. After obtaining the \$1.20 Julie Mobley quit the crop and left and never worked any more in the crop. He has done no work for me since, neither has he paid nor offered to pay me the \$1.20 back." The prosecutor further testified that the defendant left because he did not want to pay the prosecutor, and that he (the prosecutor) was damaged \$1.20 and was damaged more than this because his crop suffered for want of work. He testified also that he paid the defendant's road taxes (amounting to \$3), but since there is no suggestion that this payment was made at the request of the defendant, and since no one can, as a matter of right, make another pay his debts by paying them for him and then requiring that the sum advanced be repaid, the road tax is immaterial.

[1] Leaving out of view the question whether the prosecution's case failed because of failure to prove that the accused did not have good cause for quitting the service of the employer with whom he had contracted (*Johnson v. State*, 13 Ga. App. —, 79 S. E. 179), for it is evident that the prosecutor's testimony upon this point is purely opinionative, without the statement of a single fact from which the court could for itself determine whether the conclusion reached was correct, the real question in the case is whether the record shows that the employer sustained loss. A citizen cannot be deprived of his liberty or convicted of crime upon suspicion that he has caused a loss or because of an imaginary loss. When loss is made the basis of a fraud alleged to be criminal, it must be proved to be an actual loss, definite in amount and capable of exact computation. It is no longer an open question that proof of actual loss is essential to authorize a conviction of the offense denounced in section 715 of the Penal Code. *Millinder v. State*, 124 Ga. 452, 52 S. E. 760; *Abrams v. State*, 126 Ga. 591 (2), 593, 55 S. E. 497; *Coleman v. State*, 6 Ga. App. 398, 65 S. E. 46. On the direct examination, as we have already stated, the prosecutor testified that he was damaged in the amount of \$1.20, which the accused obtained from him, and which he would not have "loaned" the accused but for the fact that he was in his employ, and that he also sustained some dam-

age (not estimated) due to the fact that his crop had suffered for lack of cultivation. Upon cross-examination the prosecutor (who was the only witness) testified that the crop which the accused, jointly with the Wrights, was to cultivate could reasonably be expected to make 30 bales of cotton, worth 10 or 12 cents per pound, and that the corn crop would amount to 50 bushels of corn, and after payment of the expenses and of advances made to the croppers, amounting to about \$600, he could get one-half of the net remainder. Properly construing the testimony, the 30 bales of cotton would be worth at least \$1,800 (viewed as commercial bales averaging 500 pounds each), and the corn would be worth \$50, making \$1,850 for the receipts (to say nothing of the cotton seed and fodder, which this court knows to be marketable), which would leave \$1,250 (after deducting the \$600 above stated as expenses and advances), a half of which, or \$625, would be the property of the prosecutor. In the meantime, and until there is a settlement and the advances and expenses (whether they are greater or less) are paid, the entire crop is in the absolute control of the prosecutor. Civil Code, § 3707.

To say the least of it, we do not think that the evidence showed, beyond a reasonable doubt, that this laborer, in procuring a loan of \$1.20 after four and a half months of faithful service, intended to defraud his employer. It is a matter of common knowledge that ordinarily by the 10th of May arable land has been prepared for planting and corn and cotton have been planted and have generally received their first working. There is nothing in the record to suggest that this was not true in the present case. It might have been possible for the prosecutor to prove his loss with sufficient definiteness to have established it, but he did not attempt to do so, and, on the contrary, it appears that one Charley Wright came to the defendant's place after the defendant left and took the defendant's place in the crop, and that Charley Wright will be paid out of the crop as a part of the expenses. There is nothing to suggest that Charley Wright is not as good a farm hand as the defendant, and therefore it devolved upon the state to show how the crop was damaged by the exchange of laborers, and definitely how much the damage amounted to. This the state failed to do. From the figures in the record it seems to us that the defendant, who abandoned his third of a half interest in the crops, is the only probable loser actually disclosed. But if, as a matter of fact, the sum of \$1.20 loaned him, and the \$1.20 for extra plowing on Life Fleming's crop, was the only cash advanced him up to May 10th, we cannot greatly blame him for seeking greener fields and pastures new. As an obiter we would say this would be good cause for quitting.

[2] 2. We regret that there seems to be a

very prevalent misapprehension of the scope and purposes of section 715 of the Penal Code, ordinarily known as the "labor contract act" of 1903. This statute was not designed to afford machinery for the collection of debts by criminal prosecution, but it was intended to apply only to cases where punishment should be inflicted upon those who obtained money, or other advances of value, by fraud and with the intent to cheat and damage the opposite party to the contract. It is axiomatic that, where no loss is shown to have been sustained by a person alleged to have been defrauded, the act alleged to be fraudulent is not punishable as a crime.

In the present case, aside from the absence of any proof that the employer sustained actual loss, the fact that the servant and farm laborer discontinued his service after having obtained as small a sum as \$1.20, after having given satisfactory service for more than four months, and after having apparently performed all the hard labor incident to the preparation for planting, does not beyond a reasonable doubt compel the conclusion that this servant, at the time of the advancement or loan, harbored and was actuated by a definite intent to defraud. The defendant is a human being. He may be presumed to have some knowledge, indefinite though it may be, of the value of his services in preparing the ground and planting the crop. Presumably he knew the amount of the advances made to him, and if, as an intelligent being, he knew that he had given full value, or more than value received, for all of the advances he had obtained, he would not have had an intent to defraud, even if he had intended to quit his master's service at the time he asked for the loan. Of course in quitting the servant acts at his peril in becoming judge in his own case, and he must take the consequences if he judges wrongly. But, when his act is called in question, the law places upon the prosecution the burden of proving beyond any reasonable doubt that, at the time the servant quitted the service of his employer, he either knew, or reasonably should have known, that his act would impose a loss. In *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022, and in *Patterson v. State*, 1 Ga. App. 782, 58 S. E. 284, we pointed out that the intent to defraud was one of the absolutely essential ingredients of the offense denounced in section 715 of the Penal Code. It rests upon the state to prove the existence of this intent at the time the advance was made which it is claimed was procured by fraud. The offense of cheating and swindling, based on the violation of a contract to perform services, so far as it is affected by the element of fraud, does not differ in any respect from other offenses into the perpetration of which fraud enters as a controlling ingredient. In all cases, civil or criminal, where fraud is claimed to have been commit-

ted, the charge falls when it appears that no loss resulted from the act alleged to have been fraudulent. No loss, no fraud. This is true in law at least, and we think it is also sound in morals.

[3] 3. Under the rulings in *Young v. State*, 3 Ga. App. 463, 60 S. E. 117, *Holloway v. State*, 6 Ga. App. 243, 64 S. E. 671, and *Coleman v. State*, 6 Ga. App. 398, 65 S. E. 46, the evidence was wholly insufficient to authorize the judgment finding the accused guilty, and the court erred in overruling the motion for a new trial.

Judgment reversed.

COOPER v. STATE. (No. 5,183.)

(Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 88*)—CITY COURTS—SALE OF NARCOTIC DRUGS—ACCUSATION.

One charged with a violation of the act of 1907 as to the sale of narcotic drugs (Acts 1907, p. 121), as codified in sections 1651 and 1652 of the Civil Code (Pen. Code, § 459), can be prosecuted in a city court having jurisdiction of misdemeanors, by accusation filed therein, as well as by indictment of the grand jury transferred to that court from the superior court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 127; Dec. Dig. § 88.*]

2. CRIMINAL LAW (§§ 369, 376, 419, 420*)—EVIDENCE—HEARSAY—CHARACTER EVIDENCE—OTHER OFFENSES.

The accused was on trial for a violation of the above-mentioned statute. The trial judge permitted the state to prove by the justice of the peace, who issued the warrant upon which the accusation was based, that he had information that the accused had been convicted before, and, that being the second charge, fixed the bond at a larger amount. *Held*, that this evidence should have been excluded, on the objection that it was hearsay, irrelevant, and prejudicial. It was putting the character of the accused in issue by the state, and was also a violation of the general principle that, while one is on trial for one offense, evidence that he committed another offense is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824, 836-839, 841, 843, 973-983; Dec. Dig. §§ 369, 376, 419, 420.*]

3. CRIMINAL LAW (§ 850*)—CUSTODY OF JURY—DISQUALIFICATION OF BAILIFF.

A deputy sheriff, who is also the prosecutor in a criminal case, is not a proper official to have charge of the jury in that case pending the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2033, 2034, 2038; Dec. Dig. § 850.*]

4. CRIMINAL LAW (§ 814*)—SALE OF NARCOTIC DRUGS—PROSECUTION—INSTRUCTIONS.

It was erroneous to instruct the jury that if they believed that the accused did sell the drug, as alleged, to the person named in the accusation "or to any one else," within the last two years prior to the filing of the accusation, they would be authorized to find him guilty; the error being in the use of the words "or to any one else."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from City Court of Bainbridge; H. Spooner, Judge.

C. R. Cooper was convicted of the unlawful sale of narcotic drugs, and brings error. Reversed.

W. V. Custer and W. M. Harrell, both of Bainbridge, and P. D. Rich, of Colquitt, for plaintiff in error. M. E. O'Neal, Sol., of Bainbridge, for the State.

HILL, C. J. Judgment reversed.

COX v. STATE. (No. 4,926.)

(Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 655*)—NEW TRIAL—GROUNDS—CONDUCT OF JUDGE.

A trial judge may, by the form of the question which he propounds, intimate an opinion as to the existence of a fact the proof of which is material to the issue, and such an intimation of opinion, under the provisions of the Code (Pen. Code, § 1058; Civ. Code, § 4863), requires the grant of a new trial. *Sharpton v. State*, 1 Ga. App. 542, 57 S. E. 929; *Rouse v. State*, 2 Ga. App. 184, 58 S. E. 416.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 655.*]

2. PERJURY (§ 37*)—DEFENSE—INSTRUCTION.

Upon the trial of one indicted for the offense of perjury, an instruction which withholds from the jury the determination as to whether the testimony alleged to have been false was material to the issue is erroneous.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 134-138; Dec. Dig. § 37.*]

3. PERJURY (§ 31*)—BURDEN OF PROOF—EVIDENCE.

In a trial for perjury, the burden is upon the state to prove that the accused was duly sworn, as alleged in the indictment, and it is error to charge the jury that, from the fact that the accused went upon the stand as a witness, submitted to an examination as a witness, and answered questions as a witness, the law would presume that he was sworn, and the burden of proof would be upon him to show that he was not sworn.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 107; Dec. Dig. § 31.*]

4. PERJURY (§ 10*)—ELEMENTS OF OFFENSE—"OATH."

While no presumption that an oath was administered to one accused of perjury arises from the fact that he made statements upon the stand as a witness, still it is not necessary that in testifying a witness should have his hand upon the Bible, or that he raise his hand. If he appeared as a witness, and a lawful oath was administered to him, and he assented to it, the fact that he consciously took upon himself the obligation of the oath could be implied, and it would be immaterial whether he was standing with the rest of the witnesses or in another part of the courtroom by himself.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 36, 37; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4871-4874; vol. 8, p. 7735.]

5. PERJURY (§ 37*)—INSTRUCTIONS—DEFINITION OF OFFENSE.

A definition of the offense of perjury, from which is omitted the statement that the alleged

false testimony was material to the issue in question, is fatally defective, and the jury should be told that a charge of perjury cannot be based upon testimony not delivered in a judicial proceeding, and that, to convict of this offense, the testimony of two witnesses, or of one witness supported by such circumstances of corroboration as the jury consider necessary for that purpose, is required. Pen. Code, § 259.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 134-138; Dec. Dig. § 37.*]

6. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—EVIDENCE.

Where there is no evidence that the accused confessed, the judge is not required to charge the jury upon the subject of admissions and confessions. *Malone v. State*, 77 Ga. 767; *Sellers v. State*, 99 Ga. 212, 25 S. E. 178; 3 Mich. Enc. Dig. Ga. Rep. 228.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

7. CRIMINAL LAW (§ 1122*)—APPEAL AND ERROR—EXCEPTION—SUFFICIENCY.

An exception, in which it is insisted that the judge erred in failing to charge the jury the rule of law as to the insanity of the accused at the time the alleged perjury was said to have been committed, without alleging any reason why the failure to charge was error or without pointing out wherein the cause of the accused was prejudiced, presents nothing for the consideration of this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.*]

8. EXCEPTION TO CHARGE.

The exception to the entire charge of the court is too vague and indefinite to be considered.

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Ben Cox was convicted of perjury, and brings error. Reversed.

Wm. T. Townsend, of Cartersville, and John W. Bale, of Rome, for plaintiff in error. J. M. Neel, Sol. Gen. pro tem., of Cartersville, for the State.

RUSSELL, J. Judgment reversed.

POPE v. STATE. (No. 5,001.)

(Court of Appeals of Georgia. Oct. 30, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 83*)—VOLUNTARY MANSLAUGHTER—PRINCIPAL IN SECOND DEGREE.

One may be convicted as principal in the second degree of the offense of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 109; Dec. Dig. § 83.*]

2. HOMICIDE (§ 310*)—REFUSAL OF INSTRUCTIONS—EVIDENCE.

There being no evidence of any conspiracy or concert of action between the accused and the person who actually committed the homicide, and the evidence not demanding a finding that the deceased came to his death as a result of the wound inflicted by the accused, it was error to refuse to charge the jury the law applicable to the offense of assault with intent to murder, for, unless the jury should find that the death of the deceased resulted from a wound

inflicted by the accused, he could at most be convicted only of the offense of assault with intent to murder, and would not be guilty of any grade of unlawful homicide.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 657-661; Dec. Dig. § 310.*]

3. NO OTHER ERROR.

Except as above indicated the trial was free from material error.

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW (§ 67*)—"PRINCIPAL IN SECOND DEGREE."

A "principal in the second degree" is a person who is present, aiding and abetting the act to be done.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 81-86; Dec. Dig. § 67.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5556, 5557; vol. 8, p. 7763.]

5. CRIMINAL LAW (§ 59*)—PARTIES TO OFFENSE.

Where two or more parties, either with or without a common cause or quarrel, act with a common intent, and jointly commit an unlawful act, each is chargeable with criminal responsibility for the acts of all the others.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.*]

Error from Superior Court, Jasper County; J. B. Park, Judge.

One Hulan, alias Buck, Pope, was convicted of voluntary manslaughter, and brings error. Reversed.

Greene F. Johnson, of Monticello, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, for the State.

RUSSELL, J. The plaintiff in error was jointly indicted with one Ollie Roberts for the offense of murder. The indictment charges both defendants as principals in the first degree. The accused was found guilty of voluntary manslaughter, and his motion for a new trial was overruled. The fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, seventeenth, and eighteenth grounds of the motion raise in various forms the question whether the defendant, Pope, could lawfully be convicted as a principal in the second degree. It is contended that the evidence did not authorize the instructions to the jury which are complained of in these grounds, that they gave to the state the benefit of a theory to which it was not entitled under the evidence, and it is further insisted that the offense of voluntary manslaughter is of such a nature that one cannot be a principal in the second degree in the commission of this offense. The twelfth ground of the motion for a new trial excepts to an instruction of the court upon the law of self-defense, on the ground that the instruction imposed upon the defendant the burden of satisfying the jury that he was acting in self-defense, before they would be authorized to acquit him, whereas, the law imposes upon the state the burden of satisfying the jury beyond a reasonable doubt that the defendant was not acting in self-defense at the time he com-

mitted the homicide. In the thirteenth ground of the motion complaint is made that the verdict finding the defendant guilty is entirely unsupported by evidence, for the reason that there is no evidence sufficient to authorize the jury to conclude that the defendant fired the shot which took the life of the deceased. In the fifteenth ground of the motion it is insisted that, since there was evidence from which the jury might have inferred that the plaintiff in error was acting independently in shooting at the deceased, and no evidence as to which of the joint defendants inflicted the mortal wound, it was error for the court to omit to charge the jury that, if they found from the evidence that he acted independently in shooting at the deceased, and without any concert of action with the other defendant, and without any common purpose with the joint defendant, and there was no evidence of a conspiracy, then he could not be convicted either of murder or of voluntary manslaughter, unless the jury found that the life of the deceased was taken by a wound inflicted by him. In the nineteenth ground it is insisted that the court erred in failing to give in charge the law of assault with intent to murder, and in omitting to instruct the jury that, in the event they believed this offense to have been made out by the evidence, they would be authorized to find the defendant guilty of assault with intent to murder. As it is not likely that any of the alleged errors assigned in the other grounds of the motion for new trial will recur upon another trial of this case, those grounds will not be considered.

According to the evidence the defendant, Pope, and the deceased had some words. The evidence is in conflict as to whether the deceased attempted to use a weapon, and as to who really provoked the difficulty. Whether justifiably or not, Pope fired upon the deceased. At about the same time the deceased was fired upon by Ollie Roberts, his codefendant. A large crowd had assembled, and a frolic had for some time been in progress; but it does not appear that Pope came to the frolic with Roberts, or that they spoke to each other either before or after they reached the scene of the festivities. There was no evidence that they were intimate or even acquainted with each other. The undisputed evidence discloses that they were not akin, and only one of the defendants participated in the quarrel with the deceased. There is no evidence tending to show that the two defendants participated in a common intent, other than the fact that both fired upon the deceased about the same time. The deceased came to his death by reason of one of the shots in the mêlée, fired by one or the other of the defendants; but the record does not disclose which gave the mortal wound.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

[1] 1. We think it is settled that one may be convicted as a principal in the second degree of the offense of voluntary manslaughter. *Maughon v. State*, 9 Ga. App. 559, 71 S. E. 922. Of course, one could not be accessory before the fact of the offense of voluntary manslaughter, because of the fact that the offense is usually committed upon the sudden heat of passion, and there can be no case of voluntary manslaughter where there has been such previous deliberation and premeditation as is necessarily involved in the commission of a crime which is counseled, commanded, and procured. *Ex vi* terminat the whole idea of an accessory before the fact involves predetermination, for the accessory intends to be, and, as a matter of law, must necessarily be, absent from the scene of the crime at the time of its commission.

[4] A principal in the second degree, however, is one who is present, aiding and abetting the act to be done, and the same causes which influence the principal in the first degree to be suddenly overwhelmed with the impulse to kill may operate upon a friend or near relative who may be present. Two friends may be traversing together a public highway; one of them may be assaulted by a third person, and, under the sudden impulse of passion engendered in the principal's companion by the natural bias of friendship, he may participate in acts that show participation in the intent to kill which has only instantaneously developed in the mind of his fellow. The human mind operates with such celerity that this is only one of the many illustrations which might be given to show that one in aiding and abetting another to commit a homicide may be mastered by the impulse, and his act may be the result of an intent entertained in common with another, although there was no premeditation and no conspiracy. The court, therefore, did not err in instructing the jury to the effect that if it be established that the principal in the first degree was guilty of voluntary manslaughter, one shown by proof to be a principal in the second degree may be convicted of the same offense.

The point now before us in its full scope was not before the Supreme Court in *Brown v. State*, 28 Ga. 199, for the ruling in that case went no further than to hold that one charged with the offense of murder as a principal in the second degree could be convicted of voluntary manslaughter, where it appeared that he participated in the felonious act, but that as to him the element of malice was lacking. It is distinctly held in that case that: "Presence and participation in the act of killing a human being is not evidence of consent and concurrence in the perpetration of the act by a defendant charged as aiding and abetting in the killing, unless he had a felonious design or participated in the felonious designs of the per-

sons killing" (fourth headnote). The ruling stated in the fifth headnote is merely that, if one charged with murder in the first degree committed an assault upon the deceased with a deadly weapon, but the intention of the principal in the second degree was to participate in an assault and battery only, with no design to kill, and without knowledge that the principal in the first degree intended to use a weapon, the principal in the second degree would be guilty of manslaughter only. An instruction to the jury that the principal in the second degree would be guilty of murder if he was connected with the act of killing was expressly disapproved, upon the ground that this did not present to the jury for determination the question whether the defendant was actuated by the intent to kill.

[2] 2. Without referring to the several exceptions to the charge of the trial judge, the real error in the case, to our minds, as presented by various assignments of error, is that under the evidence this defendant could not have been convicted of any higher offense than that of assault with intent to murder, and the judge should have instructed the jury as to the law of assault with intent to murder, and have charged them that, if they believed the accused made an assault upon the deceased with intent to kill him, the jury would be authorized to find the accused guilty of assault with intent to murder, unless it appeared from the evidence that he was justified, under the rules of law appropriate to that subject, which we will not elaborate here.

[5] There was no evidence that the shot from this defendant's pistol struck the deceased, or that the wound which resulted in the death of the deceased was inflicted by him. Proof upon this point was essential to his conviction of any grade of homicide, unless the evidence demanded a finding that he was actuated by an intent which was shared by his codefendant. Proof that two or more parties, either with or without a common cause or quarrel, but acting with a common intent, jointly engaged in the same undertaking, and jointly committed an unlawful act, will charge each of the participants with liability and responsibility for the acts of all of the others. And this answers the suggestion of the learned counsel for the state that society would be helpless indeed if, when one was assaulted by deadly weapons in the hands of a mob, and killed, there could be no conviction of murder, because it was impossible to show which shot killed the deceased. In such a case as that used for illustration by the state's counsel, proof that one of the mob aided and abetted in the killing would supply evidence of a common intent; but can this be said to be true in a case in which it does not plainly appear that there was any common intent, or any common cause or quarrel, and where,

on the contrary, it appears that the defendant was acting independently? It is perhaps true, as insisted by the solicitor general, that under the record the court might have treated this defendant as a principal in the first degree; but there is not sufficient evidence to make him responsible for the acts of the party indicted with him.

[§] The remaining exceptions are sufficient-ly dealt with in the headnotes.

Judgment reversed.

JOHN FLANNERY CO. v. JAMES.
(No. 4,616.)

(Court of Appeals of Georgia. Sept. 16, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1003*)—VERDICT—EVIDENCE.

When a verdict is supported by some evidence, though it be against the large preponderance of the evidence, this court cannot grant a new trial on the ground that the verdict is contrary to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

2. PRINCIPAL AND AGENT (§ 116*)—AUTHORITY OF AGENT—FACTORS.

An agent of a cotton factor who is authorized to solicit shipments of cotton to his principal is presumptively authorized to make terms under which the cotton shall be shipped, received, stored, sold, and handled by his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. § 116.*]

3. FACTORS (§ 23*)—POWER TO SELL—DISCRETION.

Where a cotton factor has advanced to the owner large sums of money on shipments of cotton, so that the factor's pecuniary interest in the cotton equals, if it does not exceed, the pecuniary interest of the owner in the cotton, the factor is not bound at his peril to hold the cotton under instructions from the owner, but has the right to exercise his own judgment as to when he shall sell the cotton, having due regard to his own pecuniary interest as well as to that of the owner, and the factor is not bound to follow instructions from the owner detrimental to his own pecuniary interest. Under the facts of this case, a charge embodying in substance the rule of law above stated should have been given.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 23, 24; Dec. Dig. § 23.*]

(Additional Syllabus by Editorial Staff.)

4. FACTORS (§ 46*)—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence in a cotton broker's action against the owner of cotton for commissions and charges, wherein the defense was that plaintiff negligently failed to comply with selling instructions, held insufficient to show that the factor was guilty of neglect of his duty to the owner through violation of his instructions.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 72-80; Dec. Dig. § 46.*]

Error from City Court of Blakely; L. M. Rambo, Judge.

Action by the John Flannery Company

against D. W. James. Judgment for defendant, and plaintiff brings error. Reversed.

O'Byrne, Hartridge & Wright, of Savannah, and W. G. Park, of Blakely, for plaintiff in error. Pope & Bennett, of Albany, and C. L. Glessner, of Blakely, for defendant in error.

HAMMOND, J. The John Flannery Company is a cotton factorage corporation located in Savannah, Ga. James is a cotton grower, cotton buyer, and shipper, located in Blakely. The John Flannery Company sued James in the city court of Blakely for \$8,250.32 upon an account claimed to be due for advances made to him on 834 bales of cotton, commissions, storage charges, insurance, etc. James filed an original plea to the suit, in which he denied that he owed the amount claimed for storage, insurance, and interest. He set up a special contract made with an agent of the John Flannery Company, by the terms of which he was to be charged only 20 cents a bale for storage and insurance, and 6 per cent. interest on advances, and alleged that the difference in his favor between the amount of these items as claimed in the suit (except the difference as to interest, which was waived) and the amount due under contract was \$2,641.50, and he asked that this amount be deducted from the account. In his plea he admitted that he owed the balance of the account, to wit, \$5,608.82, and this amount was tendered in full settlement and payment. The plea alleged also certain facts in reference to this tender, which was set up as an accord and satisfaction of the account. Subsequently, during the same term of the court, the defendant filed an amendment to his answer, in which he alleged that at the time the 834 bales of cotton were shipped to the John Flannery Company it was distinctly and expressly agreed between them that the cotton was to be sold by the plaintiff for the defendant whenever the price in the Savannah market reached 11½ cents a pound; but the plaintiff, in violation of this agreement, failed and refused to sell the cotton at this price, although the cotton did reach this price per pound in the Savannah market, and the plaintiff could have sold it for this price, and the plaintiff subsequently, in violation of the defendant's instructions and the agreement, did sell 820 bales of the cotton at 11 cents per pound, and 14 bales of the cotton at 9 cents per pound, and thereby the defendant lost, and the plaintiff became indebted to the defendant, the sum of \$2,273.07, being the sum which would represent the difference in the value of the cotton at 11½ cents per pound and the price at which it was sold by the plaintiff. The amendment set up also that the plaintiff had lost all right to storage, insurance, and interest claimed, because of its negligent failure to carry out the defend-

ant's instructions in reference to the sale of the cotton. The plea set out the amounts which it was claimed should be deducted from the account sued on. On the trial of the issues thus formed a verdict was found for the defendant. On motion of the plaintiff a new trial was granted.

On the second trial the defendant filed another amendment to his answer, thereby adding to his original answer, as first amended, the following allegations in substance: That the disregard of the instructions which the defendant had given to the plaintiff in reference to the sale of this cotton when the market price was $11\frac{1}{2}$ cents per pound, and the failure to comply with the duty it owed as factor, arose out of the negligence and careless failure and omission of the plaintiff to properly grade and correctly classify the 834 bales of cotton, which lot of cotton graded as high as "Liverpool middling," but was negligently and carelessly undergraded by the plaintiff, and the plaintiff made no attempt to sell the cotton as "Liverpool middling" while the price of that grade of cotton remained as high as $11\frac{1}{2}$ cents per pound, and did not discover its negligent mistake in undergrading the cotton until the market price had declined, and when it was impracticable to sell the cotton for this price in compliance with the instructions from the defendant. On the second trial the verdict was for the defendant, and the plaintiff filed a motion for a new trial, based upon the general grounds, and several special assignments of errors of law in the admission of evidence, and in excerpts from the charge of the court, and in refusals to charge. This motion was denied, and the case is here for review. We will first discuss the case as made by the evidence as pertinent to the issues, and we will then consider, in the light of the evidence, the special assignments of errors of law.

[2] The defense relied upon in the original plea and answer—that the plaintiff was entitled to only 20 cents per bale for storage and insurance, as per the terms of a special verbal contract made with the agent of the plaintiff—was proved by the defendant and his son. It was strenuously denied by the agent with whom the contract was alleged to have been made. On the law as applicable to this question we state the general rule. Whenever an agent is empowered to do a particular thing, he is also empowered to use all lawful means necessary to accomplish it, and, when an agent is sent out to solicit shipments of cotton to his principal, he is a general agent for that purpose, and presumptively is fully authorized to make terms upon which the cotton may be shipped, received, stored, sold, and handled by the principal. *Bass Dry Goods Co. v. Granite Mfg. Co.*, 119 Ga. 124, 45 S. E. 980; *French Plano Co. v. Cardwell*, 114 Ga. 340, 40 S. E. 292. This rule would not be altered by any secret in-

structions given to the agent by the principal unknown to the shipper. *Civil Code*, § 3595.

[1, 4] 2. The second defense relied upon in the first amendment to the plea and answer is that the plaintiff negligently failed and refused to comply with the instructions given by the defendant to sell his cotton when it reached the market price of $11\frac{1}{2}$ cents per pound. The instructions are admitted by the plaintiff; but it is insisted that they could not have been complied with, for the simple reason that cotton of the grade, of defendant's cotton never reached $11\frac{1}{2}$ cents per pound in the Savannah market. True, the defendant introduced some evidence, not of much probative value, that the cotton could have been sold for $11\frac{1}{2}$ cents per pound; but the daily market reports of the Savannah Cotton Exchange were sent to this defendant by the plaintiff every day, and he had knowledge from these reports that at no time had cotton reached $11\frac{1}{2}$ cents per pound in Savannah for cotton of the grade of his cotton in the hands of the plaintiff. No reason is given why the plaintiff could not have complied with the instructions. On the contrary, the facts prove that it had every reason to make a sale as promptly as possible. When the cotton was first shipped by James, he drew drafts for its value on the John Flannery Company. These drafts were honored even before the cotton had been received, and there never was a time when the factor did not have a greater pecuniary interest in the cotton than the owner. Besides, the record contains many letters from the John Flannery Company urging James to sell because of the improbability of the cotton reaching $11\frac{1}{2}$ cents per pound. To many of these letters James made no reply. The record shows also that the John Flannery Company needed the money which had been advanced to James on the cotton, and made frequent requests for payment. James did make some payments, but never sufficient to make the John Flannery Company safe, looking alone to the value of the cotton. It seems wholly inconceivable that a factor who had advanced on cotton more than its value, and who needed the repayment of its advances, should negligently or arbitrarily fail or refuse to sell the cotton, when by doing so his debt would be paid. James insists that the plaintiff could have sold his cotton for $11\frac{1}{2}$ cents per pound, and that, if this had been done, the factor's debt would have been fully paid from the proceeds. We are discussing the question entirely apart from the well-established rule that a factor who has made advances on goods can regard his interest as to the time of sale, notwithstanding instructions. We are at a loss to understand how this issue could have been found against the factor. Instead of negligent disregard of a factor's duty, the evidence shows

the greatest regard and consideration for the interest of the owner.

3. We come now to a consideration of the second amendment to the plea and answer, which was filed at the last trial. It is insisted that the reason why the plaintiff did not sell the cotton at 11½ cents per pound is because it had been undergraded; that the cotton was "Liverpool middling," but that the plaintiff had negligently undergraded it. This is the defense mainly relied on in the argument before this court. It is true the defendant testified that his cotton was "Liverpool middling," and the evidence shows that "Liverpool middling" was "Savannah middling," and, since the defendant so testified, this court cannot, in a juridic sense, say that there was no evidence in support of the amendment. But it is pregnant with significance that the defendant delayed so long in setting up this defense. He knew the grade which the plaintiffs gave his cotton when first received. He was definitely informed in a letter from the plaintiff, April 9, 1906, that: "We were rather strict in giving grades of your cotton as fully low middling. In value it will average between fully low middling and middling." Notwithstanding his knowledge of cotton and this representation as to the grade of his cotton, he accepts without dissent the grading as made by the factors. During the whole life of the transaction and during several years of litigation no objection was made to the grading of the factor. The question of grading was vital to the value of the cotton. On it depended the opportunity to sell at 11½ cents per pound. On it depended the ability to repay the debt made for advances. Yet no word was spoken or written by the defendant, although he was in possession of specific information on the subject. He did not take issue with the factors or notify them of any undergrading. He said nothing about undergrading when he made his tender. It was strictly a post mortem discovery. Though brought to life for the first time on the dissecting table of the second trial, it would be good in law if it were a real discovery. But why should the factors have undergraded the cotton? It is conceded that they were skillful, with long experience, and were business men of high integrity. Besides, they had every reason to grade the cotton as high as they truthfully could. They had advanced more money on it than it was worth, and the higher the grade the greater the security for the debt. While, therefore, the evidence pertinent to the issue made by this amended plea makes the grant of a new trial on general grounds inconsistent with the view of our right under repeated rulings, yet it moves us to a more

favorable consideration of the special assignments of errors of law.

4. One of the grounds of the amended motion for a new trial assigns error in the following charge of the court: "If you believe, from the testimony in this case, that the Flannery Company had a soliciting agent upon the road, whose duty it was to go over his territory and solicit shipments of cotton for Flannery; if you believe that that agent had authority to quote the charges and expenses, or the terms upon which the Flannery Company would handle that cotton—then I charge you that it would follow, as a matter of law, that this agent would have a right to vary the terms under which he was sent out." This instruction, while rather broad, is not in conflict with the rule discussed in the first division of this opinion.

[3] 5. The trial judge instructed the jury that: "If any special instructions were given as to price, they [referring to the plaintiffs] were bound to sell it [the cotton] at that price, or stand the consequences of failure to do so if they sold it at a lower price." While this instruction states correctly an abstract principle of law, under the facts of this case it should have been qualified by the statement that, if a factor made advances on produce consigned to him for sale, he would have an interest in the consignment, and would have the right to exercise his discretion as to the time of sale, and that, if any instructions given were detrimental to the factor's interest, they might be disregarded by him. *Frost v. Powell*, 10 Ga. App. 95, 72 S. E. 719, and citations. We think this charge was erroneous also, because there was no evidence to warrant it. It was not contended that the plaintiff had, in selling the cotton for a lower price, disregarded the defendant's instructions; on the contrary, the evidence proves beyond all controversy that the plaintiff held the cotton, although not compelled to do so, because of the plaintiff's large pecuniary interest in it, for the 11½ cents per pound, and did not sell it until instructed by the defendant to do so at 11 cents per pound. True, the factor did not get 11 cents per pound; but it voluntarily made good the difference to the defendant, moved to do so by the natural desire to close out a transaction in which it had been from the first a probable loser.

We have given the case careful examination, and are clearly of the opinion that the ends of justice, as well as the voice of the law, demand another trial.

Judgment reversed.

Judge H. C. HAMMOND, of the Augusta Circuit, was designated by the Governor, and presided in this case in place of POTTS, J., disqualified.

PITTMAN v. STATE. (No. 5,206.)

(Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)

1. LARCENY (§ 15*)—SIMPLE LARCENY—ELEMENTS OF OFFENSE.

One cannot be convicted of simple larceny unless it appears that he took the goods described in the indictment wrongfully and fraudulently, with the intent then and there entertained to steal the same. If possession of goods be delivered by the owner to another under an agreement by the latter to sell them for the benefit of the owner and to return to the owner either the proceeds arising from the sale or the goods themselves if unsold, and the goods are subsequently converted, the conversion is larceny after a trust delegated, and the person thus guilty of the conversion cannot be convicted of simple larceny, unless there is some proof that he fraudulently induced the owner to surrender possession of the goods, intending at the time to appropriate them to his own use.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 39-42; Dec. Dig. § 15.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 3991-4003; vol. 8, p. 7701.]

(Additional Syllabus by Editorial Staff.)

2. LARCENY (§ 63*)—SIMPLE LARCENY—EVIDENCE OF FRAUDULENT INTENT.

Evidence merely that defendant failed to pay for, and converted to his own use, goods received from the owner under an agreement that he should sell the same and return to the owner either the proceeds or the unsold goods was insufficient to sustain a finding that he fraudulently induced the owner to surrender the goods, intending at the time to appropriate them to his own use.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 163; Dec. Dig. § 63.*]

Error from City Court of Ft. Gaines; B. M. Turnipseed, Judge.

Elh Pittman was convicted of simple larceny, and brings error. Reversed.

King & Arnold, of Ft. Gaines, for plaintiff in error. P. C. King, Sol., of Ft. Gaines, for defendant in error.

POTTLER, J. The accused was convicted of simple larceny, under an accusation charging that offense. He presents the point that if he was guilty of any offense the evidence demands a conviction of larceny after a trust. The evidence was that the accused went to the store of the prosecutor and wanted some goods to sell at a picnic which was to be held at Hatcher's Station. The prosecutor asked the accused why he did not purchase the goods at Hatcher's Station, and he replied that the merchants at that place did not have the goods he wanted. The prosecutor testified: "I let the defendant have on consignment, to sell for me at the picnic, the following goods [referring to the goods described in the indictment]. The defendant was to sell these goods for me at the picnic and bring me back the money, or return the goods that were not sold. I made several demands on the defendant for the money, but did not get the money, and no

goods have been returned to me that I let him have. After waiting about a month I took out a warrant for him. I explained to the defendant, when I let him have the goods, I was not selling the goods to him, but he was to act as my agent. The defendant came to me and got some candy and other goods to sell at a picnic. I consigned the goods to him."

[1] The point presented is not without difficulty. The same facts may involve simple larceny and larceny after a trust, so that a conviction for either offense would be authorized. The decisions are in some confusion, and do not clearly draw a general distinction between the two offenses which can be applied in all cases. In *Rice v. State*, 6 Ga. App. 160, 64 S. E. 575, it was said that the words "other bailee," as used in section 189 of the Penal Code, must be understood as implying a delegated trust to a person occupying some fiduciary relation to the bailor, and that hence a mere temporary loan of property, with no benefit to the lender, was not such a bailment as was contemplated by that section of the Code. The principle enunciated in this decision was followed in *Basley v. State*, 10 Ga. App. 470, 73 S. E. 624, and upon its application to the facts of that case we held that the evidence demanded a finding that the accused was guilty of larceny after a trust, and not of simple larceny. In that case a master intrusted his servant with a bill for the purpose of getting it changed and bringing back the change, and the servant fraudulently converted and appropriated it to his own use. We said that this was a delegated trust to a person standing in a fiduciary relation, and both the actual and legal possession had been voluntarily surrendered by the owner without any fraud or artifice on the part of the servant other than that involved in the promise to return the money. In *Bryant v. State*, 8 Ga. App. 389, 69 S. E. 121, it was held that where property had been hired to another who afterwards converted it to his own use, he might be convicted of simple larceny if it appeared that he fraudulently induced the owner to hire the property to him, intending at the time to steal it. This decision was similar in principle to that made in *Martin v. State*, 123 Ga. 478, 51 S. E. 334, where it was held: "If a person, fraudulently intending to get possession of the money of another and appropriate the same to his own use, by false representations induces the owner to deliver the money to him for the purpose of being applied for the owner's use or benefit, and then appropriates it in pursuance of the original intent, he is guilty of both larceny after trust delegated and simple larceny, and may be prosecuted for and convicted of either offense." The case of *Baron v. State*, 126 Ga. 92, 54 S. E. 812, is an illustration of the exact converse of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

proposition stated in the Martin Case. It was there held that if a person voluntarily, and without being induced by the fraud of another, delivers property into the latter's possession for the purpose of having it delivered at a distant place, and the person so receiving possession wrongfully and fraudulently converts the property to his own use, the conversion is larceny after a trust, without the element of simple larceny. In the opinion it was said: "It is not a case of violence to the possession of the prosecutor; for it affirmatively appears that the prosecutor voluntarily parted with his possession, and the injury results to the prosecutor, not from the thing being fraudulently taken from him, but from a fraudulent disposition by the defendant after the trust had been imposed. Under the facts, there is no simple larceny whatever in the case, and the court should not have charged upon that subject."

[2] We may get the matter clearer in our minds by recurring to the definition of simple larceny, which is: "The wrongful and fraudulent taking and carrying away, by any person, of the personal goods of another, with intent to steal the same." Penal Code, § 152. There can never be a conviction for simple larceny unless it appears that the original taking was wrongful and fraudulent and with the intent at the time of the taking to steal the property. If the possession is acquired rightfully and without fraud, and subsequently the goods be converted, the offense is not simple larceny. If the owner voluntarily surrenders possession and retains title to the property delivered, without any artifice or fraud on the part of the person receiving it, a subsequent conversion of the goods will be larceny after a trust. In the present case, the evidence shows that the owner surrendered merely the possession of the goods, but retained the title. His surrender of possession was voluntary. The case turns, therefore, on the question whether there was any evidence from which the jury could find that he was induced to surrender this possession by any artifice or fraud on the part of the accused. In other words, the question is whether the jury could find that the original taking by the accused was wrongful and fraudulent, and with a present intent to steal. Apparently, from the testimony of the prosecutor, the accused came to his store to buy some goods, either for cash or on credit, for the purpose of reselling them at a picnic. The prosecutor declined to sell the goods to the accused, but offered to deliver the goods to him in order that he might sell them as the agent and for the benefit of the prosecutor, upon the agreement of the accused either to return the goods or to bring back the agreed price to the prosecutor. So far as appears, this arrangement was entered into at the suggestion of the prosecutor himself.

There is nothing in the evidence to suggest any fraudulent intent on the part of the accused at the time he received the goods, except the bare fact that he failed to return them or to pay for them. It is settled by the decisions that this fact alone is not sufficient proof of a fraudulent taking of goods which were voluntarily delivered by the owner into the possession of the person receiving them.

If it had appeared, from the testimony, that the accused gave a false reason for coming to the prosecutor for the goods (such as that he could not purchase them at Hatcher's Station, for the reason that the merchants at that place did not have the goods he wanted, when in fact there were similar goods at Hatcher's Station), this would have authorized an inference that he had the fraudulent intent at the time he received the goods from the prosecutor. Or if it had appeared that the accused did not in fact sell or make any effort to sell the goods at the picnic, such inference might have arisen. But nothing of this sort appears. The case is one simply where the accused was appointed the agent of the prosecutor and the possession of the goods was voluntarily surrendered by the prosecutor without any artifice or fraud on the part of the accused, and he subsequently converted to his own use either the goods or the proceeds arising from the sale. For aught that appears, the accused may have sold the goods and stolen the money, forming the intent to steal after the goods were sold. It may be doubted whether, under the evidence as it stands, he could be convicted of larceny after a trust in stealing the goods; it not appearing but that in compliance with his contract he sold the goods as he agreed to do. But, however this may be, we do not think he could be convicted of simple larceny without some evidence to show the existence of a fraudulent intent at the time he received the goods.

Judgment reversed.

EVANS v. STATE. (No. 5,204.)
(Court of Appeals of Georgia. Oct. 29, 1913.)

(Syllabus by the Court.)

1. JURY (§ 83*)—COMPETENCY OF JUROR—CRIMINAL CASE.

A challenge propter affectum to a juror in a criminal case should be sustained when it is made to appear to the court as trier that the juror, in his official capacity as justice of the peace, received the affidavit and issued the warrant which was the basis of the accusation. The smallest degree of interest is a decisive objection to a juror in a criminal case.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 400, 402-404; Dec. Dig. § 83.*]

2. CRIMINAL LAW (§§ 572, 775*)—INSTRUCTION—ALIBI—EVIDENCE.

In charging upon alibi it is error to instruct the jury that if they "believe from the evidence, and believe it beyond a reasonable doubt, that it was impossible for the defendant to be present

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

at the scene of the offense at the time of its commission, and that the evidence in this respect is sufficient to exclude the possibility of the defendant's presence at the time and place it was committed, you will be authorized to acquit the defendant." To establish an alibi the evidence must be sufficient to exclude the possibility of the defendant's presence at the scene of the crime at the time of its commission, but he is not required to establish the impossibility of his presence beyond a reasonable doubt; it is sufficient if this impossibility is shown to the reasonable satisfaction of the jury. Proof of alibi may entitle the accused to an acquittal even though it goes no further than to raise a reasonable doubt of the defendant's guilt when considered on the general case with the rest of the testimony; and for this reason, if for no other, to require the defendant to establish the defense of alibi to the exclusion of a reasonable doubt places on him a burden not imposed by law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1263, 1289-1291, 1833-1837; Dec. Dig. §§ 572, 775.*]

Error from City Court of Leesburg; H. L. Long, Judge.

Eli Evans was convicted of crime, and brings error. Reversed.

W. G. Martin, of Leesburg, for plaintiff in error. J. B. Hoyl, of Leesburg, for the State.

RUSSELL, J. The plaintiff in error excepts to the judgment overruling his motion for a new trial. The accusation was based upon an affidavit made before a justice of the peace, who issued the warrant for the defendant's arrest.

[1] On the panel put upon the prisoner, this justice of the peace appeared as a juror. Immediately after the panel was put upon the accused, and before the jury was stricken or sworn, the accused objected to the justice of the peace, upon the ground that he was not a competent juror, because of the facts stated above, and, in substantiation of this objection, submitted to the court the affidavit of the prosecutor and the warrant issued by the justice, commanding the arrest of the defendant, and the entry of the arrest (from which it appears that the prosecutor was also the arresting officer). The court overruled the objection and held that the juror was competent, and this ruling is the subject of the first assignment of error.

In our search for precedents we have been unable to find a case identical upon its facts with the case at bar. Apparently in this state the practice of excusing a juror under such circumstances has been very general, for otherwise the question would ere this have been raised in some form in the Supreme Court. However, upon the question now squarely presented whether, upon timely challenge to the poll, a juror in a criminal case, who in his official capacity as a magistrate received the affidavit of the prosecutor and issued the warrant for the arrest of the accused, is subject to challenge propter affectum, we are compelled to hold that, upon proof of the fact that the challenged juror is the individual who issued the warrant,

he should be held subject to challenge, and that as to him the defendant should not be required to exercise the right of peremptory challenge by exhausting one of his strikes. The argument of learned counsel for the state, to the effect that justices of the peace are not disqualified from serving as jurors in criminal cases, has no bearing whatever upon the question. Of course the mere fact that a juror might happen to be a justice of the peace would be no objection to his qualification as a juror, and in fact the intelligence and personal character of these magistrates is such as ordinarily to render them peculiarly qualified for jury service. The objection in the case at bar was not that the juror Godwin was a justice of the peace but that he was the justice who issued the warrant in this case. And it is for this special reason that we hold that he was disqualified.

Nothing is better settled than that no man can be a judge in his own case, and the disqualification dependent upon this rule has very naturally been extended, in the interest of fair jury trials, to include any and every case in which the trier in question does not possess an exclusive interest but may be affected by a partial interest in the subject-matter. The principle that a juror should not sit on a cause in which he is eventually interested is founded in wisdom and justice and has no regard to the degree of pecuniary interest. Under our law, the justice of the peace who issues a warrant in a criminal case has a pecuniary interest in the result of the trial, for if the accused is convicted and is sentenced to pay a fine and the costs, and does pay it, the fees for issuing the warrant and for other services legally performed by the justice must be included in the costs and be paid as a part of the costs before the defendant is entitled to be released. It matters not how upright the magistrate may be nor that the amount of his costs may be small. It may be that the juror in question is a man of such Spartan firmness that his interest would not affect him, even though it were a hundredfold as large; and history is not without instances of men of that stamp; and yet, if the courts should proceed upon any such theory as this, the rule of absolute impartiality (which is the very foundation of a fair trial by jury) would be violated. Rules must be made for ordinary cases and not for exceptions. And unless the rule that every juror who tries the case of his fellow citizen must be not only absolutely fair and impartial but also absolutely disinterested is strictly adhered to and zealously upheld, our boasted right of trial by jury will become little more than a mockery. The court's duty to provide an impartial jury is absolutely imperative.

In a South Carolina case the court, in discussing the interest of jurors (*Horry's Case*, 1 Bay [S. C.] 229), adopts the following no-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

table quotation from Blackstone: "The smallest degree of interest is a decisive objection to a witness, and much more so to a juror." 2 Black. Com. 480. In this state the interest of a witness is no longer ground for objection, but as to a juror there has been no relaxation of Blackstone's rule, so far as we are able to discover. No right has been more sacredly guarded by the courts in this state than that accorded to every litigant of having his case tried by jurors not only fair, impartial, and disinterested but even beyond suspicion of bias. In *Anderson v. State*, 63 Ga. 875, the surety upon the defendant's bond was held to be disqualified for interest upon objection by the state, and certainly such a surety's pecuniary interest in the defendant is not ordinarily greater than would be the interest of a committing magistrate in his costs. In *Johnson v. City of Americus*, 46 Ga. 81, and *Mayor, etc., of Cartersville v. Lyon*, 69 Ga. 577, the Supreme Court held that citizens of a municipality were disqualified, because of interest, to sit as jurors in causes in which the municipality was a party; and it required a statute to abrogate this rule. Inasmuch as the right of liberty is more precious than the possession of mere worldly goods, it would seem, certainly in the absence of a statute and in criminal prosecutions, that the rule of Blackstone should be strictly adhered to. It is true the qualification of a juror, when he is put upon the court as a trior, is a matter addressed peculiarly to the court's discretion; but it should be borne in mind that, in the determination of the qualification of jurors in criminal prosecutions, it has uniformly been held that the discretion or latitude given the trial judge is greater when exercised in excusing jurors whose qualifications are in doubt than in retaining them.

Not only on account of pecuniary interest, but also for other reasons, the justice of the peace who binds over one accused of crime should not be held qualified to pass upon his guilt or innocence. In the first place, the act of taking the affidavit is not merely ministerial. *Gillett v. Thiebold*, 9 Kan. 431. The magistrate determines judicially to order an arrest. And even if it be true that every citizen has a right to have a warrant issued when he is willing to swear that another has committed a crime, still the warrant cannot be issued until the prosecutor has sworn to the charge; and the crime to which the prosecutor swears cannot be properly designated in the warrant until there has been a statement of at least enough of the facts to enable the justice of the peace to determine the offense for which the warrant should be issued. Under such circumstances, it would be unreasonable to suppose that an intelligent man would not form some kind of an opinion with reference to the case which has been stated and verified in his hearing by the affidavit of the prosecutor. Not only is this so, but as an officer of the

state the justice of the peace who issues the warrant sets in motion the entire criminal machinery of the state, from the operation of which the trial of the defendant results; and human nature is of such fashion that the justice of the peace will generally feel such interest in his handiwork as not to desire to be held blamable for issuing a warrant without sufficient cause or without any cause.

Upon grounds of public policy, if for no other reason, and in order that one accused of crime may have no semblance of cause for complaint, an officer of the state who, in the discharge of his duty, has taken an affidavit charging a citizen with crime, and thereupon has issued the warrant upon which he was arrested, should not be put upon the accused as a juror on his trial for that crime. The safety of every social institution worth preserving depends upon the integrity of our jury system. If there be possibility of error either way, it is far better to err by being overcautious in adhering to every regulation which will tend to provide juries whose impartiality shall be, like the virtue of *Cæsar's wife*, above suspicion.

[2] 2. The defendant, upon his trial, relied upon alibi as his defense. Upon this subject the court charged the jury as follows: "The defendant claims he was not present at the place the crime was committed. If you believe from the evidence, and believe it beyond a reasonable doubt, that it was impossible for the defendant to be present at the scene of the offense at the time of its commission, and that the evidence in this connection is sufficient to exclude the possibility of the defendant's presence at the time and place it was committed, you will be authorized to acquit the defendant." We think the court erred in this instruction. As pointed out by Chief Justice Bleckley in *Harrison v. State*, 83 Ga. 129, 9 S. E. 542, the defense of alibi rests upon two prongs: The jury may either consider the alibi on the general case, for the purpose of determining whether any view of the alibi in connection with other evidence raises a reasonable doubt; or they may consider whether the proof of the alibi alone and of itself raises such a doubt as will require the jury to acquit. But it is expressly held that, no matter which may be the purpose to which the proof of alibi is put, the defendant is not required to establish this defense by that degree of proof which excludes every reasonable doubt, but he is only required to establish it to the reasonable satisfaction of the jury. For that reason the judge in the present case, by telling the jury that they would be authorized to acquit the defendant if they believed beyond a reasonable doubt that it was impossible for him to be present at the scene of the offense at the time of its commission, placed upon him a greater burden than that imposed by law. The implication from this was that the bur-

den was upon the accused to establish this defense beyond a reasonable doubt. See *McDonald v. State*, 12 Ga. App. 526, 77 S. E. 655. To say that one who relies upon an alibi as a defense must prove beyond a reasonable doubt that it was impossible for him to be present at the scene of the crime at the time of its commission would take away from the jury their right of acquitting the defendant if the proof of alibi, though not perfect, was such as to raise a reasonable doubt as to whether he was present at the commission of the crime or not.

Judgment reversed.

SILVER v. STATE. (No. 5,162.)

(Court of Appeals of Georgia. Oct. 30, 1918.)

(Syllabus by the Court.)

1. POISONS (§ 4*)—SALE OF NARCOTICS—OFFENSE.

It is a penal offense to give, furnish, or sell any of the narcotic drugs mentioned in the statute (Acts 1907, p. 121, Civ. Code 1910, § 1651), except upon the conditions prescribed therein.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. § 4.*]

2. POISONS (§ 2*) — SALE OF NARCOTICS — OFFENSE.

The statute regulating the furnishing or sale of narcotic drugs was intended, not only to prevent traffic in such drugs, but also to lessen the evils consequent upon the habitual use of such narcotics.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. HOMICIDE (§ 68*) — INVOLUNTARY MANSLAUGHTER—ELEMENTS OF OFFENSE.

Where a person, in violation of the statute, administers, by means of a hypodermic syringe, morphine to another in such quantity as to cause death, he commits an unlawful act, and a conviction of involuntary manslaughter in the commission of an unlawful act would be authorized. It would be no defense that in the administration of the drug the intent was not to cause death, but to alleviate pain.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 91, 92; Dec. Dig. § 68.*]

4. HOMICIDE (§ 68*) — INVOLUNTARY MANSLAUGHTER—ELEMENTS OF OFFENSE.

The charge of involuntary manslaughter in the commission of an unlawful act can be based upon an act *malum prohibitum*, as well as upon an act *malum in se*.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 91, 92; Dec. Dig. § 68.*]

5. No ERROR—CONVICTION SUSTAINED.

No material error of law appears, and the evidence supports the verdict.

(Additional Syllabus by Editorial Staff.)

6. HOMICIDE (§ 138*)—VOLUNTARY MANSLAUGHTER—INDICTMENT.

An indictment for voluntary manslaughter through the unlawful administration of morphine need not state the quantity administered.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 231; Dec. Dig. § 138.*]

7. INDICTMENT AND INFORMATION (§ 63*) — STATEMENT OF CONCLUSION.

An indictment charging voluntary manslaughter in that accused caused decedent's

death by administering morphine "by means of a hypodermic syringe, by reason of which administration" decedent was then and there killed, was not objectionable as stating a conclusion instead of a fact.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 185; Dec. Dig. § 63.*]

8. CRIMINAL LAW (§§ 762, 763, 764*)—HOMICIDE (§ 289*)—VOLUNTARY MANSLAUGHTER—INSTRUCTIONS.

In a prosecution for voluntary manslaughter by the unlawful administering of morphine, an instruction that the offense was complete if accused intended to administer the morphine and death resulted was not objectionable as an invasion of the province of the jury, or an expression of opinion of accused's guilt, or for failure to state that to complete the offense death must result directly and proximately from the unlawful act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1752, 1754, 1758, 1759, 1768-1770; Dec. Dig. §§ 762, 763, 764;* Homicide, Cent. Dig. § 594; Dec. Dig. § 289.*]

9. CRIMINAL LAW (§ 1171*)—HARMLESS ERROR—CONDUCT OF COUNSEL.

In a prosecution for involuntary manslaughter by the unlawful administering of morphine, any error in permitting the solicitor general to read from medical books extracts relating to the properties of viburnum was harmless, where the evidence showed that death was caused by morphine and there was no claim that it was caused or contributed to by viburnum.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Isaac Silver was convicted of involuntary manslaughter, and brings error. Affirmed.

Shelby Myrick, of Savannah, for plaintiff in error. Walter G. Charlton, Sol. Gen., of Savannah, for the State.

HILL, C. J. [6, 7] Isaac Silver was convicted of the offense of involuntary manslaughter in the commission of an unlawful act. On arraignment he demurred, on general and special grounds, to the indictment. The demurrer was sustained in part and overruled in part. Subsequently he made a motion for a new trial on the general grounds, and on numerous special grounds. The motion was overruled, and he excepted. The first count of the indictment charges "the offense of involuntary manslaughter, for that the said Isaac Silver, in the county of Chatham and state of Georgia aforesaid, on the 8th day of March, in the year of our Lord one thousand nine hundred and thirteen, with force and arms, and without any intention to do so, but in the commission of an unlawful act, to wit, by furnishing and giving away to one Esther O'Marea, alias Marion Leonard, morphine, not upon the original written order or prescription of a lawfully authorized practitioner of medicine, dentistry, or veterinary medicine, which said morphine was furnished and given away by

the said defendant to the said Esther O'Marea, alias Marion Leonard, by administering the same to her by means of a hypodermic syringe, by reason of which administration said Esther O'Marea, alias Marion Leonard, was then and there killed; the said Isaac Silver, then and there well knowing the loss of life as aforesaid to be a possible consequence of the unlawful giving away and furnishing in manner aforesaid of said morphine, did then and there unlawfully and feloniously kill said Esther O'Marea, alias Marion Leonard, contrary to the laws of the state, the good order, peace, and dignity thereof." The second count in the indictment charged the offense of involuntary manslaughter in the commission of a lawful act without due caution and circumspection. This ground was stricken on demurrer. The indictment as a whole, and the first count specifically, were demurred to on the ground that the allegations were not sufficient to show a violation of the criminal laws of Georgia. The first count was demurred to also on the grounds that it did not state the exact quantity of morphine administered, and that it did not state how or in what manner the deceased was killed by the administration of the morphine; that the allegation that by reason of such injection the said Esther O'Marea, alias Marion Leonard, was killed was a mere conclusion. These special grounds are manifestly without merit. It was not necessary to state the exact quantity of morphine administered; it was sufficient to allege that the deceased was killed by the administration of morphine by the defendant. The quantity was wholly immaterial. The first count does state specifically that Esther O'Marea, alias Marion Leonard, was killed by the accused by administering morphine to her "by means of a hypodermic syringe, by reason of which administration said Esther O'Marea, alias Marion Leonard, was then and there killed." The sentence as a whole is not a conclusion, but the statement of a fact.

[1] There was no error in overruling the demurrer on the general ground. The Act of 1907 (Acts of 1907, p. 121), contained in section 1651 of the Civil Code, declares that "it shall be unlawful for any person, firm, or corporation, to sell, furnish, or give away any cocaine, alpha or beta eucaine, opium, morphine, heroin, chloral hydrate, or any salt or compound of any of the foregoing substances, or any preparation or compound containing any of the foregoing substances or their salts or compounds, except upon the original written orders or prescription of a lawfully authorized practitioner of medicine, dentistry, or veterinary medicine," etc., and section 459 of the Penal Code provides that any person who shall violate any of the provisions of section 1651 of the Civil Code, supra, shall be guilty of a misdemeanor. It was insisted by the learned counsel for the

plaintiff in error that this statute was never designed to cover an isolated instance of the administration of morphine by means of a hypodermic syringe, especially where the morphine was administered without charge, at the request of a party suffering pain; that the law in question was intended only to operate against persons selling the narcotic drugs mentioned in the act. This argument was based in part upon the caption of the original act, which is in the following language: "An act to provide against the evils resulting from the traffic in certain narcotic drugs, and to regulate the sale thereof." There was no attempt to question the constitutionality of the act, but the caption was referred to simply for the purpose of supporting the position that the intention of the Legislature was to prevent the sale of narcotic drugs, and not to make it a penal offense to give away such drugs, or administer a narcotic drug to alleviate suffering.

[2] The act in question was passed by the Legislature by virtue of the broad police powers of the state, not only to prohibit the traffic in such dangerous drugs, but also to protect the victim of the habit by making it difficult for such victim to obtain the drug. In other words, the act was aimed at both the evil of the traffic and the evil of the habit. This, we think, is clearly indicated in the body of the act. It expressly makes it unlawful for any person to either "sell, furnish, or give away" any of the narcotic drugs mentioned in the act, except upon the written order or prescription of a lawful practitioner of medicine, dentistry, or veterinary medicine; and, in furtherance of the purpose to prevent the evils of the habit, the act further provides that it shall be unlawful for any practitioner of medicine, dentistry, or veterinary medicine to furnish or prescribe any of the narcotic drugs mentioned "for the use of any habitual user of the same." Under the express terms of this act, therefore, we must hold that it is a violation of the statute for any person either to sell, furnish, or give away any of the narcotic drugs mentioned in the act without a written order or prescription as therein provided.

[3, 4] It is insisted, in the next place, that the charge of involuntary manslaughter in the commission of an unlawful act can only be predicated upon an act that is *malum in se*, and cannot be based upon an act *malum prohibitum*, and in support of this position the authorities cited in 21 Cyc. 761, 765, are given. Whether the administration of morphine is an act evil in itself would, of course, largely depend upon the amount and the circumstances under which it was administered. Administration in small amounts and to alleviate pain might be construed as a beneficent act, but administration without this purpose, or to one who habitually uses it, might well be considered a wrongful act. However this may be, under the statute of

this state the administration of morphine in any quantity or for any purpose, except under prescription as provided by the statute, is unlawful; and the Penal Code, § 67, declares that "Involuntary manslaughter shall consist in the killing of a human being without any intention to do so, but in the commission of an unlawful act." In *Hayes v. State*, 11 Ga. App. 371, 73 S. E. 523, it is said: "An unlawful act within the meaning of our statute is an act prohibited by law; that is to say, an act condemned by some statute or valid municipal ordinance of this state. In order, therefore, to support an indictment for involuntary manslaughter in the commission of an unlawful act, some act must be alleged which is prohibited by a valid law." The administration of morphine without a prescription being unlawful under the statute of this state, it follows that where death ensues from such unlawful and intentional administration of morphine, the person so administering the morphine is guilty of involuntary manslaughter in the commission of an unlawful act. The question made by counsel for plaintiff in error seems to be settled by the statute and the decision of this court. Even if this were not so, we would hesitate to concur in the soundness of the view that the unlawful act which constituted an element of involuntary manslaughter must be one *malum in se*, for, outside of those things which are condemned as evil or wrong by the Holy Scriptures, the question of what would be evil or wrong in its nature depends on individual conception and environment.

[5, §] 2. The following charge of the court is objected to: "If he intended to commit the act—that is, to administer the drug described—and death resulted from that, then the offense would be complete." It is insisted that this charge took away from the jury the right to decide whether, under all the facts and circumstances of the case, the offense of involuntary manslaughter had been committed at all by the defendant, and because it amounted to an expression of opinion that the defendant was guilty as charged, and also because it incorrectly laid down the rule with reference to death resulting from an unlawful act, in that it did not state that, in order for the offense to be complete, death must result directly and approximately from the unlawful act. We think this excerpt from the charge is not subject to the criticism upon it, and that it clearly states the law pertinent to the contentions. If one intentionally does a wrongful act, he is liable for the natural and probable consequences of the act. The very definition of involuntary manslaughter shows that, although the homicide be not intended by the party committing the unlawful act, yet if the unlawful act be intentionally committed, the party committing it would be responsible for the consequences resulting therefrom.

[9] 3. It is earnestly insisted that the trial judge erred in permitting the solicitor general to read, over the objections of the defendant, certain extracts from a book known as "Bartholow's *Materia Medica and Therapeutics*," relating to the properties of the drug *viburnum*, and its effect upon the human system, and also in permitting the solicitor general to read these extracts to the jury as a part of his argument; the objection being that the book was not in evidence, and was no part of the record. The trial judge, referring to this ground of the motion for a new trial, makes the following statement in his order overruling the motion: "Whilst the decisions are conflicting on the subject of the eighth ground, and there is no positive adjudication in Georgia on that point, it is fair to assume, if the action permitted stood by itself, it would be held to be error. Whether it was harmful error, necessitating the grant of a new trial, will be referred to later herein. The reading of the book to the jury was not begun by the prosecuting officer. The defendant's counsel sought and obtained the consent of the judge, over the objection by the solicitor general, to read to a witness extracts from the book, and to establish the reliability of the work itself. This was error on the part of the court, but it is not error of which the defendant can complain, since he induced the ruling, and he must therefore abide by the consequences of his act. Two wrongs do not make a right, but one error may make that innocuous which by itself would be error. A paper might not be admissible in evidence, but if one of the parties introduces a part of it, he cannot object to references to other portions which he may not wish the jury to hear. That is precisely what the defendant himself did in this case. Not only did counsel read to the witness in the hearing of the jury extracts from the book and seek and obtain commendation of the work from the witness, but the defendant, whilst making his statement, read to the jury an extract from the book. His position thus being that the book was credible, and the publication having been established, and its contents, so far as it suited the defendant's purposes, read by him to the jury, why should the solicitor general not read that portion on the same subject which follows? It could not have been harmful error, since what the solicitor general read had already been established by witnesses. But more than this, it was absolutely harmless error—no more error than reading Phillips' *Famous Cases of Circumstantial Evidence*, or the *Declaration of Independence*—for no one contended that *viburnum* had killed the deceased. It was a question between the absolute poison of morphine and club sandwiches. Apparently *viburnum* could have been taken as freely as soda water, but the one thing which would produce the characteristic signs apparent on the dying girl was

morphine. She had been given morphine, through injection, by the defendant; the signs of morphine poison were present, and we might with equal advantage speculate on death by lightning from a clear sky as consider any other means of death than the one set forth in the indictment and demonstrated by the evidence." We adopt in part what has been so well said by the trial judge in discussing this ground. It is perfectly manifest that, even if it had been erroneous to permit the solicitor general to read from this book of the effect of viburnum on the human system, it was harmless error. The evidence demanded a finding that the cause of the death of the girl was an overdose of morphine. There was no pretense that her death was caused or contributed to by viburnum. It is true the evidence shows that she took about an ounce of viburnum just after the morphine had been injected into her hip, but the evidence is uncontroverted that this quantity of viburnum was absolutely harmless. For myself I do not see any logical reason why the statement of an expert scientist contained in a book would not have as much value as a mere expert opinion of a scientist on the same subject made on the witness stand. The only difference, of course, would be that in the one case there would be the right of cross-examination, and in the other this right could not be exercised.

The other special assignments of error contained in the motion for a new trial have either been abandoned or are without merit. The controlling question in the case under the evidence was whether the decedent died from the effects of morphine poisoning or ptomaine poisoning. The expert evidence on the subject demanded the verdict that she died from morphine poisoning. The contention that she died from the effects of ptomaine poisoning is an inference from the following facts: The decedent and another girl both received hypodermic injections of morphine at the same time; both girls also ate of club sandwiches and drank of beer; one girl vomited and did not die, the other girl failed to vomit and died—and therefore it was what they had eaten and drank, and not the morphine injected into the blood, which caused the death. This inference is not without some force, but its weakness consists in the fact that no two persons are affected in the same manner, either by what they eat or drink, or by morphine, the effect of food or medicine upon a person largely depends upon the physical condition of the subject, and as to the particular drug, upon the habit, but this discussion is academic, for the evidence is clear and strong that the decedent died from the effects of morphine poisoning; certainly the jury were authorized to accept this theory of the evidence. We fail to find any error in the

record that would warrant the grant of another trial.

Judgment affirmed.

MIMBS v. BATTLE. (No. 4,681.)

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

MALICIOUS PROSECUTION (§ 47*)—ACTION—PETITION—SUFFICIENCY.

While certain paragraphs of the petition were subject to special demurrer, the petition as a whole set forth a cause of action, and it was error to dismiss the suit upon general demurrer.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 91, 92, 96; Dec. Dig. § 47.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by J. H. Mimbs against J. J. Battle. Judgment for defendant, and plaintiff brings error. Reversed.

W. A. Covington and Shipp & Kline, all of Moultrie, for plaintiff in error. Parker & Dowling, of Moultrie, and Branch & Snow, of Quitman, for defendant in error.

RUSSELL, J. This was an action for malicious prosecution. It was dismissed on general demurrer. In brief the petition set forth that Battle sold to Mimbs in January, 1910, a mare, representing to Mimbs that she was sound in every respect, and especially that her eyes were sound and perfect, although, as alleged, Battle well knew at the time that the mare's eyes were weak and defective; that shortly after his purchase the plaintiff discovered that the mare's eyes were very defective, and that she was going blind, and thereupon he tendered the mare to Battle, and asked for the note which he had given Battle for the purchase price, but Battle refused this offer of rescission. The mare finally went totally blind, and, upon Battle's threatening to sue, the petitioner offered the mare back and the sum of \$25 in addition; but this offer was refused. Finally, the mare having become totally worthless, the plaintiff took her to Battle's stable, and left her with the person who at that time had the stable in charge. A few minutes thereafter Battle approached the petitioner on the streets of the city of Moultrie, and, after cursing and abusing him, threatened to have him arrested. It is alleged that a few moments after the unprovoked abuse and threat of arrest the petitioner was actually arrested by the sheriff, under a warrant sworn out by the defendant, Battle, charging him with the offense of misdemeanor. The petitioner gave a bond for his appearance at the next regular term of the city court of Moultrie, and at the next succeeding term of that court he appeared and asked for a trial, but was informed that

there was nothing in the charges against him, and that no accusation would ever be drawn. It was further alleged that Battle failed to push the case in any court, abandoned the prosecution, and the prosecution has terminated.

It is easily to be seen that this petition is demurrable in several respects. But the plaintiff offered an amendment which, we think, so amplified the statements as to the prosecution as to enable it to withstand the general demurrer. In the meantime it is stated that the warrant under which the plaintiff was arrested was returned by the sheriff to the clerk of the city court of Moultrie, that it was docketed upon the criminal docket of that court, and that from the entries upon the docket it appears that the case was dismissed; the entry of the dismissal being in the handwriting of his honor J. D. McKenzie, who was judge of the city court of Moultrie in the years 1911 and 1912. From the amendment it further appears that the defendant appeared in accordance with the obligation of his bond at the November term, 1911, the February term, 1912, the May term, 1912, and the August term, 1912, of the city court, and finally, in October, 1912, in the open session of the city court, he was informed by the solicitor and the judge that there was nothing against him, and that the case against him was dropped. It is further averred that, after search in the offices of the clerk and the sheriff of the city court of Moultrie, neither the affidavit nor the warrant nor the bond can be found, and the contents of these papers are briefly set forth, so as to lay the ground for parol evidence of their contents.

The chief insistence of counsel for the defendant in support of the ruling sustaining the general demurrer is that, while the original petition attempted to set out the essential elements of an action for malicious prosecution, the amendment transformed the action into a suit for malicious arrest. It is further contended, of course, that the allegations of the original petition were insufficient to set forth any cause of action. We agree with the contention of counsel for the defendant that the plaintiff cannot in the present action recover damages for slander; but we are of the opinion that the averments as to the language alleged to have been used by the defendant to the plaintiff in the hearing of the public can well be treated as a matter of inducement illustrative of the contention that the swearing out of the warrant and the subsequent proceedings were without any probable cause.

The principal questions in the case, as raised by the demurrers, are (1) whether the facts alleged show a case of malicious prosecution, and (2) whether it can be determined from the allegations that the prosecution is

ended. Our Code defines a malicious prosecution to be a criminal prosecution "maliciously carried on, and without any probable cause, whereby damage ensues to the person prosecuted." Civil Code, § 4439. It is undisputed from the record that the defendant swore out a warrant against the plaintiff, charging the commission of a misdemeanor, and that upon this warrant the plaintiff was arrested. In pursuance of the provisions of the act creating the city court of Moultrie the warrant was returned to that court, and the plaintiff executed a bond to the clerk of the court, and the case was entered on the docket. It does not appear whether the solicitor preferred an accusation; but for five terms of the court the defendant in the warrant—the plaintiff in this case—was required, in accordance with the obligation of his bond, to attend the city court of Moultrie, and at length, after having several times orally demanded a trial, was informed in open court by the judge and the solicitor that there was nothing against him, and subsequent inquiry disclosed that the judge had formerly made upon his docket an entry that the case was dismissed. Under the facts which we have already stated, it appears that the jury would be authorized to find that the prosecution was instituted with malice and without probable cause. The defendant flew into a rage, whether rightfully or wrongfully, because the plaintiff returned a horse which the defendant had sold. He threatened the plaintiff that he would have him arrested. So far as appears from the allegations of the plaintiff's petition, the plaintiff had done no act which made him a violator of any penal law of this state. The affidavit and the warrant attempted to conceal the imaginary offense under the blanket term of a misdemeanor. For five terms of the court the prosecutor made no effort to have a judicial investigation either in the city court or by indictment in the superior court—of which this court knows that there were two sessions in the period of time set forth in the petition. Certainly these circumstances are sufficient to authorize the inference on the part of the jury that there was no basis for the prosecution at the start, and the conduct of the prosecutor in not pressing the prosecution corroborated the inference that the prosecution was instituted in bad faith. Before there can be a recovery for damages resulting from malicious prosecution, it must appear that the prosecution has ended. The petition set forth that the case has been dismissed in the city court, and we hold this dismissal to be sufficient evidence of the termination of the prosecution, since prosecutions in that court must be based upon affidavit, and it would require an entirely new affidavit to renew the prosecution.

Judgment reversed.

TAYLOR v. STATE. (No. 5,092.)
(Court of Appeals of Georgia. Oct. 30, 1913.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§§ 381, 782*)—CHARACTER EVIDENCE—PROBATIVE EFFECT—INSTRUCTIONS.

"Evidence of good character is not admitted as a mere makeweight but as evidence of a positive fact and may of itself, by the creation of a reasonable doubt, produce an acquittal." *Seymour v. State*, 102 Ga. 803, 30 S. E. 263. It was therefore error, in instructing the jury upon the weight and effect to be given to evidence touching the good character of the accused, to charge them in effect that it is only in connection with other evidence that such evidence may, by the creation of a reasonable doubt, produce an acquittal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 846, 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. §§ 381, 782.*]

2. CRIMINAL LAW (§ 381*)—CHARACTER EVIDENCE—PROBATIVE EFFECT.

While, of course, mere proof of the good character of the accused will not avail as a defense when the jury are satisfied by the evidence, beyond all reasonable doubt, of the guilt of the accused, still such proof of good character may of itself annihilate an apparently plain case of guilt by discrediting and impeaching the testimony upon which the conclusion of guilt is necessarily based.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 846; Dec. Dig. § 381.*]

3. HOMICIDE (§ 340*)—APPEAL—PREJUDICIAL ERROR—INSTRUCTIONS.

The instructions of the trial judge, other than those relating to the consideration of the testimony as to the defendant's good character, were free from error, but since the verdict rendered, of guilty of shooting at another, was not demanded, and there was testimony supporting the defendant's statement at the trial, which might have justified him, the error in the instructions to which we have referred must be adjudged to have been prejudicial and a new trial should have been granted.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

(*Additional Syllabus by Editorial Staff.*)

4. HOMICIDE (§ 340*)—APPEAL—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

In a prosecution for assault with intent to murder, the refusal of instructions relating to the offense charged, particularly an instruction not to convict defendant of such offense if he was resisting an illegal arrest, was harmless where defendant was convicted only of the lesser offense of shooting at another.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

5. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REQUEST.

Where, in a prosecution for assault with intent to murder, one defense is that defendant was attempting to prevent an illegal arrest but there is no evidence thereof outside of defendant's statement, the court need not, in the absence of request, instruct on the law relative to resistance of illegal arrest.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

6. HOMICIDE (§ 309*)—VOLUNTARY MANSLAUGHTER—EVIDENCE.

In a prosecution for assault with intent to murder, the state's evidence that accused shot a

depot gatekeeper without any present provocation, when considered with defendant's evidence that he was resisting an illegal arrest and evidence of defendant's ejection from the waiting room a few minutes before the shooting, authorized an instruction on voluntary manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

7. HOMICIDE (§ 295*)—ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS—COOLING TIME.

Where, in a prosecution for assault with intent to murder, the court instructs relative to the "cooling time," he should state that the cooling time is a question solely for the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 606-609; Dec. Dig. § 295.*]

8. HOMICIDE (§ 105*)—RESISTING ARREST.

Where a person does not exceed the measure of force necessary in the resistance of an illegal arrest, he is guilty of no offense.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 135; Dec. Dig. § 105.*]

9. JURY (§ 110*)—INCOMPETENCY OF JUROR—WAIVER.

Where accused accepted a juror before his strikes were exhausted, he waived his right to object that the juror was incompetent.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.*]

10. JURY (§ 110*)—INCOMPETENCY OF JUROR—SCOPE OF INQUIRY.

The examination of a juror upon his voir dire exhausts the right of accused to inquire into his competency unless he puts him upon the judge as a trier and then proves some fact tending to establish that his answers on the voir dire were not true.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.*]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

W. H. Taylor was convicted of shooting at another, and brings error. Reversed.

John R. Cooper, of Macon, for plaintiff in error. John P. Ross, S. C. Gen., of Macon, for the State.

RUSSELL, J. The defendant was indicted for the offense of assault with intent to murder and was convicted of the statutory offense of shooting at another, and he excepts to the judgment overruling his motion for a new trial. There are numerous assignments of error in the motion for a new trial. We have given consideration to each of them and have carefully examined the record with reference to all of those assignments whose validity depended upon an examination of the record. All of the requests to charge which were refused and which contained correct and pertinent instructions appear to have been well covered in the charge of the court.

[4] The refusal to give some of the requested instructions which were pertinent and legal but which related to the offense of assault with intent to murder affords no just grounds of complaint, because the defendant was convicted only of the lesser offense of shooting at another, and manifestly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

the court's omission to give these instructions was not harmful to him. Several of the requests for instructions did not correctly state the law.

We shall not discuss some of the assignments of error (such as the exception to the court's refusal to continue the case) for the reason that they relate to points not likely to recur upon another trial; and some of them (including some of the assignments of error upon rulings on the evidence) will not be dealt with for the reason that the questions sought to be raised were properly presented.

[5] One of the assignments of error relates to the refusal of a request to charge the jury as follows: "The defendant has two defenses in this case, one of self-defense, and the other to prevent an illegal arrest. If the defendant shot in order to save his own life, you could not convict him of any offense. If you believe that the defendant shot in order to resist an illegal arrest, or an attempted illegal arrest, then and in that event you could not convict him of assault with intent to murder." If an arrest was attempted by the prosecuting witness, the fact appears only from the defendant's statement, and therefore, in the absence of a request (as has been often ruled), the court was not required to give instructions upon the subject; but an instruction embodying the principle relating to resistance to an illegal arrest, or an illegal attempt to arrest, would be required on request. The failure of the judge to give an instruction on this point was harmless however, since the accused was not found guilty of assault with intent to murder; but upon the next trial, if requested to do so, the court should charge the jury that if they believe from the evidence, or from the statement of the accused, that the prosecuting witness was attempting illegally to arrest him, he would have the right to resist and use whatever force was necessary to prevent an illegal arrest, and that if, in resistance of illegal arrest, he used no more force than was necessary for that purpose he would be justified.

[6] According to the evidence for the state, the accused shot one Moffett (who was a gatekeeper at a railroad depot in Macon, Ga.) without any present provocation; and a verdict finding him guilty of assault with intent to murder would have been fully authorized by this testimony. According to his statement, Moffett attempted to strike him with a "billy," such as is ordinarily used by the police, which, according to the testimony, was a weapon likely to produce death, and he shot only to prevent Moffett's blows. There was also testimony in support of the defendant's statement, at least to the extent that Moffett had the bludgeon in his hands and attempted to strike him before he fired, though Moffett asserted that Moffett's official club was hanging up in the depot at the time of the encounter. It is insisted that under this state of the case the defendant should

either have been convicted of assault with intent to murder, or acquitted, for the reason that there is no middle ground upon which a finding of a verdict for shooting at another can rest. We think there is nothing in this contention, however, because the jury was fully authorized, from the evidence as a whole, to find that the accused was not justified, and yet to find that his assault upon Moffett, instead of being due to a deliberate intention to kill, was the result of uncontrollable passion aroused by a previous assault or indignity inflicted upon him about 15 minutes before the shooting, when Moffett, as caretaker of the building, had ejected Taylor from the waiting room. The evidence is in dispute as to the degree of force used by Moffett in removing him from the waiting room, but it is uncontradicted that he was removed from the waiting room by Moffett a very few minutes before the shooting, and that they had some words in regard to the matter. It was only a very few minutes from the time that he was put out of the waiting room until he returned to the depot and the shooting took place; and if the jury, though satisfied of his guilt of some offense, had doubt as to whether he was guilty of assault with intent to murder, or of shooting at another, they did nothing more than their duty if they gave him the benefit of the doubt and found him guilty of the lesser offense. Viewing the evidence as a whole, we are very clearly of the opinion that the law of voluntary manslaughter was involved in the case, and that the instructions of the court upon this subject were both necessary and proper.

[1-3] The verdict could very well be allowed to stand but for the fact that the judge erred in his instructions to the jury as to the weight and effect of the testimony which had been submitted touching the good character of the accused. We would not order a new trial if the error in this respect had been an immaterial one, nor would we feel obliged to grant a new trial if the defense of the accused rested wholly upon his statement; but the testimony that the shooting of the prosecuting witness was unprovoked is contradicted, and the error as to the instruction is a vital one, affecting the whole scope of the testimony as to the good character of the defendant.

Upon the subject of good character the court charged as follows: "Now in this case the defendant has put in evidence his good character. Good character in itself is no defense, no complete defense, but proof of good character is a matter for the jury to consider in connection with all the evidence in the case, and it is entitled to have such weight as the jury think it ought to have as bearing upon the question of the guilt or the innocence of the accused; it may be considered and should be considered and given such weight as you think it entitled to have for that purpose. If the consideration of the other evidence, taken in connection with the

proof of good character, should develop a reasonable doubt, or if in that consideration a reasonable doubt arises as to the guilt of the defendant, it would be the duty of the jury to give the defendant the benefit of that doubt and acquit him." It cannot be said that the last sentence of this instruction is in itself erroneous, but we think that, in addition to the principle therein stated by the court, the jury should have been distinctly told that proof of good character may be sufficient alone and of itself to raise in the minds of the jury such a reasonable doubt as to the defendant's guilt as to authorize his acquittal, or it may be sufficient to authorize the jury to discredit entirely testimony which if credited would require the conviction of the accused; and for this reason it was clearly error for the judge to tell the jury that good character in itself is no defense, and the modification to the effect that it was "no complete defense," without explaining that sentence, as suggested above, was likely to confuse the jury.

There was a time when the law was as stated by the trial judge and when proof of good character could only be considered in connection with the other evidence in the case to enable the jury to say whether, when considered in connection with the other evidence and upon the case as a whole, the proof of good character generated a reasonable doubt of the defendant's guilt. There are a number of cases apparently to the effect that good character as a defense is only available in doubtful cases and is of no value where the evidence is clear. *Thomas v. State*, 59 Ga. 784; *Coxwell v. State*, 66 Ga. 309; *Epps v. State*, 19 Ga. 102; *Jackson v. State*, 76 Ga. 551. According to the later rulings of the Supreme Court, however, in which the prior rulings of the court were expressly referred to and construed, formal evidence of good character, when offered by the defendant in a criminal case, should be considered by the jury not merely where the balance of the testimony in the case makes it doubtful whether the defendant is guilty or not but where such evidence of good character may of itself generate a doubt as to the defendant's guilt. *Shropshire v. State*, 81 Ga. 591, 8 S. E. 450; *Redd v. State*, 99 Ga. 210, 25 S. E. 268; *Seymour v. State*, 102 Ga. 804, 30 S. E. 263. In the latter case Chief Justice Simmons, delivering the opinion of the court, says: "Evidence of good character is not admitted as a mere makeweight but as evidence of a positive fact and may of itself, by the creation of a reasonable doubt, produce an acquittal." And in *Mitchell v. State*, 103 Ga. 17, 29 S. E. 435, Justice Cobb, delivering the opinion of the court, held that proof of the defendant's good character was sufficient of itself to authorize an acquittal and to rebut the presumption arising, in a case of larceny, upon proof of the defendant's recent possession of property alleged to have been stolen. As was said in the *Shropshire Case*, of course if the

guilt of the defendant is plainly proved to the satisfaction of the jury, beyond a reasonable doubt, it would be their duty to convict, notwithstanding proof of good character, and in that event the proof of good character would be of no avail. Such a case would merely be one in which the jury might believe that the defendant had a good character and yet be fully convinced of his guilt of the crime with which he was charged. The *Seymour Case* and the *Mitchell Case* are both instances in which it was held that proof of good character might effect more than the mere creation of such a reasonable doubt as would authorize acquittal. They establish the proposition that proof of good character as a substantive fact may in some cases provide an absolute defense to the accused by going further than merely raising a reasonable doubt and actually disproving the charge by discrediting the witness upon whose testimony the charge rests.

We have no doubt that the learned and eminently fair judge who tried this case, in using the language that "good character in itself is no defense," or at least not a complete defense, had in mind the proposition that proof of good character is not available as a defense if the jury is satisfied beyond a reasonable doubt, from the evidence in the case, that the defendant is guilty. But the language actually used did not appropriately convey that meaning to the jury. Personally we are reluctant to grant a new trial upon this ground, for we are not certain that in the case at bar the error in the instructions prejudiced the defendant. Personally we are inclined to the opinion that the accused, smarting under his ejection from the waiting room, flew into a rage and in passion, but without malice, shot the gatekeeper, and that therefore the case is a typical case of "shooting at another." But no one can know what would have been the effect of a consideration of the proof of good character, under proper instructions, especially since the jury, even if they did not justify the defendant, were not compelled to find him guilty of shooting at another but might have found him guilty of the lesser offense of assault.

[7, 8] Since, in our judgment, there should be another trial of the case, it is perhaps proper for us to say that, if the judge in his charge to the jury on that trial should refer to the subject of "cooling time," they should be told that "cooling time" is a question solely for the jury; and, if an appropriate request upon the subject is timely presented, the jury should be instructed upon the theory of the defense which rests upon the defendant's statement, to the effect that he made his attack upon the prosecutor in resistance to an attempted illegal arrest. For if the defendant, in resistance of an attempt to arrest him illegally, did not exceed the measure of force necessary for that purpose, he would not be guilty of any offense;

and, even if he did use unnecessary force in resistance of illegal arrest, it would not necessarily follow that he would be guilty of shooting at another, for under some circumstances the jury might be authorized to find such a one merely guilty of assault.

[9] It is apparent that the defendant waived the incompetency of the juror Broadway, if he was incompetent, by accepting him as a juror before his strikes were exhausted.

[10] As to the ruling of the court upon the competency of stockholders in railroad companies having the depot building in charge, and their relatives, to serve as jurors in this case, there is no ground for complaint. The objection of counsel for the defendant was made en bloc to all jurors who might be stockholders or employes of the Central of Georgia Railway Company and other railroads using the depot and was properly overruled. Even if it be true, as was insisted by counsel, that the Central of Georgia Railway Company was the real prosecutor or behind the prosecution of the case, the court would have been compelled to act merely upon supposition to reach this conclusion from the fact that the person who was assaulted happened, at the time of the assault to be the gatekeeper of the depot. The examination of jurors upon their voir dire prima facie exhausts the right of the defendant of inquiring into the competency of the jurors. If either the state's counsel or the accused wishes to test further the bias or prejudice of the juror, he must first put the juror upon the judge as a trier and then proceed to prove some fact tending to establish that his answers upon the voir dire are not true. The effort in this case fell far short of the legal requirements. The motion to purge the jury was properly overruled, because there was no evidence that the Central of Georgia Railway Company or any other railroad company using the depot was participating in the prosecution. Even if this had appeared, we are not prepared to hold that every employe or stockholder of one of these railroads would be disqualified to serve as a juror. It would take more than the mere fact of pecuniary interest in the corporation to disqualify a stockholder in this case, and an employe would not have even that interest.

Judgment reversed.

PETERSON v. STATE (No. 5,159.)

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

1. DRUNKARDS (§ 10*)—APPEARANCE ON PUBLIC HIGHWAY.

Under the rule of strict construction, penal statutes cannot be extended beyond their precise terms. Under the terms of section 442 of the Penal Code of 1910, it is only unlawful for a person to be and appear in an intoxicated

condition on any public street or highway when the intoxication is made manifest by boisterousness, or by indecent condition or acting, or by profane, vulgar, or unbecoming language, or loud and violent discourse of the person or persons so intoxicated or drunken; and consequently the law does not provide for the punishment of intoxication upon public streets which is not otherwise manifested than by reckless driving.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 10, 11; Dec. Dig. § 10.*]

2. DRUNKARDS (§ 10*)—RECKLESS DRIVING.

Reckless driving cannot properly be included within that indecent conduct and acting which the provisions of section 442 of the Penal Code of 1910, require as one of the evidences of the public intoxication which is punishable by law; and the court erred in overruling the demurrer to the accusation, in which this point was presented.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 10, 11; Dec. Dig. § 10.*]

Error from City Court of Albany; Clayton Jones, Judge.

Ben Peterson was convicted of indecent conduct while intoxicated, and brings error. Reversed.

R. J. Bacon, Jr., and R. H. Ferrell, both of Albany, for plaintiff in error. J. W. Walters, Jr., Sol., of Albany, for the State.

RUSSELL, J. Judgment reversed.

BIRMINGHAM FERTILIZER CO. v. DOZIER.

DOZIER v. BIRMINGHAM FERTILIZER CO.

(Nos. 5,021, 5,022.)

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION (§ 40*)—SUFFICIENCY OF EVIDENCE—NOTES.

The evidence authorized the verdict; no material error of law was committed, and the court did not err in refusing to grant a new trial.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232-244; Dec. Dig. § 40.*]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULINGS.

Error in sustaining a demurrer to certain paragraphs of defendant's answer was harmless where the jury has found rightly in spite of the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

3. COURTS (§ 188*)—JURISDICTION—EQUITABLE DEFENSES.

While a city court is without jurisdiction to afford a plaintiff affirmative equitable relief, it may entertain an equitable defense which will prevent plaintiff from recovering.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 439, 440, 442, 447, 448, 451, 452, 454, 458, 464, 465, 467, 468; Dec. Dig. § 188.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—EVIDENCE.

The erroneous admission of defendant's evidence which was outside the issues presented

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by his answer was harmless where such evidence was within the issues presented by certain clauses of his answer which were erroneously stricken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

5. TROVER AND CONVERSION (§ 35*)—BURDEN OF PROOF.

The burden is on the plaintiff in trover to prove not only title but also right of possession where he has by contract surrendered possession to another.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 215, 216; Dec. Dig. § 35.*]

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by the Birmingham Fertilizer Company against P. N. J. Dozier. Judgment for defendant, and plaintiff brings error, and defendant files cross-bill of exceptions. Judgment on main bill of exceptions affirmed, and cross-bill of exceptions dismissed.

A. H. Gray and Glessner & Park, all of Blakely, for plaintiff in error. Smith & Miller, of Edison, and Byron R. Collins, of Blakely, for defendant in error.

RUSSELL, J. The Birmingham Fertilizer Company brought an action in trover to recover from P. N. J. Dozier 29 promissory notes, described in an exhibit attached to the petition, and alleged to be of the value of \$850. The defendant in his answer admitted having in his possession at the time of the service of the suit certain promissory notes of the form described in the plaintiff's petition, but not all of them. In other words, the defendant contended that some of the notes described in the plaintiff's petition had been delivered by him to the plaintiff prior to the suit. The defendant, in his answer, contended that those notes which were in his possession did not belong to the plaintiff, and, by way of equitable defense, alleged that by virtue of a contract between the parties the notes included his commissions and charges for the sale and handling of the fertilizers, which gave him such an interest in the notes as entitled him to retain possession of them until the commissions were paid. The defendant further pleaded that under the contract between himself and the fertilizer company after taking into consideration the payments made by him and the notes delivered by him to the plaintiff at its request, the plaintiff was indebted to him in a sum greater than the amount evidenced by the notes which are in his possession. The jury returned a verdict in favor of the defendant; the plaintiff's motion for new trial was overruled, and exception is taken to this judgment. The defendant, by cross-bill of exceptions, excepts to the judgment, striking from his original answer paragraphs 5, 6, and 7, and his prayer "to have his claims against the peti-

tioner offset, and that the plaintiff be mulct-ed the costs of the court," and excepts also to the court's refusal to allow certain amendments to his answer. Since, in view of the result of this case, the ruling upon the defendant's answer—without regard to its correctness—was harmless, we shall consider only the assignments of error in the main bill of exceptions.

[1, 2] It appears from a review of the record that the verdict was perhaps partly induced by evidence which would have been admissible under the defendant's answer if the court had not sustained the demurrer to the fifth, sixth, and seventh paragraphs, and had allowed the amendments which he sought to make. Under the ruling in *Spence v. State*, 7 Ga. App. 825 (2), 68 S. E. 443, if the result reached by the jury would have been the correct conclusion of the case had the judge ruled or charged in accordance with the contentions of one of the parties to the case, the verdict will not be set aside merely because the judge erroneously ruled to the contrary, or omitted to give in charge to the jury a principle which should appropriately have been included within his instructions. In other words, if the result reached would have been the same had the court ruled properly, and if the jury has found rightly in spite of judicial error, the finding will not be set aside in order that the same result may be reached by a proceeding free from legal error.

The defendant, in his answer, attempted to set up, in response to the petition in trover, that he had received on commission \$8,576.36 worth of fertilizer; that he had paid over to the Birmingham Fertilizer Company, on account of his sales, \$6,850.73, and had returned to it notes amounting to \$1,915.63; that his commission and storage, by virtue of the terms of the contract between himself as agent and the plaintiff as principal, amounted to nearly \$600, leaving the plaintiff due him the sum of \$542.52. The defendant did not ask a judgment for this \$542.52, but merely insisted that, inasmuch as the plaintiff owed him \$542.52, he was entitled to the possession of the notes still remaining in his hands, and that, as the plaintiff was not entitled to possession, it could not recover these papers in trover. The fact that the jury found for the defendant itself evidences that the jury must have acted upon the evidence which the defendant would have introduced in support of his answer if it had been allowed, and that he received full benefit of his contention, although the plea in which this contention should have been formally presented to the court was stricken.

[3] Having held that the defendant got the benefit of his answer and of the stricken amendments as substantially as if the court had overruled the demurrers which were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sustained, the question which arises upon the main bill of exceptions is whether the amendment, the evidence in support of which no doubt caused the verdict for the defendant, could properly have been allowed, and whether paragraphs 5, 6, and 7 should have been stricken. We think there is no doubt that the court should not have stricken these paragraphs of the answer, and the amendments offered appear to be merely amplification of the statements in the original answer. The insistence of the plaintiff in error in the main bill of exceptions is that the city court of Blakely is without jurisdiction and cannot take cognizance of the equitable rights which the defendant sought to assert. That the city court is without jurisdiction to afford equitable relief is true; but it is one thing to invoke affirmative equitable relief and quite another thing to interpose as a defense a right, whether founded in law or equity, which will prevent the plaintiff from recovering. The fact that one's equitable rights will prevent a plaintiff, of whose case as laid the court has jurisdiction, from recovering does not involve the necessity that the court trying the case shall be clothed with equitable jurisdiction. The court may not be able to afford affirmative relief in equity generally; but it must be presumed to bear in mind the rights of the parties at issue, and for this reason may deal with any matter of which the court has jurisdiction, whether such rights depend for their existence upon law or equity which may affect the cause in question. For this reason we think the city court of Blakely had full jurisdiction to entertain the defendant's plea, and, if the evidence authorized it, to grant his prayer, which did not ask that judgment be rendered for the overplus claimed by him against the plaintiff, but asked merely that he be not required to deliver up notes which he was legally entitled to hold as collateral security for his commissions, the consequence of which would be that he would be forced to proceed to recover these notes from a non-resident, which the plaintiff corporation was alleged to be.

[4, 5] It was error for the court to overrule the plaintiff's objections to testimony along the line of the paragraphs of the answer which had been stricken, and of the amendments which had been disallowed, these rulings upon the pleadings being an adjudication that the defendant could not plead the commissions accruing to him under the contract in recoupment of the plaintiff's action; but the ruling in regard to the testimony was error only because violative of the previous ruling to the contrary. And since the defendant, by timely exception pendente lite, preserved his rights, the whole matter is now properly before this court for adjudication, with the result that we must hold that the ruling in regard to the evidence, though in a technical sense error, in

effect corrected the antecedent error in striking the paragraphs of the defendant's answer. A review of the evidence discloses that the testimony authorized the jury to find that the defendant contracted with the plaintiff to sell for it guano upon commission, and that, deducting the commissions transmitted by the agent in cash, and the notes which were returned to the plaintiff, the plaintiff was indebted to the defendant and entitled to retain the remaining notes which are in his possession as collateral until his commissions and charges are paid. To recover in trover it is essential that the plaintiff show either title or right of possession; in some cases he must show both. In the latter class of cases, although the plaintiff may show that he has legal title, if it appears that he has by contract surrendered possession to another, who is rightfully entitled to retain possession, he cannot recover possession by mere proof of title. Under the testimony in behalf of the defendant the jury were authorized to find that, even if the fertilizer company had title to the notes in question, Dozier was entitled to their possession as collateral until his commissions and his account for storage were paid.

The plaintiff's case was based upon the theory that the notes were placed in Dozier's hands for collection, and that it was his duty to surrender them upon demand. If the jury had believed the testimony in behalf of the plaintiff, the result would have been a verdict in his favor. On the other hand, if the contention of the defendant, which is sustained by the testimony in his behalf, is credible to the jury—that the fertilizer was sold by him on commission under a written contract, under which he was to receive \$1 per ton as commission on fertilizer of a certain grade sold by him, and that the fertilizer sold was of this grade—there is a stipulation in the contract that the notes taken for fertilizer shall be payable to the Birmingham Fertilizer Company, and it appears that the notes were so taken. The notes were sent to Dozier by the company for collection, and in the trust receipt given by Dozier it appeared that the notes of Thompson, Keaton, and McDowell, aggregating something over \$1,800, had been entered as a credit on the statement of account rendered by the fertilizer company to Dozier. This trust receipt was attached to an amendment offered by the defendant, and was not admitted in evidence by the court; but the defendant testified in substance to the same facts as appear from this receipt in the record, and, if the jury credited his testimony on this point, there remained only one other question, and that was whether a stipulation of the contract which imposed personal liability on Dozier in case of his failure to collect any of the several notes was abrogated, and Dozier was relieved from liability by the conduct of the plaintiffs in themselves undertaking to col-

lect the notes due by Keaton, Thompson, and McDowell. Upon this point the jury evidently gave preference to the testimony in behalf of the defendant, and they had this right.

Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed.

POTTLE, J., disqualified.

HILLIS v. E. T. COMER & CO. (No. 4,717.)
(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 271*)—FORECLOSURE—AFFIDAVIT TO COPY—SUFFICIENCY OF VERIFICATION.

Where a chattel mortgage is foreclosed by attaching to the affidavit of foreclosure a copy of the mortgage, this copy must be "verified as correct by an affidavit thereon of the owner or his agent or attorney." Such a copy is not sufficiently verified by a certificate, signed by the attorney for the mortgagee and by the attesting officer, which recites merely, "I hereby certify on oath that the above is a true and correct copy of the original mortgage which is not in my possession." Such a certificate does not show that any oath was administered to the attorney as required by the statute.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 555-558; Dec. Dig. § 271.*]

2. CHATTEL MORTGAGES (§§ 43, 48*)—WHAT CONSTITUTES—"IN TRUST."

An instrument in the form of a promissory note for the purchase price of fertilizer contained the stipulation: "In consideration of interest of payees in my crops, by reason of this fertilizer being furnished to make same, I hereby covenant and agree that all cotton and corn grown during the current season on lands fertilized with this manure shall be held by me in trust for payment of this third note." Held, that the language quoted was adequate to create a lien upon the crops mentioned, and that the mortgage was sufficient when aided by parol evidence identifying it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 83, 93-95; Dec. Dig. §§ 43, 48.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3485, 3486; vol. 8, p. 7684.]

3. CHATTEL MORTGAGES (§ 278*)—FORECLOSURE—BURDEN OF PROOF.

There being no evidence in the present case to identify the crops mortgaged by showing on what land the fertilizer was used, it was error to direct a verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 567; Dec. Dig. § 278.*]

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by E. T. Comer & Co. against R. J. Hillis. Judgment for plaintiff, and defendant brings error. Reversed.

H. A. Boykin, of Sylvania, and H. J. Fullbright, of Waynesboro, for plaintiff in error. Brinson & Hatcher, of Waynesboro, for defendant in error.

RUSSELL, J. This is a case in which it was sought to foreclose a mortgage. An

affidavit of illegality was overruled in part, and in part sustained, and a verdict was directed by the court. The mortgage was as follows:

"State of Georgia, Screven County.

"Millhaven P. O. July 6th, 1912.

"1,080.00. On or before October 1st next I promise to pay to E. T. Comer & Co., or order, one thousand eighty and ⁰⁰/₁₀₀ dollars, from first proceeds of sale or picking of my cotton crop of this present year, for 480 sacks Farmer's Pride guano.

"(1) Which are hereby guaranteed by payees to standard of analysis branded on each sack, and it is understood that no other or larger warranty is given by the payees. I admit that every sack is branded according to law, and that the inspector's tag is attached thereto.

"(2) If this note is not paid on or before maturity I agree to pay 8 per cent. per annum interest from maturity, and all cost of collection, including ten per cent. attorney's fees.

"(3) I hereby expressly waive and renounce all exemption and homestead rights I may have under the laws of this state or any other state as against this debt or any renewal thereof.

"(4) In consideration of interest of payees in my crops, by reason of this fertilizer being furnished to make same, I hereby covenant and agree that all cotton and corn grown during the current season on lands fertilized with this manure shall be held by me in trust for payment of this third note.

"Witness my hand and seal the day and year above written. R. J. Hillis.

"Signed, sealed, and delivered in the presence of: J. T. Arvet, N. P. B. C. Ga. J. W. Comer."

It is verified by the following certificate:

"I hereby certify on oath that the above is a true and correct copy of the original mortgage which is now in my possession. H. C. Hatcher.

"Signed before: E. C. Blount, Dpty. Clerk Supr. Court, Burke Co., Ga."

The affidavit of foreclosure was not made by H. C. Hatcher, but was by L. J. Kilpatrick, as the agent of E. T. Comer & Co. In the affidavit of foreclosure it is averred that the mortgage is attached. By the affidavit of illegality it was sought to raise the following points:

That, while the affidavit of foreclosure recites that the mortgage is attached, none is attached, and it is recited that what is attached is the mortgage, instead of there being an averment that the paper attached is a true copy of the original mortgage. As to this ground of illegality we will only say that, as the court had the papers before it, it is to be assumed that the trial judge could determine the validity of the objection by an

inspection of the papers, and ascertain whether what purported to be a mortgage was the original or a copy, and that he did determine this question properly.

[1] The second ground of illegality of the foreclosure is that the copy mortgage attached is not a sworn copy; in other words, that it does not appear that H. C. Hatcher was duly sworn to the certificate, or that he was authorized to make the affidavit that the paper was a true copy of the original mortgage. Section 3286 of the Civil Code permits the affidavit of foreclosure to be annexed either to the original mortgage or to a sworn copy of the original mortgage; but, if for any reason a copy is used instead of the original, it is required to be "verified as correct by an affidavit thereon of the owner or his agent or attorney." Even though the trial judge was authorized to infer that Hatcher was the attorney of the foreclosing mortgage holder, it does not appear from the certificate of Hatcher that he was in fact sworn. Hatcher states in the certificate that he certifies "on oath"; but the attesting officer does not state that Hatcher was in fact sworn, or that he knew that Hatcher was assuming the obligation of an oath, or that he administered an oath. Nor does it appear, by reading Hatcher's certificate, or by the contents of the certificate being called to the attention of the officer, that the latter knew that Hatcher was certifying on oath. The language used in the certificate would have been as effectual to obligate Hatcher if he were actually sworn as if the phraseology appropriate to an ordinary affidavit had been used. But there is no jurat to the certificate. Instead of the attesting officer who was qualified to administer oaths stating that the certificate was sworn to and subscribed before him, it is merely stated that it was signed before him. On this subject, see *Green v. Rhodes*, 8 Ga. App. 301, 68 S. E. 1090. The very fact that an officer authorized to administer an oath certified no more than that the proposed affiant "signed" the statement in question is of itself sufficient to cause a suspicion that for some reason the administration of an oath was dispensed with, that the proposed affiant was in fact not sworn, and that for that reason the officer who signed the jurat purposely omitted the usual form, to the effect that the person who signed was first sworn. Of course it was not essential that the deputy clerk should have administered a formal oath; but it was his duty to have called the attention of the signer of the sworn certificate to the fact that he was assuming the obligation of an oath. One of the tests for determining whether one who makes an affidavit or other sworn certificate was in fact sworn is a determination of the question whether the affiant could be convicted of falsely swearing. In any trial for perjury or false swearing it is absolutely essential to prove that

an oath was administered before it becomes material to investigate whether the statements alleged to have been false were false or true. Certainly the certificate in the present case, if employed in a criminal prosecution, would not serve even to indicate that Hatcher had sworn. When the officer before whom the writing is signed does not know that the signer proposes to be sworn, there is no administration of an oath, and the recital as to an oath is not more binding than in a case where the signer himself does not consciously assume the obligation imposed by an oath. Since it does not appear from the record that there was any effort to amend the affidavit verifying the copy mortgage, we are of the opinion that the court erred in overruling the second ground of the affidavit of illegality.

[2] The third ground of the affidavit of illegality presents the contention that the paper which it was sought to foreclose was not a mortgage, but only a promissory note. This ground was properly overruled, for the covenant and agreement that the property described in the paper should be held by the maker "in trust" for its payment is sufficient to create a mortgage lien. The Code does not require that any particular form of expression shall be used to create a mortgage. It is evident from the language employed that it was the intention of the maker of the note to create a special lien operative upon the property described, and the expression used is tantamount to the ordinary term "mortgage." In *Jackson v. Carswell*, 34 Ga. 279, Jackson gave a note describing land as advertised by Rollins Stanley, administrator of Benjamin Jackson, and promised to pay certain named persons \$500 "out of said land." The Supreme Court held that this instrument contained "all the necessary stipulations to create a mortgage lien." We think the stipulation to "hold property in trust" with which to pay a note is really stronger than simply to say a note is to be paid "out of the land."

Another ground of attack upon the mortgage was that the property was not sufficiently described, and we think this ground was properly overruled, under the ruling in *Thomas Furniture Co. v. T. & C. Furniture Co.*, 120 Ga. 881, 882, 48 S. E. 333. See, also, *Stephens v. Tucker*, 55 Ga. 543; *Crine v. Tifts*, 65 Ga. 644; *Duke v. Neisler*, 134 Ga. 594, 68 S. E. 327, 137 Am. St. Rep. 250. In the *Neisler* case the description did not go as far as that contained in the mortgage now before us; but the Supreme Court held that a mortgage containing, as a description of the property mortgaged, the language "our crop planted this year, and on which said fertilizer is used," was not void for uncertainty. See, also, *Broach v. O'Neal*, 94 Ga. 478, 20 S. E. 113; *Patterson v. Evans*, 91 Ga. 799, 18 S. E. 81.

Even if the affidavit of foreclosure is full-

er and more complete in its description of the property than the mortgage, the added terms of description could not have resulted in harm to the defendant. In the foreclosure the mortgagee was compelled to stand on the mortgage and be confined to its description; but, since the description in the mortgage could properly be supplemented by parol explanation, the inclusion in the affidavit of a description of the land upon which the mortgaged property was grown could not have harmed the defendant.

[3] However, since there was no proof that the fertilizer sold by the plaintiff was used in the cultivation of the cotton, the identification of the property only partially described in the mortgage itself was not completed by parol, and it was therefore error to have directed a verdict for the plaintiff. It is true that the defendant did not testify that the guano was not placed under the cotton; but there was no testimony whatever that the guano was in fact used on the cotton, and affirmative proof upon this point was essential under the rulings of the Supreme Court in *Patterson v. Evans*, 91 Ga. 799, 18 S. E. 31; *Thomas Furniture Co. v. T. & C. Co.*, 120 Ga. 881, 48 S. E. 333, and citations.

The court erred in directing a verdict as to the cotton, because it was not made to appear that the guano was used in the cultivation of the cotton levied upon, and, if it was not so used, the cotton levied upon was not subject to the mortgage.

Judgment reversed.

CHARLESTON & W. C. R. CO. v. BROWN.
(No. 4,905.)

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 246*)—INJURY TO RAILROAD EMPLOYE—RIGHT OF RECOVERY.

This was an action against a railway company under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) to recover damages for personal injuries. The case made by the petition was substantially as follows: The plaintiff was a locomotive fireman on the defendant's train, which operated daily between Georgia and South Carolina. At a point in South Carolina the track was being repaired, and, when the train upon which the plaintiff was employed approached, one of the track flagmen grabbed a flag of distress, and in an excited manner ran up the track of the railroad, met the train, and signaled it to stop; thereupon the engineer, after putting on the emergency brakes, jumped from the engine, and the plaintiff, seeing that the rails of the track ahead of the engine were out of line and "buckled," and believing that the train would be wrecked and his life be in peril, jumped from the engine, and in doing so sustained serious injury. It is alleged that the defendant was negligent in suffering its roadbed to get out of order and its rails to become "buckled," and in not placing a danger flag at a sufficient distance on its line from the place where the track was out of or-

der, after the "buckled" condition of the track had been discovered, to have notified the employes on the engine of the danger, and thus have prevented the application of the emergency brakes and the apparent necessity for the plaintiff to jump from the engine. Held, that the petition was not subject to general demurrer, nor to demurrer upon the ground that the negligence complained of was not the proximate cause of the injury, nor was it essential to allege that the train actually ran off the track. The plaintiff did not complain of injuries sustained by reason of a derailment, but complained of injuries resulting from his fall in consequence of the jump made necessary by an emergency brought about by the defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 789-794; Dec. Dig. § 246.*]

2. MASTER AND SERVANT (§ 228*)—NEGLIGENCE (§ 101*)—INJURY TO RAILROAD EMPLOYE—CONTRIBUTORY NEGLIGENCE.

The allegations of the petition showed that the plaintiff was engaged in interstate commerce, and the suit was properly brought under the federal Employers' Liability Act. Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]. Under this act it is not essential for the plaintiff to show that he was free from fault. He was entitled to recover for the negligence of the defendant, and his own fault, if any, would not defeat but merely go in reduction of the damages.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.* Negligence, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.*]

3. APPEAL AND ERROR (§ 302*)—PRESENTATION BELOW—ADMISSION OF EVIDENCE.

The exception to the admissibility of documentary evidence, as set forth in the eighth ground of the motion for a new trial, cannot be considered, because the document to which exception is taken is not set forth in the motion for a new trial, either literally or in substance, nor is a copy attached thereto as an exhibit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

4. TRIAL (§ 255*)—INSTRUCTIONS—FAILURE TO REQUEST.

While, under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), there is no presumption of negligence against the railway company in a case of this character, still failure of the judge in the present case to affirmatively charge the jury that there is no such presumption is no cause for a new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

5. MASTER AND SERVANT (§§ 246, 289*)—INJURY TO RAILROAD EMPLOYE—RIGHT OF RECOVERY—QUESTION FOR JURY.

The evidence authorized the verdict, which was not legally excessive, and the question as to whether the plaintiff's injuries resulted from his own negligence or from that of the defendant was fairly submitted to the jury, and there was sufficient evidence to support their finding in the plaintiff's favor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 789-794, 1089, 1090, 1092-1132; Dec. Dig. §§ 246, 289.*]

6. NO ERROR.

No material error of law was committed, and the judgment overruling the motion for a new trial will not be disturbed.

*(Additional Syllabus by Editorial Staff.)***7. MASTER AND SERVANT (§ 246*)—INJURY TO RAILROAD EMPLOYEE—CONTRIBUTORY NEGLIGENCE—EMERGENCY.**

The question whether a locomotive fireman was justified in jumping from his engine in an emergency depends upon whether he used ordinary care under the circumstances of the emergency presented to him, and not upon the true conditions as they may have appeared to other persons in a better position to ascertain the real facts.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 789-794; Dec. Dig. § 246.*]

Error from City Court of Richmond County; Wm. F. Eve, Judge.

Action by J. J. Brown against the Charleston & Western Carolina Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. K. Miller, of Augusta, for plaintiff in error. H. C. Roney, of Augusta, for defendant in error.

RUSSELL, J. Brown, the plaintiff in the court below, brought an action for damages, alleging that he was injured while employed as a fireman by the defendant who was alleged to be a carrier engaged in interstate commerce. He expressly planted his case upon the federal Employers' Liability Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), which provides that such a carrier shall be liable in damages to any person suffering injury while employed by the carrier in such commerce, resulting in whole or in part from the negligence of any of the officers, agents, or employes of the carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Of course, in such a case the burden of proving that the negligence of the employer was the proximate cause of the injury rests upon the plaintiff (*Bowers v. Southern Railway Co.*, 10 Ga. App. 367, 73 S. E. 677), and the doctrine that the servant assumes the risks ordinarily incident to his employment applies where the action to recover damages for personal injuries is based upon the federal Employers' Liability Act (under the same circumstances and conditions), just as it would apply if the action were proceeding under the statutes of this state.

In the case at bar the plaintiff's petition alleged that he was a locomotive fireman on a passenger train of the defendant, which ran daily from Augusta, Ga., into the state of South Carolina, and returned to Augusta. On the occasion under investigation the train upon which the plaintiff was a fireman left Spartanburg, S. C., at 12:30 p. m. for Augusta, and on the return trip reached Woodruff, S. C., and had passed that station a mile or two when the casualty which result-

ed in the plaintiff's injury occurred. The petition alleges that track hands were working on the line of the railroad, and that, as the train approached and was within a short distance from where they were working, one of the track workmen grabbed a flag of distress in a very excited manner, and ran up the railroad, meeting the train, and signaling the train to stop, and that thereupon the engineer, after putting on the emergency brakes, jumped from his engine, and the plaintiff, seeing that the rails of the track ahead of the engine were out of line and "buckled," and that apparently the train would be wrecked, and believing his life to be in peril, also jumped from the engine, and in jumping lost his footing and fell, and the fall broke the bones of his right hip, his collar bone, and two ribs. It is averred that the defendant was negligent in suffering its roadbed to get out of order and its rails to become "buckled," and in not placing a danger flag at a sufficient distance on its line from the place where the track was out of order, after this condition was discovered, to have notified the crew of the passenger train of the danger, and thus have prevented the necessity for applying the emergency brakes, and to have prevented the plaintiff's injury. The defendant demurred to the plaintiff's petition, the demurrer was overruled, and upon the trial the jury returned a verdict for the plaintiff. Exception was taken *pendente lite* to the judgment overruling the demurrer, and this exception, as well as that to the judgment overruling the motion for a new trial, is presented for our consideration by the bill of exceptions.

[1] 1. We find no error in the judgment overruling the demurrer. The petition was certainly sufficient to withstand the ground of the demurrer in which it was insisted that the petition failed to set out a cause of action, nor could the ground in which it was insisted that the negligence complained of was not the proximate cause of the injury be sustained, for, if the allegations of the petition were proved, the jury might be authorized to infer that the negligence of the defendant was the prime underlying cause of the injury suffered by the plaintiff, and that, though he might have been negligent in some respects, he would not have jumped or have been hurt but for the concurrent negligence of the servants of the company. Nor was it necessary for the plaintiff to allege that the train ran off the track. His case was not one of a person complaining that he was injured by reason of a derailment. The petition plainly alleged that the plaintiff was injured in jumping from the engine, and by reason of the fall consequent upon the jump. Therefore it is immaterial, so far as concerns his right to recover, whether the train remained upon the track or was derailed.

[7] The petitioner alleged sufficient facts to

authorize submitting to the jury the question whether he was justifiable in jumping from the engine at a time when, as it appeared to him, his life was in peril, for it must be borne in mind that one who is called to act in an emergency must necessarily be governed by the surroundings as they appear to him, and that, though he must use ordinary care for his preservation, the determination of the question as to whether he did or did not use ordinary care is to be reached by a consideration of the aspect the circumstances of the emergency presented to him, and not the true condition as it may have appeared to bystanders who, perhaps, may have had better opportunity of ascertaining the real facts.

[2] 2. We think the facts alleged clearly brought the case under the federal Employers' Liability Act, and that the seventh ground of the demurrer (which, though applicable only to the seventh paragraph of the petition, was general in its nature) was properly overruled. Under the allegations of the petition the defendant was engaged in interstate commerce; the plaintiff was employed by it on an interstate run; he had suffered an injury, and, even if this injury was partly due to his own negligence, if the injury also resulted in part from the negligence of an employé of the carrier, he was entitled to recover. He was not required to show that he was free from fault (as the employé who proceeds for damages under the statutes of this state must do), if he succeeded in proving that it was negligence to give the signal to stop the train, and that his injury resulted primarily from this negligence of one of the carrier's employés.

[3] 3. In one of the grounds of the motion for a new trial complaint is made that the plaintiff, Brown, was allowed to introduce a letter from the defendant's engineer to the master mechanic of the railroad company. It is assigned as error that the engineer was a witness under subpoena of the plaintiff, and therefore his reason for jumping from the engine should have been given by himself as a witness, and, further, that his letter could not operate as an admission by the defendant company nor bind it as such, and the cases of *Carroll v. East Tennessee, Virginia & Georgia Railway Co.*, 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214, and *Howard v. Savannah, Florida & Western Railway Co.*, 84 Ga. 711, 11 S. E. 452, are cited in support of this contention. The majority of the court decline to consider this ground of the motion for a new trial, because the document, to the admissibility of which objection was raised, is not set forth in the motion for a new trial, either literally or in substance, nor is a copy attached to the motion as an exhibit. The writer (not losing sight of the decisions of the Supreme Court which require documentary evidence to be exhibited in the motion for a new trial) is of the opin-

ion that, even if we should consider the exception, it is without merit. Moved by the argument of the learned counsel for the plaintiff in error, I was under the impression that the paper in question was necessarily a letter, and its admissibility seemed to be doubtful, because the paper refers partly to matters not connected with the plaintiff, and therefore foreign to the issue. After mature deliberation, however, it is my opinion that the trial judge did not err in overruling the specific objections made to the introduction of the paper, and it is plain that its admissions could not have harmed the defendant. It does not appear from the contents of the paper whether it was a letter or a report such as is sometimes required by the rules of employers. The paper is equally susceptible of either construction. The addressee is addressed as "master mechanic," and there is no word which refers to anything other than the occurrence in which the plaintiff was injured, nor is there any statement acknowledging receipt of an inquiry, or indicating that the paper is a letter in reply to one received by the writer. The trial judge could properly have held that the paper submitted for his inspection was a report by an employé to his superior, and, even if this is not so, the engineer was in charge of the engine; he was, for the occasion, the alter ego of the defendant company. Some of the statements in the letter (if it was a letter) could be treated as admissions of the company itself because made by its alter ego.

Of course, an agent's declarations, beyond the scope of his authority, or as to matters outside the scope of his duty, cannot affect his principal, and consequently, in *Wright v. Georgia Railroad & Banking Co.*, 34 Ga. 337, it is held that the statements of an agent should not go to the jury until it has been shown that his sayings relate to matters within the scope of his agency; but the principal is bound by statements made by him as to matters which are peculiarly within the province of his agency. Under the rulings in *Imboden v. Etowah & Battle Branch Mining Co.*, 70 Ga. 87 (11), 113, *Cotton States Life Insurance Co. v. Edwards*, 74 Ga. 222, *Dobbins v. Pyrolusite Manganese Co.*, 75 Ga. 450, *Georgia Railroad Co. v. Smith*, 76 Ga. 634, *Krog v. Atlanta & West Point Railroad Co.*, 77 Ga. 202, 4 Am. St. Rep. 77, as well as in many subsequent cases, such admissions of Hargrove, the engineer, as related to matters within the scope of his duty as engineer were admissible, whether the communication to the master mechanic be treated as a formal report or as correspondence personal in its nature. As was said by Chief Justice Jackson, in the *Imboden Case*, supra; A corporation can only make admissions through its agents, and "the admissions of such agents acting within the scope of their powers and about the business of their agency" are admissible. "Un-

less such admissions are binding on a corporation, it cannot be bound by admissions at all. The only way in which a corporation can talk and admit is by agents. It is dumb as well as deaf by itself, having no organs of speech or hearing except by natural persons as its agents." In the present case Hargrove was the engineer in charge of the particular engine in jumping from which the plaintiff was hurt. It was his duty to operate the engine and control its movements, and as to the particular engine he was the alter ego of the carrier. For this reason it would seem plain that so much of his communication to the master mechanic as relates to the particular facts touching the operation of the engine at the very time the plaintiff was hurt was relevant testimony, and, even though the communication contains some irrelevant matter, the admission of the whole paper was not erroneous, for the objection was not aimed at these particular portions of the paper, but was directed to it as a whole.

The requirement that admissions of an agent which bind his principal must be made dum fervert opus is supplied, in a case in which the admission is made at a time so far subsequent to the transaction to which the statement relates that it cannot be said to be a part of the *res gestæ*, if the statement is as to matters peculiarly within the very class of work intrusted to this agent, and especially if it is the business of this agent solely, and does not relate to the acts or duties of any one else than himself. For this reason, as to so much of the statement of Hargrove as related to what he himself did in applying the emergency brakes and stopping the train, it is immaterial that this statement was made several days after the casualty in which the plaintiff was alleged to have been injured. As was held in *Chattanooga, etc., Railroad Co. v. Liddell*, 85 Ga. 490, 11 S. E. 853, 21 Am. St. Rep. 169, the sayings of an agent are admissible only upon the principle of being a part of the *res gestæ*; but, in *Evans v. Atlanta & West Point Railroad Co.*, 56 Ga. 500, it is pointed out that statements made in the line of the agent's duty are to be classed, as to the particular transaction involved, as part of the *res gestæ*. I am of the opinion, therefore, that so much of the engineer's report to the master mechanic as relates to facts as to which it was his duty to report was properly admissible.

[4] 4. Exception is taken to the fact that the trial judge did not instruct the jury that under the federal Employers' Liability Act there is no presumption against the railway company. The court did not charge upon this subject at all, and the request to charge was merely oral. The real question presented, therefore, is whether it was the duty of the court to point out to the jury the distinction or difference between the federal statute and the laws of this state, due to the fact that

there is a presumption of negligence against the company where it is sought to recover damages under the laws of this state, but no such presumption where the right to recover is based upon the federal statute. We do not think that the court, in the absence of an appropriate written request, is in any case required to charge the jury what is *not* the law. His duty is fulfilled if he tells the jury what is the law applicable to the case. In the present case, in telling the jury that the plaintiff was required to prove all the allegations of negligence set forth in the petition, or that otherwise the jury should find for the defendant, the judge certainly conveyed no intimation that there was a presumption of negligence against the company, and, in order to hold that further instructions were necessary, it would have to be assumed that there was some good reason why the jury should have thought that there was a presumption before it would appear that a jury of ordinary intelligence would have such an impression. The judge several times told the jury that the action was based on the federal Employers' Liability Act.

[5] 5. The plaintiff proved his case as laid. The evidence was sufficient to authorize the jury to find that the fireman was impelled by the aspect of his surroundings, as they appeared to him, to jump from the engine for the preservation of his own safety. It was not necessary that the train should have run off the track, since if he waited for the derailment of the train before jumping, he might be injured before he could jump, or might, by the overturning of the engine, be prevented from jumping at all. It was for the jury to say what emotions of apprehension might naturally and reasonably be aroused in the mind of the plaintiff, and the plaintiff was authorized to act in accordance with the conditions as they appeared to him, and not as they might have appeared to a bystander. "All the authorities concur in holding that the duty of a person for his own safety in such an emergency is not to be measured by the ordinary standard, but that allowance is to be made for the emotions. The authorities to this effect which might be cited amount to scores, if not to hundreds." *Atlanta, Knoxville & Northern R. Co. v. Roberts*, 116 Ga. 508, 42 S. E. 753; *Georgia Railway & Electric Co. v. Gilleland*, 133 Ga. 621, 66 S. E. 944; *Smith v. Wrightsville & Tennille R. Co.*, 83 Ga. 671, 10 S. E. 361. As was said by us in ruling upon the demurrer, the fact that the engine was not derailed is of no consequence in determining whether the plaintiff was justified in jumping, for, as was held in *Southwestern Railway Co. v. Paulk*, 24 Ga. 356, "if, through the default of the company, or of its servants, the passenger is placed in such a perilous condition as to render it an act of reasonable precaution, for the purpose of self-preservation, to leap from the cars, the company is responsible for the injury he

receives thereby, although if he had remained in the cars he would not have been injured." And the case of an employé cannot differ from that of a passenger if the employé is free from all fault as to the matters which caused his peril.

It is strenuously insisted by learned counsel for the plaintiff in error that the buckling of the track was due to natural causes, and that, since the section force had an hour for dinner, they did not, after returning, have sufficient time to pull the track in line, or to find out that they could not do so before the arrival of the train. Even if we concede all that is claimed in behalf of the plaintiff in error upon this point, the fact remains that the jury were authorized to find that the signal upon which the train was stopped was not properly given, nor given at the proper place, as well as that it was not given as soon as it should have been. Furthermore, even if the buckling of the track was due to natural causes, the circumstances as detailed by the plaintiff, if his testimony was credible, authorized him to infer that one of the rails had been taken up in order to cut it off, and that, if he remained upon the engine until the gap in the track was reached, the engine would be overturned.

[8] 6. Without discussing at length other assignments of error, whose review would be profitless either to the parties or the profession, we are content to express the opinion that no material error of law was committed. There was sufficient evidence to authorize the verdict, which was approved by the trial judge upon review, and the judgment overruling the motion for a new trial will not be disturbed.

Judgment affirmed.

HOTSINPILLER v. HOTSINPILLER et al.
(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 46*)—ACTION ON CONTRACT.

If by the express terms of an oral contract for continuous services, or the clear understanding of the parties, payment therefor is to be postponed until the death of the promisor, or provision made therefor in his will, right of action on the contract does not accrue to the other party until the death of the promisor, and the statute of limitations does not begin to run until the event contemplated happens.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

2. CONTRACTS (§ 214*)—CONSTRUCTION—PAYMENTS.

Though such contract does not so expressly provide for postponement of payment, yet if from the peculiar circumstances of the parties, the dealings between them, their confidential relations, and the declarations of the prom-

isor, it clearly appears that such was the understanding by which they were to be bound, the contract should be so interpreted and enforced.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 980-995; Dec. Dig. § 214.*]

Appeal from Circuit Court, Preston County. Bill by William G. Hotsinpiller against George W. Hotsinpiller and others. Decree for defendants, and plaintiff appeals. Modified and affirmed.

Warder & Robinson, of Grafton, for appellant.

MILLER, J. Plaintiff, claiming to be a large creditor of the estate of his father, James W. Hotsinpiller, deceased, sued John A. Hotsinpiller, executor, and others, in equity, seeking to charge that estate with the payment of his debt of \$2,938.40, which his bill alleges was for labor performed for his father during his life time, "in the year 1900, and for several years prior thereto," and which he alleges was never paid by decedent nor by his executor since his death. There is no allegation of an express contract that said labor was to be paid for at testator's death, or provision made therefor in his will. It is alleged that the personal estate is insufficient to pay the debts, and that the executor has failed to bring any suit within the time prescribed by statute, to subject the real estate to the payment of the debts, wherefore plaintiff's suit.

The executor demurred to and answered the bill, the answer putting in issue the validity of the alleged account, and pleading the statute of limitations. The demurrer was overruled, and issue being joined on the general replication to the answer, the case was referred to a commissioner, to report the debts, and other matters usual in such cases.

On the evidence introduced the commissioner found and reported, among other things, a debt in favor of plaintiff for \$939.00, for five years services, 1,565 days, at sixty cents per day. No exceptions were filed to this report, and the court decreed that sum to plaintiff, who has appealed to this court to reverse that decree because he was not allowed and decreed the full amount of his claim. No exceptions were filed to the report, but the legal question relied on is fairly presented on the face of the record. The commissioner reported that if the statute of limitations did not apply, which with other questions he submitted to the court, plaintiff would be entitled to his whole claim, \$3,038.40, unless he should be charged with his board, clothing, etc., during the five intervening years he was an invalid and was maintained by testator. By its decree complained of the circuit court evidently concluded that the statute of limitations applied, for it adopted the finding of the commissioner and decreed to plaintiff only \$939.00.

[1] The only appearance or brief filed here was by counsel for appellant. The proposition on which they rely to reverse the decree is that plaintiff's claim did not accrue until after the death of his father, and that the statute of limitations did not begin to run until the debt then matured. If the contract was as is claimed, right of action did not accrue until the death of the testator, and the proposition is well founded in law. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910, and *Cann v. Cann*, 45 W. Va. 563, 31 S. E. 923, and the decisions of other courts referred to in those cases.

[2] It is not specifically alleged, that by the terms of the contract for services, payment was to be made at death, or provision made therefor by will; but will not proof of such contract support the contract alleged? We are disposed to hold that it will. We recently decided that an oral contract to make a will, if certain and definite in terms, and upon sufficient consideration, if equitable, is valid and enforceable against the estate of a decedent, as any other valid contract. *Davidson v. Davidson*, 79 S. E. 998, decided at the present term and not yet officially reported. See, also, the authorities cited therein for the proposition. In *Reynolds v. Robinson*, 64 N. Y. 589, that court held that where the provision in a will was not sufficient to cover compensation for services rendered and to be so provided for, the party rendering the service had cause of action against the personal representatives of decedent for any balance due him on his contract. The authorities are numerous for the proposition that where the agreement is for services to be compensated by provision in a will, and the will makes no such provision, an action at law lies to recover the value of such services. Besides our cases and other cases cited, see monographic note to *Johnson v. Hubbell* (N. J.) 66 Am. Dec. 773, 785, where most of the cases are collated. See, also, Judge Holt's concurring opinion in *Cann v. Cann*, 40 W. Va., at page 157, 20 S. E. 910, on the question of the statute of limitations.

The cases referred to constitute ample grounds for the conclusion that where there is a contract for services to be rendered, payment to be postponed until the death of promisor, or to be provided for in his will, the cause of action does not accrue until the death of the deceased promisor, and action may be brought at any time thereafter within the period prescribed by the statute. For a full discussion of this subject, see *Stone v. Todd*, 49 N. J. Law, 280 et seq., 8 Atl. 300. In that case it is said to be "well settled that where there is no express agreement as to the time or measure of compensation for long-continued services, the law will not imply a postponement of compensation until the termination of the employment, but for the purpose of determining when the statute will begin to run, the hiring will be

regarded as from year to year." Citing *Beach v. Mullin*, 34 N. J. Law, 343; *Davis v. Gorton*, 16 N. Y. 255, 69 Am. Dec. 694. But as the remarks of the learned judge following the above quotation are peculiarly pertinent to the case here, we may with propriety quote them also. He says (49 N. J. Law, 283, 8 Atl. 304): "The jury have found that there was an understanding between the plaintiff and the deceased that she should remain in charge of his household during his life, without any claim or demand for services, and at his death, if she survived him, she should be compensated liberally for her services, either by will or by a charge against his estate. The verdict can only be sustained upon such finding. The facts are very close on this point. It is not entirely clear that if she had left before the death of the intestate an action for services rendered would have been suspended until his death upon any express agreement between them. The result seems to have been reached by the jury from the peculiar circumstances of the dealing between the parties and their confidential relation, showing that there was such an understanding, by which the plaintiff and the decedent were bound, and his distinct statement that she should be well paid at his death, and similar expressions testified to by witnesses."

As in the New Jersey case, so in this, the point, on the statute of limitations, is close. If we overrule the lower court and give plaintiff a decree here for the full amount of his claim we must find that the contract for services, which was fully proven, and as to which there was no evidence to the contrary, also includes a contract or understanding for postponement of payment till death, or provision made for same in decedent's will. Can we reach this conclusion from the evidence? There is little, if any, evidence of an express contract to postpone payment until the death of the promisor, or to provide for plaintiff in his will, so as to suspend the running of the statute. The plaintiff, whose evidence, being objected to, we cannot consider, swears that he had a contract with his father for sixty cents a day, and that he worked seventeen years for him "at sixty cents a day by the year," making \$2,938.40, subject to credits \$154.20; that he had been paid each year on the account small amounts, out of which he had provided his clothing. He was then asked: "Q. What did your father ever tell you about paying you? A. He said he had fixed in his will for me to get my money. That is what he told me, he made a provision in his will." A disinterested witness, Adolphus Evans, swore that the testator stated to him that he had plaintiff to stay with him at fifty or sixty cents a day, that plaintiff was a good boy and that he would keep him with him while he lived, that testator had made it appear to him as near as he could come

at it that he had made provision for plaintiff in his will, and intended to keep him on the place there with him. Witness said this conversation took place when he tried to buy the timber on the testator's land, and who declined to sell, giving as a reason that he had arranged things. W. A. Rodeheaver, another disinterested witness, who tried in 1907, to purchase a part of decedent's land, swears, that testator declined to sell, giving as a reason, "John has got my money and he pays the taxes on the land, keeps them paid up, and he says I don't owe very much, except Wille (meaning plaintiff) and he says I have made provision for him, but he didn't say what provision or anything of the kind; didn't talk any more about it." Rachel Sheets, a sister of plaintiff, says, with reference to the alleged contract: "I sat right by father when he hired him; he said he would give him sixty cents a day the year through, wet and dry, and provide some of his clothes if he needed them." "Q. And how about board? A. Board went in too, he said." On cross-examination: "Q. You don't mean to say he undertook to board him, furnish clothes and pay him sixty cents? A. Yes, sir, that is what he said; he said he could have some clothes out of the trade. Q. As a matter of fact, he has had all the clothes he needed from the farm, or from your father's property, has he not? A. I suppose so." This witness also swears that for five or six years intervening between the date of the alleged contract and her father's death, plaintiff was an invalid from a sunstroke, and sore finger, during which time her father was cared for by her mother, her brother Lee and plaintiff, but that the latter earned his board and that they could not have gotten along without him. No claim is made by plaintiff for compensation during these five years. Mrs. Nose, another sister, after referring to services rendered by plaintiff, his work on the farm, and his labor in caring for the old people day and night testified: "Q. What did your father ever say about paying Will for his services? A. He said he provided for him in the will; and he said it would be good when he was gone; it would all come in a lump together. Q. Did your father ever tell you what he was to pay Will for his services? A. Yes, sir, time and time again; he was to give him sixty cents a day and clothing," and that he was to have his board. Mrs. Hose, another sister, after proving the declarations of her father that he had hired plaintiff at sixty cents per day, testified: "Q. Do you know whether or not your father paid Will for his services? A. He didn't pay him very much; he said he couldn't; he had his taxes and things to raise, he couldn't pay these other men. Q. Did you ever hear him say how much he was to provide for Will? A. He told me, after he was sick two or three years, he told me had made a will; I went up to wash for him during this time the

will should have been made; I went up on Tuesday, he made it along through the week, and he told me he made a will and I says to him, 'You did?' and he says, 'Yes. I have made a will, for I am paralyzed, and I provided for William G. Hotsinpillar in my will, for I owe him,' and he said he wanted us children to see Will was paid. Then on Thursday before he died, he died on Sunday he called me to the bed and told me as near what he owed, who all he owed, and he wanted them paid to the half cent, and he said he provided in his will for his debts to be paid; and he wanted William G. Hotsinpillar paid, and if there was anything left he wanted me to have equal with the boys. Q. That was on Tuesday before he died? A. Yes, sir, that was Sunday night."

The contract for sixty cents per day is fully proven. Indeed this seems to be conceded. No proof was offered to the contrary. But how about the contract to postpone payment, or to provide therefor in testator's will? Unless we can find from the evidence, the situation of the parties at the time of the contract, and afterwards, and the declarations of the old man respecting provisions to be made for plaintiff, that the parties regarded the employment for a continuous service, to be paid for at the death of decedent, or that he was to specifically provide for such payment by testatorial devise, the statute would run against the debt, and the decree below would have to stand. As noted we can not consider plaintiff's evidence. If we could he does not distinctly state that it was a part of the contract, that payment was to be postponed, or provided for by will. He does say, that, subsequently, his father told him that he had provided for payment in his will. The will, however, shows no specific provision therefor. A general provision is made for payment of all the testator's debts, as follows: "I direct that all my just debts be paid as soon after my decease as conveniently may be, and to that end charge my whole estate, real and personal, with the same." The will was made in 1897; testator survived until 1909, more than ten years thereafter. After making small money bequests to his daughters he provided that the rest of his estate, real and personal, should be divided equally between his four sons, George, John, William (the plaintiff), and Samuel.

We do not think the evidence clearly proves a contract for provision by will, such as could be specifically enforced against decedent's estate. But does not the evidence prove a contract for continuous service and a mutual understanding between the parties that payment was not to be made until testator's death, and that no action would accrue to plaintiff until that time? Testator had little money, not sufficient to pay all his taxes, as the evidence shows. He had no source of income except what was produced from his farm, mainly by the labors

of plaintiff, which at times had to be divided between the farm and the care and nursing of his father and mother. If plaintiff had sued before his father's death would not a good defense have been an understanding or agreement to postpone payment until that time? We think the evidence would have sustained that defense. From the whole record it is quite evident, we think, that the parties did not contemplate payment before the death of testator. His financial condition made that impossible. This is manifest from the numerous declarations of deceased in his life time. Nothing of consequence was paid. Only small sums, about sufficient to clothe plaintiff, was ever paid. We think, therefore, we must find from the evidence, that there was a mutual understanding between the parties that plaintiff was to labor on, under the contract, and wait for his pay until his father's death, and thereafter look to his estate, under some general or special provision to be made in his will. If this was the understanding or agreement, under which plaintiff worked for twenty years, or thereabouts, and devoted himself to the care and keeping of his old parents, while his brothers and sisters married and went away in other pursuits, we think the cause of action did not, under the authorities cited, accrue until the death of his father, and that the statute of limitations should not be applied. The decree below, therefore, will be modified so as to give plaintiff the full amount of his claim, and when so modified it will be affirmed.

STATE v. REED et al.

(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913. Rehearing Denied
Nov. 14, 1913.)

(Syllabus by the Court.)

1. PUBLIC LANDS (§ 186*)—SUIT FOR SALE OF FORFEITED SCHOOL LANDS—DECREE.

Though a decree of dismissal in a suit for the sale of lands as forfeited, for the benefit of the school fund, recites that it is entered on motion and by the consent of the commissioner of school lands and the attorney prosecuting the cause, yet if it is based on a report of the commissioner of school lands pursuant to the latter provision of Code 1906, ch. 105, sec. 6, and actually dismisses lands from the cause, it is not a mere retraxit but an adjudication.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. § 186.*]

2. PUBLIC LANDS (§ 186*)—SUIT FOR SALE OF FORFEITED SCHOOL LANDS—REPORT OF COMMISSIONER.

When a new county is formed from the territory of a county in which a suit for the sale of forfeited lands has been instituted, the commissioner of school lands of the new county may make the report in the suit which is contemplated by the latter provision of Code 1906, ch. 105, sec. 6.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. § 186.*]

3. PUBLIC LANDS (§ 186*)—SUIT FOR SALE OF FORFEITED SCHOOL LANDS—REPORT OF COMMISSIONER—HEARING—DELAY—GROUNDS.

A hearing of the matters raised by the report of the commissioner of school lands, pursuant to Code 1906, ch. 105, sec. 6, will not be delayed to enable a formal party to the cause, claiming the right to redeem, to contest the same, when the matters are the same as those already raised by the bill and as to which he has had ample time to present his case.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. § 186.*]

4. PUBLIC LANDS (§ 186*)—SUIT FOR SALE OF FORFEITED SCHOOL LANDS—DISMISSAL.

When it appears by a report of the commissioner of school lands that the forfeited title to tracts involved in a suit for the sale of forfeited lands has been granted by the State to another and that there has been no subsequent forfeiture of the same, the suit may properly be dismissed as to such tracts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. § 186.*]

Appeal from Circuit Court, Marion County.

Action by the State against John R. Reed, trustee, and others. From the decree, J. K. Anderson, trustee, appeals. Affirmed.

Malcolm Jackson, of Charleston, Edward C. Lyon, of New York City, John W. Mason, Jr., of Fairmont, and Campbell, Brown & Davis, of Huntington, for appellant. Stokes & Bronson, of Williamson, and Holt & Duncan, of Huntington, for the State.

ROBINSON, J. The decree of dismissal complained of was entered in an old suit for the sale of forfeited lands, begun in the circuit court of Logan County in the year 1893, and later transferred to the circuit court of Marion County. The suit originally involved the William McCleary grant of 100,000 acres, the greater part of which was in the county of Logan as the territory of that county existed at the time the suit was instituted. In 1895, Mingo county was formed from the bounds of Logan. A part of the grant involved was thus thrown into Mingo.

In 1908, amended bills were filed in the name of the State, specifying two particular tracts of the original survey, lying on Sycamore Creek, in Mingo, as remaining forfeited and unsold for the benefit of the school fund. These amended bills brought in the claimants of the two tracts and prayed that the land be proceeded against pursuant to the statute in such case made and provided. In them, it was averred that the commissioner of school lands of Mingo County had reported the two tracts to the circuit court of Mingo County, that a proceeding for their sale under the statute had thereupon been begun in that court, but that the same had been dismissed when it was found that the grant to which the two tracts belonged was already involved in the suit pending in Marion County.

No appearance was made to the amended bills by any claimant of the two tracts until March, 1911, when J. K. Anderson, Trustee,

appellant herein, appeared and tendered his answer claiming title thereto in succession to McCleary, admitting the alleged forfeiture, and praying that he be permitted to redeem. The commissioner of school lands of Mingo County filed a report in the cause, setting forth that upon investigation by him it had been ascertained that the two tracts specifically proceeded against by the amended bills were not subject to sale as forfeited land, but were rightfully the property of the heirs of one Lawson, by virtue of a grant from the State for one tract and a deed of a commissioner of school lands for the other, and the regular payment of taxes on both. With this report, the grant and the deed through which the heirs of Lawson had taken the State's title to the land were exhibited. In view of the matters found and reported, the commissioner of school lands of Mingo County asked that the suit be dismissed as to the two tracts of land.

The court refused to continue the cause on motion of Anderson, Trustee, but heard the same upon his answer, the report of the commissioner of school lands, and the other papers and orders properly in the cause, and entered a decree dismissing the suit as to the two tracts of land. From that decree Anderson, Trustee, has appealed.

[1] It appears from the decree that the same was entered on the motion and by the consent of the commissioner of school lands of Mingo County and the attorney prosecuting the amended bills. Appellant submits that the decree shows that the dismissal was a mere retraxit of the suit which could not be made over his objection and to the deprivation of the right to redeem opened to him by the instituting of the suit. But we hold that the decree is in such terms that it speaks an adjudication pursuant to the latter provision of Code 1906, ch. 105, sec. 6. For the sake of clearness we recite that provision: "And if at any time during the pendency of any suit for the sale of school lands, whether now pending or hereafter brought, the commissioner of school lands of the county where such suit was or may be instituted shall become satisfied that part or the whole of the lands sought to be sold therein is not liable to sale for the benefit of the school fund, such commissioner shall report in writing to the court the facts and reasons which lead him to that conclusion, which report shall be filed and made part of the record; and if the court upon consideration thereof, and upon such other inquiry as it may be advised to make, shall concur in such report, in whole or in part, it shall confirm the same to that extent and shall dismiss such suit as to the lands embraced in such report as far as it may be confirmed."

[2] That the commissioner of school lands of Mingo County was the proper officer to make such report as that mentioned in this statute we have no doubt. True he was not the commissioner of school lands of the coun-

ty eo nomine in which the suit was instituted. But his county, Mingo, had been taken from the county in which the suit was instituted, Logan. The formation of the new county gave him jurisdiction over proceedings for the sale of all forfeited lands therein. It substituted him, as to this very suit, then already begun, for the commissioner of school lands of the county in which the suit was instituted, as far as lands involved therein situated in the new county were concerned. Indeed, in a sense the suit was instituted in his county, for it was instituted when Logan and Mingo were one and the same. The division of the county divided the duties and acts to be done under the statute in a suit already begun between the official of the old and the official of the new county, each taking jurisdiction over the forfeited lands within the territory of his county.

[3] Did the court err in refusing appellant time to meet the matters contained in the report on which the dismissal was made? Appellant was a purchaser of the land pendente lite. He and those under whom he held had years in which to ask redemption in this very suit. When he purchased, the record told him that the title which he was taking had been forfeited, and the examination which he was bound to make under the law in that regard directed him to this suit in which the land was involved for sale for the benefit of the school fund. But he and his predecessors did nothing until after the amended bills were filed. Even then, though a formally summoned party, though the amended bills set up the claim of the Lawson heirs to the land and brought him in to answer as against the same, he took no steps in the cause for more than two years to vindicate the right to redeem which he claims as against the Lawson heirs and all others. When appellant filed his answer it was a delayed one. The court was not bound to grant him a continuance to make out a case, since he showed no grounds for a continuance by affidavit. The statute makes this rule applicable to ordinary chancery causes also applicable here. Code 1906, ch. 105, sec. 7. Appellant was in default and entitled to no further time without purging himself of the delay. The rule is just as pertinent for a wholesome administration in this class of cases as in any other. It can not rightly be said that appellant was taken by surprise by the report of the commissioner of school lands and the request of the State to dismiss and therefore was entitled to time in which to meet these matters. Long before, by the amended bills, he had been summoned to meet the very same claim which was reported by the commissioner of school lands as warranting a dismissal—the claim of title by the Lawson heirs. Yet he sought delay solely for the purpose of proving only that which the amended bills called

upon him to prove—the superiority of his claim of right to redeem over the claim of title by the Lawson heirs. He asked delay to present proof which he had already been given more than two years to present. If he had promptly filed his answer and put in proof of a right to redeem as against the Lawson heirs, as the bills called upon him to do, the filing of the report and the asking of the dismissal could in nowise have affected his interests. He was bound to take cognizance that the statute allowed a report to be filed and a dismissal asked at any time and to be prepared for the same by having diligently made out his claim that he was entitled to redeem as against the State and all other claimants of the land. Of course if the matter presented by the report had been of a claim which the bills had not called him to answer, there might have been ground for a request for time to meet the same. But such was not the case. Under the status of the cause when it was submitted by the State in prosecuting it, appellant was entitled to no further time and the court could take the cause for decision.

[4] Plainly the record of the cause supports the decree. As submitted the record fully proved that the forfeited title which appellant claimed the right to redeem had been sold by the State to others upon the forfeiture which appellant himself admitted and from which he asked to redeem. The record was plainly against him as to all that was raised by the bills and asked by his answer. It showed that the forfeited title which he asked to redeem had been sold by the State long years before his asking the redemption, and that there had been no subsequent forfeiture of the title thus passed. *State v. King*, 64 W. Va. 610, syl. 2, 63 S. E. 495. The decree was a proper one to make. It will be affirmed.

LYNCH, J., absent.

GUY v. LANARK FUEL CO.

(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913. Rehearing Denied
Nov. 14, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 92*)—LIABILITY TO SERVANT—MEDICAL ATTENDANCE—NEG-LIGENCE.

A master who employs a physician to treat his employes, and collects small monthly fees from their wages, all of which he turns over to the physician as his compensation, is not liable for the physician's malpractice, unless he was negligent in selecting or retaining him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 143; Dec. Dig. § 92.*]

2. MASTER AND SERVANT (§ 92*)—LIABILITY TO SERVANT—MEDICAL ATTENDANCE—NEG-LIGENCE.

Having selected a competent physician, the master may rely upon the presumption that

his competency will continue until notice of a change.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 143; Dec. Dig. § 92.*]

3. MASTER AND SERVANT (§ 270*)—LIABILITY TO SERVANT—MEDICAL ATTENDANCE.

Evidence of the physician's general reputation for drunkenness in the community in which he practices is admissible as tending to prove that the master knew, or by proper diligence should have known, of it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

4. MASTER AND SERVANT (§ 92*)—LIABILITY TO SERVANT—MEDICAL ATTENDANCE.

To constitute constructive notice, the reputation must be so general and notorious that ignorance of it shows neglect of the master's duty. Reputation confined to a small number of the master's employes is not sufficient.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 143; Dec. Dig. § 92.*]

5. MASTER AND SERVANT (§ 92*)—LIABILITY TO SERVANT—MEDICAL ATTENDANCE—NOTICE OF INCOMPETENCY.

Where the reasons which are relied upon to charge the master with knowledge of the physician's reputation apply with equal force to show knowledge by the servant also, the negligence of the latter in not complaining is as great as that of the former in retaining the physician.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 143; Dec. Dig. § 92.*]

Error to Circuit Court, Raleigh County.

Action by Annie L. Guy against the Lanark Fuel Company. Verdict for plaintiff, and, from an order granting a new trial, plaintiff brings error. Affirmed.

Sanders & Crockett, of Bluefield, and M. F. Matheny, of Charleston, for plaintiff in error. Price, Smith, Spilman & Clay, of Charleston, and McGinnis & Hatcher, of Beckley, for defendant in error.

WILLIAMS, J. Plaintiff recovered a verdict for \$12,500 damages against defendant in an action of trespass on the case for a personal injury, alleged to have been caused by the malpractice of Dr. A. B. Nelson, who was employed by defendant company to treat its employes and their families. The court sustained defendant's motion to set aside the verdict, and granted it a new trial, and plaintiff was awarded this writ of error to that order of the court. Her counsel urge that it was error to set aside the verdict.

Defendant is engaged in mining coal, and employs a large number of miners. It employed Dr. Nelson to treat, professionally, its employes and members of their families. In consideration of the physician's services, each married employe was required to pay a monthly fee of \$1, and each unmarried one a fee of 75 cents. The fees were deducted from the wages earned, and the money turned over to the doctor. The company retained no part of it, nor is there any evidence that it profited by the physician's services. Plaintiff, the wife of Benjamin M. Guy, who is one of

defendant's employes, became ill on October 15, 1910, and Dr. Nelson was summoned in. She was then suffering great pain. Both she and her husband testify that they told the doctor that she had not menstruated for two or three months, and had then begun to menstruate, and Mrs. Guy says she told him that such a thing had never occurred in her life before; that she had always been strong and healthy, and regular in her periodical sickness, and that she feared she was going to have an abortion. The doctor did nothing but take her temperature, and give her a few white tablets, and told her she would be all right in the morning. This visit was made between 7 and 9 o'clock in the evening. He returned the next day about 12 o'clock, and did nothing but repeat the performance of the previous evening. He came to see her the third day. Plaintiff says she was then very much worse, and told him that she feared she was going to die. He made no examination of her person, and pronounced her temperature normal. She and her husband both testify that on the third visit the doctor was drunk. The next day her husband called in Dr. Hume, who made a digital examination, and discovered that she was suffering from an abortion. Dr. Hume says he found that there was some infection, necessitating an operation. He gave her some medicine to relieve her pain, and on the next day returned, and curetted the uterus, and found portions of an afterbirth; he also discovered that septic poison had set in, caused, he says, by the retention of portions of the afterbirth. He testifies that curetting is the usual practice in such case, and gives it as his opinion that, if this had been done sooner, it was strongly probable that infection and septicæmia would not have followed. He also says that it was the duty of a physician, having the history of the case, to make a digital examination. Dr. Hume treated her for about a week; but she continued to grow worse on account of the infection, which extended from the uterus up into the fallopian tubes, and involved the ovaries to such an extent that she had to be taken to a hospital, and have them removed. Her physical suffering and mental anguish were very great. She remained in the hospital over five weeks. She was then 37 years old, had been married 15 years, and was the mother of five children.

Counsel for defendant practically admit that the evidence is sufficient to warrant the jury in concluding that plaintiff's injury resulted from the neglect or malpractice of Dr. Nelson, due to his drunken condition; but they insist that the evidence fails to prove negligence on the part of defendant, that the jury were not justified in finding against it, and that the court properly set aside the verdict.

[1] To entitle plaintiff to recover, it is necessary to prove two things: (1) That the malpractice of Dr. Nelson was the proximate cause of her injury; and (2) that defendant

was negligent in selecting or in retaining him. Defendant was under no legal obligation to provide a physician and surgeon for its employes; but, having assumed to do so, it was bound to exercise reasonable care to select a competent and skillful one. *Neil v. Flynn Lumber Co.*, 77 S. E. 324; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839; *Secord v. St. Paul, etc., Ry. Co.* (C. C.) 18 Fed. 221; *Laubheim v. De K. N. S. Co.*, 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815; and *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147. It was not bound to select a physician possessing the highest degree of competency and skill, but only the average skill of physicians in the locality in which he was to practice. *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17, and *Neil v. Flynn Lumber Co.*, supra.

"Where the hospital is maintained by a master for the sole purpose of relieving injured servants, without any intention of profit to himself, he is not liable to his servants for the malpractice of the physician employed, if ordinary care was exercised in selecting him, although the hospital is supported by the contributions of the servants." 26 Cyc. 1082; 5 Labatt (2d Ed.) § 2005; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95; and *Quinn v. Kansas City, etc., Co.*, 94 Tenn. 713, 30 S. W. 1036, 28 L. R. A. 552, 45 Am. St. Rep. 767. To the same effect as above is *Neil v. Flynn Lumber Co.*, supra.

[2] Did defendant exercise reasonable care in the selection and retention of Dr. Nelson? If it did, then it is not liable for his malpractice; otherwise it is liable. The record discloses no proof whatever that Dr. Nelson was not, at the time of his employment, generally competent. On the contrary, it is proven that he had graduated at a reputable medical college, had successfully passed an examination by the state medical board of this state, had had some experience in actual practice, and was recommended for employment to defendant's superintendent by another reputable physician. But the contention is that after his employment he became so much addicted to the excessive use of intoxicants as to render himself careless and incompetent, and that he had acquired so general and notorious a reputation for drunkenness in the community that defendant either must have had actual knowledge of it, or was negligent in not obtaining such knowledge.

No more rigid rule is applicable in case of the employment of a physician to treat its servants than is applicable in the case of employment of fellow servants, and it is well settled in such cases that the master's duty is not wholly discharged by the exercise of proper care in their selection in the first instance. He is bound to keep himself advised as to their continued fitness, so far as it can be accomplished by proper supervision and superintendence. 3 Labatt (2d Ed.) §

1098; *Cooney v. Commonwealth, etc.*, B. R. Co., 196 Mass. 11, 81 N. E. 905; *B. & O. R. Co. v. Henthorne*, 73 Fed. 634, 17 C. C. A. 623; *Ohio & Miss. Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *N. & W. B. R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342. But the same degree of care to keep himself informed of the continued fitness of his servants is not required of the master as in case of their employment, or as is required in keeping machinery and appliances, which are known to deteriorate with use, in proper repair. On the contrary, "when suitable and competent persons have been employed, good character and proper qualifications may be presumed to continue, and the master may rely on that presumption until notice of a change." 3 Labatt (2d Ed.) § 1098; *Southern P. Co. v. Hetzer*, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; *Blake v. Maine, etc.*, R. R. Co., 70 Me. 60, 35 Am. Rep. 297; *Lake Shore, etc., Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Mich. Cent. R. R. v. Gilbert*, 46 Mich. 176, 9 N. W. 243.

[3] A corporation acts by, and obtains knowledge through, its officers and agents, and knowledge acquired by them is generally attributed to it. But there is no evidence that any of defendant's officers had actual knowledge of Dr. Nelson's drunken habits. On the contrary, it is proven by Mr. L. El. Yoder, defendant's chief engineer and superintendent, who employed the doctor, and by Mr. John Porter, his successor in office, who was in charge of the mine at the time plaintiff's injury occurred, that they had not heard of Dr. Nelson's drinking, and knew nothing of it, prior to October 15, 1910, the time of plaintiff's sickness, notwithstanding they say they made inquiry frequently, when at Lanark, to find out if there were any complaints against him. Moreover, Mr. Porter says plaintiff's husband was the first one who thereafter informed him of his drinking. This testimony is not contradicted, and it proves that defendant did not have actual knowledge of the doctor's incompetency. But it seems to be well settled that the general reputation of an employé for drunkenness or habitual carelessness in the community in which he is employed is admissible as tending to prove that the master had actual knowledge thereof, and that he should have been thereby put upon inquiry to ascertain if that reputation was well founded. *B. & O. R. R. Co. v. Henthorne*, 73 Fed. 634, 17 C. C. A. 623; *Wabash R. R. Co. v. Kelley*, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752; *Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. 1003; *Gilman v. Eastern R. R. Co.*, 13 Allen (Mass.) 433, 90 Am. Dec. 210; *Davis v. Railway Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; *Hilts v. Chicago, etc., Ry.*, 55 Mich. 437, 21 N. W. 878; 1 Wigmore on Evidence, § 249. In *Wabash R. R. Co. v. Kelley*, supra, it was held that: "The reasonable diligence which

a railroad company must use in carrying out its agreement to care for its injured and sick employes includes the duty to discharge a surgeon in chief who had become incompetent from the use of intoxicants and narcotics, which was notorious in the community, so that the supervising officials of the company must have, or at least ought to have, known it." Judge Cooley, in *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 124, 4 Am. Rep. 364, says: "The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." But can we say that it was the duty of defendant to make inquiry of persons in the neighborhood to ascertain if Dr. Nelson had continued to remain a sober man, before it had received any intimation that he was drinking? Such a course would be unusual indeed, and we do not think the rules of law lay upon defendant any such requirement. For, having ascertained that the doctor was competent at the time it employed him, defendant had a right to presume he would continue so. It was reasonable to suppose that his professional skill would improve with practice, and the law does not recognize such general depravity in mankind as to exact of an employer ceaseless vigilance to guard against its consequences.

Does the testimony prove that the doctor's reputation for drunkenness in the community in which he was practicing was so general as to establish negligence in defendant not to know of it? We think not. Certainly not, when its officers and managers in charge of its works at Lanark, where the doctor lived and practiced, testify that they never heard of his drinking. Nearly all the witnesses examined on this question were, or had been, employes of defendant, and lived at or near its mine. Five or six of plaintiff's witnesses testified to having seen the doctor in a state of intoxication; sometimes two or more of them being witnesses to the same occasion. This testimony was admissible for the purpose of proving the doctor's incompetency, as there is also evidence tending to prove that he failed to give plaintiff proper treatment at the time he was called to see her because of his then drunken condition. But it was not admissible for the purpose of proving his general reputation. 1 Wigmore on Evidence, § 250.

[4] On the other hand, quite as many witnesses, including Ben Guy, plaintiff's husband, testified for defendant that they never heard his reputation for drunkenness or sobriety discussed prior to October 15, 1910. In *Driscoll v. Fall River*, 163 Mass. 105, the court, in discussing the effect of evidence as to the general reputation of one of its employes as affecting the master with notice of his careless habits, says: "The reputation of a foreman amongst a few workmen employed under him is not a general reputation. It is merely the opinion of a small number

of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to heed." See, also, the opinion of Judge Cooley, of same purport, in *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 123, 4 Am. Rep. 364; 3 Labatt on Master and Servant (2d Ed.) § 1105; and *Walkowski v. Penokee, etc., Mines*, 115 Mich. 629, 73 N. W. 895, 41 L. R. A. 33.

R. E. Peters, D. W. Anderson, Ben Carey, Henry Thomas, and Spencer Thompson testified that they were acquainted with the doctor's reputation in the community, and that he had the reputation of being a drunkard. But on cross-examination none of them could give the names of more than one or two persons whom they had heard speak of the matter, and generally, when a name was mentioned, it proved to be some one of the other witnesses. Moreover, most of the witnesses were unable to say whether they had heard it mentioned before, or after, the time of plaintiff's injury. Such testimony is too uncertain and indefinite to support a verdict depending on proof of general reputation as matter of notice. It shows that the reputation is limited, and not general. It does not arise to the dignity of proof of a general reputation. Nor does it prove that the limited reputation for drunkenness was not acquired after October 15, 1910, the time of plaintiff's injury. Shortly after that time the doctor was taken to a sanitarium, and it is admitted that he then acquired a very general reputation for drunkenness. But defendant was not affected by a reputation thereafter acquired.

[5] But there is another reason why we think the court did not err in setting aside the verdict, and that is this, the evidence by which plaintiff seeks to show defendant's negligence applies with equal force to prove her own negligence, or that of her husband, which is the same thing, for he acted as her agent in calling in the physician. Ben Guy's opportunities to know Dr. Nelson's general reputation for drunkenness, if he had such reputation, was equally as good as, if not better than, that of defendant's managers. He lived in the same community with the doctor; they did not. He saw him frequently, and had on previous occasions called him in to treat members of his family. In *Davis v. Detroit, etc., R. R. Co.*, *supra*, which was

an action by defendant's "head yardman" to recover damages for an injury received through the carelessness of one of its engineers, plaintiff and the engineer were fellow servants, and the principle on which he sought to make defendant liable was its negligence in retaining a careless and incompetent fellow servant. The only evidence in that case to show that defendant knew or should have known of the engineer's careless habits was the testimony of a few witnesses as to his reputation in that regard. Judge Cooley, in discussing the effect of such evidence upon plaintiff at page 125, says: "It cannot be claimed that the officers of the company were chargeable with constructive notice of the unfitness of Harris, and the plaintiff not. The same facts which it is claimed they ought to have heard about must have transpired in his immediate presence, or at least within the limited space within which he was constantly employed, and in view of those with whom he was constantly associated. All the reasons which charge the officers with knowledge apply with more force to a person situated as he was, in a position intermediate the persons who would be likely to complain and the officers. The probability that he was fully informed is greater than that they were, and, if they were guilty of negligence in not discharging Harris, we think the plaintiff was guilty of at least equal negligence in not complaining of him."

We do not mean to say that the duty rests upon the servant, as it does upon the master, to acquaint himself in regard to the competency of a fellow servant with whom he is working; but what we do say is that, having knowledge of such incompetency, it is the servant's duty to bring it to the attention of his master, else he will be held to have assumed the risk. And in the present case the only evidence of knowledge is the testimony of certain witnesses as to reputation, and it is just as reasonable to suppose that Ben Guy had notice of it as that defendant had. Like a two-edged sword, the evidence cuts both ways. See, also, 4 Thompson on Negligence, §§ 4895, 4896.

For the reasons herein given, we affirm the judgment of the lower court, and remand the case for further proceedings.

HINDMAN v. RAPER.

[Supreme Court of Georgia. Oct. 14, 1913.
Rehearing Denied Nov. 18, 1913.]

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 216*)—PROCEEDINGS TO DISPOSSESS—RECOVERY OF DOUBLE RENT.

Where one claiming to be a landlord made an affidavit, and procured the issuance of a warrant to dispossess another as a tenant who failed to pay his rent when due, and who refused to deliver possession, and the defendant interposed a counter affidavit, denying that he held the premises under the plaintiff or any one from whom the plaintiff claimed title, and where upon the trial the plaintiff testified to having made a demand for possession, but did not specify the date thereof, and the defendant denied the making of such demand, it was error to direct a verdict in favor of the plaintiff for the premises, with double rent for the year in which the trial took place and for several preceding years, including two years before the commencement of the proceeding.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 861-865; Dec. Dig. § 216.*]

Error from Superior Court, Floyd County; John W. Maddox, Judge.

Action by Lewis Raper against George Hindman. Judgment for plaintiff, and defendant brings error. Reversed.

On March 30, 1910, Raper made an affidavit to obtain a warrant to dispossess Hindman, alleging that one Raines had rented the land to Hindman for the year 1907 for the sum of \$30; that Raines conveyed the land to the plaintiff, who is the owner thereof; that Hindman had "failed to pay rent when due, or any part of rent for that year or since, and deponent desires possession of the same from the said George Hindman; and that said George Hindman neglects, omits, and refuses to give possession of the said premises and tract of land described above to affiant." Hindman filed a counter affidavit, alleging that "he is not holding possession over and beyond his term; that he does not hold the premises from the said Lewis Raper or from any one [under] whom the said Lewis Raper claims, either as alleged in said affidavit, or otherwise." The plaintiff amended his affidavit by alleging as follows: Plaintiff bought the land from Raines on November 23, 1907. Prior to the purchase Raines rented the property to Hindman for the year 1907 for the sum of \$30. On November 25, 1907, Raines swore out a distress warrant against the defendant for the rent of the premises for that year. On February 14, 1910, judgment was rendered in the justice's court in favor of Raines. Hindman appealed to a jury in that court, and on March 12, 1910, a verdict was rendered in favor of Raines. This was an adjudication that Hindman was the tenant of Raines, who was the predecessor in title of

the plaintiff, and the defendant is estopped from denying that he is the tenant of plaintiff. On the trial, at the close of the evidence, the court directed a verdict for the plaintiff for the premises in dispute, and for double rent for the years 1908, 1909, 1910, 1911, and 1912, amounting to \$300. The defendant excepted.

M. B. Eubanks, of Rome, for plaintiff in error. Harris & Harris, of Rome, for defendant in error.

LUMPKIN, J. (after stating the facts as above). Raines conveyed the land to Raper during the term of the tenancy of Hindman. In *Raines v. Hindman*, 136 Ga. 450, 71 S. E. 738, 38 L. R. A. (N. S.) 863, Ann. Cas. 1912C, 347, it was held that Raines could not evict the tenant after the expiration of the term, on the ground that the latter was a tenant holding over beyond his term, or on the ground of nonpayment of rent. In the opinion it was said that "Raper had the right, after 1907, to dispossess the defendant as a tenant holding over upon the failure of the latter to deliver possession to him." Acting under this, Raper made an affidavit, and obtained the issuance of a dispossessory warrant. Raines proceeded by distress warrant to recover the rent for 1907, and obtained a judgment therefor. This adjudicated the existence of the relation of landlord and tenant between him and Hindman in that year. The conveyance made from Raines to Raper during the term made the latter the landlord. The direction of the verdict was, however, erroneous. It included double rent for the years 1908 to 1912, inclusive. Two of these years antedated the commencement of the present proceeding. Raper testified that he demanded possession from the defendant; but he did not know the date of the demand. Hindman denied that Raper ever spoke to him about vacating the premises or about rent, or gave him any notice to vacate. A proceeding of this character cannot be used as a means of recovering back rent accruing before any demand for possession. *Talley v. Mitchell*, 138 Ga. 392, 75 S. E. 465. Under the conflicting evidence in regard to the demand, it was error to direct a verdict.

A demand for possession made by Raines after he had conveyed the property to Raper would not authorize the latter to recover possession with double rent. The judgment against Raines on the dispossessory warrant sued out by him adjudicated the fact that he was not entitled to recover possession, because he was not the landlord when he commenced the proceeding; but it did not adjudicate that he never had been such.

Judgment reversed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**ATLANTIC COAST LINE RY. CO. v.
COLLINS. (No. 5,004.)**

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 320*)—HEARSAY—EXCLUSION.
Where a witness testifies to certain facts upon his direct examination, but upon cross-examination shows that he has answered from hearsay and without any personal knowledge of the facts about which he has testified, his testimony should, as hearsay, be excluded from consideration, for the reason that hearsay evidence is without probative value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1201; Dec. Dig. § 320.*]

2. CARRIERS (§ 134*)—FAILURE TO DELIVER FREIGHT—EVIDENCE.

Upon cross-examination the plaintiff, by his testimony, demonstrated that his knowledge of the loss of the six sacks of fertilizer was wholly dependent upon hearsay; and, the testimony of those witnesses who would have known of the failure of the carrier to deliver (if there was a failure in this respect) not being introduced, the judgment in favor of the plaintiff in the justice's court was not warranted by the evidence, and the certiorari should have been sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583-592, 607; Dec. Dig. § 134.*]

3. APPEAL AND ERROR (§ 1078*)—BRIEF—ABANDONMENT OF OBJECTIONS.

The questions raised by the demurrers, not being argued in the briefs, must be treated as having been abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

Action by G. D. Collins against the Atlantic Coast Line Railway Company. Judgment for plaintiff. From denial of certiorari, defendant brings error. Reversed.

Pope & Bennet, of Albany, and Spence & Bennet, of Camilla, for plaintiff in error.

RUSSELL, J. Judgment reversed.

LEATHERS v. RABURN. (No. 4,803.)

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 444*)—ACTION BY ADMINISTRATOR—PETITION—SUFFICIENCY.

Where suit is brought by a plaintiff in his individual capacity to recover damages for an alleged injury to property, the title to which is alleged to be in him, an amendment merely adding, after the name of the plaintiff, the words "as administrator of" a named person, is not sufficient to state a cause of action for the recovery of damages to property in the plaintiff as legal representative of the estate of that person, unless it is alleged, either in the original petition or in the amendment, that the title to the property was in the person named as decedent, and

that that person is in fact dead and that the plaintiff has been duly appointed and qualified as administrator upon the decedent's estate. The petition as amended failed to set forth a cause of action in the plaintiff as the legal representative of the person named, and it was error to overrule a demurrer raising this objection. In view of this erroneous ruling, it is unnecessary to determine any of the questions raised by the plea in abatement.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1813-1817, 1837-1841; Dec. Dig. § 444.*]

Error from City Court of Carrollton; Jas. Beall, Judge.

Action by H. O. Raburn against C. R. Leathers. Plaintiff amends, so as to sue as administrator. Judgment for plaintiff, as administrator, and defendant brings error. Reversed.

Boykin & Boykin, of Carrollton, and John M. Moore, of Montezuma, for plaintiff in error. Newell & Fielder, of Carrollton, for defendant in error.

RUSSELL, J. Judgment reversed.

AVERY & CO. v. POPE. (No. 4,728.)

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

ATTACHMENT (§§ 2, 106*)—PLEADING (§ 199*)—AFFIDAVIT—"DUE"—PURCHASE MONEY.

The court erred in dismissing the attachment.

(a) In an affidavit made to obtain an attachment for purchase money, the statement that the defendant is indebted is equivalent to the word "due," employed in the statute. Civ. Code 1910, § 5056.

(b) The property sought to be attached was sufficiently described to enable the levying officer to identify it for the purpose of seizure. Furthermore, the defendant was precluded by the admissions of his answer from denying that the property was subject to the attachment; and the demurrer should have been filed at the appearance term, and came too late.

(c) The modes of procedure to be followed in attachments for purchase money do not differ from attachments based upon other grounds enumerated in section 5055 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 5-7, 280-284; Dec. Dig. §§ 2, 106,* Pleading, Cent. Dig. §§ 464-469; Dec. Dig. § 199.*]

Error from City Court of Leesburg; H. G. Long, Judge.

Attachment proceedings by Avery & Co. against R. F. Pope. The attachment was dismissed, and plaintiffs bring error. Reversed.

J. B. Hoyl, of Leesburg, for plaintiffs in error. R. R. Forrester, of Leesburg, and Hollis Fort, of Americus, for defendant in error.

RUSSELL, J. Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ATLANTIC COAST LINE R. CO. v. BUNN
et al.

BUNN v. ATLANTIC COAST LINE R. CO.
(Nos. 4,976, 4,977.)

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

1. BAILMENT (§ 31*)—ACTION FOR LOSS—BURDEN OF PROOF.

"In all cases of bailment, after proof of loss, the burden of proof is on the bailee to show proper diligence."

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124-131; Dec. Dig. § 31.*]

2. TRIAL (§ 25*)—ARGUMENT—RIGHT TO OPEN AND CLOSE.

The admissions made by the answer as amended were sufficient, without more, to entitle the plaintiff to recover the damages sued for, and, the amendment having been filed before any evidence was introduced by the plaintiff, there was no error in allowing the defendant to open and conclude the argument to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

3. BAILMENT (§ 31*)—ACTION FOR LOSS—SUFFICIENCY OF EVIDENCE.

The defendant failed to successfully carry the burden set up by his affirmative defense, and the verdict in his behalf is without any evidence to support it, and is therefore contrary to law.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124-131; Dec. Dig. § 31.*]

4. PLEADING (§ 243*)—AMENDMENT TO PETITION.

The judgment allowing the plaintiff to strike from his petition an allegation which was immaterial and not essential to his case, but was introduced merely by way of inducement, was not erroneous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 643-651, 820-822; Dec. Dig. § 243.*]

Error from City Court of Waycross; W. C. Lankford, Judge.

Action by the Atlantic Coast Line Railroad Company against J. R. & T. Bunn. Judgment for defendants, and plaintiff brings error, and defendants file cross-bill of exceptions. Reversed on main bill, and affirmed on cross-bill.

The Atlantic Coast Line Railroad Company brought suit in the city court of Waycross against J. R. & T. Bunn for \$1,049.95 principal, with interest. It was alleged that the plaintiff was a railroad company operating a line of road through the county of Ware and the station of Fairfax therein; that the defendants were carriers for hire, and the plaintiff delivered to the defendants at their tramroad two freight cars in good order, giving the numbers; that these cars were delivered to the defendants for use on their tramroad, and they agreed to pay a per diem for the use of the cars; and that while these cars, with others, were being moved by the defendants over their tramroad and across a trestle spanning what was called "Seventeen-Mile creek," the bridge or trestle gave way, resulting in the destruction of

the two cars. The amount sued for was the value of the cars, less the value of the trucks, which were saved, and a small amount for repairs made on the trucks, and a small sum for inspecting the cars and for freight covering the transportation of the cars from Fairfax to the respective railroads (stating them) to which the two cars belonged.

To this petition the defendants filed a general and special demurrer, which was overruled, and they filed an answer, practically denying all the allegations of the petition, or, for want of sufficient information, neither denying nor admitting the allegations. The defendants admitted that they were carriers for hire, and that they had agreed to pay 25 cents a day for all cars furnished on their tramway by the plaintiffs. Pending the trial, and before any evidence had been introduced, the defendants offered an amendment (which was allowed over objection), admitting that the plaintiff had delivered into their possession, custody, and control the cars described in the petition, and that they were damaged as alleged while in the possession of the defendants, and that the damages were the sums claimed by the plaintiff, and upon filing this amendment the trial judge granted to the defendants the right to open and conclude the argument. This amendment was allowed over the following objections: (a) That the amendment comes too late to entitle the defendants to the opening and concluding argument before the jury, because the plaintiff's counsel has already made his opening statement to the jury, although no evidence has yet been introduced by plaintiff. (b) That the admissions in the amendment are not sufficient to entitle defendants to the opening and concluding arguments, because the answer, as sought to be amended, does not admit the plaintiff's case as laid, and does not admit, among other things, that the cars involved were in good condition when received by the defendants from the plaintiff. The allowance of this amendment is complained of in the main bill of exceptions. The plaintiff demurred also on general and special grounds to the original answer; the trial judge sustained the demurrer as to certain portions of the answer (to which ruling no exception was taken by the defendant), and overruled the demurrer as to certain other portions of the answer. The judgment overruling the demurrer to these portions of the answer is also complained of in the main bill of exceptions.

The paragraphs of the answer which were sustained as against the demurrer alleged substantially that the plaintiff was guilty of negligence in furnishing to the defendants cars which were defective, and that the defects in the cars caused the destruction of the bridge and the consequent wreck of the cars. It was objected by the demurrer that

the allegations of the answer in this respect did not specifically state the day when the cars were received by the defendant, the time when the trestle or bridge which fell, destroying the cars, was built, the name of the party by whom it was constructed, or the names of the employees of the defendant by whom the cars were being handled and operated at the time they were wrecked; that the defects alleged were not pointed out or the manner in which said defects could have caused a wreck; and that these averments of the answer were simply the conclusions of the pleader without the statement of any facts upon which they were based. In the answer relating to this subject it is alleged that the defendants cannot point out the defects specifically in the cars that were destroyed because of their destruction; but they aver affirmatively that the bridge or trestle was substantially built, that the track over the bridge was in good order, and that the train pulling the cars was running very slow, and the inference drawn from these facts by the answer was that the two cars were defective, and that these defects which could not be described specifically caused the wreck of the two cars.

The original petition, in the fourth, fifth, and seventh paragraphs thereof, alleged that the various rail carriers in the United States interchange and handle the cars of one another under a system of rules known as the "master car builders' rules"; that under the terms of the said rules any carrier having in its possession or use the car of another carrier thereby becomes an insurer of the same, and obligated to pay for the same should it be damaged or destroyed while in its possession; and that the defendants received said cars from the plaintiff in good order for use by them on their said tramroad under the rules. The plaintiffs submitted an amendment to the petition, striking therefrom, the words "under said master car builders' rules," and over the objection of defendant that the striking of these words constituted a new cause of action, this amendment was allowed. The exception to the allowance of this amendment constitutes the single assignment of error in the cross-bill of exceptions. The verdict rendered on the trial was in favor of the defendants, and the plaintiff's motion for a new trial was overruled. The special grounds of the motion for a new trial, so far as material, are covered by the exceptions pendente lite. The evidence will be referred to in the discussion of the general grounds of the motion.

Bennet, Twitty & Reese, of Brunswick, for plaintiff in error. J. R. Walker, of Valdosta, and Andrew B. Estes, of Waycross, for defendants in error.

HILL, C. J. (after stating the facts as above). [1, 2] 1. Did the trial judge err in

allowing the defendant to open and conclude the argument upon the filing of the amendment to the answer? The attack made upon this ruling is that this amendment was not sufficient to entitle the defendant to the opening and conclusion of the argument, for the reason that it did not admit the plaintiff's prima facie right to recover. Objection is also made upon the ground that the amendment came too late. The latter objection is manifestly without merit, the amendment having been made before the introduction of any evidence by the plaintiff, and, if the amendment contained a sufficient admission of the plaintiff's right to recover prima facie, there was no error in allowing the defendants the opening and conclusion of the argument. *Culver v. Wood*, 138 Ga. 60, 74 S. E. 790; *Brunswick Railroad Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; *Central of Georgia Railway Co. v. Morgan*, 110 Ga. 168, 35 S. E. 345. This must be determined by a consideration of the allegations of the petition, which state the cause of action, and the admissions made by the amendment to the answer. The petition alleged, in substance, that the plaintiff railroad company delivered to the defendants, as bailees for hire, two described cars, to be used by the bailees in the transportation of lumber to their sawmill over their tramway; that the defendants agreed to pay a certain per diem for the use of these cars; that the two cars in question belonged respectively to certain named railroad companies, but were in the possession of the plaintiff at the time of the bailment; that the two cars were delivered by the plaintiffs to the defendants in good order for their use on their railroad, and the defendants obligated themselves to keep the said cars in like good order, and to pay the plaintiff for all damage or injury to the cars while in their possession, use, custody, or control. The petition alleged the value of the two cars, alleged that they were destroyed by the negligent conduct of the defendant as described in the petition, and the suit was brought to recover for the damage sustained by the wrecking of the cars while they were in the possession of the defendants. Proof of these allegations would have made out a prima facie case, for "in all cases of bailment, after proof of loss, the burden of proof is on the bailee to show proper diligence." Civil Code 1910, § 3469. The amendment to the answer, upon the allowance of which the trial judge awarded to the defendants the right to open and conclude the argument, was in the following language: "The defendants admit that on or about the 3d day of August, 1907, the plaintiff delivered into their possession, custody, and control the two cars described in plaintiff's petition, damages to which are sought to be recovered in this case, and that the damages to said cars were sustained while they were in the possession of defendants, and that the damages were the

sums claimed by defendant." An analysis of this amendment shows that three things were admitted: The bailment, the damage, and the amount of the damages. Did the admission of these three things give the plaintiff a prima facie right to recover? These admissions, aided by the rule that the burden of proof of proper diligence is on the bailee, clearly made out plaintiff's right to recover, and to avoid liability it was necessary for the defendant to establish some affirmative defense, and this it undertook to do.

[3] The defense set up was that the cars were defective, and that these defects caused the wreckage, and not the negligence, as alleged, of the defendants. After a careful examination of the evidence we have reached the conclusion that this defense was not established by the evidence; in other words, that the presumption of negligence against the bailee on proof of the bailment and of damage was not overcome. Defects in the cars were alleged in the most general terms. None were pointed out by the answer. It was alleged that the trestle and the track were in safe and sound condition, and that the train was handled with due care by the servants of the defendants, and it is claimed that, as these things were shown, the cars must have been defective, else the wreck could not have occurred. But the evidence is uncontroverted that these two cars were carefully inspected before they were delivered to the defendants; that they were moved by the plaintiff from Brunswick to Fairfax; that the defendants accepted them without any complaint and used them; that they were loaded by the servants of the defendants and moved over their tramway for some miles; and that no defective condition was discovered and nothing happened until the trestle was reached. The trestle gave way, and the cars broke loose from the train, and fell through the broken trestle. These facts would seem to indicate that the cause of the wreck was the defective and unsafe condition of the trestle. The proof of defects in the cars is more unsatisfactory than the allegation on that subject made by the answer. The evidence in behalf of the defendants as to any defects in the cars is that some of the planks in the sides or the floors of the cars were unsound. How could these unsound planks cause the trestle to give way? The wheels and the trucks of the two cars were sound; only some of the planks were decayed, and, in passing, it might be stated that the defendants admitted that they had subsequently used some of these planks in constructing other cars. This being so, a verdict for the value of these planks was demanded. There being no reasonable causal connection between the partially decayed planks of the cars and the breaking down of the trestle, it seems that we must look for some other cause of the wreck. This cause

is found in the evidence for the plaintiff that the trestle had been previously inspected and found to be in an unsafe condition, and this unsafe condition was reported by the inspectors to the defendants, and they were warned to have necessary repairs made; but the warnings were not heeded. We will not prolong the discussion on this point. We feel constrained to grant another trial, because we do not find any evidence of probative value to support the verdict.

[4] 2. The cross-bill of exceptions contained only one assignment of error, to wit, that the court erred in allowing the plaintiff to strike from the seventh paragraph of the petition the following words "under the said master car builders' rules," on the ground that the striking of said words constituted a new cause of action. This assignment of error is not meritorious. The allegation of the petition in reference to the master car builders' rules was simply by way of inducement; the allegation does not relate to the cause of action. It was made as an explanation of the possession of the cars by the plaintiff, and the measure of diligence which these rules imposed upon carriers who had possession of the cars of other carriers. It had nothing whatever to do with the liability of the defendants, or with the contract of bailment between the plaintiff and the defendants relating to the two cars. The allegations as to these rules were wholly immaterial, and, in so far as the cause of action was concerned, were superfluous. The judgment on the cross-bill of exceptions must therefore be affirmed.

Judgment on main bill of exceptions reversed; on cross-bill of exceptions affirmed.

THORPE v. MAYOR AND ALDERMEN OF
CITY OF SAVANNAH. (No. 5,180.)
(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§§ 63, 591, 604*)—
POLICE POWER—DELEGATION OF DISCRETION
—CONTROLLED BY COURTS.

It is a lawful exercise of the police power of a municipality, whether conferred expressly or under a general welfare clause, to prescribe terms upon which citizens of the municipality shall be permitted to keep cattle within its corporate limits. As incidental to this power the municipality, through its constituted authorities, has the right to grant to a city official the discretion to permit or to refuse an application of a citizen to keep cattle within the corporate limits, and, unless such discretion is arbitrarily abused, the courts will not interfere with its exercise by the officer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 152, 155, 1310, 1335-1337, 1378, 1379; Dec. Dig. §§ 63, 591, 604.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Mrs. V. L. Thorpe was convicted of violating a city ordinance, and, from a judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on certiorari sustaining the conviction, she brings error. Affirmed.

W. B. Stubbs, of Savannah, for plaintiff in error. John Rourke, Jr., and David S. Atkinson, both of Savannah, for defendant in error.

HILL, C. J. The plaintiff in error was convicted of violating a city ordinance which prohibited the keeping of any cow or cows within the corporate limits of the city of Savannah except under a permit first obtained from the health officer of the city. On certiorari the conviction was sustained, and the plaintiff in error excepted. The brief filed in this court by counsel for the city so fairly and fully states the facts and so clearly and, in our opinion, correctly states the law pertinent to the question raised by the record that we adopt without substantial change that brief as the opinion of this court.

In section 1 of the ordinance of the city of Savannah of September 8, 1909 (the caption of which is "An ordinance to provide regulations touching the keeping of cows, stables for cows, dairies, milk and the sale of milk"), the following language appears: "It shall not be lawful for any person, persons, or corporations to keep or possess within the corporate limits of the city of Savannah, any cow or cows, either for the conduct of the dairy business, or for his or her personal use, unless and except that a permit shall have been first obtained from the health officer, permitting such cow or cows to be located within the corporate limits of the city of Savannah." Section 19 contains the penal provisions, as follows: "The violation of any provision or regulation of this ordinance, and any failure to comply therewith, and the refusal or failure to comply with any direction or order of the health officer hereunder, shall be subject, upon conviction before the police court of the city of Savannah, to a fine not exceeding fifty dollars and to imprisonment not to exceed ten days, either or both, in the discretion of the court." The plaintiff in error applied to the health officer for a permit to keep three cows on her residence lot, as she claimed, for her personal use. The entire lot, including that portion with the improvements thereon, was only 30 feet wide and 90 feet in length or depth. The health officer refused a permit for three cows but informed the plaintiff in error that he would grant a permit for one to be kept on the lot for her personal use. One reason for his refusal to give a permit for three cows was that, for the special reason hereinafter mentioned, the lot could not be maintained in a sanitary condition with three cows kept on it. The plaintiff in error declined to apply for a permit for one cow, and she continued thereafter to keep three cows on her lot without any permit. She was afterwards summoned to appear before the police court of the city to answer for a violation of the foregoing

ordinance. Her case was heard before the recorder on February 20, 1913, and, upon conviction, a fine of \$25 was imposed, with the alternative of 10 days in jail.

A certiorari was applied for, and in the recorder's answer to the writ it was stated: "(1) That Dr. W. F. Brunner, health officer of Savannah, testified upon the hearing of said case that he refused Mrs. Thorpe a permit to conduct a dairy on the premises in question for the reason that same was unsanitary; (2) that he refused a permit for keeping three cows upon said premises for the further reason that said premises could not be kept in a sanitary condition; the droppings from said cows mixing with the soil and causing the entire premises to be unsanitary and objectionable; (3) that another reason for his refusal of three cows on said premises was that the supply of milk from the three cows was more than was daily needed for the defendant's (the plaintiff in error) family, and that he had reason to believe that the overplus of milk was being sold." The answer was traversed as to the above-stated second and third paragraphs, and the jury on the trial of the issue found "against the traverse of the second paragraph and for the traverse of the third paragraph." It follows conclusively that the fact was judicially determined, under the above-stated second paragraph of the recorder's answer, that the premises of the plaintiff in error could not be kept in a sanitary condition with three cows on the premises, for the reasons specified by the health officer of the city, and that for these reasons he refused a permit for her to keep three cows thereon. After this fact was thus established in conjunction with the other facts not controverted, the judge of the superior court rendered his judgment sustaining the decision of the recorder and dismissing the certiorari. To this judgment the plaintiff in error excepts.

The plaintiff in error contends: First, that under the aforesaid ordinance she has the legal right to keep three cows, and as many cows as she pleases, within the corporate limits of the city, for her personal use, upon naming the number of cows in her application, and that the grant of the permit is mandatory on the health officer; and, secondly, that if the ordinance does not give her this right, and invests the health officer with a discretion as to granting or refusing a permit, the ordinance is unconstitutional and void, as depriving her of her liberty of action and the equal protection of the laws. It is contended by counsel for the city that under this ordinance no person can keep a cow or cows within the corporate limits without a permit from the health officer, who is invested with a discretion as to the grant or refusal of the permit, as the only means of safeguarding the public health; and, secondly, that ordinances of a municipality, passed in the exercise of the police power, for

the preservation of the public health, as the ordinance in question was passed, are not unconstitutional and void for any reason. In his judgment dismissing the certiorari, the learned judge of the court below, after quoting from section 1 of the ordinance and referring to section 19 as containing the penalty for violations of the ordinance, says: "Whether the health officer acted arbitrarily or not is not the question before me, although it is alleged in the petition. Such ordinances, designed to protect the health of the entire community, must of necessity have some drastic provisions in order to be effective. If the health officer exceeds his power, the courts may interfere, but the mere exercise of judgment, when such prerogative is given for the general good, is not necessarily reversible, unless it be so patently oppressive as to leave the court no alternative. The ordinance is not unreasonable. There is a provision requiring a permit before a cow is kept on premises within the corporate limits; cows were kept by the plaintiff in certiorari without a permit; and the ordinance is therefore violated."

The power vested in an officer or public body to grant licenses, unless mandatory in terms, carries with it the right to exercise a reasonable discretion. 25 Cyc. 622, 623, and cases cited in notes 21 and 22. In *People v. Wurster*, 14 App. Div. 556, 560, 561, 43 N. Y. Supp. 1088, 1091, 1092, the court said: "The nature of the provision that the persons or classes of persons referred to in the ordinance are required to be licensed fairly means that license is essential to enable or permit them to pursue the occupations and institute and conduct the places of amusement and entertainment specified in the ordinance; and the further provision that licenses shall be granted to such persons or class of persons by the mayor for such purposes fairly and reasonably imports that the power is vested in the mayor to grant licenses and that they shall be granted by him only. In terms, therefore, the provisions are not imperative. * * * While the mayor may be permitted to exercise his judgment, his discretion is not unqualified. A denial of an application for a license may be such as to constitute an abuse of power. * * * It is now quite well settled by authority that public policy requires that power not imperative in terms vested in the chief magistrate of a city to grant licenses should be deemed discretionary. *People v. Thacher*, 42 Hun, 349; *People v. Grant*, 58 Hun, 455, 12 N. Y. Supp. 879; s. c., 126 N. Y. 473, 27 N. E. 964. * * * The view here taken is that, as incidental to the power vested in the mayor to grant licenses, he is permitted to exercise his judgment in such matters, without having discretion expressly conferred upon him by the ordinance, and that the denial to him of such right in the execution of the power granted is dependent upon a mandatory provi-

sion of an ordinance of the common council in that respect."

It is peculiarly proper that discretion as to the granting or refusal of permits for the sale of milk, and for other purposes looking to the preservation of the public health, should be committed to health officers or boards of health of a city. *People ex rel. Lieberman v. Vandecarr*, 81 App. Div. 128; 80 N. Y. Supp. 1108; s. c., 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781; s. c., 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305. City councils may exercise their police powers through the agency of the municipal health officers, in matters pertaining to health. It is the invariable custom to delegate such authority to such officers, or other like functionaries, and the authority to do so is well recognized. *New Orleans v. Charoulean*, 121 La. 890, 46 South. 911, 18 L. R. A. (N. S.) 368, 126 Am. St. Rep. 332, 15 Ann. Cas. 46; *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018. In the case at bar the health officer of Savannah is expressly designated as the officer to grant a permit under the ordinance in question, and he is clearly invested with a discretion as to a grant or refusal of such permit. The ordinance itself could not in imperative and mandatory terms specify all the cases in which the health officer should be required to grant a permit, because each case for a permit necessarily presents its own special features and conditions, each of which requires personal investigation and a consideration of the size of the lot, its location or neighborhood, the number of cows applied for to be kept on the lot, and all other matters which might affect the public health; and the health officer of the city is logically and pre-eminently the city official to conduct such investigation and consider all such conditions as a prerequisite to exercising his discretion and judgment in granting or refusing a permit. The health officer in this case did not exercise his discretion and judgment arbitrarily; his refusal to grant a permit for three cows was on the ground that the small lot belonging to the plaintiff in error could not, for the special reasons assigned by him, be maintained in a sanitary condition with three cows kept on it. This view, as above stated, was expressly upheld by the verdict of the jury in the superior court that heard the facts, pro and con, upon this particular ground of refusal. He offered to grant a permit for one cow, but the plaintiff in error declined to apply for it and deliberately violated the ordinance by keeping three cows on her lot, within the corporate limits, without a permit.

"One of the chief purposes for the institution of municipal government is the conservation of the public health and safety. No more important obligation is confided to municipal corporations. The nature of the ordinances they shall adopt for this purpose

is largely a matter within the discretion of the local authorities." 3 McQuillin, Mun. Corp. § 899; 28 Cyc. 709. The keeping of cows and dairies within the corporate area are subjects of local police regulation (3 McQuillin, Mun. Corp. § 909, pp. 1948, 1950, and cases cited in notes; section 969, p. 2152, and note 37), and likewise the inspection, testing, and sale of milk (Id. § 969, pp. 2149, 2154, and the many cases cited in the notes thereto).

The city of Savannah having the inherent right under the police power to regulate the keeping of a cow or cows, and cow stables, and milk dairies within its corporate limits, for the preservation of the public health, it follows that the plaintiff in error has not been deprived of any constitutional or legal right by the ordinance of September 8, 1909, nor by an act of the health officer thereunder. *People ex rel. Lieberman v. Vandecarr*, 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781; s. c., 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305; *Adams v. Milwaukee*, 144 Wis. 377, 129 N. W. 518, 43 L. R. A. (N. S.) 1066; s. c., 228 U. S. 572, 33 Sup. Ct. 610, 57 L. Ed. 971, decided May 12, 1913. It is not "an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in a community and enjoying the benefits of its local government" should have the powers of subordinating the welfare and safety of the entire population to their notions of what may be the best means of safeguarding the health of that community. *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 25 Sup. Ct. 358, 366 (49 L. Ed. 643, 3 Ann. Cas. 765).

Judgment affirmed.

PHILLIPS & CREW CO. v. DRAKE et al.
(No. 5,043.)

(Court of Appeals of Georgia. Oct. 31, 1913.)

(Syllabus by the Court.)

JUDGMENT (§ 785*)—LIEN—PRIORITY—SALES.

Where personal property is delivered under a contract of conditional sale, and afterwards and before the contract has been recorded a judgment against the purchaser is obtained by a third person, the lien of the judgment has priority over the vendor's unrecorded reservation of title. The case is controlled by the decision of the Supreme Court in *Southern Iron & Equipment Co. v. Voyles*, 138 Ga. 258, 75 S. E. 248, 41 L. R. A. (N. S.) 375, Ann. Cas. 1913D, 869, and is distinguishable from the cases of *Conder v. Holleman*, 71 Ga. 93, and *American Law Book Co. v. Brunswick Cross-Tie Co.*, 12 Ga. App. 259, 77 S. E. 104.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1358-1362; Dec. Dig. § 785.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Claim case by the Phillips & Crew Company against John Drake and others. Judgment for Drake, and claimant brings error. Affirmed.

Hendrix & Silverman, of Atlanta, for plaintiff in error. Horton Bros. & Burress, of Atlanta, for defendant in error.

RUSSELL, J. Whitfield and others executed a promissory note to John Drake in 1908. On March 17, 1911, Phillips & Crew Company sold to Whitfield a piano under a conditional sales contract, in which title was reserved in seller. In 1912 Drake sued on Whitfield's note given in 1908, obtaining a judgment in December, 1912. The execution which issued upon this judgment was not filed for record or recorded upon the general execution docket of the county. On February 21, 1913, it was levied upon a piano in Whitfield's possession, admitted to be the same piano which had been sold to him by Phillips & Crew Company. At the time of the levy there was due upon the conditional sale contract an unpaid balance of something more than \$100. The contract had never been recorded. Phillips & Crew Company filed a claim to the piano, and before the trial of the claim case, but after the levy of Drake's *fi. fa.*, they filed their conditional sale contract for record in the clerk's office of the superior court. Upon the trial in the superior court the judge directed a verdict in favor of the plaintiff in *fi. fa.* Exception is taken to that judgment. The only question presented by the record is whether the lien of the judgment in favor of Drake is superior to Phillips & Crew Company's reservation of title.

This case is controlled adversely to the plaintiff in error by the decision of the Supreme Court in *Southern Iron & Equipment Co. v. Voyles*, 138 Ga. 258, 75 S. E. 248, 41 L. R. A. (N. S.) 375, Ann. Cas. 1913D, 369. In that case it was held that the lien of an attachment obtained after the execution of a conditional bill of sale which had been illegally recorded, had priority over the conditional sale, notwithstanding the attachment was founded on a debt antecedent to the conditional bill of sale. The statute (Civil Code, § 8262) provides that an unrecorded or a defectively recorded mortgage is postponed to younger liens. It is pointed out in the decision just cited that the same rules govern the priority of conditional bills of sale, as affected by registration, as govern the registration of mortgages. In the present case the undisputed evidence shows that Drake obtained a judgment which was junior in date to the conditional sale upon which the plaintiff in error's claim of title was founded. The mere fact that this judgment was founded upon a debt antecedent to the conditional sale did not prevent the judgment lien from having priority over the conditional sale. The facts of the case clearly distinguish it from the cases of *Conder v. Holleman*, 71 Ga. 93, and *American Law Book Co. v. Brunswick Cross-Tie Co.*, 12 Ga. App. 259, 77 S. E. 104. In both of these cases the lien under which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

priority was claimed antedated the contract of conditional sale.

A judgment creditor whose lien is obtained before the conditional sale is made is not one of the third persons referred to in section 3318 of the Civil Code. If, however, his lien is acquired after the conditional sale is made, he does come within the terms of that section of the Code. While the debt upon which the judgment is founded was not created upon the faith of the debtor's apparent unconditional ownership of the property, still the lien was obtained at a time when the possession of the debtor furnished presumptive evidence of ownership, and it is for this reason that the judgment lien takes priority. The fact that the execution which issued upon the judgment was not recorded upon the general execution docket of the county in which the judgment was rendered would make no difference. As against third parties acting in good faith and without notice who may have acquired a transfer or lien binding the defendant's property, a money judgment against him would not be a lien upon his property from the rendition thereof, unless the execution issuing thereon be entered upon the docket within ten days from the time of its rendition, and, if not entered within ten days, the lien dates from the time of such entry of the execution. Civil Code, § 3321. This section, however, has no application in the present case. The plaintiff in error is not in the position of one who acquires title on the faith of the defendant's apparent unincumbered ownership without notice of the judgment lien. Having sold the property to the defendant and delivered it over into his possession without recording its contract of conditional sale, it took the risk of creditors of the defendant acquiring a lien against his property. The owner of personal property sold on conditional sale cannot withhold the contract from record, and then enforce the reservation of title against one who subsequently obtains a lien at a time when the defendant is apparently clothed with the absolute title to the property.

There was no error in directing a verdict finding the property subject.

Judgment affirmed.

STATE v. DANIELS.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. CRIMINAL LAW (§ 1151*)—APPEAL—CONTINUANCE—REVIEW.

An order denying a continuance is not reviewable, unless there has been an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

2. CRIMINAL LAW (§ 594*)—CONTINUANCE—PROOF OF FACTS BY OTHER WITNESSES.

It was not error to refuse a continuance for absence of a witness who was a fugitive

from justice, by whom accused expected to prove that he was under the influence of cocaine at the time of the homicide to such an extent that he was incapable of premeditation and deliberation, where nothing was developed by the state indicating that accused was not in the full possession of his faculties and he claimed that he could prove the fact that he was under the influence of cocaine by other witnesses, but introduced no proof in his own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

3. HOMICIDE (§ 232*)—PREMEDITATION—DELIBERATION—DAMAGES.

Where defendant killed deceased without provocation, prepared for the killing by arming himself with a deadly weapon, and just before shooting deceased addressed him by saying: "I am talking to you, damn you, I don't like you nohow, and what it takes to kill you, I got it"—and after the killing stated that he "wished he had got one more damn shot at the Dunne-gan nigger," the evidence was sufficient to show premeditation and deliberation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 480; Dec. Dig. § 232.*]

Appeal from Superior Court, Durham County; Bragaw, Judge.

Cleve Daniels was convicted of murder in the first degree, and he appeals. Affirmed.

This is an indictment for murder, and the prisoner being convicted of murder in the first degree, appeals from the sentence of death.

The prisoner moved for a continuance on account of the absence of Richard Cash, who was with the prisoner before and at the time of the killing, and by whom he expected to prove that he was under the influence of cocaine to such an extent that he was incapable of premeditation and deliberation. The motion was overruled, and the prisoner excepted.

The deceased, Jim Dunnegan, was killed in the daytime in the city of Durham on the 26th day of January, 1912. Ed Cain, offered by the state, testified: "Was living in January, 1913, on Glendale avenue in the northern part of the city of Durham; knew Cleve Daniels and Jim Dunnegan. Had known them for 10 or 15 years. Jim Dunnegan is dead; was shot. Saw the shooting; take place on Sunday; thinks deceased died on Monday morning. Went to the burial. Shooting took place about 50 yards from my house on Glendale avenue. I was about 10 feet from them. Was standing up against a tree on that street before the shooting. Garland Smith, Aaron Hobbs, and Joe Hayes were with us. Saw Jim Dunnegan and Robertson coming up from Corporation street, coming towards where I was standing. They stopped and went to talking. These two joined us, and made six of us there in all. Cleve Daniels and a white fellow named Cash was on Geer street at a house called Agnes Leathers', about 40 or 50 yards from where I was. Cleve Daniels went to Agnes Leathers' house, and afterwards he came to where we were

standing. When he came up, Cleve Daniels says: 'What did you say, old nigger?' Never spoke to any one particularly, was talking to the whole crowd, and no one gave him any answer, and he said so a second time: 'What did you say, old nigger?' Jim Dunnegan asked him who he was talking to, and he said: 'I am talking to you, damn you. I don't like you nohow, and what it takes to kill you I got it.' He pulled out his pistol and fired, and Jim moved his leg like that, and he shot again, and by that time Jim grabbed his hand. He took his pistol out of his pocket and pointed it right level at Jim Dunnegan. Don't know whether he hit him the first time or not; knew he hit him on the second time, because Jim Dunnegan said so, then grabbed him. The shot hit him somewhere about the abdomen in the direction the pistol was pointed. It was a black pistol. I think a Smith and Wesson. (Identifies the pistol, which is here offered in evidence.) Nothing had been said between Jim Dunnegan and Cleve Daniels before Daniels stepped up and asked the question: 'What did you say, old nigger?' Jim Dunnegan had been with me about five minutes before Cleve Daniels came up. After the second shot, Jim Dunnegan grabbed Cleve Daniels by the wrist, and after he caught his wrist he snapped three more times, but the pistol failed to go off. Jim Dunnegan did not have any weapon; only he took the pistol away from Cleve Daniels in the struggle. Afterwards Cleve Daniels got up and went down to his house about as far as from here to the back side of the courthouse. Jim Dunnegan lived on Corporation street, about as far as from here to the corner of Roxboro street. The only other words spoken were, Aaron Hobbs, Cleve Daniels' brother, said to Jim Dunnegan, 'He has shot you once, why don't you beat hell out of him?' Jim Dunnegan did not do anything after he got Cleve Daniels down and struck him two or three times. Jim Dunnegan did not get his hand on Cleve Daniels until after the second shot was fired; they were about six feet apart then. Jim Dunnegan had both hands in his pocket. Cleve Daniels got the gun from back here somewhere (indicating his hip pocket). He had on an overcoat. Don't know whether he got it out of his overcoat pocket or his hip pocket. When Cleve Daniels walked up he said, 'What did you say, old nigger?' and didn't anybody say anything to him, and then he spoke a second time and said, 'What did you say, old nigger?' and Jim Dunnegan said: 'Who is he talking to?' and Cleve Daniels said, 'I am talking to you, God damn you, I don't like you nohow, and what it takes to kill you, I got it.' Then he drew his pistol." Cross-examination: "The oath was not supplied. He cursed when he told Jim Dunnegan he did not like him nohow. I told it at the trial before. I don't know that I told that before. I know he cursed; know there was a damn in the oath. Pistol

was aimed at Jim Dunnegan, and the shots were bam! bam!—just like that, in the same direction both times. Jim Dunnegan did not catch hold of Cleve Daniels' hand after the first shot; did not tell that downstairs. Pistol was pointed in the same direction both times, one shot right after the other, and the range of the pistol was not changed between the shots; pointed both times at Jim Dunnegan; fired twice, and if both bullets left the pistol it hit him both times; did not swear downstairs that Jim Dunnegan ran to Cleve Daniels and said, 'Look, the negro shot me!' and grabbed him by the hand as he shot the second time. After he shot the second time, Jim Dunnegan grabbed him. They had had no trouble at all that I know of. Don't remember that he said, 'What did you say when I passed here before?' He went by the first time with Mr. Cash, but Jim Dunnegan was not there; only me, his brother, Garland Suitt, and Joe Hayes was there. Jim Dunnegan wasn't there. Don't know how long it was from the first time he went there until he came back. When Cleve Daniels first came by there Jim Dunnegan wasn't there, and Aaron had two dogs playing or fighting, and Cleve Daniels came by there and asked Garland Suitt about the dogs, and told him he would get him when he came back, and Jim Dunnegan wasn't anywhere about there. He did not have any words before with Jim Dunnegan. There was no trouble with Suitt, only Cleve Daniels told Garland Suitt he would fix him when he came back down there. Don't remember the exact words, he told him something about fixing him, damn him, when he came back. Don't know what Cleve Daniels' condition was. He did not look drunk to me. He did not look like he was under the influence of morphine or cocaine. He looked like he always looked. I have not had any trouble with Cleve Daniels; just had fusses like negroes always do. I did not dislike him. We are just as much friends as we always were. Did not have any trouble the day before that; had just cut his hair on Saturday. I was over to his house on that Saturday. I have been up for taking money away from Jim Strudwick and fighting seven or eight times. Did not get mad with Cleve Daniels the day I cut his hair. Cut his hair on Saturday." Redirect: "When Cleve Daniels passed by, Mr. Cash was with him and went about as far as from here to the station house before he came back. They were walking along."

Bud Robertson, another witness, testified to substantially the same facts.

Mary Holman, a sister of the deceased, testified that she went to the home of the prisoner after the shooting; "that Cleve Daniels was standing on the porch with his wife, Bedie, as I walked up and said, 'Cleve Daniels, what did you shoot Jim Dunnegan for?' and he said, 'I have not shot no damn Jim.' And I looked up and saw Mr. Stone and another

man, and I said, 'There comes the policeman now.' At that time Cleve Daniels shot out of the door and went through the front door and out of the back door, and tried to get over the fence. I saw him after they arrested him, and he said he wished he had gotten one more damn shot at the Dunnegan nigger."

The prisoner requested his honor to charge the jury that there was no evidence of premeditation and deliberation, which was refused, and he excepted.

J. C. L. Harris, of Raleigh, and Manning, Kitchin & Everett, of Durham, for appellant. Attorney General Bickett and T. H. Calvert, Asst. Atty. Gen., for the State.

ALLEN, J. [1] We have given careful consideration to the entire record, and find no error in the proceedings in the superior court. The motion for a continuance was addressed to the discretion of the court, and the ruling of his honor, denying the motion, is not reviewable, unless there has been an abuse of discretion, and we find none.

[2] The killing was on the streets of Durham, in the daytime, in the presence of several witnesses, and immediately before the shooting the prisoner was at the home of Agnes Leathers, and just after was at his own home with his wife. No evidence was offered by the prisoner, and nothing was developed upon the examination of the witnesses for the state, indicating that the prisoner was not in full possession of his faculties. His honor was therefore fully justified in concluding that, if the prisoner was under the influence of cocaine at the time of the killing, as he alleged, he could prove the fact by other witnesses, and that he was not dependent upon the evidence of Bud Cain, a fugitive from justice, who might never return.

[3] There was, in our opinion, sufficient evidence of premeditation and deliberation to sustain a conviction of murder in the first degree. The absence of provocation; the preparation of a deadly weapon; the language used before the killing: "I am talking to you, damn you. I don't like you nohow, and what it takes to kill you, I got it"—and after, "that he wished he had got one more damn shot at the Dunnegan nigger," are circumstances tending to prove premeditation and deliberation, fit to be considered by the jury, and this evidence was submitted to them in a clear charge, which fully protected the rights of the prisoner.

In *State v. McCormack*, 116 N. C. 1036, 21 S. E. 694, the court says: "While premeditation and deliberation are not to be inferred as a matter of course from the want either of legal provocation or of proof of the use of provoking language, yet all such circumstances may be considered by the jury in determining whether the testimony is inconsistent with any other hypothesis than that

the prisoner acted upon a deliberately formed purpose. *State v. Fuller*, 114 N. C. 885 [19 S. E. 797]. Kerr (in his work on Homicide, section 72) says: "The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense." The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment. The conduct of the accused just before or immediately after the killing would tend at least to show the state of mind at the moment of inflicting the fatal wound. In passing upon the question whether the facts in a given case are sufficient to show, beyond a reasonable doubt, that the killing was done with deliberation and premeditation, while sudden passion, aroused by provocation that would neither excuse nor mitigate to manslaughter the killing with a deadly weapon, is sufficient, if the homicide is committed under its immediate influence, yet the want of provocation, the preparation of a weapon, proof that there was no quarreling just before the killing, may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design." This case has been approved in *State v. Lipscomb*, 134 N. C. 694, 47 S. E. 44; *State v. Daniel*, 139 N. C. 552, 51 S. E. 858; *State v. Stackhouse*, 152 N. C. 808, 67 S. E. 764, and in other cases.

The judgment must be affirmed. No error.

J. T. McTEER CLOTHING CO. v. HAY.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. JUDGMENT (§ 713*) — CONCLUSIVENESS — MATTERS IN ISSUE.

A judgment upon the merits is a finality as to the claim or demand in controversy, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose, and constitutes an absolute bar to a subsequent action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

2. JUDGMENT (§ 585*)—CONCLUSIVENESS.

A judgment is not conclusive in a subsequent action between the same parties upon a different claim or demand, but in such case operates as an estoppel only as to those matters in issue or points controverted upon which the judgment is rendered, and hence a judgment against defendant on a note covering all sums then due was not an estoppel as to a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

different claim or cause of action not then in issue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1132; Dec. Dig. § 585.*]

3. JUDGMENT (§ 956*)—RES JUDICATA—EVIDENCE AS TO IDENTITY OF ISSUES.

Under a claim of estoppel by judgment, extrinsic parol evidence is admissible to show the material points and the decision in the former action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1822-1825; Dec. Dig. § 956.*]

Appeal from Superior Court, Alamance County; Peebles, Judge.

Action by the J. T. McTeer Clothing Company against W. E. Hay. Judgment for defendant, and plaintiff appeals. New trial.

This action is to recover two items of an account for goods sold and delivered; the first item being of date March 26, 1909, for \$306, and the second of date March 26, 1909, for \$13.50, both being subject to a credit of \$63 for goods returned, leaving a balance due of \$255.50. The defendant denied the indebtedness, and pleaded an estoppel by judgment.

The facts appearing of record in regard to the estoppel are as follows: Prior to the institution of this action, the plaintiff commenced another action against the defendant, in which he alleged that on May 14, 1909, the defendant was indebted to the plaintiff in the sum of \$1,002.28, and that on that day he executed his note therefor payable in installments; that payments had been made thereon; that default had been made; and that there was a balance due the plaintiff of \$452.78. The defendant answered, admitting the allegations of the complaint, except he alleged that he was entitled to an additional credit of \$40.

At January special term, 1911, a judgment by consent was rendered in said action, which, after reciting that the parties had agreed to a full settlement of all matters in controversy, adjudged that the plaintiff recover \$412.78, which was the amount claimed by the plaintiff, less the additional credit of \$40 claimed by the defendant. It does not appear of record that the two items embraced in this action were in controversy in the first action, and, on the contrary, the account attached to the complaint in the original action shows those two items were not due when the note was executed, and were not embraced therein.

On the trial of this action, the plaintiff offered a witness who testified: "I live at Knoxville, Tenn. I am treasurer and credit man of the McTeer Clothing Company. I am familiar with the books of that company. I know about the time the note was given for \$1,000 as indicated in the record. At that time that was all the indebtedness of W. E. Hay that was due, but not the entire amount he owed. It was never intended that the note should cover anything but the past

due indebtedness at the time the note was given. The items now sued for in this action were not due at the time the note was given. These items were to fall due the October following the execution of the note. The note was in the hands of the collecting department of the Credit Clearing House all the time from the time it was executed until suit was brought on it. It was afterwards forwarded to W. H. Carroll, attorney, here. That note and the suit upon it has been settled. W. E. Hay ordered the goods sued for by letter." This evidence was withdrawn from the jury, and the plaintiff excepted.

His honor submitted the following issue to the jury: "(1) Were all matters at issue between the plaintiff and defendant settled in the case between the same parties at the January special term, 1911?"—and instructed the jury, if they believed the evidence, to answer the issue, "Yes," and the plaintiff excepted.

W. H. Carroll, of Burlington, for appellant.

ALLEN, J. (after stating the facts as above). [1, 2] There appears to be some confusion in the authorities as to the matters concluded by judgment; some declaring that it estops only as to the questions actually litigated, and others that it not only estops as to those litigated but also as to all that might have been litigated in the action.

The apparent conflict arises from failure to distinguish between the difference in the causes of action; both rules existing but being applicable to different facts.

The line is clearly marked in *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, which has been approved in numerous cases, in which the court says: "The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest. In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But, where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. * * * It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

[3] If the evidence offered by the plaintiff is admissible and true, the former judgment is not, under this rule, an estoppel as to the cause of action alleged, because it was not in issue in the former action, and this action is not on the same claim or demand. We are also of opinion that the evidence offered by the plaintiff is competent.

The question was decided in *Yates v. Yates*, 81 N. C. 401, which has been approved on this point in *Bryan v. Malloy*, 90 N. C. 513; *Baker v. Garris*, 108 N. C. 227, 13 S. E. 2; *Jones v. Beaman*, 117 N. C. 263, 23 S. E. 248.

In the *Yates Case* the court says: "A verdict and judgment directly upon the point in

issue is as a plea, a bar, or as evidence, conclusive upon the same matter directly in question in another suit, not extending to any matter coming collaterally or incidentally in question, or inferred by way of argument. *Duchess of Kingston's Case*, 2 Smith's Leading Cases, 424. This became a rule and is enforced in the courts upon the idea that, when a point or question is once litigated and decided by a verdict and judgment, it was justice to the parties and good policy that the same should not again be drawn into contest in a subsequent suit between the same parties. And to give effect and application to the principle, the rules of pleading required it to be availed of by plea of the judgment as a bar, or estoppel, or as evidence on the general issue. And anciently under the system of pleading conducive to the end of ascertaining and preserving in a permanent form the material issues and the adjudication thereof, it was held that the record should not estop, unless it showed on its face that the very point sought to be kept from a second contest was distinctly presented by an issue and expressly found by a jury. A system of pleading more general and loose having been adopted and allowed at this day, but little of the ancient certainty of allegation and denial is now required, and hence it is difficult if not impossible to ascertain the subject-matter of a controversy and the precise points made and decided by a mere inspection of the record as formerly, and therefore it grew to be the rule that it was not necessary that the record should show definitely the precise point or question upon which the right of a plaintiff to recover or the validity of a defense depended, but only that the same matter might have been litigated and decided, and that intrinsic evidence might be admitted to define what the question was, its materiality, and its decision by the jury. *Young v. Black*, 7 Cranch, 565 [3 L. Ed. 440]; *Packet Co. v. Sickles*, 24 How. 333 [16 L. Ed. 650]; *Wood v. Jackson*, 8 Wend. (N. Y.) 9 [22 Am. Dec. 603]; *Eastman v. Cooper*, 15 Pick. (Mass.) 276 [26 Am. Dec. 600]; 1 Greenl. Ev. § 531. The rule of the admissibility of parol testimony in support of the plea of estoppel to show what was the material point, and its decision in a former action, generally prevails at this day."

We are therefore of opinion there is error, and a new trial is ordered.

New trial.

GOBBLE et al. v. ORRELL et al.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. DIVORCE (§ 206*) — RESTRAINING SALE OF PROPERTY.

During the pendency of a suit for divorce, an order was made restraining the husband from selling his land. The final judgment

awarded alimony and appointed a receiver of the land for the purpose of applying the rents to the payment of the alimony. *Held*, that the injunction was intended to operate only until the final decree, and hence a mortgage of the land by the owner, and the sale thereof by the mortgagee under a power of sale, subsequent to the final decree, were not in violation of the injunction, especially where the wife received the rents in full and was not injuriously affected by the conveyance.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 600–603; Dec. Dig. § 206.*]

2. ADVERSE POSSESSION (§ 60*) — HOSTILE CHARACTER OF POSSESSION.

Where a decree of divorce granting alimony appointed a receiver of the husband's land to collect the rents and profits and apply them to the payment of the alimony, but he permitted the wife to take possession of the land in discharge of her claim for alimony, her possession was not adverse to the husband, especially as she could not hold adversely to the receiver without being guilty of contempt of court, and the husband, having been deprived of his possession by the court's judgment, should not lose his rights by his enforced failure to protect them.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 282–312, 323, 328; Dec. Dig. § 60.*]

3. RECEIVERS (§ 71*)—NATURE OF RECEIVER'S POSSESSION AND PROPERTY.

A receiver's possession is that of the court, taken for the purpose of securing the thing in controversy, so that it may be subject to such disposition as the court may finally direct.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 127, 128; Dec. Dig. § 71.*]

Appeal from Superior Court, Davidson County; Justice, Judge.

Action by J. H. Gobble and others against Cleveland Orrell and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

This is an action to recover the possession of land. Hiram Gobble originally owned it, and while he was owner, his then wife, Arena Gobble, obtained an absolute divorce from him at January term, 1880. In the decree the court adjudged that alimony, in the sum of \$400 per annum, be paid by Hiram Gobble to the plaintiff, and appointed a receiver, with directions to "pay out of the rents and profits of said land, or the proceeds thereof, the said alimony, according to the terms of the decree"; that is, \$400 annually until the death of Hiram Gobble, and \$400 annually in four equal quarterly installments thereafter. An order had been previously issued by Judge Graves at fall term, 1878, restraining Hiram Gobble from selling or disposing of his real or personal property, and appointing the same person as receiver to take charge of the personal property, but not of the land. The receiver was directed in the preliminary order to sell so much of the personal effects described therein as should be necessary to pay temporary alimony, \$10 a month, then allowed by the court. The final judgment varies, as will be seen, from the preliminary order in this respect: That it omits all reference to an injunction

against selling the land, and puts the temporary receiver in charge of it and the personality, for the purpose of securing the alimony and its regular payment to the wife, who had secured the divorce, with directions hereinbefore stated. Hiram Gobble married a second time, and in 1892 he and his wife conveyed the land by mortgage, with power of sale, to J. M. Lomax, who, upon default in the payment of the debt secured by it, sold the land under the power and conveyed it to Robert H. Gobble, the purchaser, who died, leaving plaintiffs as his heirs. Hiram Gobble died in 1910, and defendants are his heirs. Arena Gobble died in April, 1911. The receiver, who was a brother of Arena Gobble, collected the rents of the land at first; that is, after the first decree of divorce, his sister remaining on the land, as she had done before. The evidence is not clear as to whether he collected the rents all the time. The jury, under an instruction of the court to answer the issue "Yes," returned the following verdict:

"(1) Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Answer: Yes.

"(2) What damage are plaintiffs entitled to recover of defendants? Answer: \$150." Judgment upon the verdict, and defendant appealed.

Walser & Walser, of Lexington, for appellants. E. E. Raper, of Lexington, for appellees.

WALKER, J. (after stating the facts as above). [1] It is apparent that plaintiffs are the owners of the land, unless the defendants have acquired it by inheritance from their father, who had mortgaged it to J. M. Lomax; it being afterwards sold by him under the mortgage to Robert A. Gobble, father of plaintiffs. Defendants contend that Hiram Gobble sold and conveyed the land in violation of an injunction issued by the court in the divorce suit, and that his deed is therefore invalid, and if this is not so, they claim by the adverse possession of their mother for 20 years of the land after the decree was entered. But, in our opinion, neither defense is good or available in law to defeat the plaintiffs' recovery. In the first place, it is evident that the court, by omitting all reference to the injunction in the final decree and placing all of the property, both real and personal, in the hands of the receiver, with instructions to collect the rents and profits and pay the alimony, intended to dissolve the prior injunction as being, perhaps, unnecessary and futile, the receiver's possession being quite sufficient to secure the alimony to Mrs. Gobble, which was the object in making the order. The court continued the possession of the receiver as to the personal property, and enlarged the former order by giving him possession and control

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the land for the purpose of his resorting to the personal property and the rents and profits of the land to pay the amount of alimony as it matured. The clear inference, and the true construction of the order and decree, which must be taken together, is that the injunction, or restraining order, lapsed or ceased to operate, and the receivership as to all the property was substituted in its place, as being a perfectly adequate and sufficient remedy for the preservation of the wife's rights. The position as to the injunction, therefore, cannot be sustained. While the point is not presented for decision, a reference to some of the authorities on the question, as to the effect of an injunction upon a deed made in violation of it, may not be out of place, and it will be seen that they are not altogether in perfect accord, some holding that the deed is voidable only to the extent of preventing its interference with the remedy of the party who obtained it, so that it will not be allowed to affect a substantial right of the other party, or to deprive him of a substantial interest. If such a right or interest is not impaired, the act done or deed executed in violation of the writ is permitted to stand, or, in other words, it is always subject to the enforcement of the right and the protection of the interest. The other authorities seem to hold the act or deed to be void, but it may be that the apparent conflict can be reconciled, if proper attention is given to the facts of each case decided, and the necessity of protecting the particular right involved, extending the principle in some cases, and relaxing or modifying it in others, to suit the facts and exigencies of the particular case. *Butler v. Niles*, 35 How. Prac. (N. Y.) 329, citing *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; 2 *Spelling on Inj. & Extr. Rem.* § 1133; *Union Trust Co. v. S. I. Nav. & Imp. Co.*, 130 U. S. 565, 9 Sup. Ct. 606, 32 L. Ed. 1043; 2 *High on Inj.* § 1461; *Morris v. Bradford*, 19 Ga. 527, citing *Jackson ex dem. Webb v. Roberts*, 1 Wend. (N. Y.) 485; *Farnsworth v. Fowler*, 1 Swan (31 Tenn.) 1, 55 Am. Dec. 718; *Seligson v. Collins*, 64 Tex. 314; *Bissell v. Besson*, 47 N. J. Eq. 580, 22 Atl. 1077; *Taylor v. Hopkins*, 40 Ill. 442; *Ward v. Billups*, 76 Tex. 466, 13 S. W. 308. The general consensus seems to be that the act in contravention of the writ of injunction is not only punishable as a contempt of the court's authority, but will not be allowed to prejudice the right and remedy of the party in whose interest it issued, but whether, subject to this rule, it will be allowed to stand at all the authorities are not agreed. We refer to the subject in passing, as the reference may be of some practical avail in the future. It does not affect the merits of this appeal, as we hold that the court did not continue the injunction permanently, conceding its power to do so, its first order being merely equivalent to one enjoining the defendant against selling the land to the hear-

ing, or until the matter was disposed of by a final decree. But if it had been continued, the plaintiff in that suit, as we will see, was not injuriously affected by its violation, as it was issued to protect and preserve her right to alimony, and this she received in full, and consequently was in no way prejudiced by the mortgage to Lomax and the subsequent conveyance to Robert A. Gobble.

[2] The other position advanced by defendants is equally untenable. They claim that, as their mother was in possession for 20 years adversely, she acquired thereby a title to the land, but we cannot admit the premise from which this conclusion is drawn. Her possession was not adverse. The receiver, it appears, collected the rents and profits of the land and paid them to her. The land was in the custody of the law, through him, and the judgment by which he was placed in the possession of it was given at her request. She could not take possession of the land and hold it adversely to the receiver, without being guilty of a contempt of the court by the violation of its order issued at her instance. *High on Receivers* (3d Ed.) 163.

[3] The receiver's possession is that of the court, taken for the purpose of securing the thing in controversy, so that it may be subject to such disposition as it may finally direct. *High on Receivers*, §§ 134, 135, et seq. The defendant in that suit was put out of possession by the judgment, as the receiver was ordered to collect the rents and profits, and was entitled to control the possession for that purpose. This being so, the law will not allow the possession by the plaintiff to destroy his title, while he was thus forbidden to enter and assert it. We have an ancient maxim that the act of law shall prejudice no man. *Broom's Maxims* (6th Ed.) marg. pp. 127, 395. The maxim was applied in *Isler v. Brown*, 66 N. C. 557, and *Howell v. Harrell*, 71 N. C. 161, to prevent the loss of a right by inaction or passiveness caused by its order. It is a just rule, and our moral perceptions of right would be rudely shocked if any other were allowed to prevail and deprive a man of his rights, when by the act of the court or the law he was rendered powerless to protect or preserve them. Besides, there is no evidence here of notorious and adverse possession under a claim of right. The plaintiff in the other case evidently held the possession by consent of the receiver, and her occupation was subordinate to his dominion over the land as an officer of the court. She received the rents and profits in this way, in discharge of her claim for alimony, instead of requiring him to lease the land, collect the rents, and pay them over to her. We will not presume that she intended to do a wrong.

Our conclusion is that the instruction to the jury was correct.

No error.

SCOTT et al. v. REYNOLDS.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE OF FACTS TESTIFIED TO.

In an action on an account for groceries, after plaintiff's clerk had testified that he presented an account to defendant's intestate; that it was the same account presented on the trial; that intestate said it was all right; that he wanted to settle it up; and that the witness did not sell any of the goods, the intestate not trading there while he worked there—he was properly permitted to testify, over objection, that the account presented was for groceries, since, while the witness did not sell any of the goods, it was doubtless apparent from the account that it was for groceries.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

2. INTEREST (§ 18*)—BOOK ACCOUNTS—WHEN ALLOWABLE.

Where a grocery account was presented to the debtor, who promised to pay it, the creditor was entitled to interest thereon.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 32-34; Dec. Dig. § 18.*]

Appeal from Superior Court, Guilford County; Shaw, Judge.

Action by C. Scott and another, trading as C. Scott & Co., against L. Scott Reynolds, administrator of L. M. Scott. Judgment for plaintiff, and defendant appeals. Affirmed.

Civil action, tried at September term, 1913, upon this issue: Is the defendant indebted to the plaintiff, and, if so, in what amount? Answer: \$631.63, with legal interest from November 30, 1910, to present date. The defendant excepted and appealed.

Adams & McLean, of Greensboro, for appellant.

BROWN, J. [1] This action is brought to recover an account for groceries alleged to have been purchased by defendant's intestate from the plaintiffs. The defendant assigns error because the witness Mann was permitted to testify that the account presented to L. M. Scott, defendant's intestate, was for groceries. The witness Mann testified: That he works for C. Scott & Co., clerk in the store. That he knew Levi M. Scott. That he had heard the testimony of Mr. C. Scott. That he presented the account to Mr. Levy Scott. That he took it and looked at it and said: "That is Mr. Clarence Scott, is it?" Witness said: "Yes, sir." He said: "That is all right. I am expecting some dividends from some insurance cases along later in the spring, and I want to settle that up." This is all that witness said to him about it. That Mr. Scott looked at the account when he said it was all right and had the account in his hands when he said that. That the amount of the account was \$631.63. That the account was the same one presented here. That this is the account he presented without the interest on it. Upon cross-examination

the witness testified that it was some time right after the first of the year of 1911 when he presented the account to Mr. Scott; that he presented it to him in his office, right over here near the courthouse. On redirect examination witness testified that he did not sell any of the goods to Mr. Scott; that Mr. Scott never traded any there after he went to work there for Mr. Scott. Witness was asked this question: "What was the account you presented to him for?" Defendant objected. The court remarked: "I think it is competent." Defendant excepted. Witness answered, "For groceries." We see no merit in this exception. If the evidence is believed, it proves that the account was duly presented for payment to defendant's intestate, and that he recognized and promised to pay it. It is true the witness did not personally sell the goods, but the fact that they were groceries was doubtless apparent in the account, itself.

The remaining assignments of error have as little merit as the above, and need no discussion.

[2] Having proved to the satisfaction of the jury that the account was duly presented, and that the defendant's intestate promised to pay it, the plaintiff was clearly entitled to interest.

No error.

BREEDEN v. MINNEOLA MFG. CO.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employe's action for injuries, where there was evidence of defendant's negligence as the cause of the injury, the question was for the jury, unless plaintiff's evidence established contributory negligence, although the jury might well have adopted defendant's view that the injury was caused by plaintiff's disobedience of orders.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§§ 285, 286*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employe's action for injuries, evidence held to make questions for the jury as to whether plaintiff was directed to clean the machine operated by him while in motion, whether the rag given him for this purpose was a safe appliance, whether the employer failed to instruct him as to the operation of the machine and its dangers, and whether its failure of duty was the cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1002, 1003, 1006, 1007, 1008, 1010-1016, 1017-1033, 1036-1044, 1046-1050, 1053; Dec. Dig. §§ 286, 286.*]

Appeal from Superior Court, Guilford County; Shaw, Judge.

Action by De Paul Breeden against the Minneola Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was instituted to recover damages because of an injury alleged to have been received while in the employ of the defendant and through its negligence.

In his complaint the plaintiff alleges that he was injured at 2:40 o'clock of the afternoon of Saturday, January 2, 1909, while cleaning with a rag held in his left hand a certain part of a tentering machine in the cotton mill of the defendant at Gibsonville while the machine was in motion, and that he was at that time about 14 years of age. The complaint contains four specifications of negligence, to wit: (1) Failure to instruct; (2) that the work assigned to plaintiff "was entirely too heavy"; (3) that defendant failed to furnish certain appliances, to wit, brushes, in general and approved use for cleaning machinery; and (4) that the defendant required the plaintiff to clean said tentering machine while running. The defendant in its answer denied each allegation of negligence and pleaded contributory negligence, assumption of risk, and the three years' statute of limitations. At the close of the plaintiff's testimony the defendant moved that the action be dismissed and for judgment as in the case of nonsuit. This motion was overruled, and defendant excepted.

The defendant offered no testimony but prayed the court in writing in apt time "to charge the jury to answer the first issue 'No.'" The court refused to charge as requested, and defendant excepted.

The defendant in apt time in writing further prayed the court "to charge the jury, if they answer the first issue 'Yes,' to answer the second 'Yes.'" The court refused to charge as requested, and the defendant excepted.

The evidence of the plaintiff tended to prove that at the time of his injury he was 14 years old, lacking 20 days; that he had, prior to his injury, worked for four or five years in various cotton mills and had done quite a variety of work, beginning with "picking quills" and ending with the operation of the tentering machine on which he was injured; that he had for several months worked in the room in which the tentering machine was, operating the stitching machine and glossers, and that he was assigned to operate this particular machine "about eight or nine or ten days" before his injury; that prior to two weeks before his injury the defendant company had provided its employees with brushes with which to clean machines, but that at that time these brushes were taken away and they were given rags and waste instead; that when brushes were used for cleaning his hands would not be nearer than two feet to the machine.

The plaintiff testified, among other things, as follows: "It was my duty to clean the machine everywhere. If I didn't, I had to go back over it. There were no instructions given me at the time I was assigned to work on this machine as to how to clean it and operate it. Up until Saturday before I was

hurt on the following Saturday, I had a brush to clean the machine with. It was a brush made out of a picker stick or anything you could get hold of, so that it was about 2½ or 3 feet long, made out of this warp they make cloth out of. You got the brush and cut notches in the stick and tied this piece of warp on this stick. The handle was from 2½ to 3 feet long. When you were cleaning the machine with a brush it was necessary for you to put your hands about two feet from the parts. Mr. Theodore Allred took these brushes and burned them up. When he came around and took the brushes I asked him what I must clean up with, and he says, 'You will have to clean up the best way you can.' I says, 'I am going to swipe me a brush somewhere and use that;' and he says, 'You can't use it if you stay in here. You will have to get out of here if you use a brush. You can clean up with a rag the best you can, or anything that you don't have to stick in there that will break the gears.' After they took up the brushes I had nothing except rags to clean up with. Neither Mr. Allred nor any one else warned me as to the danger in cleaning this machine with a rag. I was hurt about two weeks after these brushes had been taken up. I was on my knees wiping this here piece of frame that goes under the frame that holds the other frame to it. The piece that fastens across there. I was wiping this rod with this rag. I didn't have a brush so as to stand outside. I had to get on my knees and wipe with that rag. As I went to pull my hand out the wind of this here chain blew the rag and it caught in the sharp pointed teeth and jerked my hand right under this here wheel. The machine was running. The reason I did not stop the machine to clean it up was simply because they would not let me stop the machine. The reason why I did not stop the machine to clean it up was because, when the cloth would get pushed on me on a Saturday evening, I had to run this machine. They gave us three-quarters of an hour to stop the machine and clean it up, fan off. Q. Tell who gave you the instruction, who said you had to run it and clean it. A. Both of them gave me instructions, Mr. Charley Stout and Mr. Theodore Allred, both gave me instructions. Q. State what instructions they gave you. A. Told me I could not stop the machine. Q. About cleaning up while it was running or not running? A. Yes, sir; could not stop the machine during working hours, and if I wanted to clean it I would have to wait until this three-quarters of an hour came and then clean it or clean it during spare times when I got a chance or stay after working hours and get no pay for it. It would take about one hour and 15 minutes to clean it like they required. I had to sweep up the floor after I had cleaned up, after Mr. Theodore Allred inspected the machine. I said that both Stout and Allred told me not to stop the machine in order to clean it up. I

do not know at what hour the machine stopped on Saturday. I know they gave us three-fourths of an hour to stop the machine and sweep up. I do not remember whether it was 5 o'clock or 10 minutes after 3, when the mill closed down on Monday, Tuesday, Wednesday, Thursday, and Friday. I think it was 6 o'clock the year round. On Saturday I think it was 4. I think the machinery shut down in the finishing department on Saturday afternoon about a quarter past 3. It was not a quarter to 3. That is one thing I know. It shut down for us to line the machines up. He started around just as quick as we started to line up the machines, went around and inspected them, and we started to sweep the floor. That time was not given us in which to clean the machines; it was given us in which to line up the machine and sweep up. It was not given us expressly for cleaning the machine. I knew that if I got my hand caught in a moving chain I would get hurt, but you see I was trying to keep out of it. I was trying to prevent an injury to my person. I was doing what they required me to do, cleaning the machine. No instructions were given to me as to cleaning that machine. I knew I had to clean it, and clean it clean. That is all I knew. I knew how to do it with brushes. I didn't know how to do it unless I got down with the rag. I saw the chain there and saw the wheel there, and I knew if my hand was carried by the chain against the wheel that it would hurt me. A lot of the machine was nowhere near the chain and wheel; that is, a lot of the frame. I can't tell how much. I didn't understand the nature and mechanism of the machine before I was assigned to work on it. I knew nothing about it until he told me to run it. I knew how to keep the cloth on the teeth; knew nothing more about it. I knew I was likely to be hurt anywhere in there. I don't know that I knew it was dangerous cleaning that part; no, sir, not in that way. If I had had a brush it would not have been dangerous at all. The way I was cleaning it then I didn't know that I was liable to get hurt right at the present time. If I had, I would not have cleaned it. The chains were where I could see them underneath. I was kneeling down on both knees and the moving wheel and chain were immediately before my eyes. The wind in this chain could have blown the rag and jerked my hand. The rag was tight in my hand, gripped tight. I had it in the palm of my hand. My hand was caught before I knew it. The chain jerked my hand. I knew if my hand got in there it would get hurt, but I didn't intend for it to get in there."

W. E. Marshall testified for the plaintiff as follows: "I live at Durham. I lived at Gibsonville in the winter of 1909. I lived there 5 years and 7 months. I was master mechanic of the Minneola Manufacturing Company, the defendant. I was in their em-

ploy at the time Paul Breeden got hurt. That machine is something like 30 or 40 feet long, and the machine is to stretch the goods, to weave them all the same number of inches, have all the same length. Sprocket and chain. Chain continuous, one on each side, and as the carriage strikes the chain on each side the chain runs continuous, with a row of pins about like clothes pins or a little larger, something like three-eighths of an inch long, or half an inch. Space of about three-sixteenths of an inch apart, which sets them pretty thick. As these chains revolve they catch the goods here and take it out a certain distance, and the chain widens out. That machine has a frame on each side of it. It is supported by shafts and connections. At the opposite end some rollers which takes the goods off and folds it out. Driver on the machine at the opposite corner. Has a loose and tight pulley, and a short shaft drives that pinion into a large gear which drives the machine, operates the whole machine. Up at this end back here where the operator sits the goods is taken off on the table behind, and that goes over a reel, you might call it, and goes down under the platform that he sits on and comes up and enters the chain right here. There it first strikes it. That chain is open, exposed on the machine most of the way around, except a small piece right here (indicating) where the goods come over. The chain is open all the way around. The chain came here and came around the sprocket. The chain was exposed until it strikes that sprocket, which pulls it around. The wheel was more than three or four inches from the side of the carriage which reverses backward and forward on the frame of the machine. The wheel reaches to the front of the machine, all except a little shield there to stop the goods, pull the goods off until it strikes the proper place along the chain. In cleaning the machine it is necessary for one to get down under the machine when he is cleaning it with a rag. If one had a brush as was described to clean the machine and those parts about this sprocket wheel, he could do that without getting down under the machine, and could do it without placing his hand in close proximity to the chain and wheels. I worked for this defendant five years and seven months. I had been there something like three years before the injury. I know that this defendant company used brushes to clean their machinery up until about two weeks previous to the time of the injury to Breeden, and I know that this defendant took the brushes up about two weeks previous to this injury and they burned them up. I worked at the mills at Mayodan in Rockingham county, at Fries, Va., at Spray and Gibsonville. The Minneola was the last I worked for. I had worked for the others before. Three of the mills that I had worked for used brushes. One in the

spinning room didn't use long-handled brushes, used short bristle brushes."

The jury returned the following verdict:

"(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff by his own negligence contribute to his injury, as alleged in defendant's answer? Answer: No.

"(3) What damage, if any, is plaintiff entitled to recover? Answer: \$1,750."

Judgment in favor of the plaintiff upon the verdict, and defendant appealed, assigning as error:

(1) The refusal of the court to allow its motion that the action be dismissed and for judgment as in the case of nonsuit.

(2) The refusal by the court to give defendant's prayer "to charge the jury to answer the first issue 'No.'"

(3) The refusal by the court to give defendant's prayer "to charge the jury, if they answer the first issue 'Yes,' to answer the second issue 'Yes.'"

F. P. Hobgood, Jr., of Greensboro, for appellant. Brooks, Sapp & Hall, of Greensboro, for appellee.

ALLEN, J. (after stating the facts as above). There is no controversy as to the law governing this case; the defendant admitting that it was its duty to furnish the plaintiff with suitable and reasonably safe appliances and to instruct him as to his duties and as to the dangers in operating the machine at which he was working when he was injured.

The contention of the defendant is that as the plaintiff admits that the mill was stopped on Saturdays for the purpose of cleaning the machines, and that he had other opportunities to do so during the week when the machine was not in motion, the only reasonable deduction from the whole evidence is that the plaintiff was instructed to clean the machine when at rest, and not to do so when in motion, and that if this is true the rag furnished the plaintiff was a reasonable and safe appliance for cleaning the machine not in motion; that there was no need of instruction, because there was no danger if he performed his duties as he was told to do; and that the real cause of the injury to the plaintiff was his disobedience of the order not to clean the machine when in motion.

[1] The learned counsel for the defendant urges this contention in a strong, forceful argument, which convinces us that there was good reason for asking the jury to adopt his view, but it does not satisfy us that there was no other reasonable inference to be drawn from the evidence, and, if there is evidence of negligence as the cause of the injury, the question is one for the jury, unless the evidence of the plaintiff establishes contributory negligence on his part.

[2] The position of the defendant is predicated upon the fact that the plaintiff was directed to clean the machine when at rest and not to do so when in motion. No witness testified that this instruction or order was given, and the plaintiff testified: "It was my duty to clean the machine everywhere. There were no instructions given me at the time I was assigned to work on the machine as to how to clean it and operate it. No instructions were given to me as to cleaning that machine. Neither Mr. Allred nor any one else instructed me as to the danger in cleaning this machine with a rag." If the jury accepted this evidence, they must have found that the plaintiff was performing his duty when he was injured and that he had not been instructed to stop the machine to clean it. Again: "I said that both Stout and Allred told me not to stop the machine to clean up." "The reason I did not stop the machine to clean it up was simply because they would not let me stop the machine."

When the defendant took the brushes from the plaintiff which had been used in cleaning the machine, and in the use of which the hands of the plaintiff would not have been nearer to the machine than two feet, the plaintiff said to the foreman, "I am going to swipe me a brush somewhere and use that;" and he said: "You can't use it if you stay in here. You will have to get out of here if you use a brush. You can clean up with a rag the best you can, or anything that you don't have to stick in there that will break the gears." Were not the jury justified in inferring from this evidence that the defendant expected the plaintiff to clean the machine while in motion, as otherwise the use of a brush would not break the gears?

There is also evidence that the brush was taken from the plaintiff on Saturday before he was injured, and that prior to that time the machine was cleaned with the brush while in motion, and as the plaintiff, a boy 14 years of age, had been instructed not to stop the machine, it was not unreasonable for him to conclude that he was to clean the machine in motion, in the absence of specific instructions, which he says were not given him.

The excerpts from the evidence are subject to the criticism that they are taken from different parts of the testimony, and that all associated evidence is not presented; but, while this is true, nothing is omitted which is necessarily in conflict with that quoted.

We are therefore of opinion that there is evidence that the plaintiff was directed to clean the machine in motion; that the rag given him was not a safe appliance for this purpose; that the defendant failed to instruct the plaintiff as to the operation of the machine and its dangers; and that the failure of duty on the part of the defendant was the cause of the plaintiff's injury; and further that it is not necessarily inferred from the evidence of the plaintiff that he was acting in disobedience of orders.

It follows, therefore, that there is no error in overruling the motion for nonsuit or in refusing to give the instructions prayed for. No error.

ORINOCO SUPPLY CO. et al. v. MASONIC & EASTERN STAR HOME, Inc. et al.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. MECHANICS' LIENS (§ 118*)—NOTICE TO OWNER—TIME FOR NOTICE.

Under Revisal 1905, § 2019, giving subcontractors and laborers furnishing material for the building, repairing, and altering of any house or improvement on real estate a lien on such house and real estate for their labor or material, and providing that the sum total of all such liens shall not exceed the amount due the original contractor at the time of notice given, section 2020 requiring subcontractors, laborers, or materialmen claiming a lien to give notice to the owner at any time before settlement with the contractor, and providing that, if the owner shall refuse or neglect to retain out of the amount due the contractor as much as shall be due or claimed by the subcontractor, laborer, or materialman, he may proceed to enforce his lien, and that after such notice is given no payment to the contractor shall be a credit on or discharge of the lien, and section 2021, requiring contractors to furnish to the owner an itemized statement of the amount owing to laborers, etc., or for materials, upon delivery of which it shall be the owner's duty to retain from the money due the contractor a sum sufficient to pay such laborers and for such materials, and providing that any laborer or materialman may himself furnish such itemized statement, upon delivery of which he shall be entitled to all the liens and benefits conferred thereby as though the statement were furnished by the contractor, where neither the contractor nor materialmen gave notice to the owner until after the last payment by him to the contractor, the claims of the materialmen were not a lien on the property.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 161; Dec. Dig. § 118.*]

2. STATUTES (§ 48*)—VALIDITY—REPUGNANCY.

Pub. Loc. Laws 1911, c. 761, amends the general mechanic's lien laws (Revisal 1905, §§ 2019–2021), so as to provide that the owner shall require the contractor to furnish him, before paying any part of the contract price, an itemized statement, duly verified, of the amount due any person for materials, that the owner shall pay such amount to the person furnishing materials, and that in the event of his failure to require such statement the rights of laborers or materialmen to file and enforce a lien shall not be affected thereby, and provides in section 5 that it shall apply only to Durham, Rowan, Guilford, and Randolph counties, provided it shall not apply, nor shall it be enforced in Union and Stanly counties, and provided, further, that where material is furnished by any person, firm, or corporation outside of Union county its provisions shall not apply in the collection of such debt, but the law now on the statute books shall apply. *Held*, that such act is contradictory, self-destructive, and void, and capable of no construction giving it any force or effect, since it is expressly made inapplicable in Union county and outside of Union county.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 48.*]

3. STATUTES (§ 246*)—RULES OF CONSTRUCTION—LOCAL STATUTES.

A special statute, entirely local in its nature, in abrogation of the general law of the state, should be strictly construed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 327; Dec. Dig. § 246.*]

4. STATUTES (§ 207*)—CONSTRUCTION—INCONSISTENT PROVISIONS.

Where the proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 284; Dec. Dig. § 207.*]

Appeal from Superior Court, Guilford County; Shaw, Judge.

Action by the Orinoco Supply Company and others against the Masonic & Eastern Star Home, Incorporated, and others. From a judgment against it, the defendant named appeals. Reversed.

W. F. Harding, of Charlotte, for appellant. Chas. A. Hines, of Greensboro, for appellee Wharton Builders' Supply Co. L. M. Swink, Hastings & Whicker, and Manly, Hendren & Womble, all of Winston-Salem, for appellee Orinoco Supply Co.

BROWN, J. This is an action brought by the plaintiffs to subject the property of the defendant to a lien for material furnished to the Ange Construction Company, a contractor that had undertaken to erect under contract a building upon said defendant's lot in Guilford county. The contractor failed to complete the building, and was adjudicated a bankrupt. The owner completed it, and expended more than the contract price, and at the date of the adjudication in bankruptcy the owner owed the contractor nothing. None of the creditors, parties in this cause, filed any notice of their claims with the owner prior to the adjudication of the contractor in bankruptcy, except the Orinoco Supply Company, who gave notice of their claim on April 16, 1912, but this notice was given after the last payment to the contractor by the owner on April 8, 1912, and at the time the notices were filed nothing was owing to the contractor by the owner.

[1] Under the General Lien Law of this state (Revisal 1905, §§ 2019–2021) materialmen have no lien for materials furnished the contractor unless the contractor files with the owner an itemized statement of amounts due for material, or the materialman gives notice to the owner of the amount due him before the owner makes settlement with the contractor, and then only as to such amount as may be due the contractor from the owner on its contract. No notice having been given, either by the contractor or by the materialman, before the payments were made by the owner to the contractor, and there being no funds in the hands of the owner due the contractor on his contract at the time notice

of claims was given, such claims cannot, under the general statute, be a lien on the property of the owner. 27 Cyc. 102; Clark v. Davis, 119 N. C. 115, 25 S. E. 794.

[2] But the plaintiffs contend that Act of 1911, c. 761, Public Local Laws, gives them a lien on defendant's property, irrespective of notice to the owner, and without regard to his indebtedness to the contractor. The special statute provides that the owner shall require the contractor to furnish him, before paying any part of the contract price, an itemized statement, duly verified, of the amount owing any person for materials furnished, and that the owner shall pay such amount shown by the statement to the person furnishing materials. The statute further provides that, in the event of failure of the owner to require the itemized statement duly verified, such failure shall not in any way affect the rights of the laborer or materialman to file and enforce his lien.

[3] It is contended by the defendant that such special statute is void for ambiguity, as well as in violation of the federal and state Constitutions. Section 5 of the special statute provides that: "This act shall apply only to Durham, Rowan, Guilford and Randolph counties: Provided, this act shall not apply nor shall it be enforced in Union and Stanly counties: Provided further that where material is furnished by any person, firm or a corporation outside of Union county the provisions of this act shall not apply in the collection of said debt, but the law as now on the statute book shall apply." This special statute, entirely local in its nature, is in abrogation of the General Lien Law of the state, and undertakes to confer on the furnishers of building material in four counties privileges, legal rights, and advantages not common to the citizens of other counties in the state. Its constitutionality is doubtful. But we are not called upon to pass upon it, as we think the act is self-destructive and void on its face. Being in abrogation of the general law, it should be strictly construed. 27 Cyc. 20.

[4] It has long been held that if a proviso in a statute be directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature. 1 Kent, Comm. 430; Potter's Dwarrris, p. 118; Bacon, Ab. tit. Statute.

It was held by all the Barons of the Exchequer in the case of Attorney General v. Governor & Company of the Chelsea Water Works, 9 B. & C. 835, that where the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand and be held a repeal of the purview,

because as was said, "it speaks the last intention of the lawgiver." It was compared to a will, in which the latter part, if inconsistent with the former, supersedes and revokes it.

Dwarrris says, page 118: "It has been remarked upon this case in Fitzgibbon that a proviso repugnant to the purview renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should be destroyed by the one and not by the other." See, also, Rex v. Justices of Middlesex, 2 B. & A. 818; Townsend v. Brown, 24 N. J. Law, 80.

In Farmers' Bank v. Haile et al., 59 N. Y. at page 59, the opinion says: "A saving clause is only an exception of a special thing out of the general things mentioned in the statute, and if repugnant to the purview is void. * * * The office of a proviso is more extensive, it is used to qualify or restrain the general provisions of an act, or to exclude any possible ground of interpretation as extending to cases not intended by the Legislature to be brought within its purview. * * * And if repugnant to the purview it is not void, but stands as the last expression of the Legislature." As between conflicting provisions of the same statute, the last in order of arrangement will control. See, also, the following pertinent cases: Hall v. Equator Mining & Smelting Co., Fed. Cas. No. 5,931; Quick v. White Water Township, 7 Ind. 570; Ryan v. State, 5 Neb. 276; Ex parte Hewlet, 22 Nev. 333, 40 Pac. 96; Packard v. Sunbury & E. R. Co., 19 Pa. 211; Hightower's Lessee v. Wells, 14 Tenn. (6 Yerg.) 249; Savings Inst. v. Makin, 23 Me. 360.

The statute under consideration declares, on the one hand, that it shall apply only to Durham, Guilford, and Randolph counties, and especially that it shall not apply nor be enforced in Union and Stanly counties, and on the other hand, it provides where material is furnished by any persons, firm, or corporation outside of Union county the provisions of the act shall not apply in the collection of said debt, but that the law now on the statute books shall apply. So it makes no difference whether in Union or out of Union the statute is inapplicable to the facts in this case, and admits of no construction which can give any force or effect to it.

We are led to the conclusion that the special statute relied upon by the plaintiffs is contradictory, self-destructive, and void.

Reversed.

WALKER and ALLEN, JJ., concurring in result.

BALLARD v. LOWERY, Sheriff, et al.
(Supreme Court of North Carolina. Nov. 12, 1913.)

1. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—COLLATERAL ATTACK.

Where a judgment was rendered by a justice of the peace without service of the summons on defendant, but the summons bore an indorsement purporting to show such service, defendant's remedy was by a motion before the justice to set aside the judgment, when it would be the justice's duty to find the facts, and the service, appearing valid on the face of the record, could not be impeached in an action to enjoin the service of execution thereunder.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. § 128.*]

2. JUSTICES OF THE PEACE (§ 127*)—JUDGMENT—VACATING—NOTICE OF MOTION—SERVICE.

Notice of a motion before a justice of the peace to set aside a judgment recovered by a nonresident plaintiff for want of service of the summons might be given by publication or by service on plaintiff's attorney of record.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 401; Dec. Dig. § 127.*]

3. JUSTICES OF THE PEACE (§ 127*)—JUDGMENT—MOTION TO VACATE—STAYING EXECUTION—PROCEDURE.

Where judgment is rendered by a justice of the peace without service of the summons on the defendant, docketed in the office of the clerk of the superior court, and an execution thereon issued, and defendant then moves to set aside the judgment, he may apply to the clerk and, upon giving the required bond, have the execution recalled until the motion is finally disposed of.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 401; Dec. Dig. § 127.*]

4. APPEAL AND ERROR (§ 171*)—THEORY OF ACTION IN LOWER COURT—VACATING JUDGMENT.

Where a person against whom a justice of the peace rendered judgment without service of the summons, instead of moving before the justice to set aside the judgment, brought a civil action in the superior court to enjoin the service of an execution thereunder, the Supreme Court could not, even by consent, treat such action as a motion in the cause in the justice's court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

Appeal from Superior Court, Anson County; Adams, Judge.

Action by T. J. Ballard against R. J. Lowery, sheriff, and others. From an order dissolving an injunction and dismissing the action, plaintiff appeals. Affirmed.

The defendants S. Lowman & Co. were non-residents of the state.

Lockhart & Dunlap, of Wadesboro, for appellant. Guldedge & Boggan, of Wadesboro, for appellees.

BROWN, J. [1] On the 25th day of February, 1911, at the instance of S. Lowman & Co., J. H. Benton, a justice of the peace for Anson county, issued a summons against T. J. Ballard, returnable the 1st day of March,

1911. On February 27, 1911, the said summons was returned to said justice's court with the following indorsement: "Served February 27, 1911, by reading within summons to T. J. Ballard, defendant, R. J. Lowery, sheriff, J. T. Short, deputy sheriff." March 16, 1911, said justice of the peace rendered judgment in favor of S. Lowman & Co. against T. J. Ballard in the sum of \$173.75, with interest and costs, and said judgment was docketed in the office of the clerk of the superior court of Anson county, and upon which S. Lowman & Co. caused execution to be issued.

Injunction was issued by Bragaw, judge, at the instance of T. J. Ballard to prevent the service of said execution, claiming that no summons had ever been served on him in the original case of S. Lowman & Co. against T. J. Ballard before the said J. H. Benton, justice of the peace. Upon the return day of the restraining order before Adams, judge, the latter dissolved the injunction and dismissed the action.

We are of opinion that the proper procedure for the plaintiff to pursue is to move before the justice of the peace to set aside the judgment. It is then the justice's duty to find the facts.

[2] Notice of such motion may be given by publication or by service upon the attorney of record. It appears upon the face of the record that the service of the justice's summons was valid. Therefore it cannot be impeached except by motion in that cause to set it aside. *McKee v. Angel*, 90 N. C. 62; *Whitehurst v. Trans. Co.*, 109 N. C. 344, 13 S. E. 937.

It is said in *Thompson v. Notion Co.*, 160 N. C. 525, 76 S. E. 473: "If the judgment is rendered in the absence of the defendant, and the process is defective, or there is the appearance of service when in fact none, the defendant may move before the justice to set the judgment aside."

[3] When such motion is lodged, the defendant may apply to the clerk and, upon giving the required bond, have the execution recalled until the motion is finally disposed of.

[4] We cannot treat this civil action originating in the superior court, even by consent, as a motion in the cause in a justice's court.

Affirmed.

McNAIR et al. v. BOYD.
(Supreme Court of North Carolina. Nov. 12, 1913.)

1. TAXATION (§ 707*)—TAX SALES—NOTICE—DEED.

The provision of the statute authorizing the sale of land for taxes for 1897, requiring the purchaser to serve notices on the owner of the land and persons in possession, and make affidavit of such service before the purchaser should be entitled to a deed, is mandatory, and

hence a tax deed issued for the taxes of that year without such affidavit was void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1426-1428; Dec. Dig. § 707.*]

2. TAXATION (§§ 730, 742*)—TAX SALES—PURCHASE BY COUNTY—EFFECT—FORECLOSURE.

The statute authorizing the sale for taxes in 1897 did not permit the county to become the absolute purchaser in default of other bidders, the county being authorized only to foreclose the certificate of purchase or deed by court proceedings for that purpose, and the assignee of the county acquired no better right.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1463, 1481-1484; Dec. Dig. §§ 730, 742.*]

3. TAXATION (§ 746*)—TAX DEEDS—EXECUTION BY SHERIFF—TERMINATION OF OFFICE.

A sheriff after his term could execute a deed to land which he sold for taxes during his term.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1491, 1492; Dec. Dig. § 746.*]

4. TAXATION (§ 805*)—SALE—PERSON IN POSSESSION—REMOVAL OF CLOUD ON TITLE—LIMITATIONS.

The statute of limitations cannot avail a defendant, in an action to cancel a tax deed as a cloud on title of plaintiffs, who were in possession.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

5. TAXATION (§ 788*)—TAX DEED—RECITALS.

The rule that the recitals in a tax deed are evidence, either conclusive or presumptive, does not apply when the deed itself is attacked for noncompliance with the statutory prerequisites as to giving notice to the owner and parties in possession, before the execution of the deed by the sheriff.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.*]

Appeal from Superior Court, Richmond County; Bragaw, Judge.

Action by John F. McNair and another against T. F. Boyd. Judgment for plaintiffs, and defendant appeals. Affirmed.

John P. Cameron, of Rockingham, for appellant. Russell & Weatherspoon, of Laurinburg, and U. L. Spence, of Carthage, for appellees.

CLARK, C. J. This is an action to remove a cloud from title by canceling and setting aside the deed executed by J. M. Smith, sheriff of Richmond, to W. K. Strickland January 19, 1900, in pursuance of a sale of land, therein described, for taxes. The lands in controversy were listed for taxation by Peter L. Pate in 1897, and were sold by J. M. Smith, sheriff of Richmond on July 4, 1898, to satisfy unpaid taxes thereon; no purchaser bid for the lands, which were thereupon bought in by the county. Thereafter W. K. Strickland purchased the certificate of sale from the county, and the sheriff thereupon executed a deed to him. The plaintiff introduced deeds, showing that Peter L. Pate owned the land at the time the lands were listed for 1897, and indeed showing a complete paper title back to a grant from the state, unless the same was divested by the tax deed referred to. It was also in proof that the

plaintiff D. L. Gore has since succeeded to the title of Pate.

[1] The statute authorizing the sale of land for taxes for the year 1897, and the execution of a deed therefor, required, as now, the purchaser at such sale to serve notices upon the owner of the land and the parties in possession and make affidavit that such notice and acts required by the statute had been complied with before he was entitled to a deed, and such affidavit must be registered and given in evidence along with the tax deed, in order to vest title in such purchaser. No affidavit was made in this case, and the tax deed was therefore invalid. *Mathews v. Fry*, 141 N. C. 582, 54 S. E. 379; *King v. Cooper*, 128 N. C. 347, 38 S. E. 924.

[2] The statute in force at the time this tax sale was made and the deed executed did not permit a county to become the absolute purchaser of land at a tax sale. But the county could only foreclose the certificate of purchase or foreclose the deed, if such deed had been made, instead of issuing a certificate, and the assignee of such county is in no better state than the county. Hence the deed from Smith to Strickland was not a conveyance of the land, but at most the assignment of an equity under which to institute proceedings for foreclosure, which was not done. *Wilcox v. Leach*, 123 N. C. 74, 31 S. E. 374; *Collins v. Bryan*, 124 N. C. 738, 32 S. E. 975; *Whitman v. Dickey*, 124 N. C. 741, 32 S. E. 974; *Collins v. Pettitt*, 124 N. C. 726, 32 S. E. 975; *Huss v. Craig*, 124 N. C. 743, 32 S. E. 974; *Kerner v. Cottage Co.*, 126 N. C. 356, 35 S. E. 590; *Smith v. Smith*, 150 N. C. 84, 63 S. E. 177.

In *Collins v. Pettitt*, 124 N. C. 727, 32 S. E. 975, there was a dissenting opinion on this last point, and the next Legislature amended the statute (Laws 1901, c. 558, § 18) by requiring the sheriff to execute a deed to the county or its assignee, without foreclosure. This section is now *Revisal 2905*. But this sale took place under the statute in force prior to that time.

[3] The plaintiffs tendered the amount of taxes due on the lands before suit brought. *Moore v. Byrd*, 118 N. C. 688, 23 S. E. 968; *McMillan v. Hogan*, 129 N. C. 314, 40 S. E. 63. The deed could, however, be executed by the sheriff after his term expired.

[4] The statute of limitations cannot avail the defendant, since the action is brought to cancel the tax deed in order to remove a cloud from the title of the plaintiffs who are in possession. *Cauley v. Sutton*, 150 N. C. 330, 64 S. E. 3; *Beck v. Meroney*, 135 N. C. 532, 47 S. E. 613.

[5] There was no evidence contradictory to the facts above recited, and the court therefore properly charged the jury that if they believed the evidence they should answer the issues as set out in the record, which are in favor of the plaintiffs. The recitals in the tax deed are evidence, either conclusive

or presumptive, under the terms of the statute. But this does not apply when the tax deed itself is attacked for noncompliance with the prerequisites as to giving notice to the owner and parties in possession before the execution of the deed by the sheriff (Revisal 2884), and when the evidence is uncontradicted that the lands were bought in by the county and assigned to Strickland who thereby acquired only an equity foreclosure, but not the right to a deed from the sheriff, under the law then in force.

The decree, therefore, properly adjudged upon the issues found that the deed from Smith to Strickland should be canceled upon payment by the plaintiff to the defendant of the taxes due on the land on June 6, 1898, with 20 per cent. per annum interest thereon in accordance with the statute.

No error.

SHEPHERD v. NORTH CAROLINA R. CO.
(Supreme Court of North Carolina. Nov. 12, 1913.)

1. RAILROADS (§ 400*)—ACTIONS FOR INJURIES TO PERSONS ON TRACK—QUESTIONS FOR JURY.

Where the evidence showed that a bright and intelligent young man while on the way to his home found a crossing blocked by a freight train, that he attempted to cross some distance from the crossing, near a well-known and much-used crossing for pedestrians, this evidently being the best and nearest route to his home under the circumstances, that it was a dark, rainy night, and that he was run down and killed by a freight train on which there was no headlight, and which gave no signal of its approach, defendant's negligence should have been submitted to the jury, and a nonsuit was improperly granted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

2. APPEAL AND ERROR (§ 927*)—REVIEW—APPEAL FROM NONSUIT.

On appeal from a nonsuit, the evidence must be taken in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3753, 4024; Dec. Dig. § 927.*]

3. RAILROADS (§ 362*)—OPERATION OF TRAINS—EQUIPMENT—HEADLIGHTS.

Under Laws 1909, c. 446, requiring railroad locomotives to carry an electric headlight at night, the failure to do so is unlawful, and constitutes negligence per se.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1245, 1247, 1248; Dec. Dig. § 362.*]

Appeal from Superior Court, Alamance County; Peebles, Judge.

Action by J. R. Shepherd, administrator, against the North Carolina Railroad Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

W. H. Carroll, of Burlington, for appellant. Parker & Parker, of Graham, for appellee.

CLARK, C. J. [1] This is an action for the wrongful death of plaintiff's intestate,

Lacy Shepherd. Upon the admissions in the answer and the uncontradicted testimony it appears that Lacy Shepherd died on the morning of February 20, 1911, from injuries sustained by him the night before on the track of the defendant at Elon College. He lived south of the railroad, and about a quarter of a mile west of the station. He was about 14 years of age, a student at Elon College, and was returning home from a Christian Endeavor meeting, which had been held in one of the college buildings some 200 yards north of the track. His usual crossing place going to and returning from the college to his home was at Main street immediately west of the depot building. On approaching this crossing on that night he found Main street blocked by a long freight train; the engine being near the depot building and the rear of the train extending westward. The engine was shifting cars upon the siding by lantern light. The plaintiff's intestate just before reaching the depot left his comrades and attempted to cross the railroad track at a point about 75 yards east of the said depot. There was evidence that he was knocked down and run over by the train which was going east from said station, the engine being without a headlight, and no signal of any kind being given to warn him of its approach. His left leg was cut off entirely. He was a bright young man, having perfect eyesight and hearing, and in good health and vigor. The testimony is uncontradicted that it was a dark, windy, cold, rainy night, and that the train was without a headlight, or light of any kind showing its approach, and that, without any warning or the ringing of a bell or the blowing of a whistle or otherwise, the train moved out from the depot, going east, and immediately after it had passed, the screams and cries of Lacy Shepherd were heard. Parties went immediately to him, and found him lying just north of the railroad track, and his foot was lying inside and just south of the north rail of said track. The place where the accident occurred is within the corporate limits of Elon College, and was very near two foot-paths or crossings, used by pedestrians living on the south side of the track going to and from the college buildings, which are on the north side of the railroad.

In *Heavener v. Railroad*, 141 N. C. 245, 53 S. E. 513, the court approved an instruction that if the defendant "was running its train through the corporate limits of the town of Concord and the track whereon the train was running was much used by the public, both in crossing the track and walking on it, and the jury should further find that on the night alleged it was running its train at a rapid rate, without any headlight or other proper signal, and while so running ran over and killed the intestate; and if the jury should further find from the evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that if there had been a proper light on the engine, or if the bell had been ringing, the intestate would have had notice of the approaching train in time to escape the danger, and that the plaintiff by reason of not having such notice or warning was injured—then such failure to have the headlight or other proper signal was continuing negligence, and would be the proximate cause of the injury.” That case cites *Stanley v. Railroad*, 120 N. C. 514, 27 S. E. 27, in which the defendant was held liable where the intestate was walking at night on the railroad track and was killed by being struck by a train which carried no light and gave no signal, and that it was error to instruct the jury that plaintiff could not recover if his intestate could have discovered the train by ordinary watchfulness and precaution, and by using his senses, since the failure of the defendant’s train to carry a light was a continuing negligence and the proximate cause of the injury. *Stanley v. Railroad*, supra, has been cited in many cases; see citations in *Anno. Edition*. *Heavener v. Railroad*, supra, has been cited with approval in *Morrow v. Railroad*, 147 N. C. 627, 61 S. E. 621, which held that it was evidence of negligence on the part of defendant if “the plaintiff, when he was injured, was where people in the vicinity were accustomed to walk, and under the circumstances he was entitled to notice of the approach of the train if there was no headlight and it was so dark that he could not see it in time to leave the track” (citing *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953; *Heavener v. Railroad*, 141 N. C. 245, 53 S. E. 513). It has also been cited in *Allen v. Railroad*, 149 N. C. 258, 62 S. E. 1079, and *Hammett v. Railroad*, 157 N. C. 322, 72 S. E. 1077, which held that the defendant company was negligent where the intestate was killed by a freight train backing along its track “on a dark night, without signals or warning,” and without light on the rear car.

Here the train was going forward, but as there was evidence that there was no light on the engine, and no signal given, the law applicable is the same.

[2] This being a nonsuit, the evidence must be taken in the light most favorable to the plaintiff. *Cotton v. Railroad*, 149 N. C. 229, 62 S. E. 1093. But indeed there was no conflicting testimony. The evidence was that, his way home being blocked by a long freight train, the intestate, a bright and intelligent young man, was struck and fatally injured by the defendant’s train about 75 yards east of the depot building, being at the time at or near a well-known and much-used crossing for pedestrians; that he was evidently on his way home, and was going the best and nearest route to get there under the circumstances; that it was a dark, rainy night, and that he was run down and killed by a freight train on which there was

no headlight, and by which no signal of any kind was given of its approach. Among the numerous cases to sustain the proposition that this was negligence can be cited, in addition to those already quoted, *Holman v. Railroad*, 159 N. C. 44, 74 S. E. 577; *Whitesides v. Railroad*, 128 N. C. 229, 38 S. E. 878; *Powell v. Railroad*, 125 N. C. 370, 34 S. E. 530; *Cox v. Railroad*, 123 N. C. 604, 31 S. E. 848; *Fulp v. Railroad*, 120 N. C. 525, 27 S. E. 74; *Pickett v. Railroad*, 117 N. C. 637, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611.

In *Snipes v. Railroad*, 152 N. C. 42, 67 S. E. 27, the court says: “It is well established that the employees of a railroad company engaged in operating its trains are required to keep a careful and continuous outlook along the track, and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of this duty.” How could this duty be performed in the nighttime in the absence of a headlight? To the same effect, *Guilford v. Railroad*, 154 N. C. 607, 70 S. E. 393; *Edge v. Railroad*, 153 N. C. 214, 69 S. E. 74; *Sawyer v. Railroad*, 145 N. C. 29, 58 S. E. 598, 22 L. R. A. (N. S.) 200; *Arrowood v. Railroad*, 126 N. C. 629, 36 S. E. 151.

“Where the plaintiff’s intestate was killed by the engine of the defendant while backing on a dark night over a crossing, without light, signals, or other warning, in a thickly settled community, a clear case of negligence is made out, and without other evidence the question of contributory negligence does not arise.” *Gerringer v. Railroad*, 146 N. C. 32, 59 S. E. 152 (in which the concurring opinion calls attention to the statute authorizing the abolition of grade crossings and the necessity of doing so); *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953; *Stanley v. Railroad*, 120 N. C. 514, 27 S. E. 27; *Mayer v. Railroad*, 119 N. C. 758, 26 S. E. 148; *Lloyd v. Railroad*, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764.

It is a reasonable inference upon this evidence that if the train had been supplied with the proper headlight the plaintiff’s intestate would most likely have seen its approach in time to have saved himself, or the engineer could have stopped the train in time to have saved his life, especially as the train was just pulling out, and could not have attained a very high rate of speed. If the train could have been stopped in time, it was negligence not to have done so. *Sawyer v. Railroad*, 145 N. C. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200; *Baker v. Railroad*, 144 N. C. 36, 56 S. E. 553.

[3] The statute (Laws 1909, c. 446) now requires every engine of the defendant to carry an electric headlight at night, and failure to do so was unlawful and per se negligence. This of itself entitled the plaintiff to have this case submitted to the jury. Even prior to the statute, failure to carry a headlight

was held to be negligence. *Willis v. Railroad*, 122 N. C. 909, 29 S. E. 941, and cases there cited and citations thereto in Anno. Ed.

This case differs from *Royster v. Railroad*, 147 N. C. 351, 61 S. E. 179, relied on by the defendant, because in that case the plaintiff stepped "in front of a train known to be approaching." It also differs from the other two cases cited by the defendant (*Beach v. Railroad*, 148 N. C. 153, 61 S. E. 664, and *Exum v. Railroad*, 154 N. C. 410, 70 S. E. 845, 33 L. R. A. [N. S.] 169), in that in those cases the deceased were killed in the daytime while walking on the track, and there was evidence that they did not look and listen for the approaching train.

The judgment of nonsuit must be reversed.

DOOLEY v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. COURTS (§ 97*)—RULE OF DECISION.

In construing a federal statute the state Supreme Court is bound by the construction placed thereon by the Supreme Court of the United States in so far as it has construed the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.*]

2. DEATH (§ 31*)—FEDERAL EMPLOYERS' LIABILITY LAW—RIGHT TO RECOVER—DEPENDENCY OF PLAINTIFF.

Federal Employers' Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), provides that every interstate carrier shall be liable in damages to any person suffering injury while employed by such carrier or, in case of death, to his personal representative for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents, and, if none, of the next of kin dependent upon such employé, for such injury or death resulting from the company's negligence. The act was amended by Act April 6, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), by adding section 9, which provides that any right of action given by the act to a person suffering injuries shall survive for the benefit of the surviving widow or husband and children, and, if none, then of the employé's parents, and, if none, then of the next of kin dependent upon such employé. *Held*, that a father may recover for the wrongful death of an adult son merely by proving a reasonable expectancy of pecuniary benefit from the son without showing that he was dependent upon the son; proof of dependency being required only when the recovery is for the benefit of the next of kin.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 40-43, 71; Dec. Dig. § 31.*]

3. DEATH (§ 75*)—ACTION—SUFFICIENCY OF EVIDENCE—EXPECTATION OF PECUNIARY BENEFIT.

In an action by a father under the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), for damages for the negligent death of his son while employed on an interstate railroad, evidence held to sustain a finding that plaintiff had a reasonable expectation of

pecuniary benefit from the continuance of the life of his son.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 154-177; Dec. Dig. § 75.*]

4. DEATH (§ 86*)—DAMAGES—AMOUNT—FEDERAL EMPLOYERS' LIABILITY ACT.

The damages recoverable by a parent for the negligent death of a son under the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), are limited to such loss as results to the parent because of being deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the employé.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 182; Dec. Dig. § 86.*]

Appeal from Superior Court, New Hanover County; Justice, Judge.

Action by J. T. Dooley against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Reversed for new trial in part.

This is an action brought under the federal Employers' Liability Act of 1908, as amended in 1910, to recover damages for wrongful death.

The first section of the act of 1908 is as follows: "Section 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The amendment of 1910 leaves this section as it is in the original act and adds a new section to the act as follows: "Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury."

The plaintiff's intestate was 23 years of age at the time of his death, was unmarried, and left surviving him a father and mother. The evidence shows that he was a young man

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of good character and good habits, and that he was strong, healthy, and industrious.

The father testified as follows: "I am foreman for the Tidewater Power Company, rack work and trestle work. I think I have been employed there now about 12 years and am constantly employed. I get fair wages, \$100 a month. At present I am not dependent on my son, but I might be in a few years. At present I would be glad to get whatever help I can get. I was not dependent on my son at the time of his death. He never did leave me, but I think he was about 21, as well as I remember, when he began to work for himself. He went to work for the Seaboard at Monroe. His age had nothing to do with his leaving though. Up to the time he was 21, he gave me money when I needed it. If I happened to be short, he would help me sometimes; if I needed money, he would give it to me, the last cent of it. He could not come home but about every six months. Possibly he would come home in a space of about three months; I am not sure about that. He had to come when they let him off."

His honor charged the jury on the measure of damages that: "The measure of damages for loss of life of plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting his net gross income and then estimating the present value of the accumulation from such net income, based upon this expectation of life." The defendant excepted. The defendant moved to nonsuit the plaintiff upon the ground that it was neither alleged nor proven that the father and mother were dependent on the son. The motion was overruled, and the defendant excepted.

J. D. Bellamy & Son, of Wilmington, for appellant. J. O. Carr, of Wilmington, for appellee.

ALLEN, J. (after stating the facts as above). The appeal presents two questions for decision: (1) Can an action be maintained for the benefit of the father under the federal Employers' Liability Act for the wrongful death of an adult son, without alleging and proving that the father was dependent on the son? (2) If the action can be maintained, did his honor instruct the jury correctly as to the measure of damages?

[1] Both questions would be answered in the affirmative if we were dealing with an action under the statute of this state, but the action is brought under the federal statute, and in so far as it has been construed by the Supreme Court of the United States we are bound by that construction.

[2] We are referred by counsel for the defendant to three recent decisions of that court, which he insists support his position that dependency must be alleged and proven in all cases. *Mich. Cent. R. R. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417; *Am. R. R. Co. v. Didricksen*, 227 U. S. 145,

33 Sup. Ct. 224, 57 L. Ed. 456; *Gulf, Col. & Santa Fé R. R. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785.

The question was not raised or decided in either case that the word "dependent" in the first section of the act of 1908 refers to the beneficiaries named in the statute as well as to the next of kin; and, while expressions appear to the effect that it was the purpose of the act to give a right of action to dependent relatives, it is distinctly held that the right of action exists in favor of those named in the statute, other than the next of kin, if there is a reasonable expectation of pecuniary benefit from the continuance of life, although prospective.

In the *Vreeland* Case, which was an action for the benefit of the wife on account of the death of her husband, the court says: "The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. * * * The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, according as the action is brought for the benefit of the husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled."

In the *Didricksen* Case: "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employé,"—and this language is approved in the *McGinnis* Case.

It would seem, then, that the construction placed upon the act by the Supreme Court of the United States is that the action may be maintained in behalf of widow, or husband, or children, or parents upon proof of a reasonable expectation of pecuniary benefit, and that, when it is for the benefit of others as next of kin, there must be proof of dependency.

It may be doubted whether the courts should limit and qualify the right of action for the benefit of the widow, etc., when the statute does not do so, and when the effect is to narrow the scope of the act passed for the protection of employés, so that under this construction in most cases the amount of recovery will be greatly reduced, and in many it will be nominal, but, however this may be, the language will not permit the construction that the word "dependent" relates to any of the beneficiaries except the next of kin.

In the first section, after declaring the liability of the employer to the injured employé, it adds: "Or, in case of the death of such employé, to his or her personal representa-

tives, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death," etc.

The beneficiaries are divided into three classes, and it is only when there is no one belonging to the first and second classes that an action may be maintained in behalf of more remote relatives, next of kin, and they must be dependent. If, then, the parent may maintain an action for the wrongful death of his son, although not dependent, if he has a reasonable expectation of pecuniary benefit from the continuance of his life, what is the meaning of this phrase, and how may the fact be proven?

We follow the precedent set by Mr. Justice Lurton, who said in the *Vreeland Case*: "The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act"—and who had recourse to the decisions upon the English statute and upon like statutes in different states to ascertain the meaning of the federal statute.

One of the earliest cases by the English court is *Franklin v. South Eastern R. R. Co.*, 4 Hurl. & N. 511, in which Pollock, judge, says: "It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants, had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and, if so, to what extent, were the questions left in this case to the jury. The proper question, then, was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and in fact he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that the actual benefit should have been derived; a reasonable expectation is enough; and such reasonable expectation might well exist, though, from the father not being in need, the son had never done anything for him." This case was approved in *Dalton v. S. E. Railway Co.*, 4 C. B. N. S. 303, and the latter case was cited with approval by Lord Haldane, during

the present year, in *Taff Vall Ry. Co. v. Jenkins* (1913) A. C. 1, in which he says: "The action is brought under Lord Campbell's Act by the father on behalf of himself and the mother for damages for the loss of the daughter. Now we have heard a good deal of authority cited as to what the foundation of such an action is, but I do not think there is much difficulty in coming to a conclusion as to the principle which underlies those authorities. The basis is not what has been called solatium (that is to say, damages given for injured feelings or on the ground of sentiment) but damages based on compensation for a pecuniary loss. But this loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition, either in statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them. As regards the judgment in the court below, I have already indicated that in my view the real question is that which *Willis, J.*, defines in one of the cases quoted to us, *Dalton v. South Eastern Ry. Co.* (1): 'Aye or no, was there a reasonable expectation of pecuniary damages?'"

These English cases decide that an action may be maintained for the benefit of the parent for the wrongful death of an adult son, when there is a reasonable expectation of pecuniary benefit from the continuance of the life of the son, and that it is not necessary to prove that the son has contributed to the support of the parent in order to establish such reasonable expectation, and the American authorities support the same position.

In *Tiffany on Wrong. Death* (2d Ed.) § 159, the author says: "The loss which a man suffers by the death of a relative may be the loss of something which he was legally entitled to receive, or may be the loss of something which it was merely reasonably probable he would receive. The first description of loss is principally confined to a husband's loss of his wife's services, a wife's loss of her husband's support and services, a parent's loss of the services of a minor child, and a minor child's loss of the support of a parent. But the statutes do not confine the benefit of the action to husbands, wives, minor children, and parents of minor children; and hence a person entitled to the benefit of the action may recover damages for the loss of a pecuniary benefit to which he was not legally entitled, but which it is reasonably probable he would have received except for the death. The second description of loss includes the loss by the beneficiary of any pecuniary benefit which he might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable

that the deceased would have added to his estate had he lived out his natural life, and which the beneficiary would probably have received by inheritance. Thus the second description of loss may be divided into (1) losses of prospective gifts, and (2) losses of prospective inheritance. The loss sustained by a husband, wife, minor child, and parent of a minor child may be of both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative can only be of the latter description." The following cases, among others, support the text: *Greenwood v. King*, 82 Neb. 22, 116 N. W. 1128; *Hillebrand v. Stan. Bis. Co.*, 139 Cal. 236, 73 Pac. 163; *Dukeman v. Railroad*, 237 Ill. 108, 86 N. E. 712; *Railroad v. Kindred*, 57 Tex. 498; *Hopper v. Railroad*, 155 Fed. 277, 84 C. C. A. 21.

In the last case (*Hopper v. Railroad*) the action was brought in Colorado for the benefit of the father for the wrongful death of his daughter, 19 years of age, but an adult under the laws of Colorado, who had never contributed to the support of the father, and Mr. Justice Van Devanter, then Circuit Judge, said: "Another reason assigned by the Circuit Court for directing a verdict for the defendant was that there was no evidence of any pecuniary injury to the plaintiff from the death of the daughter. In substance, the evidence was as follows: When the deceased was two years old, the mother died at the family home in Texas and shortly thereafter the child was taken by the father to an aunt near Greenfield, Mo., with whom she lived until she was 16. He then sent her to a school at Parkville, Mo., that she might prepare herself for teaching, and he paid the expenses incident thereto. She had been in this school three years and was on a visit to a sister in Colorado when she met her death. She was sympathetic, ambitious, industrious, of good health, fond of her father, and wanted to keep house for him, but had not as yet rendered any service to him or made any contribution to his support. After the mother died, the father continued to reside in Texas, but broke up housekeeping. He was chiefly engaged as a traveling machinist, and sometimes as a farm laborer; his earnings being about \$50 per month. He had not married again, and was 60 years old. Considering this evidence in the light of natural influence or prompting of filial ties, we think it would have sustained a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter. *Pierce v. Connors*, 20 Colo. 178, 182, 37 Pac. 721, 46 Am. St. Rep. 279; *Gibson, etc., Co. v. Sharp*, 5 Colo. App. 321, 327, 38 Pac. 850; *Swift & Co. v. Johnson*, 71 C. C. A. 619, 138 Fed. 887 [1 L. R. A. (N. S.) 1161]."

The evidence meets fully this rule of the English and American courts. The deceased was, according to the evidence, strong, healthy, intelligent, and industrious, and he was a young man of good habits and good character. He had helped the father and was so disposed to him that he would give him his last cent if the father needed it, and the father was growing old, and, while not actually dependent on the son for support at the time of death, he did not know how soon he might be.

[3] This furnishes sufficient evidence to sustain a finding that the father had a reasonable expectation of pecuniary benefit from the continuance of the life of the son, and the motion for judgment of nonsuit was therefore properly denied.

We do not think the amendment of 1910 affects this action one way or the other, and we forbear discussing it further than to say that it does not purport to deal with any causes of action except those given by section 1, and that it declares that "the right of action given by this act to a person suffering injury shall survive."

[4] The rule for the assessment of damages laid down by his honor, while following the decisions of this court in the construction of Lord Campbell's Act, is erroneous as applied to the Federal Employers' Liability Act, as construed by the Supreme Court of the United States. In *American R. R. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, that court says: "The cause of action which was created in behalf of the injured employé did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employé from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employé. The damage is limited strictly to the financial loss thus sustained." This language was quoted with approval in *Railroad v. McGinnis*, 228 U. S. 175, 33 Sup. Ct. 427, 57 L. Ed. 785, and the court adds in the last case: "In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employé for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss."

There must therefore be a new trial on the issue of damages.

Partial new trial.

McCONNELL v. NEW YORK CENT. & H. R. R. CO. et al.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. CARRIERS (§ 177*)—TRANSPORTATION OF GOODS—ORAL CONTRACT—DAMAGES—CARRIER'S LIABILITY.

Where an initial carrier agreed, for consideration, to carry plaintiff's goods from point of shipment to destination under an oral contract, and such arrangement required transportation of the goods over the lines of other carriers, to be selected by defendant, it was liable as an insurer for injuries to the goods resulting on its own line or that of connecting carriers so selected.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.*]

2. CARRIERS (§ 177*)—CONNECTING CARRIERS.

At common law carriers are not bound to carry beyond their own line, but by special contract to transport the goods to destination over the lines of connecting carriers they may subject themselves to liability over the whole route.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.*]

Appeal from Superior Court, Moore County; Adams, Judge.

Action by S. P. McConnell against the New York Central & Hudson River Railroad Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This action was brought to recover damages for injury to a car load of household goods, shipped by plaintiff from Oscawana, N. Y., to Carthage, N. C. The goods were shipped under an oral contract for their transportation from the beginning to the end of their journey and their delivery at the terminal point to the consignee. The goods were damaged during the transit, as the jury find, by the negligence of the defendant in transferring them from its car, in which they had been originally and carefully packed, to a car of a connecting line, and also by the careless manner of stowing or arranging them in that car. Defendant alleges that they were shipped under a written contract of carriage, with a specified valuation clause inserted in consideration of a reduced charge or toll for the carriage, it being \$10 per 100 pounds, and other stipulations restricting its liability for loss from negligence to its own line or its portion of the through route, and also in other respects, but they need not be dwelt upon, as the decision of the case will turn upon other matters. After the goods had arrived at their destination, plaintiff signed a bill of lading and placed it among the claim papers, as he said, by inadvertence, not meaning thereby to change the contract of shipment, which contained no clause of limitation as to liability or value in case of loss, and that this paper was not signed by him until after the goods arrived in Carthage; that he did not know how this bill got into his files, and he signed it not knowing what it was and by accident or mistake

in making up his claim papers. The following is the verdict of the jury: "(1) Did the plaintiff deliver to the defendant for transportation from Oscawana, N. Y., to Carthage, N. C., a car load of furniture and household goods, as alleged in the complaint? Answer: Yes (by consent). (2) If so, were said furniture and household goods damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes. (3) Did plaintiff and defendant make a written contract for the transportation of said property, as alleged in the answer? Answer: No. (4) What damages, if any, is the plaintiff entitled to recover? Answer: \$2,671, with interest from September, 1911." Judgment was entered upon the verdict, and defendant appealed.

W. H. Neal, of Laurinburg, for appellants.
U. L. Spence, of Carthage, for appellee.

WALKER, J. (after stating the facts as above). The decision of this appeal turns upon the question as to what was the contract of the parties.

[1] If the defendant undertook, for a consideration, to carry the goods from Oscawana, N. Y., to Carthage, N. C., and safely deliver them there, without restriction and with no release of its common-law liability, the defendant is undoubtedly answerable to the plaintiff for actual damage to the goods. His liability is that of an insurer, with certain well-defined exceptions. Hutchinson on Carriers (3d Ed.) § 265 (section 170a), says: "The liability of the common carrier by law is, as has been seen, an unusual and extraordinary one, based upon considerations of public policy which have survived the wonderful change in the circumstances under which they first arose. By that law the common carrier is regarded as a practical insurer of the goods against all losses of whatever kind with the exception of (1) those arising from what is known as the act of God, and (2) those caused by the public enemy; to which in modern times have been added (3) those arising from the act of the public authority, (4) those arising from the act of the shipper, and (5) those arising from the inherent nature of the goods." *Currie v. Railroad*, 156 N. C. 432, 72 S. E. 493. But there was evidence of negligence on the part of the defendant, which was properly submitted to the jury, and they found that the goods had been damaged by its negligence, so that the question of its common-law liability is not important. The serious and vital question arose upon the issue as to damages; plaintiff contending for full damages, and the defendant for an assessment according to the terms of the bill of lading. The court instructed the jury to find whether the goods were shipped under the unlimited oral contract or under the contract as evidenced by the bill of lading, and in a charge which was full and explicit up-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on this point, and exceedingly clear and forceful, and, we may add, very fair to the defendant and as favorable as it was entitled to ask or could expect, the court explained the issue thus squarely made by the parties, and the jury have found that the contract was as stated by the plaintiff, oral and unrestricted, and was not the one contained in the bill of lading. It was conceded by learned counsel for the defendant (who presented its side of the case with his usual ability and precision, confining himself to the vital issue of the case) that no particular form or solemnity of execution is required for a contract of the carrier to transport goods. It may be by parol, or it may be in writing. *Railway Co. v. Patrick*, 144 Fed. 632, 75 C. C. A. 434; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Hutchinson on Carriers* (3d Ed.) § 411 (242); *Berry v. Railroad*, 122 N. C. 1003, 30 S. E. 14. In *Railway v. Patrick*, supra, the court says: "It (the contract of shipment) may be orally made, and when so made, in the absence of fraud or imposition, it is as obligatory upon both the shipper and carrier as a written one. The difficulty generally arises in establishing its terms by parol, but, when once established, it determines the rights and obligations of the parties, except as affected by statutory law, as conclusively as if it had been in writing and in the accepted form of a negotiable bill of lading."

As the jury have found that the parties contracted orally, and not according to the usual terms of bills of lading issued by the defendant, which limited its liability and presented a rule for assessing the damages in case of a loss, we are not called upon to comment upon the course of decision in this court as to the validity of stipulations in bills of lading, used in interstate commerce, restricting the recovery of damages to an appraised value at the initial point where the contract was made; nor need we discuss the effect of recent decisions in the Supreme Court of the United States upon that question (*Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314), which were mentioned in the charge of the court. We simply determine the rights of the parties according to the oral contract, which the jury have found to be the true one, and not to have been altered in any way or waived by what afterwards transpired. At the present term, in *Smith v. Railway Co.*, 79 S. E. 433, we have dealt with the question involved in this case, though not upon the same facts. That case resembled more in its main features *Railway v. Patrick*, supra, where the Court of Appeals of the Indian Territory (affirmed by the higher court) said: "But the paper issued and denominated a bill of lading in the case at bar was never signed by the carrier, and by reason of that fact it was not a bill of lading, and consequently the pretended limitation of liability stated therein

was not binding on the appellee, and none of its provisions were binding on either the carrier or the shipper. Therefore there is no evidence that any verbal or written contract was made between the parties, limiting the common-law liability of the carrier." But the principle of the cases is the same.

It having been determined that the goods were shipped under the oral contract to transport and deliver without any restrictive features, the defendant is liable for the injury to the goods, according to the principles of the common law, as an insurer. *Mitchell v. Railroad*, 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; *Hinkle v. Railroad*, 126 N. C. 982, 36 S. E. 348, 78 Am. St. Rep. 685. It was said in *Mitchell's Case*, supra: "It is the duty of a common carrier, irrespective of contract, but subject to reasonable regulations, to accept, safely carry, and deliver all goods intrusted to it. If the goods are lost, it must show what became of them, and, if they are damaged, it must prove affirmatively that they were damaged in some way that would relieve it from responsibility. The plaintiff has a prima facie case when he shows the receipt of the goods by the carrier, and their non-delivery or delivery in a damaged condition. Any further defense is in the nature of confession and avoidance. If the defendant pleads exemption by virtue of a special contract, it must prove the contract and show that the loss or damage comes within some one of the exceptions. It must appear to the court as matter of law that the contract is *reasonable* in all of its essential features, and that the exemptions are not contrary to public policy. All such exemptions, being in derogation of common law, should be strictly construed." *Currie v. Railroad*, 156 N. C. 432, 72 S. E. 493.

Without deciding the question, it may well be doubted whether an agreement to waive or discharge the original contract by parol and substitute another for it, which is made after the loss had accrued or after breach, would be binding on the plaintiff, where not founded upon a new consideration. *Hutchinson on Carriers* (3d Ed.) § 412 (243); *The Delaware v. Oregon Iron Co.*, 14 Wall. (U. S.) 603, 20 L. Ed. 783, and cases cited; *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360.

In the absence of any exemption in the contract from its common-law liability, we must hold that defendant was an insurer, who is liable in all events and for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in its contract, whether oral, or written in the form of a bill of lading. *The Delaware v. Oregon Iron Co.*, 14 Wall. 597, 20 L. Ed. 779. This is said by Justice Clif-

ford, in that case, to be the best description of a carrier's obligation.

[2] Something was said in the argument as to the Carmack amendment to the Hepburn Act of June 29, 1909 (34 Stat. at Large, 584, c. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), providing that, where goods are received for shipment in interstate commerce, the initial carrier shall be liable for damages caused by itself or a connecting carrier, and making void any contract of exemption against such liability, but allowing the initial carrier to recover over against the connecting carrier, on whose line the loss or damage occurred, the amount thereof. We need not decide whether that act is applicable to the facts of this case, as defendant agreed by its oral contract to carry the goods and deliver them at Carthage, choosing its own intermediate agents or connecting lines for the purpose. At common law, carriers are not bound to carry except on their own lines, but they may, by special contract, subject themselves to liability over the whole course of transit. *Railroad Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; 3 Enc. of U. S. Supreme Ct. Reports, p. 610, and notes. They thus extend their route with the help of others, and their position is the same as to liability for negligence as if the course and means of transportation employed were all their own. *Railroad Co. v. Railroad Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291. In this case, though, the jury have found, when the verdict is interpreted in the light of the pleadings, evidence, and the charge of the court, that defendant's own negligence caused the damage to the goods.

We have discovered no error in the trial or in the record.

No error.

GIBSON et al. v. BOARD OF COM'RS OF SCOTLAND COUNTY.

(Supreme Court of North Carolina. Nov. 12, 1913.)

ELECTIONS (§ 106*)—REGISTRARS—FAILURE TO ADMINISTER OATH.

The fact that the registrar of elections did not administer an oath to any of the electors whose names were registered in the register book would not invalidate an election to determine whether a school tax should be levied, in the absence of fraud or improper motive.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 103; Dec. Dig. § 106.*]

Appeal from Superior Court, Scotland County; Webb, Judge.

Injunction suit by R. D. Gibson and others against the Board of Commissioners of Scotland County. From a judgment dissolving a temporary injunction, plaintiffs appeal. Affirmed.

This is an action in behalf of certain citizens and taxpayers to restrain the levying of a tax for schools in Rockdale public school district, upon the ground that no legal election authorizing the tax has been held. The General Assembly, at its session of 1913, passed an act (Priv. Laws 1913, c. 347), which was ratified on the 6th day of March, 1913, creating Rockdale public school district in Scotland county, and directing an election to be held upon the question of levying a tax to support the schools in said district. The county commissioners of Scotland county, pursuant to the act, ordered the election, and directed that a new registration of voters be had. The election was held, and a majority voted in favor of the tax, and the vote was properly canvassed and returned, and the result of the election declared. At the hearing of the motion to continue the temporary restraining order to the hearing, his honor found the following facts as to the registration of voters, which are not disputed: "That the registrar did not administer any oath to any one of the 122 voters whose names were entered in said registration book, but he did examine each and every one as to his qualifications to register for said election. That no one of the said voters whose names were entered on the registration book offered to be sworn or requested the registrar to administer any oath to him. That the registrar would have administered an oath to any or all the applicants for registration had they requested him to do so. That no voter within the said school district who had the right to register for said election was denied the right to register and vote in said election. That each and every one of the 122 voters whose names were entered in the registration book had the right to qualify and register for said election. That the election was held at the time and place designated in the order of the board of county commissioners. That the registrar and judges canvassed and judicially determined the results of said election and certified the same to the board of county commissioners at a regular meeting of said board, and the said results were by order of the said board of county commissioners recorded in the office of the register of deeds of Scotland county. That the said results as certified and recorded set forth that there were 122 registered electors in said election. That of these 65 cast their ballots in favor of the school and the tax levy, and the remaining 57 were counted in the results of said election against the school and the tax levy, and that a majority of the qualified electors in said election cast their ballots in favor of the school and the tax levy." The motion of the plaintiffs was denied, the temporary restraining order dissolved, and the plaintiffs excepted and appealed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Cox & Dunn, of Laurinburg, for appellants.
E. H. Gibson and Jonathan Peele, both of
Laurinburg, for appellee.

ALLEN, J. Several irregularities in the registration of voters appear in the record, but counsel for the plaintiffs properly admit that none of them are sufficient to vitiate the election unless the failure to administer an oath to those offering themselves for registration has this effect. The question is important, presenting as it does on one hand the possibility of admitting as voters those not legally qualified, if the requirements of the law are not observed, and on the other making it possible for registrars, by neglect or fraud, to disfranchise an entire electorate. In this case there is no evidence of any improper motive on the part of the registrar or of any of the officers connected with the election, but the principle declared cannot be confined to this case, and will be authority in many others.

We have given the question careful consideration, and have concluded, in the interest of a free and full expression of the popular will, to abide by the precedent heretofore established in this court, and to sustain the election.

In *Quinn v. Lattimore*, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797, it was held that the requirement as to the administration of an oath to the elector before registration was directed to the registrar, and that "where a registrar of election registers a person entitled, under the Constitution and laws to vote, but through inadvertence or fraud fails to administer the oath required to be administered, such person shall not be for that reason deprived of his vote." It is true that in the *Lattimore* Case all the names on the registration books were not involved, as in this case; but, if the principle is admitted as to one voter, it must logically apply to all.

In 15 Cyc. 307, the author adopts the doctrine of this case, and says: "Statutes prescribing the mode of proceeding of public officers are regarded as directory unless there is something in the statute which shows a different intent. Hence as a general rule a statute prescribing the powers and duties of registration officers should not be so construed as to make the right to vote by registered voters depend upon a strict observance by the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of suffrage liable to be defeated, without the fault of the elector, by the fraud, caprice, ignorance, or negligence of the registrars; for if an exact compliance by these officers with all statutory directions should be deemed essential to the right of an elector to vote, elections would often fail, and electors would be deprived without their

fault of an opportunity to vote. A constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the Constitution of the state and that of the United States is directed to the registrars and to them alone; and if they through inadvertence register a qualified voter, who is entitled to register and vote, without administering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers."

We therefore hold that the election was valid, and that the restraining order ought to have been dissolved.

Affirmed.

IN RE SMITH'S WILL

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. APPEAL AND ERROR (§ 690*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—ADMISSIBILITY OF EVIDENCE.

Assignments of error to the exclusion of evidence cannot be considered, where the record does not disclose what the witnesses would have testified to, or what was proposed to be proven.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

2. APPEAL AND ERROR (§ 901*)—REVIEW—PRESUMPTIONS—BURDEN OF SHOWING ERROR.

Error in the rulings of the trial court will not be presumed, and appellant must not only show error, but he must make it appear plainly.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1771, 3670; Dec. Dig. § 901.*]

3. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE OF FACTS.

Questions asked witnesses were properly excluded, where it appeared that the witnesses did not have the requisite knowledge of the facts to answer them.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

4. WITNESSES (§ 245*)—EXAMINATION—QUESTIONS ALREADY FULLY COVERED.

Questions which were fully covered by previous answers of the witness were properly excluded.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.*]

5. APPEAL AND ERROR (§ 690*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—ADMISSIBILITY OF EVIDENCE.

Where the time to which proposed evidence related was material to its pertinency, assignments of error to the exclusion of such evidence cannot be considered, where the record does not show the time to which it related.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

6. APPEAL AND ERROR (§ 690*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—ADMISSIBILITY OF EVIDENCE.

Assignments of error to the exclusion of a certain record from the evidence cannot be considered, where its contents are not suffi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ciently stated to permit the appellate court to pass on its admissibility.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

7. WILLS (§ 53*)—RELEVANCY—PERSONAL STATUS AND CONDITION.

Where the issue was the competency to make a will a record of proceedings involving the testator's sanity, made some time after the execution of the will, was not in such reasonable proximity in point of time to the fact in issue as to have any tendency to establish the same.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.*]

8. EVIDENCE (§ 590*)—WEIGHT—INTEREST OF WITNESS.

While the testimony of an interested witness who is not biased by his interest, is entitled to the same weight as if he was not interested, such evidence is not necessarily entitled to the same weight as that of any other witness, as there may be other circumstances affecting the relative credibility of the witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439; Dec. Dig. § 590.*]

Appeal from Superior Court, Guilford County; Peebles, Judge.

Proceedings for the probate of a certain instrument as the will of W. R. Smith. From a judgment admitting the instrument to probate, the caveator, W. A. Smith, appeals. No error.

J. A. Barringer, of Greensboro, for appellant. King & Kimball, of Greensboro, for appellee.

WALKER, J. The caveators in this proceeding alleged that the paper writing, which had been propounded, was not the will of W. R. Smith, because at the time of its formal execution he did not have sufficient mental capacity to execute such an instrument. There was much evidence taken upon the issue joined between the parties, but it is not necessary to set out even the substance of it, as the exceptions principally relate to its competency.

[1] The caveators asked many questions, to which the propounders objected, and they were excluded, but we cannot sustain the assignment of error in respect to them, as it does not appear what the witnesses would have testified, or what was proposed to be proven. Before we can declare that there was an error committed in rejecting evidence, or if there was error, whether it was prejudicial, we, of course, must know what is the nature of the evidence, in order to ascertain whether it is competent and relevant. Besides, the witness may answer in such a way as to render the error perfectly harmless; for instance, that he has no knowledge of the matter inquired about, or he may give an answer which is entirely unfavorable to the party who asked the question, and perhaps other answers might be given, which would show that the error was not a prejudicial one. Suppose we should order a new trial because the judge excluded the question, "Do you know whether he was suffer-

ing with a disease?" and when the question was again put to the witness, he should answer it in the negative, it would at once appear that we had done a vain thing. Counsel should state what they expect to prove by the witness, if the question is objected to, unless the question itself gives sufficient indication of it, and even then there should be some probability shown that the witness will testify as expected.

[2] In *Dickerson v. Dall*, 159 N. C. 541, 75 S. E. 803, we said: "There is no statement as to the answer of the witness when the question was admitted, nor as to the evidence sought to be elicited when it was excluded; and, as we cannot see that the defendant has been prejudiced, the exceptions cannot be sustained. *State v. Leak*, 156 N. C. 643 [72 S. E. 567]." Appellant must show error; we will not presume it, but he must make it appear plainly, as the presumption is against him. *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892; *Lumber Co. v. Buhmann*, 160 N. C. 385, 75 S. E. 1008.

[3, 4] There is another class of objections in this case, where the judge properly excluded the questions, as it appeared that the witnesses did not have the requisite knowledge of the facts to answer them. *Berbarry v. Tombacher*, 162 N. C. —, 77 S. E. 412; *Aman v. Lumber Co.*, 160 N. C. 369, 75 S. E. 931.

Other questions were ruled out because they were fully covered by previous answers of the witness, which was proper. *Baynes v. Harris*, 160 N. C. 307, 76 S. E. 230.

[5] There are still others where the time to which they relate is not given, so as to show their pertinency or bearing upon the issue. The court must be able to see that the proposed evidence is both competent and relevant, and this is required by the rule just stated.

[6] Caveators offered a certain record in a proceeding, said to have involved the sanity of the testator, but the same reason for its exclusion applies as in the case of the objections above noted. We are not informed as to its contents, so that we can see its relevancy and give an intelligent opinion as to the validity of the exception now made to the ruling. We may add these authorities to those already cited upon the general question that the party asking the question, which is excluded, must disclose to the court what he expects to prove by the witness. *Overman v. Coble*, 35 N. C. 1; *State v. Pierce*, 91 N. C. 606; *Boney v. Railroad*, 155 N. C. 95, 71 S. E. 87; *Whitmire v. Heath*, 155 N. C. 304, 71 S. E. 313. The same rule prevails in other jurisdictions. In *re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144. We said in *Whitmire's Case*: "A court can never pass intelligently upon evidence unless it knows what the evidence is, in order that its bearing upon the issue may be determined. The defendant should have stated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

what he intended to prove; * * * otherwise the evidence should be excluded, not because it is incompetent, but because it cannot be seen to be competent. The court must judge of its competency and "materiality—not the witness. This is the well-settled rule, and is also the 'rule of reason.'" It also applies to papers and records offered in evidence, as will appear by reference to *State v. Pierce*, supra, and *Fulwood v. Fulwood*, 161 N. C. 601, 77 S. E. 763.

[7] If the record had any relevancy to the issue, the date to which it related was too remote for any legal bearing upon the case. There must, of course, be some rational connection between the two and some reasonable proximity in point of time, so that the proof that is offered will have, at least, some tendency to establish the fact embodied in the issue. *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851. Such was not the case here. The record was made some time after the date of the will.

[8] The only other assignment of error requiring attention is the one taken to the instruction that, in passing upon the testimony of interested witnesses, the jury may consider any bias they may have by reason of their relation to the parties or the cause, it being insisted that the court should have added that if the jury found that they were not influenced by their "bias," and that they are credible, "their testimony should have the same credit as that of any other witness," following *State v. Holloway*, 117 N. C. 732, 23 S. E. 168, and this view is earnestly pressed in the brief of counsel. The court was not specially requested to qualify its charge in the respect indicated. But we do not think it should have done so in this case, if the request had been made. If the jury had decided that the witnesses were not biased by their interest or relationship, they should not necessarily have received the credit due to other witnesses, and put upon an equality with them, as the credit to which they were entitled depended, not upon their bias or indifference alone, but upon other circumstances as well—as, for example, their intelligence and their appearance and deportment while on the stand; their character, whether good or bad; their means of knowledge; the probability of their story—these and other matters entered into the estimate of the value to be attached to the testimony of the witnesses, and the jury had the right to put them in the scales, in weighing the testimony, for the purpose of separating the true from the false and finally ascertaining where was the preponderance of the evidence. It may be proper for a judge to tell the jury "that if the witness is not biased by his interest, his testimony should have the same weight as if he was not interested," as said in some of the cases, for this is a truism, and a sensible jury would not overlook it. It is a proposition

that proves itself, but it does not mean that the witness shall occupy a position of equality with another who has a better character, more sense and knowledge of the facts, a stronger memory, superior judgment, and whose other qualities and advantages inspire the jury with greater confidence in his credibility. Speaking of the rule of the common law, whereby parties to and persons interested in the event of an action were disqualified, this court said in *Hill v. Sprinkle*, 76 N. C. 353: "For generations past and up to within the last few years, interest in the event of the action, however small, excluded a party altogether as a witness, and that upon the ground, not that he may not sometimes speak the truth, but because it would not ordinarily be safe to rely on his testimony. This rule is still applauded by great judges as a rule founded in good sense and sound policy. The parties to the action are now competent witnesses, but the reasons which once excluded them still exist, to go only to their credibility." We think that this change in the law of evidence was a wise and salutary one, but it did not abolish the other rules of evidence, and the jury should not be handicapped by an imperative instruction that, in the absence of bias of some who are interested, they should give credit to all the witnesses equally, as those who have had no interest may, in other respects and apart from any consideration of bias or impartiality, be more reliable. It is undoubtedly true that interest naturally produces bias, for we have been told that, "If *self* the wavering balance shake, it's rarely right adjusted"; but, notwithstanding this tendency of our nature and our frailty, the witness may resist the temptation which thus besets him and prove himself to be worthy of credit. *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684. If he is not in fact prejudiced by his relation to the cause or the parties, the jury may then consider whether there are other circumstances which impair the strength of his testimony, such as want of intelligence, character, knowledge of the facts, and so forth. The subject has so recently undergone discussion in this court that further comment is unnecessary. *Herndon v. Railway*, 162 N. C. —, 78 S. E. 287. See, also, *State v. Vann*, 77 S. E. 295, at the last term.

A careful examination of the entire case discloses no reversible error.

No error.

STATE v. SMITH.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. HUSBAND AND WIFE (§ 313*)—OFFENSES—ABANDONMENT—EVIDENCE.

Evidence held to sustain a conviction of a husband for willful abandonment of his wife

without providing adequate support for her and her child.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. § 313.*]

2. CRIMINAL LAW (§ 317*)—TRIAL—FAILURE OF ACCUSED TO TESTIFY.

Failure of the accused to testify in a criminal case should not be used against him, and should not be considered to his prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 732; Dec. Dig. § 317.*]

3. HUSBAND AND WIFE (§ 302*)—OFFENSES—“ABANDONMENT.”

“Abandonment” of a wife, in order to constitute an offense, must be willful, to wit, without just cause or excuse, unjustifiable, wrongful, and without her consent, and it must also appear that defendant has failed to provide adequate support for her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1100; Dec. Dig. § 302.*]

For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7559.]

4. HUSBAND AND WIFE (§ 305*)—ABANDONMENT—DEFENSES—OFFER OF HOME—GOOD FAITH.

Where a husband left his wife with intent not to return to her, and failed to provide adequate support, an offer to provide her a home in another city, not made in good faith, is no defense to a prosecution for abandonment.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1103; Dec. Dig. § 305.*]

5. CRIMINAL LAW (§ 1178*)—APPEAL—WAIVER OF ERROR.

An alleged error not argued in the brief will be deemed waived, as expressly provided by Supreme Court rule 84 (140 N. C. 666, 53 S. E. ix).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

6. CRIMINAL LAW (§ 1120*)—APPEAL—RULINGS ON EVIDENCE—RECORD.

Error, in receiving in evidence on a criminal prosecution a complaint in a civil action, would not be reviewed where the contents of the complaint was not set out in the record, so as to show prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

7. CRIMINAL LAW (§ 1169*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

Where, in a prosecution for wife abandonment, it was not disputed that defendant had actually abandoned his wife without adequate support, he was not prejudiced by the admission of evidence by the sheriff that he could not find him in the county when he attempted to serve his process.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

8. CRIMINAL LAW (§ 1169*)—RULINGS ON EVIDENCE—PREJUDICE.

Where, in a prosecution for wife abandonment, there was no dispute that accused had actually abandoned his wife and child without adequate support, and there was also ample evidence that he did not intend to return and support them, he was not prejudiced by the admission of a part of his answer in an action for divorce, which had been begun by his wife against him, but not tried.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

Appeal from Superior Court, Union County; Bragaw, Judge.

John A. Smith was convicted of abandoning his wife without providing adequate support for her and her child, and he appeals. Affirmed.

Adams, Armfield & Adams and Redwine & Sikes, all of Monroe, for appellant. The Attorney General, for the State.

WALKER, J. [1] This is an indictment against the defendant for abandonment of his wife without providing adequate support for her and their child, under Revisal § 3355. The evidence unfolds a very sad, but revolting, story of this unhappy marriage, caused by the persistent indifference of the defendant towards the prosecutrix and his constant neglect of her, which finally culminated in his desertion of his home and his refusal to perform his marriage obligations. He had seduced this woman before their marriage “with studied, sly, ensnaring art,” and pleaded scriptural authority for his betrayal of her and her consequent ruin. He went through the form of redeeming his promise, it is true, and married her, but with evident intent of dissolving the unhallowed union. He plied her with false and repeated accusations of infidelity to him, and refused to support her, in the studied execution of his preconceived design of breaking off their marital relations and forcing her to set him free by suing for a divorce. He saved himself from a prosecution for this seduction by the formal ceremony of marriage, for, so far as he is concerned, it really had no moral sanction. A child was born to them. Shortly after the marriage he began his persecution of his wife by baseless charges of her intimacy with other men, which he himself must have known were without foundation in fact. He proposed that he debauch himself so that she could get a divorce, and, failing in this, he indecently proposed that she do the same thing and give him grounds for severing the marital tie, adding that he would give her \$500 to release him in that way. He told her that he had a wife and children in Florida, but this was not true, and seems to have been said to frighten her into submission to his will. The jury might well have found from the evidence, not only that he deserted her willfully after the marriage, and failed to furnish her and their child an adequate support, but that he clearly intended, when he married her, to separate himself from her, and to add the crime of abandonment to that of antenuptial seduction, which she had condoned by the marriage, and which stood as a bar to his criminal indictment. She scornfully resented all of his immoral suggestions and wicked solicitations, and indignantly protested against his evil course towards her, which had grown from bad to worse. When

baffled by her steady refusal to defile herself for his vile purposes, or even to listen to his base proposals, he then tried to subject her to temptation, and offered a bribe for the purpose of placing her in a compromising position so that he could use the testimony of his accomplice against her virtue. But he again failed and finally offered to take her to a neighboring city to live, but she declined to go, as his previous treatment and his conduct had convinced her that he was not acting in good faith, after a change of heart and promise of repentance and reform, but solely for the purpose of removing her from the protection of her friends and family, and so isolating her that he might the more easily and successfully continue in his efforts to destroy her character out of the mouths of suborned witnesses of low degree, and, if the evidence is credible, she had good reason to think so and to take counsel of her fears. He complained of her extravagance when she had spent none of his money. For some weeks after the marriage they lived at her grandmother's home. The evidence shows that during this period as the Attorney General puts it, "he squandered on her the sum of 30 cents. Not being able to stand such excessive cost of living, the defendant made arrangements for him and his wife to live in the home of the wife's father. He carried his wife and all of their belongings to the father's home, but after 11 days, during which time he spent only one night with his wife, he moved his own things away, and has never lived with her since." He finally left for Florida, remaining away several months, and stating, while there, that he never expected to live with his wife again, and that the people at his home could do nothing with him, as, "if it got hot, he could go somewhere else and stay," and he repeated this declaration several times, and once admitted that he married the prosecutrix to get rid of trouble he had brought upon himself, alluding to his seduction of her.

[2] The defendant introduced no evidence, but this failure on his part to explain the damaging facts we have recited, and there are more of the same kind in the testimony sent up, cannot be used against him and should prejudice him in no degree.

[3] The abandonment must be willful; that is, without just cause or excuse—unjustifiable and wrongful. *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973; *State v. Toney*, 163 N. C. —, 78 S. E. 156. If she consented to the separation, his departure from her home and living apart from her would not be an abandonment. *Witty v. Barham*, 147 N. C. 479, 61 S. E. 372. There are two ingredients of this crime—abandonment and failure to provide adequate support for wife and child—and both must be alleged and proved. *State v. May*, 132 N. C. 1021, 43 S. E. 819. The state offered ample evidence to establish the completed offense.

[4] Defendant's offer to provide a home for his wife in Charlotte is no defense, if it was not genuine or made in bad faith. The court submitted this view of the case to the jury by fair, full, and correct instructions, and they found against the defendant. The verdict, in that particular, is well warranted by the evidence, and the defendant has alleged no error with respect to it.

[5, 6] He assigns in the case on appeal four errors: The first, as to the introduction of the complaint filed in a divorce suit brought by his wife, is abandoned, as it does not appear in his brief. Rule of this court No. 34 (140 N. C. 666, 53 S. E. ix); *Rogers v. Whiting Manufacturing Co.*, 157 N. C. 484, 73 S. E. 227. But if it was before us, we could not sustain it, as the contents of the pleading is not set out, and we, therefore, cannot see that the ruling was prejudicial. *State v. Pierce*, 91 N. C. 606; *Whitmire v. Heath*, 155 N. C. 304, 71 S. E. 313; *Fulwood v. Fulwood*, 161 N. C. 601, 77 S. E. 763. In *re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; In *re Smith's Will*, 79 S. E. 977, at this term.

[7] The second exception, which was taken to the testimony of the sheriff that he could not find defendant in the county when he attempted to serve his process, was only relevant upon the ground that there was evidence he was trying to evade the service and had absented himself. But in the view we take of the case, it is an immaterial fact, and was harmless. It was not disputed, either here or below, so far as appears, that defendant had actually abandoned his wife—that is, left her and his child without any adequate support—unless he was justified in so doing, which we have seen was not the case. The same may be said of the third exception relating to the same subject.

[8] The fourth exception, as to the introduction of part of the answer in the divorce suit, would give us some trouble if the record admitted by the court were at all essential as a link in the chain of evidence, but we think it is not, and if error there be, it is harmless. If material evidence is improperly admitted, there should, of course, be a reversal, even though there be enough, or an abundance, of other proof upon which the verdict could have been found for the State. *Church v. Hubbard*, 2 Cranch (U. S.) 187, 2 L. Ed. 249. A defendant is entitled in law to hear the particular accusation against him, to have the prosecution restricted to that accusation, and consequently the proof, and not to be convicted of any other offense than the one specially charged in the indictment. This is his natural and constitutional right. But there must be prejudicial and not merely theoretical error. Verdicts and judgments should not be lightly set aside upon grounds which show the alleged error to be harmless, or where the appellant could have sustained no injury from it. There should be at least something like a practical

treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. Hilliard on New Trials (2d Ed.) §§ 1 to 7. The motion should be meritorious and not frivolous. The commentators on New Trials, Graham and Waterman, volume 3, p. 1235, thus state the prevailing rule: "The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is not sufficient ground for a new trial. It does not necessarily involve loss of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress—for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury, otherwise the interference of the court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtain a new trial, he must incur additional expense, and if there is no corresponding benefit, he is still the sufferer. Besides, courts are instituted to enforce right and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly, and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit." Tried by this rule, we do not think any reversible error was committed. Defendant says that such evidence is forbidden by Revisal, § 493. "The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading." If defendant's construction of this statutory provision is conceded, we are yet of opinion there was no substantial error.

We do not see how the admission in the answer that defendant had sold his property and paid a part of his debts can have any material bearing upon the issue in this case, nor how the fact that he went to Florida and other places could have prejudiced him in his defense. It made no difference that he went to other states. The fact was not denied that he left his wife in this state before he went elsewhere, and it was immaterial to inquire as to his whereabouts afterwards. If the pleading was introduced to contradict defendant's admission therein by showing that he did not visit those places, we would order a new trial if we could see that he had been harmed by it, but it clearly appears from a careful review of the

whole case that such has not been the result. The uncontroverted facts showed a plain case of guilt under the statute, and there was no pretense of legal excuse, apart from the promise of a home in Charlotte, which the jury have found to have been a mere attempt to lure his wife, who was pure and had been faithful, to her own ruin, that he might have cause to put her away. She was too wary for him, and declined to walk into the net he had so vainly spread for her.

There was no error in the trial.
No error.

HENRY et al. v. HEGGIE.

(Supreme Court of North Carolina. Nov. 12, 1913.)

1. VENDOR AND PURCHASER (§ 197*)—TRANSFER OF MORTGAGED PROPERTY—ASSUMPTION OF MORTGAGE.

An agreement to purchase property subject to the incumbrances thereon did not constitute an assumption of such incumbrances so as to make the purchaser personally liable to the vendor for an amount paid by the vendor to satisfy an incumbrance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 407; Dec. Dig. § 197.*]

2. VENDOR AND PURCHASER (§ 197*)—TRANSFER OF MORTGAGED PROPERTY—ASSUMPTION OF MORTGAGE.

A covenant in a deed to assume all incumbrances on the property, as a part of the consideration with special reference to particular mortgages, which were excepted from the warranty, constituted an assumption of the mortgage debt by the grantee and an indemnity against its payment by the grantor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 407; Dec. Dig. § 197.*]

3. DEEDS (§ 66*)—DELIVERY—ACCEPTANCE—QUESTIONS FOR JURY.

Whether a deed was delivered to and accepted by the grantee so as to bind him to a performance of its covenants or stipulations was a mixed question of fact and law; and the jury should find the facts and the judge declare the law arising thereon.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.*]

4. TRIAL (§ 235*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—CONFLICTING EVIDENCE.

In a grantor's action to recover the amount of a mortgage, which he had paid, from the grantee, where the grantee denied that he accepted a deed containing an assumption of the mortgage and testified that he rejected it, and the deed was produced and offered in evidence by the grantor, the court erred in directing the jury to find for the grantor if they believed the evidence, as they could not believe all the evidence where it conflicted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539-541, 543-548, 551; Dec. Dig. § 235.*]

5. DEEDS (§ 208*)—DELIVERY—ACCEPTANCE—EVIDENCE.

On the question of whether a deed was delivered to and accepted by a grantee, the fact that it was produced by the grantee under a notice to him or a rule of the court requiring him to do so might have an important bearing.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. § 208.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6. DEEDS (§ 45*)—PERSONS LIABLE—GRANTEE UNDER DEED POLL.

A grantee who receives and accepts a deed is liable on its covenants to be performed by him, as the consideration of the grant or a part thereof, whether he signed it or not, since the acceptance of the deed is equivalent to an agreement on his part to perform the covenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 89-94; Dec. Dig. § 45.*]

Appeal from Superior Court, Granville County; Peebles, Judge.

Action by M. Henry and wife against C. C. Heggie. From a judgment for plaintiffs, defendant appeals. New trial granted.

The defendant, desiring to purchase a house and lot from the plaintiff, which were subject to two mortgages, executed by the plaintiff, one in favor of H. M. Gillis for about \$900 and the other in favor of W. L. Taylor for about \$150, agreed to buy the same for the sum of \$25, subject to present incumbrances, as stated above. The price asked by the plaintiff was \$1,075, and, in the letter to him agreeing to buy the property, defendant stated that the payment of the \$25 for the property, subject to the mortgages, would equal his price; that is, \$1,075. Plaintiff caused a deed for the house and lot to be prepared, executed and acknowledged the same, with joinder and privy examination of his wife, and sent it to the defendant. In the deed there is a covenant on the part of the defendant, as a part of the consideration to assume all incumbrances on the property, with a special reference to the Gillis and Taylor mortgages, and they are excepted from the warranty. There was evidence that defendant received the deed and accepted the same, giving a check for the \$25 to Mr. Lanier, attorney for the plaintiff, who collected the same. Defendant testified that he had not accepted the deed but delivered it back and had never exercised any control or dominion over the land. The plaintiff paid the Taylor debt, amounting at the time to \$165, and brings this action to recover the amount so paid. The property was sold under the Gillis mortgage and brought not more than enough to pay that debt.

The following issue was submitted to the jury, "Is the defendant indebted to the plaintiff, and, if so, in what amount?" and the jury answered it, "Yes, \$150, with interest from July 12, 1910," under an instruction of the court that, if they believed the evidence, they should so answer it. Exception and appeal by the defendant.

B. S. Royster, of Oxford, for appellant. T. Lanier and Hicks & Stem, all of Oxford, for appellee.

WALKER, J. (after stating the facts as above). [1] We do not think that the written agreement to buy the lot constituted an assumption of the mortgages, so as to make the defendant liable personally to the plain-

tiff for the amount he paid to satisfy the Taylor debt. The rule as settled by the authorities, so far as applicable here, is thus stated in 27 Cyc. at pages 1342, 1343, 1344: "Where a conveyance of land is made expressly subject to an existing mortgage, the effect, as between the grantor and the grantee, is to charge the incumbrance primarily on the land, so as to prevent the purchaser from claiming reimbursement or satisfaction from his vendor in case he loses the land by foreclosure or is compelled to pay the mortgage to save a foreclosure; in reality it amounts simply to a conveyance of the equity of redemption. * * * The grantee of mortgaged land does not incur a personal liability for the payment of the mortgage debt, enforceable by the mortgagee, merely because the deed recites that it is made subject to the mortgage; such personal liability is created only by a distinct assumption of the debt or contractual obligation to pay it. Where the land is sold subject to a mortgage, but without an assumption of it by the grantee, the mortgagor remains liable for any deficiency. But still, the contract being one of indemnity and the land being the primary fund for the payment of the mortgage, if the grantor is compelled to pay it, he may require an assignment of the mortgage to himself, or he will be regarded as an equitable assignee so as to be subrogated to the rights of the mortgagee, and so will be enabled to use the mortgage to force reimbursement from his grantee." *Hancock v. Fleming*, 103 Ind. 533, 3 N. E. 254; *McNaughton v. Burke*, 63 Neb. 704, 89 N. W. 274; *M. C. & M. Co. v. Hand*, 197 Ill. 288, 64 N. E. 381; *Hartley v. Harrison*, 24 N. Y. 170; *Loudenslager v. W. H. Land Co.*, 64 N. J. Law, 405, 45 Atl. 784; *Equitable L. Assn. v. Bostwick*, 100 N. Y. 628, 3 N. E. 296.

The *McNaughton Case* holds that: "One who buys land subject to an incumbrance acquires only an equity of redemption; that is, the interest remaining after the incumbrance has been paid. The understanding between the grantor and grantee is that the former reserves for the benefit of the incumbrancer so much of the estate as may be necessary for the satisfaction of the debt. 'A conveyance of land subject to a mortgage * * * is neither more nor less than a simple deed of whatever interest or estate the grantor has after the debt is satisfied out of it.'"

Chief Justice Mitchell, in *Hancock v. Fleming*, supra, said: "The difference between the purchasers assuming the payment of the mortgage, and simply buying subject to the mortgage, is simply that in the one case he makes himself personally liable for the payment of the debt and in the other case he does not assume such liability. In both cases he takes the land charged with the payment of the debt and is not allowed to

set up any defense to its validity.' Jones, Mort. § 736; Atherton v. Toney, 43 Ind. 211; Pomeroy, Eq. Jur. § 1205. The land, nevertheless, remained the primary fund as between the purchaser and the mortgagee, out of which payment of the debt must be made."

It was held in *Loudenslager v. W. H. L. Co.*, supra, that: "A declaration counting upon an express assumption of a mortgage by the grantee in a deed (the deed being made part of the declaration) will not be supported by a clause in the deed 'that the land is conveyed subject to such mortgage'; the words of assumption being absent."

The court ruled in the case of *Eq. L. Asso. Co. v. Bostwick*, supra, that a personal obligation on the part of a grantee to pay a mortgage upon the premises conveyed may not "be implied from a statement in his deed that the conveyance is subject to the mortgage, and that the amount thereof forms 'part of the consideration and is deducted therefrom.'"

The language in the last case we have cited is very much like that used in the letter of defendant offering to buy the lot.

A valuable authority is *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456, where the court says: In order "to raise such a liability as is contended for by plaintiff" in error, "there must be words in the deed of conveyance from which, by fair import, an agreement to pay the debt can be inferred. This was expressly held in *Elliott v. Sackett*, 108 U. S. 132 [2 Sup. Ct. 375, 27 L. Ed. 678], where Mr. Justice Blatchford, in delivering the judgment of this court, said: 'An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt to make him personally liable.' To the same effect, see *Belmont v. Coman*, 22 N. Y. 438 [78 Am. Dec. 213]; *Fiske v. Tolman*, 124 Mass. 254 [26 Am. Rep. 659]; *Hoy v. Bramhall*, 19 N. J. Eq. 74, 78; *Fowler v. Fay*, 62 Ill. 375. There are no such words in the deed made by the plaintiff in error."

[2] These cases also show that the terms of the deed tendered by plaintiff and alleged to have been delivered to and accepted by the defendant are sufficient to constitute an assumption of the mortgage debt and an indemnity against its payment by the plaintiff.

[3] So that it all comes back to the point whether the deed was delivered by the plaintiff and accepted by the defendant so as to bind the latter to a performance of its covenants or stipulations. This is a mixed question of fact and law. The jury must find the

facts and the judge declare the law arising thereon.

[4] We find upon examination of the record, as will appear by our statement of the case, that the evidence upon this matter, the acceptance of the deed, was conflicting, and therefore the court could not direct the jury how to find if they believed the evidence. *Rickert v. Railroad*, 123 N. C. 255, 31 S. E. 497; *Cox v. Railroad*, 123 N. C. 611, 31 S. E. 848; *Bank v. Nimocks*, 124 N. C. 352, 32 S. E. 717. The jury cannot well believe all of the evidence if it conflicts. It amounted to an instruction that there is no evidence to prove defendant's contention, when we see that there is. He denies that he accepted the deed and testifies that he rejected it. Besides, the plaintiff produced the deed at the trial and offered it in evidence. All of this was some evidence.

[5] It was stated on the trial as a fact, though it does not appear in the record, that the deed was produced by the defendant under a notice to him or a rule of the court requiring him to do so. If this appears in the case at the next trial, it may have an important bearing upon the question of delivery and acceptance.

[6] If the defendant received and accepted the deed, he is liable upon its covenants, as the acceptance by the grantee of a deed containing a covenant to be performed by him as the consideration of the grant, or a part thereof, is equivalent to an agreement on his part to perform it, without regard to whether he signed it or not. 11 Cyc. 1045; *Maynard v. Moore*, 76 N. C. 158, citing *Staines v. Morris*, 1 Ves. & B. 14; *Finley v. Simpson*, 22 N. J. Law, 311, 53 Am. Dec. 252; *Herring v. Lumber Co.*, 79 S. E. 876, at this term.

There was error in the charge, as pointed out, and there must be another trial.

New trial.

PENDERGRAST v. DURHAM TRACTION CO.

(Supreme Court of North Carolina. Nov. 19, 1913.)

CARRIERS (§ 292*)—INJURY TO PASSENGERS—UNAVOIDABLE ACCIDENT.

As the street car on which plaintiff was a passenger approached a certain point, plaintiff asked the conductor to slow up so that he could get off, and attempted to get off while the car was going 3 or 4 miles an hour, when he caught a very thin finger ring in a screw at the bottom of the handhold, 36 inches from the bottom of the step, and his little finger was jerked off by the forward motion of the car. The screw head projected about one-sixteenth of an inch from the surface. Held, that the injury was an unavoidable accident, for which the street car company was not responsible.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1168-1170, 1175-1178; Dec. Dig. § 292.*]

Appeal from Superior Court, Durham County; Peebles, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by A. T. Pendergrast against the Durham Traction Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Bryant & Brogden, of Durham, for appellant. Winston & Biggs, of Raleigh, and W. L. Foushee, of Durham, for appellee.

HOKE, J. The evidence, among other things, tended to show that on the 25th day of September, 1911, the plaintiff, a passenger on a street car of defendant company, in the endeavor to alight from the car while in motion, had the little finger of his left hand torn off by reason of a thin ring on that finger catching on the head of a screw at the bottom of the grab handle on the forward part of the car. The plaintiff testified that he had gone out on the platform for the purpose of alighting as the car entered the switch on Chapel Hill street when it was moving at the rate of 5 to 6 miles per hour, having asked the conductor to slow up, and, at the time of the occurrence, it was moving at the rate of 3 or 4 miles per hour; that the screw was at the bottom of the grab handle in the brass knob or socket in which the handle rested, 36 inches from the bottom of the step, and the purpose was to keep the rod from turning in the socket; that it was on the inside of the knob, and the head projected about one-sixteenth of an inch from the surface; that plaintiff took hold of the handle on the front of the platform with his right hand, and of the handle on the front part of the car with his left hand, and as he attempted to alight his left hand gilded down the rod and the ring on his little finger caught in the screw head and was pulled off by the forward movement of the car. The witness testified, further, that he did not know whether the conductor heard witness when he asked him to slow down, and that he did not hear the motorman if he told witness to "wait and he would stop the car." The motorman testified in this connection that, when he saw the plaintiff standing down on the step with his hand on the grab handle, he said to him, "Mister, if you want to get off, wait a minute, and I will stop the car."

On these the controlling facts relevant to the inquiry, we are of opinion that the plaintiff was properly nonsuited. Giving due consideration to the circumstance of the obscure placing of the screw and the slight projection on the inside of the lower end of the rod and only 36 inches from the bottom of the step, and projecting above the surface only one-sixteenth of an inch, that the plaintiff was caught in a very thin finger ring on his left hand, and that the wrench was given by the forward movement of the car, which had never stopped, and from which he was in the act of alighting, we are of opinion that the case comes clearly within the category of

inevitable accident, and for which the defendant should not be held responsible. Under the combination of circumstances shown forth in the evidence, the negligence of the defendant, if it existed, could in no sense be regarded as the proximate cause of the injury, and the judgment of nonsuit must therefore be affirmed.

Affirmed.

FARMERS' BANK & TRUST CO. et al. v. SOUTHERN GRANITE CO. et al.

(Supreme Court of South Carolina. Nov. 5, 1913.)

1. CORPORATIONS (§ 480*)—NOTICE—MORTGAGES AND BONDS—PRIORITY.

Where a prior mortgage to one who was secretary of a corporation was on record when the corporation issued bonds secured by mortgage on the same property, so that subsequent mortgagees could have ascertained the existence of a prior mortgage, such person was not estopped from asserting the validity of the prior mortgage as against the purchasers of the bonds, though they were executed by him as secretary of the company, and were headed "First Mortgage Bonds" and "Second Mortgage Bonds"; the body of the bonds not representing that there was no other mortgage on the property and the prior mortgage being of record.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 480; Mortgages, Cent. Dig. § 307.]

2. ESTOPPEL (§ 22*)—ESTOPPEL BY DEED.

A general recital will not ordinarily furnish the basis for an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 27-51; Dec. Dig. § 22.*]

3. ESTOPPEL (§ 25*)—INJURY.

An estoppel can be invoked only by a party who shows that he was misled to his injury.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 61, 62; Dec. Dig. § 25.*]

4. REFERENCE (§ 101*)—MOTION TO RECOMMIT—DISCRETION OF TRIAL COURT.

The granting of a motion to recommit to a referee to take further proof is a matter for the trial court's discretion.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 169-180; Dec. Dig. § 101.*]

5. APPEAL AND ERROR (§ 1022*)—FINDINGS—CONCLUSIVENESS.

Appellant must satisfy the Supreme Court by a preponderance of the evidence that the trial judge erred in his finding of fact, made in approving the findings of a referee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

Appeal from Common Pleas Circuit Court of Lancaster County; T. S. Sease, Judge.

Action by the Farmers' Bank & Trust Company and another against the Southern Granite Company and others. From decree for plaintiffs, defendants appeal. Affirmed.

The third exception was to the trial court's failure to rule upon plaintiff's motion to recommit the case to the referee, for further proof that the holders of the mortgage bonds relied, in purchasing them, upon the assurances contained therein.

"Referee's Report.

"Alleging that they are the owners and holders of a note and mortgage, executed by defendant Southern Granite Company on May 4, 1908, in the sum of \$15,000 in favor of plaintiff T. J. Strait the plaintiffs commenced this action on July 7, 1911, for the foreclosure of said note and mortgage. The defendant Charlotte Trust Company was made a party defendant, as alleged in the complaint, because it holds a deed of trust and an indenture of trust on the real estate covered by the mortgage sought to be foreclosed in this action, to secure certain bonds issued by defendant Southern Granite Company. The other defendants were made parties because, as alleged, they are judgment creditors of defendant, Southern Granite Company. Notice of pendency of this action was duly filed on the 7th day of July, 1911, in the offices of the register of mesne conveyances for the counties of Lancaster and Kershaw, in this state, the lands in question lying partly in both of said counties, but chiefly in Lancaster county.

"The complaint alleges the execution and delivery by the said defendant Southern Granite Company to the plaintiff T. J. Strait of the note for \$15,000, under date of May 4, 1906, due June 11, 1906, which note provides for the payment of interest on said principal at the rate of 8 per centum per annum, payable annually, and also for 10 per cent. of the principal thereof additional for attorney's fees in case said note should be placed in the hands of an attorney at law for collection after maturity; alleges the execution and delivery of a real estate mortgage upon the said tract of 1,093 acres of land in Lancaster and Kershaw counties, S. C., to secure the payment of said note; alleges the record of said mortgage in Lancaster and Kershaw counties on September 18, 1908, and September 21, 1906, respectively.

"The complaint further alleges the assignment and transfer of the said note and mortgage on May 5, 1906, by plaintiff T. J. Strait to the Charlotte National Bank, as security for a note of \$3,000, given by said T. J. Strait solely for the accommodation and benefit of the said defendant Southern Granite Company; that, subsequently, on November 11, 1910, said note and real estate mortgage for \$15,000 so held as collateral security, together with the said \$3,000 note for which said former note was held as security, were duly transferred and assigned by the said Charlotte National Bank to the said plaintiff Farmers' Bank & Trust Company, for valuable consideration, and that said plaintiff is the owner of the same to the extent of the consideration so paid by said plaintiff, and that plaintiff T. J. Strait is the owner of the remainder of said original note and the mortgage securing same.

"It is also alleged in the complaint that the Charlotte Trust Company, as trustee, for certain bondholders, and the several judgment

creditors named, hold liens on the said real property junior in right to the mortgage sought to be foreclosed herein; and judgment is asked for the sale of the mortgaged premises, and an application of the proceeds to the payment of the several lien debts held by the plaintiffs and the defendants named, in accordance with their respective legal priorities, after first paying the costs and disbursements of this action and the attorney's fees for the attorneys for the plaintiffs herein.

"The answer of the defendant Southern Granite Company admits the execution and delivery of the note and mortgage for \$15,000 and the record of said mortgage in Lancaster and Kershaw counties, as alleged, and the transfer of the same to the Charlotte National Bank as already stated, but avers that the said defendant is without knowledge or information as to the alleged transfer of the said note and mortgage to the plaintiff Farmers' Bank & Trust Company, and denies that plaintiff T. J. Strait is entitled to any part of any sum of money that may be due upon said note and mortgage.

"Further answering, the said defendant alleges: "That on the 18th day of April, 1907, the said T. J. Strait made and entered into a written agreement with this defendant, of which the following is a copy: "Whereas, Southern Granite Company is indebted to me, T. J. Strait, in the sum of fifteen thousand (\$15,000) dollars, which indebtedness is secured by a mortgage of one thousand and ninety-three (1,093) acres of land owned by the Southern Granite Company, know all men by these presents, that I, T. J. Strait, in consideration of the agreement made on the part of the Southern Granite Company, hereinafter stated, and in further consideration of the sum of one (\$1) dollar to me in hand paid by said Southern Granite Company, do hereby covenant and agree to enter full satisfaction upon said mortgage, and the Southern Granite Company, in consideration thereof, agrees to deliver to the said T. J. Strait its first mortgage bonds to the amount of seven thousand five hundred (\$7,500) dollars and its second mortgage bonds to the amount of seven thousand five hundred (\$7,500) dollars, which bonds are to be delivered to said T. J. Strait as soon as same are issued; said bonds to be a part of a fifty thousand (\$50,000) dollar bond issue of said Southern Granite Company. Witness our hands and seals this 18th day of April, 1907. [Signed] Southern Granite Company, by S. W. Heath, Pres. [L. S.] T. J. Strait [L. S.]. Witness: E. D. Blakeney."

"The said defendant further alleges: "That, at the time of the execution of the above agreement, the said T. J. Strait was and is now a director and officer of defendant company, to wit, secretary thereof, and joined in the execution of the bonds and mortgages contemplated in said agreement, which bonds and mortgages were, with the co-operation of said T. J. Strait, placed in the hands of the Charlotte Trust Company, as trustee and cus-

todian for those entitled thereto, including the said T. J. Strait, whereby this defendant has complied with the agreement hereinabove set out, and this defendant is therefore entitled to have canceled the mortgage herein sought to be foreclosed. That, at the time of the alleged assignment of the note and mortgage to plaintiff herein, the same had been fully discharged by virtue of said agreement between T. J. Strait and this defendant, as above set forth, and this defendant is therefore entitled to have said mortgage canceled. That, as this defendant is informed and believes, the note and mortgage sought to be foreclosed were transferred and assigned to the plaintiff Farmers' Bank & Trust Company, after maturity, and that said plaintiff took same subject to the equities existing between the parties thereto. That, heretofore, on the 1st day of May, 1907, this defendant, for value received, executed and delivered and caused to be authenticated by the defendant Charlotte Trust Company, as trustee, as herein set forth, its certain bonds, numbered from 1 to 100, inclusive, dated May 1, 1907, for the sum of \$500 each, with interest thereon at the rate of 6 per centum per annum, payable semiannually, on the 1st day of January and the 1st day of July in each year thereafter, as evidenced by certain interest coupons attached to each of said bonds, which said bonds were issued and denominated first mortgage bonds. That heretofore, on the 1st day of September, 1907, this defendant, for value received, executed and delivered, and caused to be authenticated by this defendant, as trustee, as herein set forth, its certain bonds numbered from 1 to 100, inclusive, dated September 1, 1907, for the sum of \$500 each, with interest thereon at the rate of 6 per cent. per annum, payable semiannually, on the 1st day of January and the 1st day of July in each year thereafter, as evidenced by certain interest coupons attached to each of the bonds, which said bonds were issued and denominated as second mortgage bonds. That, to secure the payment of the said bonds and the interest accruing thereon, this defendant did, on the 1st day of May, 1907, and the 1st day of September, 1907, deliver to the defendant, Charlotte Trust Company, as trustee aforesaid, for the benefit of the holders of its said bonds, its certain mortgage or deed of trust, wherein and whereby it conveyed by way of mortgage to the defendant Charlotte Trust Company, as trustee, the tract of land described in the sixth paragraph of the complaint herein, together with all personal property, consisting of machinery and tools constituting the operating plant of this defendant, and all rents and profits derived therefrom. Further answering the complaint herein, this defendant alleges that this defendant has defaulted in the payment of the interest upon the bonds hereinabove set forth, and that said interest is now past due and unpaid. That this defendant is heavily indebted and hopelessly insolvent, there being

a number of unpaid, outstanding judgments, as well as numerous unpaid claims in the hands of attorneys at law for collection, and that this defendant is threatened with numerous, expensive, and vexatious litigations, which, if permitted to be pressed, will seriously impair its assets to the detriment of its creditors.' The said defendant, therefore, prayed for the appointment of a receiver of its assets and the calling in of creditors to establish their demands.

"The answer of the defendant Charlotte Trust Company, which is made a party defendant as trustee for the bondholders, is substantially to the same effect, said defendant further alleging that by the terms of the said deeds of trust or mortgages securing the said bonds it is stipulated that in the event default be made in the payment of interest or principal of said bonds, or any part thereof, at maturity, the said defendant, as trustee, should be entitled to a commission of 5 per cent. as attorney's fee. This defendant also prays for the appointment of a receiver for the said Southern Granite Company. The other defendants filed no answer.

"On July 27, 1911, by order of Judge S. W. G. Shipp herein, M. C. Heath was appointed receiver for the said Southern Granite Company, and the undersigned was subsequently appointed as special referee to take testimony for the proof of claims, and also to take testimony and report upon all the issues of law and fact herein.

"In obedience to said order of reference, an advertisement for proofs of claims was made as required by said order, and several references were held for that purpose and for the taking of testimony upon the issues of law and fact as raised by the pleadings. The present holders of bonds secured by trust deeds or indentures set up in the answers aforesaid have come in before the referee, and have established the bonds held by them as hereinafter stated.

"Having concluded the taking of testimony, and after hearing argument of counsel, upon consideration of the evidence, the undersigned referee makes the following report:

"Findings of Fact.

"(1) That, on the 4th day of May, 1906, the defendant Southern Granite Company, a corporation duly organized under the laws of the state of South Carolina, for value received, made and delivered to the plaintiff T. J. Strait its promissory note in writing, dated on that day, whereby the said defendant contracted and agreed to pay to the said T. J. Strait or order the sum of \$15,000, due and payable on June 11, 1906, with interest from date at the rate of 8 per centum per annum, payable annually. In and by said note it was further stipulated that 10 per centum of the principal thereof additional should become due thereon for at-

torney's fees, in case said note should be placed in the hands of an attorney at law for collection after the maturity thereof. The consideration of this note was a portion of the purchase price of the tract of land hereinafter described, being the land described in the complaint herein, situated in Lancaster and Kershaw counties, in said state, which lands had been previously conveyed by the said T. J. Strait to the said Southern Granite Company. No part of this note has ever been paid, and after the maturity thereof the same was placed in the hands of the attorneys for plaintiffs herein for collection.

"(2) That, on the 4th day of May, 1906, for the better securing of the payment of said note, interest, and attorney's fees, the said defendant Southern Granite Company duly executed and delivered to the said plaintiff T. J. Strait its deed under seal and thereby conveyed by way of mortgage to the said plaintiff Strait the following described tract of land, to wit: All that certain piece, parcel, or tract of land, situate in the counties of Kershaw and Lancaster, containing 1,093 acres, bounded north by lands of T. J. Strait and lands known as the Stinson place; south by lands commonly known as Patterson lands; east by Stinson lands of J. R. McGill, F. M. Hammond and Wardlaw lands; west by lands of T. J. Strait, land commonly known as Warrenton place, and lands of McDowell, and being the same tract of land conveyed to the Southern Granite Company by T. J. Strait, and dated July 3, 1905.

"(3) That, on the 18th day of September, 1906, the said mortgage was duly recorded in the office of the register of mesne conveyances for the said county of Lancaster, in Real Estate Mortgage Book No. 11, p. 430, and that on the 21st day of September, 1906, the said mortgage was duly recorded in the office of the register of mesne conveyances for the said county of Kershaw, in Real Estate Mortgage Book LLL, p. 345.

"(4) That, on the 5th day of May, 1906, the said T. J. Strait executed and delivered to the Charlotte National Bank, a corporation duly incorporated, his certain promissory note in writing, dated on that day, whereby for value received the said T. J. Strait promised to pay to the said Charlotte National Bank 'or order,' the sum of \$3,000, due and payable 30 days from the date thereof, without grace, at the banking house of the said Charlotte National Bank, in Charlotte, N. C. It was proven at the reference that the said note was an accommodation note by the said T. J. Strait for money loaned by the said Charlotte National Bank to the said defendant Southern Granite Company, and the said note was executed by the said T. J. Strait to the said Charlotte National Bank as an accommodation for the said Southern Granite Company, and that

the said Southern Granite Company, in consideration thereof, agreed to pay the said note, at the maturity thereof, to the said Charlotte National Bank to the exoneration of the said T. J. Strait. No part of this note has ever been paid, except the interest thereon up to March 1, 1908; and it is admitted that payment of said note was duly demanded from the Southern Granite Company, and payment thereof refused.

"(5) That, on the 5th day of May, 1906, the said plaintiff T. J. Strait, for the better securing the payment of the accommodation note aforesaid, and with the knowledge and consent of the said defendant Southern Granite Company, by indorsement thereof assigned and transferred to the said Charlotte National Bank the said note for \$15,000 of the Southern Granite Company to him made payable, dated May 4, 1906, and due June 11, 1906, as above stated, and, on the same day, likewise, as collateral security as aforesaid, assigned and transferred to the said Charlotte National Bank in due form the said mortgage securing the said \$15,000 note.

"(6) That, on the 11th day of November, 1910, for value received, the said Charlotte National Bank, duly sold, assigned, and transferred to the plaintiff Farmers' Bank & Trust Company, the said \$3,000 note, and also the said \$15,000 collateral note and mortgage executed, as aforesaid, by the said defendant Southern Granite Company to the said T. J. Strait. It is admitted that the plaintiff Farmers' Bank & Trust Company is the owner of the said notes and mortgage so transferred to it by the said Charlotte National Bank, to the extent of the consideration paid by it therefor, to wit, the sum of \$3,721.67, being principal and interest to date of said transfer, November 11, 1910, on said \$3,000 note, besides interest thereon from November 11, 1910, at the rate of 8 per centum per annum from said last-mentioned date. It is also conceded that the said Farmers' Bank & Trust Company, being assignees for value of the said Charlotte National Bank, and the said Charlotte National Bank, being purchasers for value before maturity and without notice, are bona fide holders for value without notice in so far as concerns their interest in the said collateral note for \$15,000 aforementioned, since they stand in the shoes of the said Charlotte National Bank.

"(7) It is also conceded by defendants in argument before me that the portion of the said mortgage owned by the said bank is a valid first lien on the mortgage premises above described, and should be allowed as such, together with \$300 as reasonable attorney's fees to the attorneys for plaintiff Farmers' Bank & Trust Company, for the prosecution of this action on their behalf, such attorney's fees being secured by said mortgage as stipulated in the note.

"(8) The right of the plaintiff Strait to re-

cover the remainder of the amount due on the said \$15,000 note, as well as the right to the remainder of the amount of the attorney's fees thereby stipulated and secured by the said mortgage, is contested.

"The agreement already recited between plaintiff T. J. Strait and the defendant Southern Granite Company dated April 18, 1907, was offered in evidence by the defendants, and was marked and will hereinafter be referred to as 'Exhibit L.'

"(9) The bonds styled 'first mortgage bonds,' represented by the defendant Charlotte Trust Company, as trustee for the bondholders, bear date the 1st day of May, 1907, and the bonds styled 'second mortgage bonds,' represented by the same trustee, are dated September 1, 1907; and the deed of trust and indenture of trust, respectively, securing said bonds, bear dates of May 1, 1907, and September 1, 1907, respectively. These deeds and indentures of trust cover the tract of land already described, and also 'all other properties, franchises, and rights owned by the said Southern Granite Company.' The bond issues and indentures of trust just mentioned were for amounts of bonds as follows: (1) One hundred bonds of the par value of \$500 each, dated May 1, 1907, and due May 1, 1927, with coupons for semiannual interest at the rate of 6 per cent. per annum, secured by said deed of trust of date May 1, 1907, as above mentioned; (2) 100 bonds of the par value of \$500 each, dated September 1, 1907, and due September 1, 1927, with coupons attached for semiannual interest at the rate of 6 per cent. per annum, secured by indenture of trust, dated September 1, 1907, above mentioned.

"(10) The present holders of these bonds have come in as parties to this action and have established their claims as holders of said bonds as follows: First. Holders of bonds dated May 1, 1907: Springs Banking & Mercantile Company, 5 of said bonds; H. Well & Co., 2 of said bonds; Isaac Strouse, Sr., 10 of said bonds; Dr. Lee Cohen, 2 of said bonds; Wm. H. Bloddorn, 1 of said bonds; Isaac Strouse, Jr., 2 of said bonds; Abe Strouse, 4 of said bonds; estate of Samuel Strouse, 4 of said bonds; Ben Strouse, 2 of said bonds; Isadore Rothschild, 2 of said bonds; Morton Kauffman Sons, 2 of said bonds; R. A. Morrow, 1 of said bonds; J. F. Solomon, 2 of said bonds; O. P. Heath, 5 of said bonds; Heath Hardware Company, 1 of said bonds; W. C. Heath, 2 of said bonds; M. C. Heath, 4 of said bonds; E. Heckheimer, 4 of said bonds; Bank of Kershaw, 21 of said bonds; Mrs. A. J. Blackmon, 3 of said bonds; L. T. Gregory and Bank of Winnsboro, 3 of said bonds; Warner, Moore & Co., 3 of said bonds. In addition to the above, the attorney for the defendants deposited with the referee, on the 18th day of September, 1911, at reference held on that day, 15 of the said bonds, which were on said last-mentioned day offered to the plaintiff

Strait, by defendant's attorney, but then refused to be accepted by him. Second. Holders of bonds dated September 1, 1907: O. P. Heath, 21 of said bonds; Mrs. Mary B. Zemp, 16 of said bonds; Heath Supply Company, 28 of said bonds. In addition to the above, the defendant deposited with the referee, on the 18th day of September, 1911, 15 of the said bonds, which were on the last-mentioned day offered to plaintiff Strait by defendant's attorney, but said plaintiff refused to accept same.

"(11) The following unsecured claims were established before me against the said Southern Granite Company: First. The following claims, although unsecured, are admitted by all parties to be preferred claims as against all creditors except the liens held by the plaintiffs, to wit: Account of D. M. Jones for salary due him \$400; account of W. McD. Jones for \$175.07 for salary due him; and account of Jones & Sons for \$940.84 for wages advanced at the request of the defendant Southern Granite Company, for payment of laborers; also judgment claim of W. M. Gooch for \$191.57, dated October 29, 1910, judgment roll 7860, common pleas court, Lancaster. Second. The following are claims in judgment, not preferred: Casparis Stone Company for \$961.86, dated November 1, 1910, judgment roll No. 7866; Tyson & Jones Buggy Company, \$182.08, dated November 5, 1909, judgment roll No. 7804; Bailey Brothers (Inc.) \$263.80, dated November 5, 1909, judgment roll No. 7793; the M. O. Mayer Grocery Company, \$143.52, dated November 5, 1909, judgment roll No. 7792; Gibbes Machinery Company for \$203.70, dated June 28, 1910, judgment roll No. 7852; Max Pincus & Co., \$251.68, dated October 29, 1910, judgment roll No. 7861; Southern Coal & Coke Company, \$472.73, dated October 29, 1910, judgment roll No. 7862; Winnsboro Granite Corporation, \$874.90, dated March 30, 1911, judgment roll No. 7901. Third. The following notes and accounts were also established: Note by Southern Granite Company to Heath-Jones Company, \$165.35, dated December 6, 1909, due January 1, 1910, interest after maturity at 8 per cent., payable annually; note by same to Heath-Elliott Mule Company, \$281.98, dated June 12, 1908, due at one day, interest after maturity at 8 per cent., payable annually; account of Robert S. Harper for \$35.85; account T. W. Wood & Sons, \$43.08; C. E. Baldwin, \$45.82; Revere Rubber Company, \$18.73; Philip Cary Company, \$26; Valvoline Oil Company, \$12.80; Stone Barringer Company, \$32.14; L. Sonnesborn Sons (Inc.), \$63.51; New England Annealing Company, \$25.44; R. S. Dunn & Co., \$75; account Bewley Darsett Coal Co., \$76.05; Red 'C' Oil Co., \$33.76; Sullivan Machinery Co., \$46.15; note due Bank of Kershaw, dated November 25, 1910, \$4.985; note due Bank of Kershaw, dated March 8, 1907, \$2,933.12; note due L. T. Gregory, dated June 27, 1908, \$1,000; note

due Almetta J. Blackmon, dated December 8, 1907, \$1,500; note payable to order of Southern Granite Company and indorsed by S. W. Heath, O. P. Heath, W. C. Heath, E. Heckheimer, E. D. Blakeney, M. O. Heath, and paid by said indorsers, and now held by them, \$5,000; note of Excelsior Granite Company, dated July 29, 1905, indorsed by S. W. Heath and E. D. Blakeney and paid by them, \$1,520; note due F. W. Wagner & Co., dated March 2, 1907, indorsed by S. W. Heath and E. D. Blakeney and transferred to them by F. W. Wagner & Co., \$433.07; note due Warner, Moore & Co., dated October 27, 1908, \$500.

"(12) From the evidence in this case I find that no valid tender or delivery was ever made to the plaintiff T. J. Strait of the bonds stipulated to be delivered to him as a condition of the agreement contained in Exhibit L, already cited. By the terms of this agreement such bonds were to be delivered to the said T. J. Strait 'as soon as issued,' and it is apparent from the evidence that the said bonds were issued on the 1st day of May, 1907, as to the first series thereof, and the 1st day of September, 1907, as to the second series thereof. The first attempt at a tender of these bonds was made in the summer of the year 1909, long after the issue thereof, and at a time when the same were depreciated in value. Furthermore, at the time of such tender, nearly two years had elapsed since such issue of the bonds in question, and there were then past-due interest coupons upon said bonds for interest due January 1, 1908, July 1, 1908, January 1, 1909, and July 1, 1909, and no tender of the payment of such past-due interest coupons was made, nor has any payment of any such interest coupons ever been made or tendered. Moreover, as has been already stated, it appears from the testimony in the case that the true agreement between the plaintiff T. J. Strait and the defendant Southern Granite Company was that the said Southern Granite Company should pay the \$3,000 debt aforesaid to the Charlotte National Bank, represented by the note aforesaid, dated May 5, 1906, and falling due 30 days after said date, which was collaterally secured by the mortgage which was given to secure the indebtedness to the plaintiff Strait of the said Southern Granite Company, as already stated; and no such payment or tender of the said amount so due on the said debt to the Charlotte National Bank has ever been made. Under the said agreement such payment was a condition precedent to the right of the defendant Southern Granite Company to demand the entry of satisfaction upon the said \$15,000 mortgage.

"Conclusions of Law.

"(1) The principal question in the case is as to the effect of the agreement aforesaid between plaintiff T. J. Strait and the defendant Southern Granite Company for the acceptance of certain bonds in satisfaction of

the said \$15,000 mortgage debt due to plaintiffs. As to this matter, the conclusion has been reached that, as the agreement (Exhibit L) stipulated for a total issue of \$50,000 of first and second mortgage bonds in the aggregate, and since, as matter of fact, the bond issue actually made was to an aggregate of \$100,000, the plaintiff Strait could not be required to accept any part of such issue of bonds, such issue being in excess of the amount specified in the agreement; and as no tender or delivery of the bonds to plaintiff Strait was made at the time stipulated in the agreement (Exhibit L), a tender thereof at a later date, at a time when said bonds had become greatly depreciated in value, was not such a legal tender as to be a compliance with the requirements of said agreement. The contract expressly stipulated that these bonds should be delivered to plaintiff Strait 'as soon as issued,' and this requirement appears to have been of the essence of the contract, and a tender made for the first time some two years after the time stipulated, and when said bonds were much depreciated in value, was not a compliance with the true intent of said agreement. The plaintiff Strait could not therefore be then required to accept such depreciated bonds in satisfaction of said mortgage debt.

"Furthermore, the evidence shows that the defendant Southern Granite Company, instead of tendering or delivering said bonds to plaintiff in accordance with said agreement (Exhibit L), was using the same for its own purposes, and did put up \$5,000 of said bonds as collateral security for a loan by the First National Bank of Lancaster, S. C., on February 4, 1908, and in May, 1907, did hypothecate some of the said bonds with the Springs Banking & Mercantile Company as security for a loan. Since the defendant Southern Granite Company was so making use of the bonds for its own purposes and so failing to comply with the agreement, said defendant cannot, at this late day, be permitted to tender said bonds as a compliance with its agreement to deliver the same as 'soon as issued.'

"It thus appears that the agreement in question (Exhibit L) was broken by the defendant Southern Granite Company long before the commencement of this action, and therefore cannot operate as a defense. This contract, as shown by the evidence, was partly written and partly oral. It is true that the defendants objected to some of the oral evidence as not being admissible; but this objection cannot be sustained.

"Where a written contract is silent as to certain matters of the agreement between the parties, oral evidence may be admitted as to such matters, and such oral evidence does not vary the written contract. *Colvin v. Oil Co.*, 66 S. C. 61 [44 S. E. 380]; *Crawford v. Owens*, 79 S. C. 59 [60 S. E. 236]; *Chemical Co. v. Moore*, 61 S. C. 166 [39 S. E. 346];

Bulst v. Mercantile Co. [68 S. C. 523, 47 S. E. 978].

"Even the defendant's evidence shows that it was a part of the contract that the defendant Southern Granite Company should pay the debt to the Charlotte National Bank, which is now held by the plaintiff Farmers' Bank & Trust Company, and that such debt was really the debt of the said Southern Granite Company, and was to be paid by it before it could ask the plaintiff Strait to accept any bonds in satisfaction of his mortgage. The very mortgage in question was held as collateral security for the Southern Granite Company's debt, and, this debt to the bank having never been paid by the said Southern Granite Company, there was a failure by it to comply with a condition precedent of its agreement, since plaintiff Strait could not accept the bonds or mark his mortgage satisfied until the debt of the Charlotte National Bank (now held by the plaintiff Farmers' Bank & Trust Company) was paid by the defendant Southern Granite Company in accordance with said defendant's agreement, while the said bank held the mortgage in question as collateral to such debt of the Southern Granite Company.

"The evidence also shows that, as a part of said agreement, the defendant Southern Granite Company was also bound to pay the interest on the said \$15,000 mortgage debt held by plaintiff Strait against said defendant, up to the time of the issuance and delivery of the said bonds, before said plaintiff could be required to accept said bonds in satisfaction of the said \$15,000 mortgage. Having failed to do this, as well as to pay the said \$3,000 debt to the bank, the defendant Southern Granite Company failed to comply with its contract, and the plaintiff Strait could not be required to accept a tender of said bonds as in satisfaction of said mortgage debt.

"Moreover, from the very terms and nature of the agreement in question, it was essential that the defendant Southern Granite Company should comply with its agreement to deliver the bonds 'as soon as issued'; and the failure to do so was a failure to comply with an essential part of the contract, and a failure to perform such a prerequisite of the contract on the part of the defendant Southern Granite Company which relieved the plaintiff Strait of all obligations to surrender his original mortgage security. See 9 Cyc. 605, 606; 4 Pom. Eq. Juris., 1407, and note. It seems to be clear, also, that the agreement to accept \$15,000 of first and second mortgage bonds out of a total issue of \$50,000 of such first and second mortgage bonds cannot bind the plaintiff Strait so as to require acceptance by him of \$15,000 of bonds out of a total issue of \$100,000 of such first and second mortgage bonds.

"For the reasons stated, therefore, it must be concluded that the defense herein inter-

posed and founded upon the agreement aforesaid must be overruled; and it must be adjudged that the said mortgage debt held by the said plaintiff Strait is a valid outstanding first lien upon the said mortgaged premises.

"(2) It is claimed by the defendants that the plaintiff Strait is now estopped from enforcing his said mortgage by reason of the fact that, as secretary of the defendant Southern Granite Company, he signed officially the bonds and mortgages of May 1, 1907, and September 1, 1907, now held by the defendant Charlotte Trust Company, as trustee for the bondholders already named. As to the matter of such alleged estoppel, there is no evidence whatever that any bondholder has been misled by any such signing by the said plaintiff Strait, in his official capacity or otherwise; and it is well settled that, in order to an estoppel by any representations contained in a bond or mortgage, it must appear that the party seeking to invoke the same was misled to his injury by such representations. See *Diller v. Brubaker*, 52 Pa. 498, 91 Am. Dec. 177; *Jewett v. Miller*, 10 N. Y. 402, 61 Am. Dec. 755, and cases cited in note at page 756; *Mills v. Graves*, 38 Ill. 455, 87 Am. Dec. 316; *Earl v. Stevens*, 57 Vt. 474.

"Furthermore, there is no language used in said bonds or mortgages amounting to any representation that the plaintiff Strait did not hold a prior mortgage upon the lands in question, while such prior mortgage, being in fact of record in the proper offices, was notice to all the world of its existence and contents. The only words relied upon consist merely of the headings characterizing the bonds in question as 'First Mortgage Bonds' and 'Second Mortgage Bonds' of the Southern Granite Company; and there is no representation in the bonds or in the mortgages that the same are prior and preferred liens on the premises in question, and superior to the lien of the prior mortgage on the land duly recorded in favor of the plaintiff Strait.

"In order to constitute an estoppel, the words used in the instrument must be certain to every intent, and must not be taken by way of argument or inference. There must be a precise affirmation of that which creates the estoppel and not by way of recital. *Mills v. Graves* [38 Ill. 455] 87 Am. Dec. 314, 316, 318; 16 Cyc. 700; *Bigelow on Estoppel*, 302; 16 Cyc., 709.

"In the bonds here in question, or the mortgages securing the same, there is plainly no such certainty of intent. The only matter upon which it could be claimed that there was any representation as to the bonds and mortgage of May 1, 1907, is the mere use of the phrase, 'first mortgage bonds,' of the Southern Granite Company, the same being manifestly a mere characterization of the bond issue as being the *first bonds* issued by the said company. It is a mere statement of the fact that such bonds belong to a *series* denominat-

ed 'First.' There is certainly no 'precise affirmation' that the mortgage is a first mortgage or a first lien upon the premises in question. It cannot be held to be a definite representation that there was not a prior mortgage then existing upon a part of the property in favor of the plaintiff Strait individually, of the existence of which prior mortgage there was notice by the record. The recital in question cannot work an estoppel; that same being merely words of nomenclature of the series to which the bonds belong.

"It further appears, however, that the plaintiff Strait merely signed these bonds and mortgages officially, as secretary of the Southern Granite Company, and he was required officially to so sign the same by resolution of the stockholders and directors of the said Southern Granite Company. As is said by the Supreme Court of this state in its latest deliverance upon the subject by Mr. Justice Woods: 'An officer of a corporation is not estopped as an individual by signing a deed for the corporation under the direction of the board of directors or superior officer of the corporation.' *Forbes v. Bowman*, 87 S. C. 508 [70 S. E. 165]. See, also, *Kern v. Chalfant*, 7 Minn. 487 [Gill. 393]; *Harper v. Little* [2 Greenl. (Me.) 14] 11 Am. Dec. 25; *Bigelow on Estoppel* (3d Ed.) 275.

"It appearing that plaintiff Strait merely signed these bonds and mortgages officially a secretary of the Southern Granite Company, in pursuance of the requirements of a resolution of the stockholders and directors of the corporation as recited in the mortgage, plaintiff Strait could not be held individually bound by any recitals therein. The forms of the bonds and mortgages given were fixed by the stockholders and directors of the Southern Granite Company, and by resolution of the company's stockholders and directors the plaintiff Strait was required to sign his attestation officially to same, and his performance of that duty in an official capacity as so required of him cannot operate to his prejudice individually, or work an estoppel against him as an individual.

"Even, however, if the words used were sufficient to create an estoppel, there is no evidence that any of the bondholders were misled thereby, and if the bondholders were not misled, then no estoppel could arise in any event. It was incumbent upon those seeking to avail themselves of this doctrine of estoppel to show that they were actually misled to their injury, and, having failed to make such showing, there is no ground upon which an estoppel could be based. See *Bethune v. McDonald*, 35 S. C. 88, 14 S. E. 674; *Scarborough v. Woodley*, 81 S. C. 331, 62 S. E. 405; *Diller v. Brubaker*, 52 Pa. 498, 91 Am. Dec. 177, and other cases already cited.

"It must, therefore, be concluded that the said plaintiff Strait is not estopped from set-

ting up his said mortgage debt, and that the same is a first lien upon the lands described therein. The referee, therefore, concludes:

"(1) That the mortgage by the defendant Southern Granite Company to the plaintiff T. J. Strait, dated 4th day of May, 1906, is a first lien upon the tract of land containing 1,093 acres, described in the complaint, to secure the payment of the amount due upon the said mortgage debt, to wit, the sum of \$15,123.33, besides interest thereon from the 11th day of June, 1906, at the rate of 8 per centum per annum, payable annually, besides the further sum of \$1,500 as attorney's fees to the attorneys for plaintiff herein, as stipulated in said mortgage.

"(2) That the condition of the said mortgage has been broken, and that the said lands should be now sold and the proceeds, after paying the costs and disbursements of this action to the said plaintiffs, should be applied first to the payment of the said mortgage debt.

"(3) That, out of the proceeds going to pay the said mortgage debt, the plaintiff Farmers' Bank & Trust Company is entitled to receive first the sum of \$3,000, with interest thereon from the 4th day of May, 1906 (as bona fide holders for value and without notice of the said debt to the Charlotte National Bank), the amount due to said plaintiff thereon being admitted at the hearing before me to be the sum of \$3,721.67, with interest thereon from the 11th day of November, 1910, and the said plaintiff T. J. Strait is entitled to receive the remainder of the amount due upon the said \$15,000 mortgage debt, the said attorneys for the plaintiff being entitled to receive, as a part of the said mortgage debt and as attorney's fees in addition thereto, the said sum of \$1,500 out of said proceeds of sale, of which amount the sum of \$300 is as attorneys for the Farmers' Bank & Trust Company, and the remaining \$1,200 as attorneys for the said plaintiff Strait.

"(4) That, after the payment of the said costs and disbursements and attorney's fees and the said mortgage debt to the plaintiffs, the remainder of the proceeds of the said lands should be applied towards the payment of the preferred claims set out in subdivision 'first' of paragraph 11 of this report, and any remainder thereof should be applied towards the payment of the mortgage bonds to the various persons holding bonds, as aforesaid, secured by the mortgage or trust deed of May 1, 1907, and any overplus then remaining should be applied towards the payment of the mortgage bonds to the various persons holding bonds, as aforesaid, secured by the mortgage or trust deed of date September 1, 1907. If any overplus of said proceeds of sale should then remain, the same should be applied to the satisfaction of the other claims as already mentioned.

"Supplemental Report of Referee.

"By an oversight, the referee herein, in his report dated September 23, 1912, failed to report that the attorney for defendant Charlotte Trust Company is entitled to a commission of 5 per cent. on the amount of the first and second mortgage bonds of the Southern Granite Company, as attorney's fee. There is no controversy as to this matter, and the referee amends his report of the above date by changing the last paragraph of said report so that same shall read as follows:

"(4) That, after the payment of the said costs and disbursements and attorney's fees and the said mortgage debt to the plaintiffs, the remainder of the proceeds should be applied towards the payment of the preferred claims set out in subdivision "first" of paragraph eleven of this report, and any remainder thereof should be applied, first, to the payment of the attorney's fee of the attorney for defendant Charlotte Trust Company, as provided for in the deed of trust of date May 1, 1907, and then towards the payment of the mortgage bonds to the various persons holding bonds as aforesaid, secured by the mortgage or trust deed of said date, and any overplus then remaining should be applied, first, to the payment of the attorney's fee of the attorney for the defendant Charlotte Trust Company, as provided for in the deed of trust of date September 1, 1907, and then towards the payment of the mortgage bonds to the various persons holding bonds, as aforesaid, secured by the mortgage or trust deed of said date. If any overplus of said proceeds of sale should then remain, the same should be applied to the satisfaction of the other claims as already mentioned."

"Second Supplemental Report of Referee.

"The attention of the referee herein, having been called to the fact that in his report dated September 23, 1912, no findings were made covering the fees, costs, disbursements, and other expenses of the receiver heretofore appointed, on behalf of all parties interested in the affairs of the defendant Southern Granite Company, the failure to report upon these matters being an oversight, the referee hereby amends his said report by amending the last paragraph of said report, and any other paragraph therein that may be inconsistent with the findings herein submitted, that said amendment consists of the following: I conclude that the receiver should first be reimbursed for any amounts that he may have paid out by way of taxes, costs, or other necessary and proper expenses, together with his lawful commissions, and a reasonable attorney's fee to his attorney for services rendered him herein, and that the payment of same is a charge upon all the property and assets of the Southern Granite Company, and constitutes a prior and paramount lien thereon.

"It has also been called to the attention of the referee herein that the agreement between all the attorneys in this case that the claim of D. M. Jones for \$400 for salary due by the company, and one W. McD. Jones for \$175.07 for salary due him by the company, and one of Jones & Son for \$940.34 for wages advanced at the request of the company for the payment of laborers, and the judgment claim of W. M. Gooch shall be paid as preferred claims was understood by all parties to mean that claims were to be preferred to all other claims against the Southern Granite Company. The referee, therefore, amends his report of date September 23, 1912, as follows: By striking out the words 'except the liens held by plaintiffs,' in paragraph 11 on page 11 of said report, and by providing in his conclusion that the above-mentioned claims should be paid first out of all the assets and property of the Southern Granite Company, after paying the costs and disbursements of this action, and, before the payment of the mortgage debt of the plaintiffs."

The decree was as follows:

"This cause comes on to be heard before me upon the original and two supplemental reports by the referee, and upon exceptions by certain defendants to the original report, and by the plaintiffs to the second supplemental report.

"No question is made by these exceptions as to the priority and enforceableness of so much of the mortgage here in question as is held by the plaintiff Farmers' Bank & Trust Company; but the defendants do contest the priority and enforceableness of so much of the said mortgage as is held by the original mortgagee, T. J. Strait.

"Substantially but two main questions are presented by the exceptions taken by the defendants, and the determination of these two questions are conclusive of all the exceptions on the part of the defendants. These questions are: First. Whether there was error by the referee in failing to hold that the paper writing recited in the report as 'Exhibit L' was such an agreement and so binding upon the plaintiff Strait as to constitute a contract and operate, as against the plaintiff Strait, as a satisfaction of the mortgage debt held by him. Second. Whether there was error by the referee in failing to hold that, by reason of the action of the said plaintiff Strait in officially signing certain bonds and mortgages issued by said Southern Granite Company, the said plaintiff is now estopped from setting up the said mortgage originally held by him. The paper in question, which is recited in the report of the referee and is denominated 'Exhibit L,' is an agreement signed by the plaintiff Strait, and also appearing to be signed in the name of the 'Southern Granite Company, by S. W. Heath, President.' There is no evidence, however, that the affixing of the name of 'Southern Granite Company' to this paper was ever authorized by the stockholders or

directors of said company, or that S. W. Heath, as president of said company or otherwise, was ever given power to sign the name of the Southern Granite Company to such paper, or that he had any such power by virtue of his office.

"The agreement proposed in said Exhibit L was that the plaintiff Strait would enter satisfaction upon the mortgage here in question, in consideration that the defendant Southern Granite Company would give and deliver to said plaintiff, Strait, 'its first mortgage bonds to the amount of seven thousand five hundred dollars, and its second mortgage bonds to the amount of seven thousand five hundred dollars, which bonds are to be delivered to the said T. J. Strait as soon as same are issued; said bonds to be a part of a fifty thousand (\$50,000) dollar bond issue by said Southern Granite Company.' This paper bears the date of April 18, 1907, at which time no issue of bonds by the Southern Granite Company had ever been authorized or made.

"There is no evidence whatever of any authority, at that time had or ever thereafter given to S. W. Heath, to make any such agreement binding upon the company; and certainly no such authority can be implied in him. Since, therefore, S. W. Heath, had neither express nor implied authority to bind the Southern Granite Company by any such signing of its name to such an agreement, it follows that the same, not being binding upon the company, could not be binding as a contract upon the plaintiff Strait. At the time of the signing thereof, it amounted merely to a proposal on the part of the plaintiff Strait that if it, the Southern Granite Company, would do certain things within a certain time, the plaintiff Strait would do certain other things in consideration thereof.

"No subsequent action was taken by the stockholders or directors of the Southern Granite Company in any way ratifying or confirming the unauthorized agreement made in the name of the company by S. W. Heath, as its president, and therefore the character of the paper thereafter remained as it originally stood when signed by plaintiff Strait as a mere proposal, subject to acceptance or ratification by authorized action on the part of the company within the time therein stipulated. It follows, therefore, that Exhibit L, never having been so accepted or ratified by any action of the company, never constituted a contract binding upon the Southern Granite Company, and since, in order to constitute a complete contract, both parties thereto must be bound thereby, the said proposal in Exhibit L never became binding as a contract upon the plaintiff Strait. It is doubtless true that, by reason of the nominal consideration expressed and the consideration implied from the seal, Exhibit L would have been binding upon the plaintiff Strait as a contract, had its terms been accepted, or

had it been ratified by the Southern Granite Company by any authorized action of its stockholders or directors, provided such acceptance or ratification had been made within the time stipulated by that instrument, or, perhaps, within a reasonable time. But no such action by way of acceptance or ratification, by the Southern Granite Company, by its stockholders or directors or other authorized officer, was ever had, so far as appears; and therefore Exhibit L never became a contract, but remained and still remains a mere proposed agreement, not accepted, acted upon, or ratified by the Southern Granite Company. Whether it be considered that the contract fixed a time limit for its acceptance by the Southern Granite Company, or that the Southern Granite Company was entitled to a reasonable time for acceptance of the proposal thereby made, the time for acceptance or ratification of the proposed contract had expired before the commencement of this action. For these reasons, therefore, if for no other, the conclusions of the referee, as to the matter of the non-effectiveness of Exhibit L, as a defense to this action, should be confirmed.

"But the conclusions of the referee upon the question of the effect of Exhibit L must be confirmed also upon the grounds stated by the referee, and especially upon the ground that the proposed agreement, Exhibit L, contemplated a total issue by defendant Southern Granite Company of first and second mortgage bonds aggregating \$50,000, whereas, the bond issue actually made was to an aggregate of first and second mortgage bonds to the amount of \$100,000. The proposal made by plaintiff Strait in Exhibit L being an offer to accept \$7,500 of first mortgage bonds, and \$7,500 of second mortgage bonds out of a total contemplated issue of \$50,000 of bonds of the company, and the bond issue actually made being a total issue of \$100,000 of bonds—that is to say, \$50,000 of first and \$50,000 of second mortgage bonds—it follows, that even if the Southern Granite Company had accepted or ratified said proposed agreement contained in Exhibit L, such an acceptance or ratification would not have been effective to bind the plaintiff Strait to accept any part of such total issue of \$100,000 of mortgage bonds of the company. In other words, it having been proposed by plaintiff Strait merely that he would accept certain definite parts of an aggregate issue of \$50,000 of bonds, it was no acceptance or ratification of that proposal for the Southern Granite Company to make an aggregate issue of twice that amount of bonds, and propose then to Strait to accept a portion of such double issue. Even if the Southern Granite Company had offered to deliver to plaintiff Strait a part of such un contemplated issue of bonds, such an offer would not have been an acceptance or ratification of the proposal by Strait to accept a portion of a smaller

issue of bonds. In other words, the contract which plaintiff, Strait, proposed to make was contingent upon an issue by the defendant Southern Granite Company of first and second mortgage bonds to an aggregate amount of \$50,000, whereas the only issue of bonds ever proposed by the company was the actual issue made to an amount double that proposed by plaintiff Strait. Such action by the defendant Southern Granite Company was far from being an acceptance or ratification of the contract proposed by the agreement contained in Exhibit L between the plaintiff Strait and President S. W. Heath. There was thus no meeting of the minds of the respective parties to the proposed contract, the plaintiff Strait, on the one hand, and the defendant Southern Granite Company, on the other; and therefore the proposal contained in said paper never became a contract between the said parties. In order to constitute a contract, there must be a meeting of the minds of the parties as to all the terms of the agreement. 9 Cyc. 245, 247.

"The situation at the signing of Exhibit L by plaintiff Strait and President Heath was that the former thereby proposed to the latter that said plaintiff would agree to mark his mortgage 'Satisfied' if the Southern Granite Company would agree, among other things, to issue first and second mortgage bonds to a total amount of \$50,000, and would give and deliver to plaintiff Strait certain specified amounts of such bonds. This proposition, however, as we have seen, was never accepted by the Southern Granite Company, and, on the contrary, this company proposed to issue, and did issue, bonds to double the amount specified in the proposal made by Dr. Strait. There was consequently no meeting of the minds of the parties as between the plaintiff Strait and the defendant Southern Granite Company, no acceptance by the latter of the proposal made by the plaintiff Strait (which had been attempted to be accepted by President Heath in the name of the company, but ineffectively attempted for the reason that he had no authority to bind the company), and consequently no contract between the plaintiff Strait and the defendant Southern Granite Company.

"It must therefore be concluded that there was no error by the referee in the holding that the proposed agreement contained in Exhibit L, never having been accepted, ratified, or acted upon by the defendant Southern Granite Company, never became a contract so as to operate as a satisfaction or discharge of the mortgage held by the plaintiff Strait, and therefore the same is not a bar to the foreclosure of the said mortgage.

"As to the second question, already mentioned as being presented by the exceptions of the defendants, it must be concluded, for the reasons stated by the referee, that the doctrine of estoppel has no application in

this case under the facts as here appearing. The action of the plaintiff Strait in signing the bonds and mortgages of the Southern Granite Company was merely an official act, which he was required and directed to perform by the resolution of the stockholders and directors of the said company. It was not therefore the voluntary act of plaintiff Strait, but was a duty imposed upon him, and which he was required to perform, and did perform, in his capacity as secretary of the Southern Granite Company. The forms of the bonds and mortgages were prescribed by resolution of the stockholders and directors of the Southern Granite Company, and the said plaintiff Strait officially was directed and required to sign these bonds and mortgages in that form. His performance of that duty imposed upon him by virtue of his office was not such an act as can be regarded as being voluntary so as to bind him individually by way of estoppel.

"It is the general doctrine of all the cases that where the act of the official of a corporation in signing an instrument in writing is a compulsory official act, or performed in obedience to resolutions or requirement of the stockholders, directors, or other superior authority, such an act cannot be considered as the voluntary act of such official, and the same, therefore, is not binding upon him individually, and cannot operate to estop him from asserting his individual rights. This is the doctrine established by all the authorities, and it appears to be the true meaning of the language used by Mr. Justice Woods in *Forbes v. Bowman*, 87 S. C. 508 [70 S. E. 165]. See, also, the authorities cited by the referee and Bigelow on Estoppel (3d Ed.), page 275.

"There is, moreover, no evidence whatever to show that any of the bondholders was misled to his injury by this official act of the plaintiff Strait; and it is well settled that no estoppel will arise in such cases unless it be made affirmatively to appear that the person seeking to invoke the doctrine of estoppel has actually been so misled and thereby suffered injury. *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868; *Scarborough v. Woodley*, 81 S. C. 331 [62 S. E. 405]; *Bethune v. McDonald*, 35 S. C. 93 [14 S. E. 674]; *Diller v. Brubaker* [52 Pa. 498], 91 Am. Dec. 177; *Jewett v. Miller* [10 N. Y. 402] 61 Am. Dec. 755, and note; *Mills v. Graves* [38 Ill. 455] 87 Am. Dec. 316; *Earl v. Stevens*, 57 Vt. 474.

"The burden of proof was upon the defendants to show that they were misled to their injury, and, no such proof having been adduced, there is no basis for the plea of estoppel. See cases just cited.

"For these reasons, as well as upon the other grounds mentioned by the referee, the finding and conclusion by the referee must be affirmed, that the plea of estoppel cannot avail the defendants in this case.

"These conclusions substantially dispose of the exceptions taken by the defendants to the report of the referee, all of said exceptions being dependent upon the conclusions reached upon the questions already discussed. The defendants' exceptions to the report must therefore be overruled.

"There remains to be considered only the exceptions by the plaintiffs to the second supplemental report. As to these exceptions it is to be noted that there was no finding by the referee that any specified amount had been paid out by the receiver of the defendant Southern Granite Company, or that any ascertained commissions were due him, or that any attorney's fees were due or had been paid by the receiver on account of any legal services rendered. Indeed, no account whatever has been filed by the receiver, and there is no showing as to what action, if any, has been taken by him, or as to whether he has done any work or performed any service entitling him to compensation. The receiver is entitled to reasonable compensation by way of commissions on any moneys which may have come into his hands, and is also entitled to be reimbursed for any moneys which may have been reasonably and necessarily expended by him in the discharge of his duties as such receiver. Such being the case, the exceptions of the plaintiffs to the second supplemental report of the referee are overruled.

"It is therefore ordered and adjudged that the original report and the two supplemental reports of the referee herein be confirmed.

"It is further ordered, adjudged, and decreed: That the mortgage held by the said plaintiff upon the lands here in question be foreclosed, and that the equity of redemption in the said premises be barred, and that the said premises be sold at the courthouse door, in said county and state, on the first Monday in November, 1913, or upon some convenient sales day thereafter, by and under the direction of the receiver heretofore appointed by this court, during the legal hours of sale, and that the said receiver do give the usual notice of the time and place of such sale by advertisement in the Lancaster News. That such sale be made upon the following terms, to wit: The purchaser to pay one-third of the purchase money in cash on the day of sale, and that the remainder of the purchase money be secured by the notes of the purchaser due in one and two years, in equal amounts, with interest from the day of sale, secured by a mortgage of the premises so sold, with the privilege to the purchaser to pay all cash on the day of sale. That upon failure of the purchaser to comply with the terms of sale, the said premises shall be forthwith resold at the risk of such former purchaser, and that, upon compliance by the purchaser with the terms of such sale, the said receiver do execute a deed to him for the said premises, and that such purchaser be let into

possession upon the production of said deed, which shall be recorded at the expense of the purchaser, both in Kershaw and Lancaster counties, and the said purchaser shall also pay the charges for recording the said mortgage in like manner.

"It is further ordered and decreed: That out of the proceeds of such sale the said receiver do pay, first, the costs and disbursements of the plaintiffs in this action, and the costs and expenses of such sale, and any lien for taxes due upon the said premises for the years 1912 and 1913, and also any amount paid by the receiver for taxes upon said premises for the year 1911, and the interest upon the same, and the commissions of the receiver on the amount so paid for taxes, if the same has not heretofore been retained by the said receiver out of moneys coming into his hands as such receiver, upon the proceeds of such sale at the same rate as is fixed by law for commissions on sales in like cases made by the clerk or sheriff. That he do next pay to the attorneys for plaintiffs, as attorney's fees stipulated to be paid in the said mortgage to the plaintiffs, the sum of \$300 as attorney's fees to the attorneys for plaintiff Farmers' Bank & Trust Company. That he do next pay the preferred claims as follows: To D. M. Jones, \$400; to W. McD. Jones, \$175.07; to Jones & Son, \$940.34, and to W. M. Gooch, the judgment for \$191.57, dated October 20, 1910, the same being the claims reported by the referee as preferred, and that he next do pay to the plaintiff Farmers' Bank & Trust Company the sum of \$3,721.67, with interest thereon from the 11th day of November, 1910, being the amount due the said plaintiff Farmers' Bank & Trust Company, as reported by the referee upon their debt herein. That he next do pay to the attorneys for the plaintiff T. J. Strait the sum of \$1,200, as balance attorney's fees for services in foreclosing the mortgage to plaintiff herein, as stipulated therein, and that he then do pay to the said plaintiff Strait the balance of the amount remaining due upon the said mortgage of \$15,123.33, besides interest thereon from the 11th day of June, 1906, at the rate of 8 per cent. per annum, payable annually, as reported by the referee, after the amount due plaintiff Farmers' Bank & Trust Company, as herein stated, has been deducted. That any remainder of said proceeds of sale be applied to the payment of the attorney's fee to the attorney for the defendant Charlotte Trust Company, as provided in the deed of trust of May 1, 1907, as reported in the supplemental report of the referee, and then toward the payment of the mortgage bonds to the various persons holding bonds, secured by said deed of trust of date May 1, 1907, as represented by the referee; and any overplus then remaining shall be applied to the payment of the attorney's fee to the attorney for the defendant Charlotte Trust Company,

as provided in the trust deed of date September 1, 1907, as reported by the referee, and then toward the payment of the mortgage bonds to the various persons holding bonds secured by the mortgage or trust deed of said date, as reported by the referee; and if any overplus of said proceeds of sale should then remain, the same should be applied to the satisfaction of the claims by judgment reported in the second subdivision of paragraph 11 of the referee's report; and any overplus then remaining should be applied to the payment of the claims reported in subdivision 3 of the same paragraph of the referee's report.

"The said receiver will report to this court his actions under this decree.

"The following is a description of the premises hereby ordered to be sold: All that certain piece, parcel or tract of land situate in the counties of Lancaster and Kershaw, in the said state, containing 1,093 acres, more or less, now or formerly bounded—north by lands of T. J. Strait and lands known as the Stinson Place, south by lands commonly known as Patterson lands, east by Stinson lands of J. R. McGill, F. W. Hammond and Wardlaw lands, west by lands of T. J. Strait and lands commonly known as Warrenton Place and lands of McDowell, being the same tract of land conveyed to Southern Granite Company by T. J. Strait."

E. D. Blakeney, of Kershaw, and Kirkland & Kirkland, of Camden, for appellants. W. P. Robinson and Ernest Moore, both of Lancaster, for respondents.

WATTS, J. This action was commenced by the respondents as complainants to foreclose a mortgage for \$15,000, securing a note for that amount executed and delivered on May 4, 1906, by the Southern Granite Company to T. J. Strait, covering 1,093 acres of land, on the line of Kershaw and Lancaster counties, whereon the Granite Company operated its rock quarry. The mortgage was recorded in both counties, in September, 1906. On May 5, 1906, the said Strait made a 30-day promissory note to the Charlotte National Bank for \$3,000, and assigned as security for the same the aforesaid \$15,000 given him by the Granite Company. This note, with the collateral mortgage, on November 11, 1910, was transferred by the Charlotte National Bank to the Farmers' Bank & Trust Company, which, as holder of this note, joined with Strait to foreclose said mortgage. After issue was joined the cause was referred to Paul Moore, Esq., as special referee, to hear and determine all issues of law and fact. The said referee made his report in favor of the plaintiffs. Exceptions were duly taken to this report by the Charlotte Trust Company and Southern Granite Company, and these exceptions were heard by his honor, Judge Sease, who overruled these exceptions and sustained the

report of the referee. From this decree of his honor, Judge Sease, the appellants appeal. The reports of the special referee and the decree of his honor should be set out in the report of the case, for a proper understanding of the same.

[1] The first exception is: "For that his honor erred in holding that the execution and subscription of the mortgage bonds of the Granite Company by T. J. Strait, as secretary of said company, which bonds proffered on their face to be secured by first and second mortgages did not operate as an estoppel upon said Strait individually, so as to preclude him from asserting the priority of his mortgage; whereas, his honor should have held that the said Strait, by participating and co-operating with the stockholders and directors in the proceedings of said company leading up to and resulting in issuance of said mortgage bonds, and in subscribing the execution of same, and in placing them before the public, is, in equity, by such conduct, estopped from asserting as prior the mortgage of the company held by him." This exception cannot be sustained. The mortgage of Strait was on record in the proper offices, both in Kershaw and Lancaster counties, and the purchasers of these bonds issued by the exercise of the slightest care could have ascertained that this mortgage, given for purchase money, was open and unsatisfied. The mere keeping silence in regard to it on the part of Strait cannot operate so as to find an estoppel against him. It was incumbent on the purchasers of the bonds, or those intending to make loans on mortgages, to examine the title and make an inspection of the record, and the presumption is that this was done. *Mills v. Graves*, 38 Ill. 455, 87 Am. Dec. 317; *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538.

[2] The alleged misrepresentation consists solely in the bond headings, "First Mortgage Bonds" and "Second Mortgage Bonds"; such words are mere general recitals by way of nomenclature of the bond issues of the company. Nowhere in the bonds are there any affirmations or statements that there is no other mortgage on the property in question, and that no prior mortgage existed in favor of Strait. It is a characterization that the bonds are a certain issue designated, "first" and "second," issued by the company and secured by mortgage. There is nowhere in the body of the bond any affirmation that it is the first mortgage or lien on the property in question, and a general recital does not furnish a basis for estoppel. *Bigelow on Estoppel*, 302.

The mere fact that Strait signed the bonds in his official capacity as secretary of the Southern Granite Company in pursuance of a resolution of the stockholders of the company is not such a voluntary act on his part as would estop him from asserting his in-

dividual claim, as his mortgage was on record, notice to the whole world, and there is no evidence that the holders of any of the bonds claim that they relied on any statement, representation, or act of Strait that would estop him, other than the mere general recital in the bonds' nomenclature of "first" and "second" mortgage. There is no evidence that they examined the records, and no evidence that they took the trouble to ascertain whether the T. J. Strait, who held the mortgage on record in two counties, was the same T. J. Strait, who signed the bonds as secretary of the Southern Granite Company. Strait's signing the bonds in question under the circumstances he did was an official, and not an individual act, and it was not necessary, and in fact he could not, by any authority or power, put in any statement of his individual rights in the premises in any instrument signed by him in the discharge of an official duty, and under the direction of the stockholders so as to operate as an estoppel upon him. *Bigelow on Estoppel* (3d Ed.) 275; *Wright v. DeGroff*, 14 Mich. 164.

[3] The second exception assigns error on the part of the circuit judge in holding that the burden was upon the appellants of showing affirmatively that they had been misled to their injury. The referee and circuit judge both concluded that the doctrine of estoppel can be invoked by the party setting it up showing that he had been misled to his injury. This conclusion of the referee and circuit judge is fully supported by the following authority: *Bigelow on Estoppel* (3d Ed.) 434; *Bethune v. McDonald*, 35 S. C. 93, 14 S. E. 674; *Gaston v. Brandenburg*, 42 S. C. 348, 20 S. E. 157; *Scarborough v. Woodley*, 81 S. C. 329, 62 S. E. 405—and for this and the reasons in overruling exception 1 this exception is overruled.

[4] The third exception is overruled for the reason that this was a matter purely within the discretion of the court, and we see no abuse of discretion on the part of his honor.

The fourth, fifth, and sixth exceptions are overruled for the reason that no exceptions were made to his honor's finding of facts, and we see nothing erroneous in his conclusions of law as to these matters.

[5] The referee and circuit judge concurred in their findings of facts and it is incumbent on the appellants to satisfy this court by the preponderance of the evidence that his honor, the presiding judge, erred in his findings of fact, and this they have failed to do. *Lumber Co. v. Stallings*, 91 S. C. 476, 74 S. E. 1072; *Leland v. Morrison*, 92 S. C. 501, 75 S. E. 889.

Judgment affirmed.

GARY, C. J., and FRASER, J., concur.
HYDRICK, J., concurs in result.

DAVIDSON v. DAVIDSON et al.
(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913. Rehearing Denied
Nov. 14, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 59*)—CONTRACT TO MAKE WILL—CONSIDERATION—WARRANTY.

A parol contract between an unmarried woman and her seducer, a man of large property, shortly after the birth of her child, upon consideration that if she would not prosecute him for bastardy he would "provide for her and her child by will and that he would make the same provision for them as if he were married" to her, considered in the light of the surrounding facts and circumstances, is supported by a sufficient consideration and is sufficiently definite and certain in terms, to be binding on his estate and enforceable.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 166; Dec. Dig. § 59.*]

2. WILLS (§ 58*)—CONTRACT TO MAKE—ENFORCEMENT.

An oral contract to make a will, if certain and definite in its terms, and upon sufficient consideration, if equitable, is valid, and enforceable against the estate of a decedent, as any other valid contract.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 164, 165; Dec. Dig. § 58.*]

3. WILLS (§ 58*)—CONTRACT TO MAKE—EVIDENCE.

Contracts of this character, however, are viewed by courts with suspicion, are not favored, and to be enforceable must be upon sufficient consideration, be equitable, and definite and certain in their terms, and clearly proven.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 164, 165; Dec. Dig. § 58.*]

Appeal from Circuit Court, Monroe County.

Bill by William A. Davidson, administrator, against George T. Davidson and others. Decree for plaintiff, and defendants French Shultz, his next friend, and others appeal. Affirmed.

J. W. Arbuckle, of Lewisburg, and G. C. Osborne, of Keenan, for appellants. Sanders & Crockett, of Bluefield, and J. L. Rowan and Clark & Keadle, all of Union, for appellee.

MILLER, J. Appellants, Susan Shultz and French Shultz, an infant, by Susan Shultz, his next friend, intervened by petition in the suit by plaintiff to convene the creditors and marshal the assets of C. H. Davidson, deceased, and because of deficiency of personal assets, to obtain a decree for the sale of sufficient of decedent's lands to pay creditors in full.

French Shultz, as the petitions show, is the illegitimate son of Susan Shultz, by the deceased C. H. Davidson. The object of the petitions was to enforce specific performance of an alleged contract between Susan Shultz and said Davidson in his life time, made for her own and the benefit of her infant son, as it is alleged in consideration of her forbearance to sue Davidson for breach of promise of marriage and in bastardy proceedings proposed or threatened by her.

According to her individual petition the alleged contract between petitioner and Davidson was, substantially, that said Davidson, being at the birth of her child possessed of a large estate, and being desirous of concealing from his father the paternity of the child, for fear that his father would disinherit him, shortly after the birth of the child, promised and agreed with her, in consideration that she would not institute such bastardy proceedings "to provide for her and the child by will and that he would make the same provision for them as if he were married to petitioner." She alleges that decedent reiterated this promise to petitioner's mother and to her sisters, "telling them to tell and assure her for him that he would provide for her and her child, if she would not swear the child to him." She further alleges that in consideration of said promises and the love and affection had for and confidence and trust reposed in him she abstained from bringing suit or taking any action in the courts against decedent, and so continued and remained true to him up to the time of his death.

Another allegation of her petition is that "in pursuance of this contract and agreement the said C. H. Davidson executed a will and in it made provision for petitioner and left to her said son * * * the sum of \$10,000 of which said will he duly informed this petitioner"; "that afterwards he destroyed this will and declared his intention of increasing this legacy to the sum of \$30,000, but if he made another will it has not been found." She charges "that at the time the said C. H. Davidson destroyed said will, he was not in a mental condition to know or understand what he was doing." The petition contains a charge that by reason of said contract to provide for her, as if married to him, petitioner has the right to charge his estate with a large sum, to-wit one third of the value of said estate for her life.

The prayer of the petition is that the personal representatives and heirs of decedent be treated as trustees holding for her benefit the estate of which the said C. H. Davidson died seized.

In the petition of the infant petitioner, by his mother as next friend, the inducement and consideration for the alleged contract are stated substantially as in her petition, and the contract alleged to have been made on behalf of petitioner coincides in part with the contract as alleged in her petition, as follows: "That the said Charles H. Davidson then promised the mother of this petitioner that if she would not institute the said proceedings against him that he would provide for her and this petitioner by will the same as if they were married." But following that allegation is this charge: "That he afterwards promised her to leave this pe-

titioner \$15,000.00 by his will, if she would not sue him, and repeatedly sent these promises to her by others," and that he repeated this proposition to petitioner's grandmother and aunts.

The prayer of this petition is that petitioner "be allowed his claim of \$15,000.00 as aforesaid against the estate of Chas. H. Davidson, deceased."

There was a demurrer to these petitions by the adult defendants, who also answered, putting in issue every material allegation therein; and the infant defendants also answered formally by their guardian ad litem, and on final hearing on pleadings and proofs taken and the report of the master commissioner, and exception thereto, by defendants, the court below denied petitioners any relief and dismissed their petitions out of the cause, and that is the decree which they seek to have reversed on this appeal.

The commissioner in his report found that C. H. Davidson agreed with Susan Shultz to provide for her in his will a comfortable support for her life time, provided she would not sue him for breach of promise of marriage or bastardy, "that it will take \$181.25" per year, and which on the basis of her life expectancy, 10.705 years, would amount to \$1,940.28, which sum he found in her favor, to be paid out of decedent's estate as a general lien; and he found in favor of the infant petitioner the sum of \$15,000.00 to be likewise paid out of the estate of decedent.

[1] It is conceded by counsel that a contract to make a will, if certain and definite in its terms and upon sufficient consideration, is valid, and like any other contract, and that by the same rules it will be enforced. For this there is abundant authority. Page on Wills, §§ 70-83; Gardner on Wills, Ch. IV, §§ 19-21; 1 Underhill on the Law of Wills, §§ 285-294; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773, and note, p. 783; Rice v. Hartman, 84 Va. 251, 4 S. E. 621; Cox v. Cox, 26 Grat. (Va.) 305, Anno. 107, and note. The law in such cases is the same, substantially, as in the cases of parol contracts for deeds. Frame v. Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323; Burkholder v. Ludlam, 30 Grat. (Va.) 255, Anno. 94, and note, 32 Am. Rep. 668; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383.

[2] It is practically conceded, also, that the consideration for the alleged promise set forth in the petitions would be sufficient to support a valid promise by decedent to provide for petitioners by will. So the controversy here is narrowed to three questions, namely: First, is the contract alleged definite and certain so as to be enforceable? Second, if it is, is the contract proven as alleged, or does the proof show any contract with decedent which is enforceable? Third, if a valid contract is alleged and proven, is it affected by the statute of frauds, or taken

out of the statute of frauds by part performance of the contract by petitioner Susan Shultz?

On the first proposition, according to the petitions, the alleged promise of decedent, for the consideration alleged, was to provide for petitioner and her child by will, making the same provision for them as if he was married to her. What is the meaning of such a promise? Does it amount to a promise by decedent, as the petitions imply, to will to petitioner all the property of which he might die seized? If so, in what proportion? Or does it mean such parts of decedent's estate as petitioners would take, if marriage had followed, and without will? Decedent, if married, might have disposed of his estate by will so as to wholly cut out his child, but not his widow. Would the alleged contract have prevented such disposition of his estate? These are some of the questions naturally presented in connection with the alleged contract. Mr. Page in his work on wills, on the subject of the certainty of such contracts, referring in foot note to the decisions, gives illustrations of contracts which have been held invalid and of others held to be valid, as follows: "A contract to bring up a child, educate it and make it the 'heir' of promisor has been held to be unenforceable in Kentucky. And an ante-nuptial contract by which the husband agrees to adopt his wife's children by a former marriage as his 'heirs' has been held not to be a promise to make a devise of the husband's property to them, but to leave the husband with the same power of excluding them from a share in his Illinois realty that he would have had of excluding his own children. A similar contract has been held valid and enforceable in Missouri. Or the promisor may definitely intend to make some testamentary disposition of his property in favor of promisee, but he does not decide what provision he will make. Thus, he may agree to leave promisee 'as much as any relation he had on earth,' or that while promisor lived promisee should have a good home, and at his death she should be provided for so that she should never want as long as she lived; or that he will provide for the adopted child as he does for his own children, and his will makes his own children residuary legatees. These agreements are too indefinite to be enforced.

"An agreement in writing to leave by will to an employé as much as he would lose by declining an offer of a partnership in a competing firm, in consideration of his declining such offer and remaining in the employ of promisor was held to be too indefinite for enforcement in law or in equity. But a promise to leave promisee so much property 'that she need not to work,' or to leave her 'independently rich,' or to make her 'his heir,' or to leave promisee all the property that promisor owned at his death; or to leave promisee 'a child's share' in the estate of promisor, where promisor was at the

date of the contract and always remained childless; or to make 'adequate compensation,' have been held to be definite enough to maintain an action upon.

"A contract to bequeath so much of an annuity as should remain unexpended at the death of the annuitant is enforceable, although the amount is uncertain."

In the interpretation of contracts we must always keep in mind that it is the policy of the law to give force and effect thereto, if possible, and within well recognized canons. On the question of the definiteness and certainty necessary to give effect to a contract, one salutary rule is that that will be regarded definite and certain which by reference to the facts and circumstances surrounding the parties, and which were evidently in mind when making the contract, can be rendered certain and definite. In this case the parties to the contract were not married. According to the petitions marriage was contemplated after the death of decedent's father. What was evidently intended by the parties to the contract was that decedent would in the mean time so provide by will that in the event of his death the woman he had seduced, and the child by that act, should be provided for, and in case of his death should have of his estate what they would naturally take without will if marriage had ensued, and the relation of husband and wife and parent and child had thereby been established. So interpreted, is not the contract alleged sufficiently definite and certain to be enforceable? We are disposed to hold, in the light of the facts alleged attending the making of the contract, and the situation and circumstances of the parties, that the contract was valid and binding, and enforceable, and with the circuit court to hold the demurrers properly overruled.

While it is true the mother in her petition alleges, rather inconsistently with the terms of the contract as alleged, that decedent in pursuance of the contract executed a will making provision for her and leaving to her son \$10,000; and in the petition filed on behalf of the son, alleges that decedent afterwards promised to leave him \$15,000.00, these alleged acts and promises of decedent could not take away the rights of petitioners under the contract, unless they should elect to accept such provisions in full performance of the contract as originally made.

[3] The next inquiry is, does the proof establish the contract as alleged, or any contract enforceable against decedent's estate? We do not think it arises to the dignity of full and clear proof, required in all such cases. It is conceded that the evidence of Miss Shultz, objected to, is wholly incompetent. But if it could be considered, what does it amount to? The substance of it, so far as it applies to any contract with decedent, is that some two days after the birth of the child decedent visited her at her room, and in the presence of her sister Mrs. Heavenner,

and with the child in his arms, acknowledging it to be his own, said to her that he did not want any trouble, and did not want her to swear the child to him, that he meant to take care of her and the child, and told her sister to take care of them, that he meant to take care of them, and meant to give them every thing he had, and that he did not want any trouble for fear his father would disinherit him, and that he meant to marry her after his father's death. She also swears that he stated the same thing to her mother and requested her not to allow witness to swear the child to him, or sue him, and that he meant that all he had was for her and the child, and that he meant to will or give it to them. Did this language of decedent amount to more than the expression of a then present purpose to so provide by will for petitioners? We hardly think so. True we may say it evinced great anxiety on his part not to be exposed, and he evidently meant by representing his purposes to provide for her to persuade Miss Shultz not to sue him. But did it all amount to a contract? Did both parties understand that they were entering into a solemn contract that was to be enforceable and legally binding on him in the courts, cutting off other disposition of his property by will or otherwise for all time? We cannot so interpret their conversation as detailed by the witness. Nor is the case strengthened by her testimony, that decedent afterwards told her he had provided for her and her child by his will.

But now as to the evidence of Mrs. Heavener, the sister, present at the time of the alleged contract. The whole of her evidence as to what took place between decedent and her sister, in the latter's room on the occasion of the alleged contract is in substance this; addressing the witness, decedent said, "I want you to be good to Susan and take good care of the boy for I have made promises to her and mean to fulfill them." She says there was no one present but Susan, herself, Mr. Davidson and the baby. What promises he is supposed to have referred to does not appear. The witness had heard all the conversation between deceased and her sister, as detailed by the latter in her evidence, which we do not think amounted to a contract, though imposing on him moral obligations. He may have been referring to his previous promises of marriage, for Miss Shultz does not swear that deceased had ever before that promised to make provision for her and her child by will. Mrs. Heavener further swears that Davidson left her sister's room on the occasion just referred to, and as he left the house, he said to her "be good to Susan and take good care of the child and not let her swear the child for it might cause trouble at home, that he was afraid his father would disinherit him and for me to go back upstairs and tell Susan not to trouble for he intended to do everything for them he had promised."

But this witness gives evidence of another agreement some six weeks after the birth of the child, when her brothers James and Phineas had come to see her sister Susan and to have her swear the child to Davidson. She says Davidson was there, and took her out and requested her to go to her sister Susan and tell her not to swear the child to him, and that he would give her and the child everything that he possessed; that she communicated these promises of Davidson to her sister, and persuaded thereby she was prevented from instituting suits against him. She says Davidson knew on this occasion the purposes of her brothers who were present on that day. Mrs. Heavener also swears that later Davidson said to her he wanted her to quit worrying about Susan and the child, for he had willed the boy and her thirty thousand dollars, that she told him she did not want money without protection, that he replied that he had willed them the money and intended to protect them too.

We must admit that the alleged proposition of Davidson to Miss Shultz, through Mrs. Heavener, on the latter occasion rises more nearly to the dignity of a contract than the former, given in evidence by petitioner and this witness. But how he was to give them his property, whether by deed or will does not appear. But this witness says Davidson subsequently told her he had willed petitioner thirty thousand dollars. Phineas Shultz, the brother, swears, that on the occasion of his and his brother's visit, the same upon which Davidson is represented by Mrs. Heavener to have communicated through her the proposition to her sister, that when told something would have to be done, his sister said she would see Davidson, that she went to him and after they had talked some little time she came back and reported that Davidson did not want her to swear the child to him, and that "he would either marry her or would make them entitled to what he possessed." This statement he repeated on his cross-examination. This evidence of what occurred on the occasion in question, and the theory of a proposition made by Davidson to Miss Shultz, through Mrs. Heavener, is not exactly in harmony. According to Mrs. Heavener the alleged proposition made through her, was the accepted one, and the one on which her sister acted. The proposition according to her brother was that deceased would either marry her or give her all he possessed.

According to the mother, Mrs. Mary Shultz, Davidson said to her, on the occasion of his first visit, after the birth of the child: "Take good care of Susan and the boy, I am going to marry Susie and you tell her not to sue or swear the child to me," and that he had thirty thousand dollars that he intended for them. She says Davidson requested her to communicate this message to her daughter, which she did. The testimony of Mrs. Burd,

the other sister, is substantially the same as that of the mother. Other witnesses swear to conversations with and declarations of Davidson in his life, that he had willed his property or money to petitioners, and that he intended to marry her, etc.

Many letters from Davidson were introduced, in connection with the evidence of Miss Shultz, covering a period of eight or nine years, before his death, which were objected to, all expressing great love and affection for mother and son, and holding out assurances of his purpose to fulfill his promises. In none of them, however, is any reference made to his alleged promises to make a will, or leave petitioners his property.

Again, we inquire, is all this competent evidence sufficient to establish the contract as alleged, or any contract enforceable in law or equity? Certainly it does not clearly establish a specific contract to make provision for petitioners by will, giving them the same as they would take by marriage. But from all of it may we properly extract a definite and certain contract or promise based on good consideration, such as is alleged, or one which by proper amendment might be alleged, and enforceable as such? We acknowledge great temptation, under the circumstances of this case, to strain every rule and principle, and every exception thereto, in order to so interpret the evidence. But we have been unable to reach the conclusion that any definite and certain contract was ever made which can be enforced. We are bound by the rule that such contracts are viewed by courts with suspicion, are not favored, and to be enforceable must be upon sufficient consideration, and be equitable, and clear and definite in terms. Page on Wills, §§ 71, 73; *Freeman v. Morris*, 131 Wis. 216, 109 N. W. 983, 120 Am. St. Rep. 1038, 11 Ann. Cas. 481; *Swann v. Housman*, 90 Va. 816, 20 S. E. 830; *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; *Wall's Appeal*, 111 Pa. 460, 5 Atl. 220, 56 Am. Rep. 288; *Wood v. Evans*, 113 Ill. 186, 55 Am. Rep. 409.

As is often said, courts cannot make contracts for parties, or render by judicial decision, contracts enforceable, which have not been rendered so by the previous voluntary acts of the parties. The hardship in this case is great, but the parties should have reduced their contract to writing, or made it clear and certain; that they did not do so during the long period that intervened between the date of the birth of the child and the death of decedent, is a circumstance evincing the fact that petitioners relied on deceased to fulfill his expressed purpose and intention to make provision for them by will, but without a contract enforceable by the courts. It is unfortunate that they were not better advised—a misfortune which cannot be remedied by the courts by unwarranted judicial action.

No legal contract having been established it is unnecessary for us to consider the question of the statute of frauds.

Our conclusion is to affirm the decree below, and we will so order.

RESERVE GAS CO. v. CARBON BLACK MFG. CO.

(Supreme Court of Appeals of West Virginia.
Sept. 30, 1913. Rehearing Denied
Nov. 14, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 461*)—BOUNDARIES (§ 11*)—LEASE—DESCRIPTION OF PREMISES.

A call for an adjoining tract of land as a boundary of the leased premises in a lease containing but one description of the premises demised, which description is clear, certain, and unambiguous, cannot be ignored or rejected, in the judicial interpretation and application of the description to its subject-matter; nor is it permissible to show, by parol evidence, facts and circumstances tending to prove intent, on the part of the lessor, not to lease part of the land included by the description.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461;* *Boundaries*, Cent. Dig. §§ 92-94; Dec. Dig. § 11.*]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE—ADMISSIBILITY.

Nor is it permissible to show, in contradiction of the terms of the lease, that it was verbally understood or agreed that the lessee was not to have a portion of the land its terms include.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

3. MINES AND MINERALS (§ 77*)—OIL LEASE—FORFEITURE.

An oil and gas lease binding the lessee to drill a well on the leased premises within a certain period, or, in lieu thereof, make periodical payments of rental or delay money, and containing no clause of forfeiture, is not forfeitable merely by nonpayment of the rental. It can be terminated only by surrender, abandonment, or expiration of the term.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 204; Dec. Dig. § 77.*]

Appeal from Circuit Court, Lewis County. Bill by the Reserve Gas Company against the Carbon Black Manufacturing Company and others. Judgment for plaintiff, and the Manufacturing Company appeals. Affirmed.

Robert L. Bland, of Weston, and Davis & Davis, of Clarksburg, for appellant. A. B. Fleming, Charles Powell, and Kemble White, all of Fairmont, for appellee.

POFFENBARGER, P. Upon the bill of the Reserve Gas Company, praying cancellation of a lease, for oil and gas purposes, upon a small area of land, containing one acre, three rods, and one-half a pole, executed by Charles Butcher and wife to the Carbon Black Manufacturing Company, a corporation, and an injunction to restrain the defendants from operating or drilling upon said tract of land for oil and gas or from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taking or removing any oil or gas therefrom, the circuit court of Lewis county decreed cancellation of the lease and perpetually enjoined operations thereunder; and from this decree the Carbon Black Manufacturing Company has appealed.

The conflicting claims set forth in the pleadings and the issues made arise out of the following facts: Owning two parcels or lots carved out of a tract of land formerly belonging to Thomas Butcher, one containing 25.5 acres and the other 11 acres, according to the specifications of quantity in the deeds, Granville A. Butcher, on September 13, 1889, executed to one Fretts an oil and gas lease thereon, representing the combined area to be 49 acres. This lease for a term of 20 years was afterwards assigned to one Ira De Witt, of Pittsburgh. On the 23d day of November, 1893, Granville A. Butcher, by a deed from Louis Bennett, special commissioner, obtained another small portion of the Thomas Butcher land, which had been conveyed by Thomas Butcher to Emmanuel Butcher. Between what he had previously owned, and the lot obtained by the Bennett deed, containing one acre, three roods, and one-half a pole, there was a county road; the small lot lying north of it, and the large tract south. On the northeast of the larger tract, the one included in the Fretts lease, ran the West Fork river, and on the southeast it was bounded for the most part by a tract of land owned by Elizabeth Ervin. On the southwest lay lands of C. D. Devinney and C. A. Peters, and on the west and northwest were lands of H. B. Butcher and M. E. Butcher. The small tract acquired by the Bennett deed was bounded on the north and the west by a tract of land containing 21.98 acres which had been conveyed by Thomas Butcher to Wm. A. Arnold, who devised it to Wilson A. Arnold, by his will probated July 23, 1890. Granville A. Butcher did not own the one acre, three roods, and one-half a pole tract at the date of the Fretts lease, but he did own it on the 8th day of August, 1900, the date of the oil and gas lease to the South Penn Oil Company for a term of ten years or as long as oil or gas or either of them should be produced from the land, and describing the premises as "bounded substantially as follows: On the north by the lands of Wm. A. Arnold and others. On the east by lands of A. W. Woodford and others. On the south by lands of M. Ervin and others. On the west by lands of C. D. Devinney and others. Containing 49 acres more or less." The Fretts lease gives the boundaries as follows: "On the north by West Fork river. On the east by lands of M. Ervin. On the south by lands of C. Flesher & C. Devinney. On the west by lands of Wm. Arnold & Brothers,"—containing 49 acres more or less. On the 4th day of June, 1897, Granville Butcher leased the small lot north of the road to E. W. Boyd for oil and gas purposes for a term of five

years, and, on the 1st day of June, 1899, to the Eastern Oil Company for like purposes for a term of ten years. On January 1, 1907, he conveyed the land by deed to his son Charles Butcher. The Eastern Oil Company's lease having expired, Charles Butcher, on July 12, 1909, executed a new lease on this lot, to the Carbon Black Manufacturing Company, which company began a well on the premises March 16, 1910, and completed the same April 20, 1910.

Though there is no proof of the assignment of the Fretts lease to the South Penn Oil Company, John Butcher, a son of the lessor, says Thos. H. Kemper, one of the agents of the South Penn Oil Company, who took the lease of August 8, 1900, said, on the occasion, he had come to re-lease the property at \$1 an acre instead of 10 cents an acre, the rental provided for in the Fretts lease, and further that Kemper had the Fretts lease with him at the time. John Butcher further testified that Kemper was informed on that occasion by the lessor, Granville A. Butcher, that the small tract of land in question was already under a lease to the Eastern Oil Company. Practically all of this testimony is denied by Kemper.

As recorded, the lease of August 8, 1900, contains this clause, relating to the payment of rentals or delay money: "Such payments may be made direct to the lessor or deposited to ——— credit in ———." The original lease, put in evidence along with a certified copy of it as recorded, contains this clause: "Such payments may be made direct to the lessors or deposited to their credit in the National Exchange Bank of Weston, W. Va." The rentals were paid regularly, but not always to the lessor in person. Some time before this controversy arose, the lessor died, and, after his death, some of the rentals were paid into the bank to the credit of his heirs.

The oil and gas rights vested in the South Penn Oil Company by its lease were assigned to the Hope Natural Gas Company in April, 1902, and by it to the Reserve Gas Company November 1, 1902.

In February, 1910, the Reserve Gas Company, having discovered preparations by the Carbon Black Company for drilling on the small tract of land in question, gave notice of its adverse claim under the South Penn Oil Company lease and advised that any operations by the Carbon Black Company under its lease would be at its own peril. At this time, the Carbon Black Company had done very little towards the development of the property. Later, it expended about \$6,000 in the drilling and equipment of the well, which produced about 4,000,000 feet of gas a day, and about \$30,000 in the erection of its plant on the lot. Process was issued in this cause on May 3, 1910, and the bill was filed at June rules, 1910.

Alleged ambiguity in the description of the leased land is relied upon in argument as

justification for consideration of the surrounding and attendant facts and circumstances within the knowledge of the parties as showing their intention and authorizing rejection of the call for the Arnold tract of land as the northern boundary. If that call is to be respected and applied literally, the lease includes the small tract north of the county road, the one on which the Carbon Black Manufacturing Company has its lease and upon which it has drilled a producing gas well, for, if that tract is omitted, the Arnold tract does not touch nor bound the property at any point. It lies directly north of the remaining land owned by Granville A. Butcher at the date of the lease, but the small tract purchased at the judicial sale, conveyed by Bennett, special commissioner, lies between them. Though the call is for the lands of Wm. A. Arnold and others, and there are no lands of others lying directly north, except the Charles Butcher lot, the Arnold land is called for as a boundary with others, and, if the Charles Butcher lot is excluded from the lease, the Arnold land is not a boundary at all.

[1] As there is a definite and positive call for that land as a boundary, we are unable to perceive how it can be rejected on the ground of uncertainty or indefiniteness. The western boundary line is irregular, the general course being northeast and southwest; wherefore it may be reasonably said the call for the Arnold land and others is intended to include lands of H. B. Butcher which in some respects is the western boundary and in others a northern boundary. A plat filed in the cause by one of the surveyors has the word "Arnold" on it at a point east of the West Fork river and rather northeast of the original Granville A. Butcher land; but there is no proof of the existence of any Arnold land at that point, and, if there were, it would not lie directly north of the Butcher land. Some of the other calls for boundaries are less apt and accurate than that of the ones just discussed. The lands of M. Ervin and others are called for as the southern boundary. The Ervin land constitutes more nearly an eastern, than a southern, boundary, but it lies to the southeast. The lands of C. D. Devinney and others are called for as the western boundary. The Devinney land lies more nearly south than west, and the western boundary would be more accurately expressed by calling for the lands of H. B. Butcher and M. E. Butcher. However, the Granville A. Butcher tract, lying south of the county road, can be located by these calls without doing any violence to the terms used, and the description, as a whole, including the Chas. Butcher lot, has all the certainty the law requires. Nothing found in the terms used or disclosed by extraneous evidence creates any uncertainty or ambiguity in it. On the face of the paper, we find no repugnance or inconsistency. Effect can be given to every part of the description, notwithstanding the

slight inaccuracies adverted to, and, literally and fully applied, it includes the small tract of land in controversy. It cannot be excluded without rejecting the call for the Arnold land. If the lease contained two descriptions, one general and the other particular, and the two differed as to the quantity or identity of the land in question, the circumstances and situation of the parties, evincing intent, might be permitted to control. *Mylius v. Lumber Co.*, 69 W. Va. 346, 361, 71 S. E. 404; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; *Smith v. Chapman*, 10 Grat. (Va.) 445; *Rutherford v. Tracy*, 48 Mo. 325, 8 Am. Rep. 104; *Masterson v. Munro*, 105 Cal. 431, 38 Pac. 1106, 45 Am. St. Rep. 57. But this lease contains only one description. Butcher had formerly leased his two tracts south of the county road as a single one, specifying 49 acres as the quantity, and his lease to the South Penn Oil Company again specified 49 acres as the quantity, notwithstanding the description inserted includes the small tract which he had purchased between the dates of the two leases, but he had no land popularly known as a 49-acre tract. The mere circumstance of a single lease of two tracts as containing 49 acres is wholly insufficient to establish a reputation or designation for general purposes. The terms "Home Farm," or farm on which the grantor or testator resides, give a means of identification which, differing from the particular description, may control; or, if the granted, devised or leased premises is designated by the name of a former owner from whom it has been purchased or inherited, the words give an unerring index to the location and boundary. But the statement of a quantity is a very uncertain one. It does not purport to be a designation or description. It is a mere statement of the quantity of land otherwise described and is often immaterial. The specification of the quantity or area in the lease, taken in connection with the fact that the land had formerly been leased as containing the same quantity, is the only thing in the lease or the evidence that might be regarded as in any sense a general description, and, as it does not amount to that, for the reasons stated, there is no ambiguity, justifying the admission of the circumstances relied upon as ground for rejection of the particular description or any portion thereof.

[2] All the circumstances relied upon as indicating intent contrary to that expressed in the lease rest in parol evidence. The lease does not in any manner mention or refer to them. It does not show any separation of the Charles Butcher lot from the other lands of Granville Butcher by county road or fences, nor that it was never considered or used by Granville Butcher as a part of his home farm, nor that there were other leases on it, nor that it was under lease to the Eastern Oil Company at the time the South Penn Oil Company lease was executed. Being incon-

sistent with the written terms of the lease and contradictory thereof, and the lease itself being free from ambiguity, these circumstances are inadmissible in evidence. *Oil Co. v. Knox*, 68 W. Va. 362, 69 S. E. 1020; *McCoy v. Ash*, 64 W. Va. 655, 63 S. E. 361; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611. Nor is it permissible to show contradiction of the terms of the lease by a parol understanding or agreement that the small tract was not to be included. Neither antecedent nor contemporaneous parol agreements are permitted to vary or contradict the terms of a written contract which is legally deemed to be the final and deliberate repository of the terms and provisions of the contract. *McCoy v. Ash*, cited; *Knowlton v. Campbell*, 48 W. Va. 294, 37 S. E. 581; *Howell v. Behler*, 41 W. Va. 610, 24 S. E. 646.

[3] An averment and claim of forfeiture of the South Penn Company lease as to the Charles Butcher tract are founded upon failure of the claimants under it to pay the rentals directly to the heirs of the lessor after his death, instead of payment thereof into the National Exchange Bank to their credit, under that provision of the original lease authorizing such payment which was only partially recorded, as has been shown. The lease was on a printed form in which space was left for designation of a bank for such purpose. A large amount of evidence tending to prove the blanks in question were filled before the lease was recorded, consisting of the testimony of the agent who took the lease, and agents, clerks, and officers in the office of the South Penn Company, and books and papers from its files, is unopposed by anything except the failure of the clerk to enter upon the deed book, in copying the lease, the words written in the blanks. For all that appears, these words were omitted by mere inadvertence, and the testimony just referred to very strongly tends to show they were so omitted. But the admissibility of this evidence is denied in argument under the rule forbidding collateral attack upon judicial and quasi judicial acts and proceedings, such as were performed by the clerk in admitting the lease to record. The evidence was neither offered nor introduced for the purpose of impeaching the record or amending it, but only to show the contents of the original lease. The purpose was not to change the character of the lease as a recorded one, but to prove it as an unrecorded lease. The original lease was admissible in evidence, notwithstanding admissibility of a certified copy thereof under the provisions of the statute and the rule adopted by the Virginia court before the passage thereof. *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894; *Carper v. McDowell*, 5 Grat. (Va.) 212; *Baker v. Preston*, *Gilmer* (Va.) 235. The rentals accruing under the lease were all paid to Granville A. Butcher until the date of his death, some time in

1908. Afterwards, they were paid in part to his heirs and partly into the bank to the credit of his heirs and devisees, but no payments were made to Charles Butcher, the owner of the lot here involved. Both the South Penn Oil Company and the Reserve Gas Company, by way of excuse for nonpayment to him, deny notice of his ownership of this lot. He gave them no actual notice thereof, and, as they are not subsequent purchasers, recordation of his deed is not constructive notice to them.

Without entering upon an inquiry as to whether there was a technical forfeiture, and, if so, whether equity will relieve under the circumstances of the case, treating the lease as one terminable by failure to drill a well within a stipulated time or pay commutation money, it suffices to say the lease in question was not of that character. It contains no forfeiture clause, and the lessee covenanted and agreed to drill a well within a certain time or pay a stipulated rental. There was a right of surrender on the part of the lessee, guaranteed by a stipulation in the lease, but no clause of forfeiture. Until termination of the lease by surrender, or expiration of the term, the lessee was bound by an express covenant to pay the rental, in default of drilling a well. Under familiar principles frequently declared by this court, there might have been a termination by abandonment; but all the facts and circumstances adduced in evidence negative any intent on the part of the lessee to abandon the lease, and the lessor, acting at his peril, attempted to assert a claim of termination by abandonment, as did all owners claiming under him. Clearly there was no forfeiture, nor is there evidence sufficient to make out a case of termination by abandonment.

Upon these principles and conclusions, the decree complained of will be affirmed.

Affirmed.

LYNCH, J., absent.

STATE v. EDWARDS.

(Supreme Court of Appeals of West Virginia.
Oct. 21, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 101*)—JURISDICTION—PREMATURE TRANSFER.

Upon an indictment for murder the circuit court was not without jurisdiction, because the clerk of the criminal court prematurely certified the same to that court, section 2, of chapter 12, Acts 1911, abolishing such criminal court, having operated proprio vigore to effect such transfer, and give the circuit court jurisdiction at the time of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 199-205; Dec. Dig. § 101.*]

2. CRIMINAL LAW (§ 1153*)—APPEAL—DISCRETIONARY RULING—ORDER OF PROOF.

A judgment of conviction in such case is not reversible because the trial court exercising

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a reasonable discretion refused to admit evidence of the good character of defendant at a particular stage of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.*]

3. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Though on the trial of an indictment for murder the court may err in refusing to admit at a particular time evidence of a material fact, the judgment will not be reversed on that account when the record shows that the evidence was subsequently admitted in the progress of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

4. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

When on the trial of an indictment for murder there is appreciable evidence on the subject it is reversible error for the court to reject instructions proposed by defendant properly presenting the law of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

Error to Circuit Court, Mingo County.

Will Edwards was convicted of murder in the second degree, and he brings error. Reversed, and new trial awarded.

F. H. Evans and Sheppard, Goodykoontz & Scherr, all of Williamson, for plaintiff in error. A. A. Lilly, Atty. Gen., and John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

MILLER, J. On a verdict of not guilty of first degree murder, but guilty of murder in the second degree, as charged in the indictment, the judgment complained of was that the defendant be confined in the penitentiary for the period of seven years.

The grounds for reversal relied on here are: First, the case was prematurely ordered to be transferred for trial from the criminal court to the circuit court, in accordance with section 2, chapter 12, Acts 1911: Second, that defendant on the trial was denied the right to prove his own good character: Third, that he was also denied the right to prove the existence of an ax at the place of the homicide, and within the reach of the deceased, in support of his theory of self-defense: Fourth, that the court erroneously rejected his instructions to the jury numbered 4 and 5.

[1] We see no merit in the first point. True an order of the criminal court, entered November 26, 1912, the prisoner being present and not objecting, directed the case to be certified to the circuit court for trial, but the Act required no such order. The Act itself without action by the criminal court transferred all cases pending therein from the criminal to the circuit court. While the Act directs the clerk on and after December 31, 1912, as a ministerial duty, to certify and transfer the cases in his court to the circuit court for trial, we do not think performance

of that duty was necessary to give the circuit court jurisdiction. By a subsequent provision of said section 2, "All indictments, suits, actions and proceedings of every kind pending in said criminal court on the day last aforesaid * * * shall * * * be docketed and proceeded in and tried and determined, and such further proceedings as may be proper, had therein by the said circuit court in all respects as if the same had been found or originated in said circuit court. * * *" The effect of this provision, we think, was to transfer such cases to the circuit court, whether regularly certified by the clerk as provided or not, and that such certificate was not a pre-requisite to the jurisdiction of the circuit court to try and determine an indictment, provided of course the circuit court actually had possession of the papers and otherwise proceeded regularly in the case.

[2] The second point we think is without substantial merit. The court did not reject finally proof of defendant's good character. When this evidence was offered the court was of opinion, for some reason not disclosed, that it was not proper to admit such evidence at that stage of the trial. There was here a plain intimation that if offered at some other stage the evidence would be admitted; but no such evidence was subsequently proposed. We can not reverse the judgment of a trial court on such matters of discretion, unless it has been abused to the prejudice of the complaining party.

[3] On the third point it is only necessary to say that the court, after the ruling complained of, admitted abundant evidence of the presence of the ax at the place of the homicide, and defendant could not possibly have been prejudiced by the first ruling, or by the order in which the evidence was admitted. *Brooks v. Wilcox*, 11 Gratt. (Va.) 417. So we must overrule this point.

[4] Lastly, in rejecting defendant's instructions numbered 4 and 5, we think the court plainly erred. It is not denied that these instructions are good in point of law. They are the same as defendant's instructions numbered 5 and 7, approved in *State v. Clark*, 51 W. Va. 468, 41 S. E. 204, and correctly state the law of self-defense relied on. The only justification offered by the Attorney General for their rejection is that there was no evidence warranting them. In this we can not concur. We do not pretend to say what weight or effect the jury should have given the evidence, but there was certainly some appreciable evidence upon which the prisoner was entitled to these instructions. He did not deny the killing. He admitted it. His own evidence, corroborated to some extent by other witnesses, was that before he fired the fatal shot the deceased in great anger had hit him on the head with a hammer, threatened to chop his head off, and at the moment he fired was making for an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ax near at hand to execute his threat, as he had reason to believe and did believe, and that it was necessary for him to kill deceased to save his own life.

As much as we regret to reverse judgments in such cases, we cannot see our way clear to deprive defendant of a substantial right to have the law of his case properly propounded to the jury.

The judgment below will therefore be reversed, the verdict set aside, and a new trial awarded.

LOVETT v. WEST VIRGINIA CENTRAL GAS CO.

(Supreme Court of Appeals of West Virginia.
Oct. 21, 1913.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 3*)—CONFLICTING ELEMENTS—OIL AND GAS LEASE—CONSTRUCTION.

While a call for quantity will never control other definite description of land, yet when all other elements of description lose their superiority through ambiguities and uncertainties the quantity called for in a deed may be considered in ascertaining the land intended to be conveyed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

2. CONTRACTS (§ 170*)—CONSTRUCTION—INTERPRETATION.

If a written contract is ambiguous in meaning, the practical construction put on it by the parties thereto may be considered in explanation of its true meaning.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

3. EVIDENCE (§ 213*)—OFFER OF COMPROMISE—ADMISSION.

Where, in an offer of compromise, a plain concession is in fact made, and not stated merely hypothetically for the purpose of buying peace, it is allowable in evidence as an admission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745-751, 753; Dec. Dig. § 213.*]

4. EJECTMENT (§ 16*)—RIGHT OF RECOVERY—POSSESSION.

The doctrine that a plaintiff in ejectment may recover on the strength of prior possession without more has no application where the defendant has acquired the possession peaceably and in good faith under claim of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41; Dec. Dig. § 16.*]

5. TRIAL (§ 139*)—DIRECTION OF VERDICT.

In a case not turning on conflicting oral testimony involving the credibility of witnesses, the court may properly direct a verdict for the party in whose favor the evidence plainly and decidedly preponderates.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Error to Circuit Court, Lewis County.

Action by James B. Lovett against the West Virginia Central Gas Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert L. Bland, of Weston, for plaintiff in error. Brannon & Stathers, of Weston, for defendant in error.

ROBINSON, J. Defendant, claiming under an oil and gas lease, entered on plaintiff's land. By this action in ejectment plaintiff sought to oust defendant from possession. At the trial, when the evidence was all in, the court directed a verdict for defendant, and judgment in its behalf followed. Assigning that the court erred in the admission and refusal of evidence and in directing a verdict, plaintiff seeks reversal of the judgment.

The lease under which defendant entered was executed by plaintiff and his wife to the Eastern Oil Company. It is the same lease that plaintiff and his wife sought to have cancelled by a suit in chancery which was ended adversely to them by a decision of this court reported in 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360. In that suit the lease was attacked as one forfeited and void. But it was adjudged that the lease was a valid, subsisting one. That suit raised no question as to what parcels of land were embraced in the lease. After the determination of the chancery cause, plaintiff, who had failed therein to relieve all of the land from the force of the lease, for the first time claimed that a parcel of about eleven acres, adjoining the two other parcels which are unquestionably within the description of the lease, was not covered by that description. Defendant, as assignee of the lease, had theretofore entered on the premises and drilled a producing gas well on one of the parcels. When defendant came to begin operations on the eleven acre parcel, the gates thereto were barred. Nevertheless defendant's servants entered and drilled another gas well. Thereafter plaintiff began this ejectment suit.

The description of the land in the lease is the general one ordinarily found in oil and gas leases. It calls for a tract of land containing ninety-three acres, bounded as follows:

"On the North by lands of Wilmer Norris,

"On the East by lands of Polk and Ceph Butcher,

"On the South by lands of Geo. N. Butcher and Bailey Bros.,

"On the West by lands of Geo. W. Dean."

Plaintiff and his wife who executed the lease owned three parcels of land, all adjoining. Together these three parcels make up the same acreage called for in the lease. Title to the parcel of eleven acres involved in this ejectment suit, and to one of the other parcels, much larger than the eleven acres, is in plaintiff; title to the remaining parcel is in his wife. The larger parcel belonging to plaintiff and the parcel belonging to his wife make a long but fairly regular boundary of land. But the parcel of eleven acres

adjoins plaintiff's other parcel by only a narrow neck and juts out therefrom so that it alone is nearly surrounded by lands of others. The location of the eleven acres is to the east of the body of the other two parcels. Plaintiff says that the call for adjoiners on the east line of the land as given in the lease will not allow the eleven acres to be included. In other words, he says that the lands of Polk and Ceph Butcher as called for in the description are not on the east of the eleven acres. True, by reason of the peculiar jutting out of the eleven acre parcel from the body of the other two parcels, the Butcher lands are to the west and north of the eleven acres. But at the same time they are directly to the east of a portion of the remaining body of the land, and the call does to an extent answer for a boundary of the whole. It is not totally inconsistent with an inclusion of the eleven acre parcel. However we may look at the land, whether as a tract containing the two parcels or the three, the description for the northern and eastern boundary is incomplete. In either case, there are other adjoiners that might have been named. Still, the calls for the north and east as given in the lease are not contrary to the taking in of the eleven acres. Then when we look at the call for the south, we find it particularly in harmony with an inclusion of the eleven acres; for, the land of Geo. N. Butcher is squarely and regularly south of the eleven acres. It is also true that the Geo. N. Butcher land might be considered a proper call for the southern boundary even if we exclude the eleven acres, but that call plainly indicates that the eleven acres is to be included. The call for the east is incomplete and leaves it uncertain whether the eleven acres is to be included. The call for the south speaks an intention to take in the small parcel, but it is not conclusive in that regard. Thus we observe that the boundary lines given in the lease are insufficient for the purpose of locating the land definitely and certainly. They are indeed consistent with either the inclusion or the exclusion of the parcel of eleven acres. Whither then may we look for further indicia of the intention of the parties?

[1] This case is plainly one where a consideration of the quantity is proper in determining whether the parties intended that the lease should cover all of the three parcels. While a call for quantity will never have effect as controlling other definite description of land, yet when there is plainly such ambiguity in description as we have here, quantity may be considered for the purpose of finding the intention of the parties. When the general boundaries given may mean the inclusion of a parcel or the exclusion of it, as in this case, certainly the number of acres which the parties have fixed in describing the land may be looked to. Particularly so is this in relation to an or-

inary oil and gas lease. In such a lease the acreage is usually stated with certainty because of the relation that it ordinarily has to the fixing of the commutation money to be paid. The land owner is particular to see that the acreage of the land he intends to lease is all that it really is, while the lessee is interested in having it stated no larger than the actual acreage of the land. Now, in the case before us the parties say by the lease that the land intended to be leased is a tract containing ninety-three acres. If the parcel of eleven acres is included, the acreage is what the parties said it should be; otherwise it is not. The stating of the quantity of ninety-three acres is further indicia that the parties intended to cover the small parcel by the lease. Where all other elements of description lose their superior value through ambiguities and uncertainties resort may be had to quantity. "Where the description of land by monuments, distances or otherwise is vague and indefinite, by reason of conflicting lines or omission of a line, or from any other cause, the statement of the acreage is an essential part of the description." *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762.

[2] But, perhaps, the clearest insight into what the parties mean by indefinite and ambiguous terms in a contract may be had from the practical construction put on it by themselves. "If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight, even though the contract is in writing, and, ordinarily, is controlling." 2 Page on Contracts, sec. 1126. Now, plaintiff, by a letter which he wrote to an agent of defendant while the chancery cause to which we have referred was pending, in specific terms recognized this very lease as embracing all of the three parcels. Here is what he says: "The tract of land embraced in the lease in controversy in the chancery cause referred to, is made up of three parcels, one containing 33 $\frac{1}{4}$ acres, one containing about 11 or 12 acres, and one containing about 48 acres. The first named tract is owned in fee simple by my wife, B. E. Lovett; the other two tracts are owned by myself in fee simple." Surely this construction of the description of the lease by the plaintiff himself needs no comment. He was too explicit in his statement ever to be misunderstood. Besides, the letter was accompanied by a pencil sketch showing the three parcels of land.

[3] It is submitted, however, that the court erred in admitting the letter and sketch in evidence, because they relate only to a compromise proposition. The letter was one offering a proposition for the compromise of the chancery suit then pending. That suit did not at all involve the question whether the small parcel was embraced in the lease. As we have said, it sought a wiping out of the lease in entirety on the ground that the lease was void. The proposition of compro-

mise related only to the issue in that suit. This suit in ejectment at that time had not been conceived. The admission in the letter and its accompanying sketch that the lease embraced all of the three tracts was in no wise material to the proposition submitted in the letter for a settlement of the issue in the chancery cause. Plaintiff was not, in an effort to buy peace, admitting something then in issue. The admission he made was not induced by the effort to compromise, since it was wholly unnecessary to any settlement of the litigation then pending. It was stated as a fact, and not merely hypothetically. "If a plain concession is in fact made, it is receivable, even though it forms part of an offer to compromise." 2 Wigmore on Evidence, sec. 1061. The book just cited contains an enlightening discussion on this point. The court did not err in allowing the letter and sketch to go in evidence.

Nor did the court err in admitting the record of the chancery cause and the evidence of witnesses for the purpose of further showing plaintiff's practical construction of the terms of description in the lease. As we have shown, the description was ambiguous. Admissions and acts of plaintiff tending to establish his understanding of the meaning of the description were allowable in evidence to clear away the ambiguity.

[4] It is further submitted that plaintiff should have been permitted to prove, by a copy of a deed or assignment which he offered, that defendant had parted with title to the lease before it entered on the eleven acres, and that therefore it was a mere intruder thereon. The evidence, however, shows that the entry on the land was made by defendant not as a mere intruder. As between plaintiff and defendant, the latter was in rightful possession of the whole of the land, including the eleven acres, under claim by the lease, at the time plaintiff says his peaceable possession was ousted by an intrusion. The rule enunciated in *Tapscott v. Cobbs*, 11 Grat. (Va.) 172, relied on by plaintiff, does not apply under the evidence herein, and the refusal to admit the paper offered was proper. The doctrine that a plaintiff in ejectment may recover on the strength of prior possession without more has no application where the defendant has acquired the possession peaceably and in good faith under claim of title. *Marshall v. Stalnaker*, 70 W. Va. 394, 74 S. E. 48.

[5] Plaintiff did not testify. He denied none of the practical construction which it was proved he had placed on the terms of the lease. In other particulars, and upon the whole, the evidence did not appreciably tend to support his case as against the evidence of defendant. A verdict against defendant could not rightly have stood on a motion to set the same aside. In such a case as this one, not turning on conflicting

oral testimony involving the credibility of witnesses, the court may properly instruct the jury to return a verdict for the party in whose favor the evidence plainly and decidedly preponderates. *White v. Hoster Brewing Co.*, 51 W. Va. 259, 41 S. E. 180.

An order will be entered affirming the judgment.

MILLER and LYNCH, JJ., absent.

BASHAR v. PITTSBURG, C., C. & ST. L. RY. CO.

(Supreme Court of Appeals of West Virginia. Oct. 21, 1913.)

(Syllabus by the Court.)

1. ASSUMPSIT, ACTION OF (§ 19*)—DECLARATION—SUFFICIENCY.

A declaration in assumpsit, based on a promise and undertaking safely to carry and deliver goods, needs no averment of a promise to pay money.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. § 19.*]

2. APPEAL AND ERROR (§ 548*)—BILL OF EXCEPTIONS—EVIDENCE.

Evidence introduced at the trial of an action but not made part of the record by bill of exceptions will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

Error to Circuit Court, Ohio County.

Action by William Bashar against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Sommerville, of Wheeling, for plaintiff in error. John J. Coniff, of Wheeling, for defendant in error.

ROBINSON, J. [1] The demurrer to the declaration was properly overruled. The pleading is not subject to the criticism that it does not allege a promise to pay, and therefore is not good in assumpsit. It is a declaration on a contract to carry goods. The promise and undertaking safely to carry and deliver is plainly averred. The declaration as a whole has been copied from the form given in 4 *Minor's Institutes* (3d Ed.) pt. 2, page 1682. It is undoubtedly good. Plaintiff's counsel seems to think it is not good because it does not allege a promise of payment. But it is not based on a case for the payment of money. It is based solely on a case for the carriage of goods. The promise to carry, not a promise to pay, is therefore the gist of the assumpsit. The failure to fulfill a promise safely to carry and deliver the goods is the breach laid. From the promise and its breach impliedly arises the obligation for damages.

[2] The other questions presented can not be decided without a consideration of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 79 S.E.—64

evidence introduced at the trial of the action. The evidence is certified and printed with the record, but has not been made a part thereof by a bill of exceptions. We are therefore precluded from looking to the same. The judgment will be affirmed.

MILLER, J., absent.

CUMBERLEDGE v. CUMBERLEDGE et al.
(Supreme Court of Appeals of West Virginia.
Oct. 7, 1913. Rehearing Denied Nov. 18, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 210*)—CONSIDERATION—VERBAL CONTRACT.

Although a deed of grant recites as consideration therefor "one dollar in hand paid," a prior verbal agreement between the parties thereto for maintenance and support, when properly pleaded and sufficiently proved, will be deemed and held the actual consideration for the grant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 635, 636; Dec. Dig. § 210.*]

2. APPEAL AND ERROR (§ 1009*)—DECREE—CONFLICTING EVIDENCE.

A decree based upon conflicting evidence, unless apparently erroneous, will not be disturbed on appeal therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Doddridge County.

Bill by George Cumberledge against Godfrey G. Cumberledge and others. From a decree for plaintiff, the defendant named appeals. Affirmed.

J. V. Blair, of West Union, and Homer Strosnider, of Clarksburg, for appellant. G. W. Farr, of West Union, for appellee.

LYNCH, J. The plaintiff, a man about 75 years old, his wife, Lucretia, being about the same age, both infirm and physically unable to endure labor, on December 1, 1906, conveyed 190 acres of land owned by him to a young and remote kinsman, at the time unmarried, in consideration of maintenance and support of the grantors during their lives. The deed of grant does not recite the real consideration; it recites only "one dollar cash in hand paid, the receipt of which is hereby acknowledged." But the bill alleges that on November 15, 1906, the plaintiff and defendant entered into a verbal contract, whereby plaintiff agreed to convey his land to defendant, and the latter to live in plaintiff's home and fully support him and his wife during the period stated, and at the demise of each of them to provide proper interment, etc., fully setting out in detail what the latter should do, and that the grant was made accordingly. While the defendant in his answer to the bill, which seeks cancellation of the deed and other gen-

eral relief, denies the agreement, and asserts that the real consideration was prior services rendered plaintiff, yet in his testimony taken in the cause and read on final hearing he substantially admits the averments relating to the agreement, that it was in fact the real consideration, and that plaintiff promptly paid him cash in full for all services rendered prior to its date. That such an agreement is a sufficient consideration for the deed is held in *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.

As the circuit court found for defendant on all the charges of the bill upon which relief is sought, except abandonment of the premises by defendant and his failure to comply with the obligations assumed by virtue of the agreement, our investigation is properly limited to the one inquiry: Whether the decree of cancellation pronounced in this cause on November 28, 1910, and from which defendant appealed, is erroneous.

[1] The defendant admits that he quit the home of the plaintiff, but denies that he intended thereby to avoid performance of any obligation toward the grantors assumed by him as a consideration for the land. On the contrary, he seeks to excuse his absence from the home, and his failure to comply with the contract, because of the conduct of the female grantor toward his wife, whom he married and took with him to plaintiff's home, as he charges, with the assent of both grantors, and with whom they lived harmoniously until the attitude of plaintiff's wife toward his wife became so intolerable that he was obliged to move and seek a home for the latter elsewhere; and he claims that he moved with plaintiff's consent.

[2] Plaintiff perhaps assented, at least did not object, to defendant's marriage subsequent to the date of the grant, and his joint occupancy thereafter of plaintiff's home. But within a few weeks the strife arose, apparently to the discomfort and annoyance of both plaintiff and defendant, who by reason thereof finally concluded that the latter should live elsewhere, and, inferentially at least, that they should consider the agreement for support terminated. This much is certain, that, pursuant to this arrangement, defendant in fact moved from the land, and that thereafter he did nothing by way of compliance with his undertaking. His failure to comply he attributes to plaintiff's rejection of his repeated offer to perform his part of the original agreement. By its decree, the circuit court evidently found for plaintiff on the evidence touching this feature of the defense. We are unable to say it erred in its conclusion, at least that error is clearly apparent. There is conflict in the testimony, the witnesses for each litigant directly contradicting the statements of those testifying for the other, especially upon the important issues. While different minds, equally impartial and capable, might, upon

a careful analysis, reach different conclusions, we think the evidence is amply sufficient to sustain the finding expressed by the circuit court in its decree. The general rule is that the holding of a circuit court or other inferior tribunal upon conflicting evidence will not be disturbed on appeal unless plainly erroneous. *Naughton v. Taylor*, 50 W. Va. 233, 40 S. E. 852; *Frederick v. Frederick*, 31 W. Va. 566, 8 S. E. 295; *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375, 6 L. R. A. 427; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Dorr v. Dewing*, 36 W. Va. 466, 15 S. E. 93. See, also, *Shaffer v. Shaffer*, 51 W. Va. 126, 41 S. E. 166.

That relief in equity in such cases may be granted, though this is not now questioned by the defendant, clearly appears from *Wilfong v. Johnson*, *supra*; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Fluharty v. Fluharty*, 54 W. Va. 407, 46 S. E. 199; *White v. Bailey*, 65 W. Va. 573, 64 S. E. 1019, 23 L. R. A. (N. S.) 232; *Wampler v. Wampler*, 30 Grat. (71 Va.) 454; *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17.

For the reasons stated, we affirm the decree.

LIGHT v. E. M. GRANT & CO. et al.
(Supreme Court of Appeals of West Virginia.
Oct. 21, 1913.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 55*)—SALE OF COAL IN PLACE—RIGHT TO RESCIND.

The grantee of coal in place in a deed conveying all the coal in a tract of land cannot rescind the sale merely because the coal area in the land is not as large as he had hoped or expected to obtain, provided there is a substantial quantity of coal in the land.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

2. MINES AND MINERALS (§ 55*)—SALE OF COAL IN PLACE—RIGHT TO RESCIND.

Nor can rescission of the sale executed by such a deed be had because of nonexistence of a particular coal vein or measure in the land.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

3. EVIDENCE (§ 413*)—PAROL—DEED TO COAL IN PLACE.

On a bill for such rescission, parol evidence to prove expectancy of a particular vein or a representation of the presence thereof in the land is inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1855-1857, 1859-1860; Dec. Dig. § 413.*]

4. MINES AND MINERALS (§ 55*)—SALE OF COAL IN PLACE—DEFICIENCY IN QUANTITY—ABATEMENT FROM PRICE.

Under a sale of land or coal by the acre, there may always be an abatement from unpaid purchase money, or a recovery of purchase money paid, in case of a deficiency in the quantity of the land or coal.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

5. MINES AND MINERALS (§ 55*)—DEED TO COAL IN PLACE—AMBIGUITY.

A deed for coal, conveying a certain number of acres as acres of coal in consideration of a sum of money which is an exact multiple of the number of acres specified, is ambiguous on its face as to whether it is a sale by the acre or a sale in gross.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

6. MINES AND MINERALS (§ 55*)—DEED TO COAL IN PLACE—CONSTRUCTION.

In such case the purpose of the vendee to obtain coal, not land, nonexistence of coal in a large portion of the land and an option for purchase of the coal in the land at a certain price for each and every acre of the coal, under which the deed was made, may be considered in seeking the intent of the parties; and the deed read in the light thereof is properly construed as embodying a contract of sale by the acre.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

Appeal from Circuit Court, Preston County.

Action by J. M. Light against E. M. Grant & Co. and others. From judgment for plaintiff, defendants appeal. Reversed and remanded.

P. J. Crogan, of Kingwood, and Goodwin & Reay, of Morgantown, for appellants. Hughes & Conley, of Kingwood, for appellee.

POFFENBARGER, P. To the bill for the enforcement of a vendor's lien in this cause, the answer set up two alternative defenses, a right of rescission of the contract of sale, with a recovery of the purchase money paid, and an abatement from the unpaid purchase money for a deficiency, both of which were disallowed by the court, and a decree was entered for the full amount claimed by the plaintiff, with interest thereon.

The deed in which the lien was reserved conveyed "all the coal in, on, and underlying all that certain tract of land owned by the grantors," described as containing 244.55 acres, out of which there was reserved a strip containing 4.157 acres which had been conveyed to a railroad company out of the tract and 6 acres of coal to be located in a contiguous body under and around the dwelling and outbuildings on the property, leaving 234.4 acres of coal. The consideration was \$2,812.80, of which one-third was paid in cash and the balance deferred in two equal payments for one and two years, respectively. The conveyance was made March 30, 1907, pursuant to an option dated October 12, 1905, several extensions of which had been granted, the last one until January 2, 1907.

[1, 2] Unsustained by proof, the prayer for rescission was properly denied. The answer set up two grounds therefor, the nonexistence of any coal in the land of the kind contracted for, and fraud on the part of the plaintiff, consisting of misrepresentation as to the kind

and quantity of coal in his land. Though neither the option nor the deed specifies any particular vein of coal as the subject-matter of the contract, the answer charges the contract was for coal of the Upper Freeport vein, which averment is denied by a special replication. Some witnesses were of the opinion that none of that vein of coal is found in the land, while others believed it contains five or six acres of such coal. That the quantity thereof, if any, is meager is an undisputed fact in the case. A witness for the defendant testifies to a representation of the existence of a large quantity of such coal by the plaintiff, but this the plaintiff denies, saying he made no claim of that sort, but, on the contrary, had said there was very little of the Upper Freeport vein of coal in his land. To strengthen the evidence of the claim or representation contrary to the fact, evidence was adduced tending to show the Upper Freeport vein of coal was the only one in that section of the country at that time deemed to have a commercial or marketable value.

[3] The general terms used in the option and deed, calling for all of the coal in the land, clearly negative any intention to limit the conveyance to a particular vein. To admit parol evidence of intention so to limit it would clearly violate a well-established rule of evidence. The terms of the deed are certain and definite. It contains not a word upon which any claim of ambiguity or uncertainty can rest, and no latent ambiguity is disclosed by the oral testimony. Hence there is no basis or ground for the admission of parol evidence. It could perform no office other than contradiction of the plain terms of the written contract, and that is inhibited by a firmly established rule of evidence. *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704; *Troll v. Carter*, 15 W. Va. 567. Having contracted for all of the coal in the land, the defendants are not entitled to rescission of the contract on account of the absence or nonexistence of a particular vein. *Shackleford v. Fulton*, 139 Fed. 97, 71 C. C. A. 295. Nor is the testimony adduced sufficient to show they were induced to enter into the contract by any representation as to the existence of the vein of coal in question. On this issue the evidence consists of the testimony of two witnesses only, and they squarely contradict each other. Moreover, a preponderance of the evidence favors the presence of the Upper Freeport coal in the land, and there is no pretense of a representation that the Freeport vein underlies the whole thereof. That the land contains less coal than was expected or represented constitutes no ground for rescission, for the quantity was not in any way made an essential element of the contract. Its plainly expressed purpose was to take and pay for such coal as the land contained, whether much or little, provided there should be a substantial quantity of it.

[4] If the sale was one by the acre, as regards the coal, and not in gross, there should have been a large abatement from the price, for 234.4 acres were sold, and, as a matter of fact, the land contained at the most not more than 125 acres of coal in veins, the existence of which has been ascertained and shown. In all cases of sale by the acre, there may be an abatement from the purchase price for deficiency in quantity. *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Bartlett v. Bartlett*, 37 W. Va. 235, 16 S. E. 450; *Thompson v. Catlett*, 24 W. Va. 524; *Board v. Wilson*, 34 W. Va. 609, 12 S. E. 778; *Neal v. Logan*, 1 Grat. (Va.) 14, 15. Right to abatement or compensation for a deficiency in the case of a sale of land in gross stands upon the existence of a warranty of quantity or fraud and misrepresentation on the part of the vendor, respecting the quantity. *Crislip v. Cain*, 19 W. Va. 438; *Hansford v. Coal Co.*, 22 W. Va. 70; *Newman v. Kay*, 57 W. Va. 98, 49 S. E. 926, 68 L. R. A. 908, 4 Ann. Cas. 39; *Winton v. McGraw*, 60 W. Va. 98, 54 S. E. 506.

[5, 6] As the consideration agreed upon and recited in the deed is an exact multiple of the number of acres conveyed, it is ambiguous on its face as to whether it was a sale in gross or a sale by the acre. *Newman v. Kay*, cited; *Hansford v. Coal Co.*, cited. On the question of the construction of such a deed or determination of the question of intent, only evidence of the circumstances which surrounded the parties, their situation when the deed was made, and their conduct in carrying the contract into execution is admissible. *Winton v. McGraw*, cited; *Newman v. Kay*, cited; *Hansford v. Coal Co.*, cited; *Crislip v. Cain*, cited. A mere declaration of intention cannot be considered. In this instance the vendees were purchasing coal, not land, and it would be unreasonable to suppose they intended to pay coal prices for land in which there was no coal, or, in other words, to pay for what did not exist. The option they had taken upon the land provided for payment of \$12 an acre for each and every acre of coal, not for the land, nor any supposed quantity of coal, and also for ascertainment of the coal acreage in the land, and the deed itself represents "a net coal area * * * of 234.4 acres." The force of these facts and circumstances stand unopposed by anything indicative of a sale in gross, and they must be accorded their legal effect, making plain and obvious an intention on the part of the parties to effect a sale of the coal by the acre.

The land was mountainous and steep. Near the top there is a coal area of five or six acres in the Upper Freeport vein. Some distance below this there is another area which contains about 40 acres which is supposed to be in the Lower Freeport vein. Still lower down there is an area of about 120 or 125 acres which is said to be in one of the

Kittanning measures. Such is the testimony of the witnesses for the plaintiff. That of the witnesses for the defendants classes the upper area as the Lower Freeport, the next one as the Kittanning, and the third one a Mercer coal bed of the Pottsville measures or series. The deficiency established by this evidence is the difference between 125 acres and 234.4 acres, amounting to 109.4 acres, which, at \$12 an acre, amounts to \$1,312.80. This deducted from the full amount of the purchase money received \$2,812.80, leaves a balance of \$1,500, of which \$937.60 has been paid, leaving a balance of \$562.40, bearing interest from March 30, 1907.

In conformity with this conclusion, the decree will be reversed, and the cause remanded, with directions to the trial court to enter a decree for said sum of \$562.40, with interest thereon from the 30th day of March, 1907, to be added to the principal and included in the decree as of the date thereof, and for further proceedings in accordance with the rules and principles governing courts of equity.

MILLER, J., absent.

BLAND et al. v. RIGBY et al.
(Supreme Court of Appeals of West Virginia.
Oct. 21, 1913.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 277*) — ACTION TO SET ASIDE—DEFENSE—PROOF.

In a suit to set aside a conveyance or transfer of property or a charge thereon for fraud, payment of full, fair, and adequate consideration for the property or claim is an affirmative defense on the part of the purchaser or claimant of the lien, to be established by clear proof.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. § 277.*]

2. FRAUDULENT CONVEYANCES (§ 300*)—ACTION TO SET ASIDE—DEFENSE—PROOF.

To sustain the claim of payment of consideration in such case, when the amounts are large, the testimony of the grantee, if uncorroborated by receipts, memoranda, or other documentary evidence, must be clear, positive, definite, consistent with other evidence offered by him, and free from self-contradiction.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. § 300.*]

3. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CAUSE—DEFECTIVE PLEADING.

If, in a suit by creditors to set aside a conveyance or charge as fraudulent, the evidence establishes the fraud, but the bill is deficient in its allegations, the decree subjecting the property to sale will be reversed, and the cause remanded, with leave to amend the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

Appeal from Circuit Court, Wetzel County.
Action by J. A. Bland and others against C. F. Rigby and others. Judgment for plain-

tiffs, and certain defendants appeal. Affirmed in part, and reversed in part and remanded.

Dave D. Johnson, of Parkersburg, for appellants.

POFFENBARGER, P. Certain town lots in the town of New Martinsville and some patent rights were decreed to be sold in this cause to satisfy the claims of Harry Wade, J. A. Bland, and M. B. McGee, judgment and execution creditors of C. F. Rigby and E. A. McCabe, late partners as machinists under the firm name of the Rigby Manufacturing Company. At the time of the decree, the real estate was claimed by Emmett C. Rigby, to whom it had been conveyed pendente lite, the patent rights by Mrs. C. F. Rigby, and prior liens on the real estate, amounting to about \$9,000, by Frank P. McCabe.

The decree stands upon the hypothesis of fraud in the transfers, inferable from the following relations and transactions among the parties: On March 25, 1901, Wash Dunn and wife conveyed to E. A. McCabe and C. F. Rigby a lot in the town of New Martinsville, 60 feet by 100 feet in size. On April 27, 1901, D. W. Gamble and wife conveyed to them another lot 40 by 159 feet. On September 29, 1902, McCabe and Rigby conveyed the two lots, together with certain personal property, consisting of machinery and tools in the buildings thereon, to S. Bruce Hall, trustee, to secure to A. Leschen & Sons Rope Company a debt of \$2,000. On November 19, 1902, Rigby and his wife conveyed to M. R. Morris, trustee, Rigby's one-half interest in the two lots to secure to Frank P. McCabe an alleged debt of \$7,000, represented as having been evidenced by a negotiable promissory note, executed by C. F. Rigby. On April 12, 1904, Rigby and wife and E. A. McCabe conveyed the two lots and the machinery, tools, and appliances therein to Frank P. McCabe by a deed which was admitted to record on the 28th day of May, 1904. On or about July 11, 1904, S. Bruce Hall sold, under the deed of trust given to secure A. Leschen & Sons Rope Company, the two lots here involved to Frank P. McCabe for the sum of \$2,305, of which sum \$768.34 was paid in cash, and for the residue of which McCabe gave his two notes, payable, respectively, in 6 and 12 months. One of the notes was paid February 9, 1905, and the other May 20, 1905. On the 16th day of September, 1904, Rigby, for the stated consideration of \$5, assigned to his son, Benj. E. Rigby, 12 separate and distinct United States Letters Patent granted to him for inventions. On the next day, or one month later, as to which the evidence conflicts, Benj. E. Rigby, for the stated consideration of \$5, assigned said letters patent to his mother, Achsah M. Rigby. By a deed dated September 13, 1905, Hall, trustee, conveyed the lots purchased from

him as trustee by Frank P. McCabe to Achsah M. Rigby, describing her in the deed as having been the purchaser. In point of fact, Achsah M. Rigby assigned to Frank P. McCabe three of the letters patent received from her husband through her son Benj. E. Rigby, in consideration of which he directed a deed for the lots to be executed to her. By a deed dated July 12, 1906, Achsah M. Rigby and her husband conveyed them to Emmett C. Rigby for the recited consideration of \$1,800.

The dates of the creation of the debts of the three attacking creditors are not disclosed. Wade obtained his judgment for \$216 September 26, 1904, Bland obtained his for \$589.12, and McGee his for \$328.05, April 6, 1905. Executions on them were issued May 22, 1905, and this suit was commenced September 29, 1905. The record establishes no firm indebtedness at the date of the execution of the deed of trust in favor of Frank P. McCabe, and there is no proof of the existence of any at the date of the conveyance of the lots to him, April 12, 1904. But as Wade procured his judgment September 26, 1904, and Bland and McGee theirs on April 6, 1905, these debts may have existed at the time of the conveyance to Frank P. McCabe, and they may have been insisting upon payment. The record of the judgments of Bland and McGee indicates incurrence of their debts, or rather their maturity, on the 19th day of May, 1904, after the execution of the deed and just prior to its admission to record.

The oral testimony in the case consists of the depositions of Frank P. McCabe, C. F. Rigby, and Achsah M. Rigby. Neither E. A. McCabe nor Benj. E. Rigby nor Emmett C. Rigby testified, although parties to the transactions complained of. Professing the status of a creditor for more than \$9,000, Frank P. McCabe was unable to state in detail how he acquired it. He claims to have advanced the \$7,000, to secure which the deed of trust was executed, and filed a statement with his deposition, showing the dates and amounts of his alleged advancements, aggregating \$7,282.51; but this statement was made up and filed some time after his deposition was taken, and he admits having made such advancements as he did make without any personal knowledge as to the value of the property or information respecting it other than that given him by the debtors. He knew nothing of the existence of the prior deed of trust on it in favor of the A. Leschen & Sons Rope Company. Moreover, his lien was on only Rigby's one-half of the property, the total value of which is set forth in the deed of trust at \$10,750. He says part of the money he claims to have advanced was represented by notes he gave and part of it by checks, but he produces none of the notes or checks, nor shows any payment of notes, nor gives the relative amounts of the checks

and notes. Though he claims to have paid the purchase money under the sale made by Hall, trustee, \$2,305, he was not present when the sale was made and could have had no personal knowledge of the character or amount of the property he was paying the money for. His purchase and payment of the money must have been made by some one else in his name. This he admits in connection with his claim in general terms of payment of the money, but, for all that appears, he may have first received the money from the debtors or one of them. Notwithstanding he claims to have put more than \$9,000 into the property, he permitted the deed of the trustee, made in pursuance of the sale under the deed of trust, to be made to the wife of C. F. Rigby in consideration of three letters patent, admitted to be of practically no value, without any inquiry or advice as to how that deed would affect his title to the property or his claim for \$7,000 or the \$2,305 he claims to have paid to Hall, trustee. The legal effect of that sale and deed, unqualified by any agreement, was the destruction of his deed of trust upon the equity of redemption and of the conveyance made to him by his father and C. F. Rigby. His advancements, if any, were induced, according to his own testimony, by his father, who presumably conducted all of the transactions in which his name appears. It must have been he who made the purchase under the trust deed sale and actually handled the money received by the trustee. His testimony was not taken, and the omission thereof is unexplained. C. F. Rigby, the other partner, testified, but was unable to state any of the particulars of the transactions between the firm and Frank P. McCabe. His part in these transactions also seems to have been left to the care of E. A. McCabe. Mrs. Rigby has no knowledge of any of these vital matters. The principal purpose of her testimony was to show she took the property under the deed from Hall, trustee, subject to the claims of Frank P. McCabe, contrary to the legal effect of the deed. McCabe also makes this claim, but neither of them testified to any express agreement to that effect. He allowed the deed to be made to her at the suggestion of his father and C. F. Rigby and says he is unable to explain why it was made to her and not to himself. He negatives any express agreement for preservation of his claim by the admission of his ignorance of the effect upon them of the sale under the deed of trust. The principal purpose of the testimony of C. F. Rigby was to show the worthlessness of the letters patent in the condition in which they were at the time they were assigned by him to his son Benj. E. Rigby and the indebtedness of the firm to his son for labor in the sum of about \$400 as consideration for the assignment. The son's testimony was not taken, but the father and mother both say the firm

was indebted to him for 80 days' work in the month of May, 1903, as a tool dresser, at \$4 per day, amounting to \$120, and work at the shop thereafter and up to September 6, 1904, at \$2.50 a day, amounting to \$247.50.

[1, 2] Frank P. McCabe assumed the attitude of a purchaser in good faith and without notice of the fraud of the debtors. To prevail over him, the creditors must establish the fraud, the transfer to him, and his notice of the fraud, but it is incumbent upon him both to allege and prove payment of full, adequate, and fair consideration. The issue of payment is an affirmative defense which he must make out by clear and satisfactory proof. *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268. His transactions with the insolvent firm involved considerable sums of money. Ordinarily such amounts do not pass from one man to another without a certain degree of formality and preservation of documentary evidence thereof, wherefore a mere claim of payment without the production of written evidence thereof, giving dates, amounts, and other particulars, is looked upon with suspicion and generally regarded as unsatisfactory and insufficient to prove the fact. Lack of corroborative evidence of the kind and character usually kept by the parties to important financial transactions is regarded as a badge of fraud. *Colston v. Miller*, cited. Reason concurs with authority in declaring insufficiency of the evidence submitted by McCabe to sustain his claim of payment as against creditors of the fraudulent debtors.

[3] Though the manifest purpose of the bill is to subject the property hereinbefore described to the satisfaction of the claims of the plaintiffs, as having been disposed of by the debtors with intent to hinder, delay, and defraud their creditors, and to do this in such manner as to exclude the claims of Frank P. McCabe, the bill does not in terms impeach the \$7,000 deed of trust nor the conveyance subsequently made to Frank P. McCabe, nor question his claim of payment of the purchase money under the sale by Hall, trustee. Ignoring the conveyance to him, in satisfaction of the alleged trust debt of \$7,000, the bill prays that he be required to release his trust deed. Treating the A. Leschen & Sons Rope Company debt as having been paid by him, it prays that said company be required to release its lien. It then prays that the tangible property, real and personal, and the letters patent held by Mrs. Rigby be subjected to sale for satisfaction of the debts of the plaintiffs.

Only in the transfer by McCabe to Mrs. Rigby of the benefit of his purchase at the sale made by Hall, trustee, effected by mere direction of the trustee to make the deed to her, does the bill charge any fraud. Its theory is that the assignments of the letters patent by C. F. Rigby to his son Benj. E. Rigby

and by the son to his mother were voluntary, and that in this manner C. F. Rigby furnished the consideration of the transfer of the property, in the manner stated, from Frank P. McCabe to his wife. The second proposition seems to be that the sale under the A. Leschen & Sons Rope Company trust deed extinguished the right of Frank P. McCabe under his subsequent deed of trust and the subsequent conveyance to him, and that, by his transfer to Achsah M. Rigby, she obtained full, legal, and equitable title to the property, stripped and freed from all claims against the same on his part. But this charge of the bill is met by McCabe's answer, denying any intention on his part to release, or treat as satisfied, his \$7,000 debt or the \$2,305 he claims to have paid to Hall, trustee, and this averment of the answer is sustained by his testimony. Moreover, Mrs. Rigby, in her testimony, disclaims any purpose or intention to exclude his claims. On the contrary, she distinctly and emphatically says she took the property by the deed from Hall, trustee, subject thereto.

As this deed was made to her, not by Frank P. McCabe himself, but by the trustee, there is no legal impediment to his proof by oral testimony of an equitable interest in the property. According to his testimony, he purchased and paid for it and caused the deed to be made to Mrs. Rigby in trust for himself to the extent of his claims against it. If he had conveyed it to her himself, he might not be permitted to prove such an equity, for the parol evidence offered to establish it contradicts the terms of the deed, a written contract. *Troll v. Carter*, 15 W. Va. 567; *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704. If the plaintiffs were creditors of Mrs. Rigby, it might not be permissible to establish it against them, because the deed from Hall, trustee, to her passed the legal title, acquired under a deed of trust prior to the claims of McCabe, to which the lien of the judgment would likely have attached the moment the title passed into her hands; but they are not creditors of hers, and the purpose of the suit is to subject the property as that of the debtors, E. A. McCabe and C. F. Rigby. Therefore only such interest in the property is liable to claims of these creditors as Mrs. Rigby acquired, and that, according to her own testimony and admissions and the evidence adduced by McCabe, was what may be called an equity of redemption. Of course the plaintiff could subject that, but nothing more. But the decree goes beyond this, treating the property as standing in the hands of Mrs. Rigby free of all claims, equities, or liens in favor of Frank P. McCabe, and accordingly subjects it wholly and unconditionally to sale for satisfaction of the judgments against the insolvent firm.

In the absence of impeachment of Frank P. McCabe's claims, he became the owner of the lots, in equity as well as in law, by his deed

from E. A. McCabe and Rigby and his purchase at the trust deed sale. Mrs. Rigby swears she got nothing and claims nothing under the deed from Hall but a sort of an equity of redemption, and, although this was not fixed by express agreement at the date of the conveyance to her, no reason is perceived why McCabe cannot hold as against her such interest as she does not claim nor any ground upon which the plaintiffs, who are not her creditors, can complain of her admission of his equitable claims, founded upon such large payments and such solemn instruments, the validity and genuineness of which are not challenged by the pleadings.

The purpose of this suit, as disclosed by the bill and the decree entered, was to subject the property to satisfaction of the debts of the plaintiffs, and the evidence is insufficient, as we have indicated, to sustain McCabe's claim of a bona fide purchase, although introduced for that purpose. Both he and the plaintiffs seem to have regarded the suit as one intended to sell the property, free and discharged of his claims, and, if the allegations of the bill were broad enough to impeach the bona fides of his deed of trust, the conveyance to him, and his claim of payment of purchase money at the sale made by Hall, trustee, the decree entered would have to be affirmed. The omission of these necessary allegations has resulted in a decree standing upon sufficient evidence and an insufficient bill in so far as it affects the lots and personal property other than the patents. In such cases the well-established practice is to reverse the decree and remand the cause with leave to the plaintiff to amend the bill.

The patent rights in the hands of Mrs. Rigby were properly held liable for the debts of the plaintiffs. As to them the bill is sufficient, and the evidence of indebtedness to the son as consideration for the assignment thereof to him is very unsatisfactory. He did not testify, and his father, testifying to the indebtedness, admits McCabe kept the books, and he had nothing from which to make up a statement between McCabe and the firm. It is highly improbable that the young man drew no wages from May 1st to September 6th, if he really worked for wages; and he assigned the patents to his mother very soon after he got them in consideration of \$1 and "other bills" he owed her. These transactions between father and son and mother and son belong to a class that are always closely scrutinized when found in the way of creditors, and as to the existence of which very clear proof is required, when attacked by them. Such as has been adduced in support of the assignments of the patents by C. F. Rigby to his son and by the latter to his mother has been held insufficient by the trial court, and no ground is perceived upon which his finding can be disturbed.

For the reasons stated, so much of the decree as holds the two lots and personal property, conveyed to Frank P. Rigby or purchased by him at the trust deed sale made by Hall, trustee, liable for the debts due the plaintiffs and costs of the suit and orders sale thereof will be reversed. In all other respects it will be affirmed and the cause remanded for further proceedings.

DIXON v. DIXON.

(Supreme Court of Appeals of West Virginia.
Oct. 21, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 157*)—APPLICATION FOR ABSOLUTE DECREE—PRACTICE.

An application, under section 13, c. 64, Code 1906, for an absolute divorce, subsequent to a decree of divorce a mensa et thoro, must be by petition or bill averring grounds for relief, and upon the usual process and proceedings at rules, as prescribed by the ordinary principles of equity practice.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 517; Dec. Dig. § 157.*]

2. DEPOSITIONS (§ 7*)—ADMISSION IN EVIDENCE—DIVORCE.

Depositions taken before the filing of the bill or other pleading, and before process or appearance, cannot be read on the final hearing of a cause. They should be suppressed on the motion of the opposite party.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 13-22; Dec. Dig. § 7.*]

3. HOLIDAYS (§ 5*)—TAKING DEPOSITIONS—ADMISSION IN EVIDENCE—NOTICE.

Nor can depositions taken on a legal holiday, under a notice specifying that day, be read on final hearing, except with the consent of parties; the notice, by virtue of chapter 15L, Code 1906, being taken to intend the following day.

[Ed. Note.—For other cases, see Holidays, Cent. Dig. §§ 2-5; Dec. Dig. § 5.*]

Appeal from Circuit Court, Fayette County.

Action by Samuel Dixon against Annie Dixon. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Osenton & Horan, of Fayetteville, and Couch & Briggs, of Charleston, for appellant. Dillon & Nuckolls, of Fayetteville, for appellee.

LYNCH, J. This is a proceeding instituted by plaintiff, under section 13, c. 64, Code, for an absolute divorce, pursuant to a prior decree granting him a divorce a mensa et thoro. From a decree awarding the relief sought, the defendant appeals. By her assignments of error, she presents two interdependent questions for determination: Whether the circuit court had jurisdiction to pronounce the decree complained of; and whether the depositions read on behalf of plaintiff should have been suppressed as irregularly taken.

As disclosed by the record, the original suit was instituted in April, 1903. A final decree therein was entered October 1, 1904, granting plaintiff a limited divorce, award-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing to each parent custody of certain of the minor children, and making provision for alimony of \$100 per month. It was "further ordered that the plaintiff pay the costs of this suit, and that the same be stricken from the docket." Apparently there was neither pleading nor proof sufficient to support this decree. But, no appeal having been taken therefrom, it cannot now be disturbed. *Chapman v. Chapman*, 70 W. Va. 522, 74 S. E. 661. Nothing further was done in the cause until September 1, 1911, when the plaintiff caused to be served upon the defendant two notices—one that he would, on the 19th of that month, apply to the circuit court "for an absolute divorce from the bonds of matrimony"; the other that he would, as he in fact did, on September 4th ensuing, take depositions in support of such application. On the day designated in the first notice the defendant appeared specially and moved to quash the notice "on the ground that there was no suit pending." The motion was overruled. The defendant then moved to suppress the depositions of plaintiff filed on the previous day; but that motion was likewise overruled. "Thereupon," as the order of the court of September 19th recites, "the plaintiff tendered his said petition and application for an absolute divorce from the defendant, notice of which had been duly served on the defendant, which said notice and petition are ordered filed." The petition recited the former proceedings in 1904, averred compliance by plaintiff therewith and the absence and improbability of a reconciliation, and prayed for an absolute divorce. By the same order the court, without further pleading or proof, granted the prayer of the petition, and "decreed that the said plaintiff continue to carry out, perform, and comply with the said decree of October 1, 1904; in respect to the support and maintenance of the defendant and in all other respects."

Appellant assigns only two grounds of error, either of which, in our opinion, warrants reversal of the decree entered September 19, 1911: First, lack of proper notice; and, second, the court's refusal to suppress plaintiff's depositions.

[1] The only information afforded appellant of the relief sought was an informal, unofficial notice, signed by appellee, that on the day named he would ask a decree for absolute divorce from her. It did not summon her to answer any pleading filed or to be filed. No pleading was in fact tendered or filed until the day and at the time of the entry of the decree granting relief. The appellee seeks to defend this informal method on the ground that the statute does not specifically require any process or pleading; that it only requires an "application." It is true there is no prescribed procedure, no definite direction in the statute. But its failure to prescribe or direct does not authorize each suitor to determine for himself, contrary to the regular and orderly procedure, the course

he may pursue to attain his purposes. Such liberality would be subversive of and discordant with all the requirements of orderly procedure, and therefore cannot be tolerated. All proceedings for divorce, or the annulment or affirmation of marriages, are to be by suits instituted and conducted as other suits in equity, with the exception noted in sections 7 and 8, c. 64, Code. Therefore the rules of chancery practice must be observed; otherwise the proceedings are abortive. "It is within the power of courts, in administering statutes, to adopt such practice or procedure as will attain the ends of justice, avoid surprise, and give parties opportunity to answer charges seeking to impose liability upon them. Where a statute allows a judicial proceeding to a man's prejudice, though it do not provide for notice, it is understood to intend it, as no judgment can be given under it without process, and process is necessary. The statute does not dispense with notice." *Goff v. Price*, 42 W. Va. 384, 388, 26 S. E. 287; *Cooper v. Bennett*, 70 W. Va. 110, 73 S. E. 260; *Railroad Co. v. Railroad Co.*, 17 W. Va. 812. When thus speaking in the *Goff* Case, Judge Brannon had under consideration the provisions of section 35, c. 125, Code, allowing answers to be filed as cross-bills, setting up new matter, and praying relief thereon; the section being silent as to notice. Again, it has been said that "at the door of every temple of law in this broad land stands justice with her preliminary requirements upon all administrations." So that, except where a statute definitely provides the necessary procedure, the courts will adopt that which will best serve the legislative intent and protect the personal and property rights sought to be affected. As was said in *Phillips v. Phillips*, 24 W. Va. 591: "Where a petition is filed in a divorce case, under section 11, c. 64, Code, unless the defendant to the petition appears thereto in court, it should be sent to rules for process to be issued thereon and to be matured for hearing." There the court was dealing with the rights of parents to the custody of their minor children subsequent to the dissolution of marriage. The course pursued was by petition, as prescribed; but the court found in the section a requirement for process to answer pleadings at rules and the usual proceedings thereat. Again, in *Railroad Co. v. Railroad Co.*, supra, this court said: "Where a statute authorizes a legal proceeding against any one, and does not expressly provide for notice to be given, it is implied that an opportunity shall be offered him to appear in defense of his rights, unless the contrary clearly appears." It there discusses the necessity for notice to the landowner in proceedings to condemn a right of way for a railroad. In the opinion, at page 835 of 17 W. Va., the court held that: "It is an essential principle of natural justice that every man have an opportunity to be heard in a court of law upon every question involving his rights or interests before he is

affected by any judicial decision of the question." "The summons and proceedings at rules cannot be dispensed with by notice of an intention to apply to a court of equity for a final decree." *Cooper v. Bennett*, supra. *Nelson on Div. & Sep.* § 815, likewise holds that, where statutes relating to divorce contain no special provision concerning the notice in divorce suits, the summons must conform to the statutes or provisions of the Code relating to suits in general.

By "notice" in the cases cited is meant process to answer some pleading stating some grounds as a basis for relief, some charge, which the defendant as advised may admit or deny, or against which he may present some counter charge or claim, thus demanding from his adversary full and competent proof, and not ordinarily a mere notice prepared, signed, and served by the plaintiff or at his instance, as in this case, of a motion in anticipation, without such pleading, except where the statute expressly authorizes that course, as of a motion for judgment under chapter 121, § 6, Code, or as now in condemnation proceedings.

Besides, the original cause had long since terminated. It was not thereafter reinstated on the docket for any purpose, not even at the date of the last decree. A final decree ends the cause—puts it out of court. After adjournment of the term, no further order as to the parties can be made therein, unless they are again brought into court by some recognized legal method. *Green v. Railroad Co.*, 11 W. Va. 686; *Ruhl v. Ruhl*, 24 W. Va. 279; *Barbour v. O'Neal*, 42 W. Va. 295, 26 S. E. 182. They cannot be reassembled by a mere notice from one to the other, as undertaken by the plaintiff—a method not sanctioned by any authority cited by appellee or found on this examination. On the contrary, as noted, it is against authority here as well as elsewhere. An application by a party who has obtained a limited divorce for a divorce from the bonds of matrimony is a new proceeding, requiring notice to the adverse party, and a hearing by the court. *Garnett v. Garnett*, 114 Mass. 379, 19 Am. Rep. 369; *Graves v. Graves*, 108 Mass. 314; *Edgerly v. Edgerly*, 112 Mass. 53. The statute construed in these cases, as appears reasonably certain, is similar to ours, and in each of them there was a petition and personal service of process. Where the object of the suit is to obtain a final decree of divorce, either party has the right to require the case to be set down on the ordinary docket of suits, and tried in the ordinary way, under averments such as would authorize a decree. *Donato v. Frillot*, 116 La. 199, 40 South. 634. The court said: "Under our Civil Code the proceedings for a separation from bed and board are separate and distinct from the proceedings for a divorce a vinculo matrimonii, and the one is not a mere continuation of the other. Hence, when a judgment of separation from bed and board

has been obtained, it is not sufficient for the party obtaining it to go into court 12 months thereafter, and by proof of the fact that no reconciliation has taken place obtain a judgment of divorce. The party must be cited to answer this new demand; the judgment of separation from bed and board being the mere basis for final judgment of divorce. The defendant is entitled of right to be notified of this new demand, and to be accorded an opportunity to be heard on the issues of fact therein raised." *Jurgielewicz v. Jurgielewicz*, 24 La. 77, holds that: "A judgment of divorce a vinculo matrimonii, rendered on a rule taken by one of the parties on a judgment of separation from bed and board, is absolutely null and void, if the opposing party has not been cited nor has appeared to defend the suit." The court in the opinion says: "The judgment is a nullity, because the defendant was not legally cited." The same procedure and holding are found in *Gernon v. Hickey*, 18 La. 454. See, also, *Graves v. Graves*, supra; *Hill v. Hill*, 196 Mass. 509, 82 N. E. 690.

[2] Our conclusion, also, is, as stated, that the court erred in refusing to suppress the depositions taken on notice to defendant. As we have seen, there was nothing to prove. No pleading of any character had been filed; no affirmations made; no cause of action, asserted; no effort for reconciliation alleged, nor its improbability stated. What was there to prove? We need only cite *Cooper v. Bennett*, 70 W. Va. 110, 73 S. E. 260, which, although an injunction suit, discusses the right to read on final hearing depositions taken before the bill was filed. There it is said: "Technically, there was no suit pending when the depositions were taken. No summons was issued, no bill had been filed, and there had been no appearance." See, also, *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402; *James v. Pigott*, 70 W. Va. 436, 74 S. E. 667.

[3] Against the reading of the depositions filed in the case, appellant also properly urges irregularity, in this, that they were taken on the 4th of September, that day being the first Monday of the month, and therefore, under chapter 15L, Code, a holiday. The provisional clause of the chapter seems to indicate that, while the notice on its face names the 4th as the return day, the return day was in fact on the 5th of September. That clause provides that: "When the return day of any summons or other court proceeding, or any notice, or the time fixed for the holding of any court or doing any official act, shall fall on either of said holidays, the next ensuing secular day shall be taken as meant and intended."

We therefore reverse the decree, and remand the cause for further proceedings, in accordance with the principles herein announced.

MILLER, J., absent.

SELVEY'S EX'RS v. ARMSTRONG'S
ADM'R.(Supreme Court of Appeals of West Virginia.
Oct. 21, 1913.)*(Syllabus by the Court.)*

1. PRINCIPAL AND SURETY (§ 199*)—CONTRIBUTION—SUFFICIENCY OF EVIDENCE.

A bank, upon a renewal note by B., with A. and S. as sureties, instituted its action at law against the makers, pending which A. died and as to whom the action thereupon was dismissed on plaintiff's motion, but thereafter was prosecuted to final judgment against B. and S. B. having become insolvent, and S. having died, the executors of the latter discharged the judgment, and subsequently, on motion and notice thereof, under section 5, c. 101, Code 1906, and after verdict, obtained judgment against A.'s administrator for half the amount so paid by them. *Held*, upon the record, the evidence, though meager, was sufficient to support the verdict and the judgment thereon.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 636-640; Dec. Dig. § 199.*]

2. APPEAL AND ERROR (§ 1149*)—JUDGMENT—CORRECTION.

The judgment, being by proper construction personal against the administrator, is correctible, and may be amended here, so as to read, "against K., administrator of Adolphus Armstrong, to be levied of the goods and chattels in his hands to be administered."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4483-4496; Dec. Dig. § 1149.*]

3. AMENDED JUDGMENT AFFIRMED.

The judgment, as amended, should be affirmed, with costs to defendant.

(Additional Syllabus by Editorial Staff.)

4. PRINCIPAL AND SURETY (§ 199*)—JUDGMENT FOR CONTRIBUTION—NOTICE—SUFFICIENCY.

A notice of a surety's motion under Code 1906, c. 101, § 5, for a judgment of contribution against a cosurety on the note was sufficient, where it described the note by naming the parties, and recited payment of the judgment and costs, though it did not state the date or amount of the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 636-640; Dec. Dig. § 199.*]

5. APPEARANCE (§ 25*)—GENERAL APPEARANCE—WAIVER OF IRREGULARITY.

Any irregularities in making a successor of the defendant administrator a party to a surety's proceeding by motion for a judgment of contribution under Code 1906, c. 101, § 5, were waived, where such successor, after the overruling of his motion to dismiss, appeared generally by filing pleas and proceeding to trial.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 144-153; Dec. Dig. § 25.*]

6. PRINCIPAL AND SURETY (§ 199*)—CONTRIBUTION—EVIDENCE—JUDGMENT.

On a surety's motion under Code 1906, c. 101, § 5, for a judgment of contribution, the judgment previously obtained against the sureties was properly admitted in evidence.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 636-640; Dec. Dig. § 199.*]

Error to Circuit Court, Taylor County.

Motion under Code 1906, c. 101, § 5, for contribution, by James W. Selvey's Execu-

tors against Adolphus Armstrong's Administrator. Judgment for moving party, and, Armstrong dying thereafter, G. H. A. Kunst, administrator of his estate, brings error. Corrected and affirmed.

John L. Hechmier, of Grafton, for plaintiff in error. Warder & Robinson, of Grafton, for defendant in error.

LYNCH, J. On the last renewal of a former note payable to it, the First National Bank of Grafton sued Burnside, Selvey, and Armstrong; the last two being sureties. Burnside was then, and for some years prior had been, insolvent. Armstrong having died before judgment, the action as to him was dismissed, but the plaintiff prosecuted the action to final judgment against the other defendants. After Selvey died, his executors paid the judgment, interest, and costs, amounting to \$770.20. They subsequently, by motion under section 5, c. 101, Code, recovered judgment against Armstrong's administrator for one-half the amount so paid by them, and the latter obtained this writ of error.

[4] He assigns several grounds for reversal. The first is error in refusing his motion to quash the notice, because insufficient in its description of the note. The notice describes the note as the one given by Burnside, Selvey, and Armstrong to the First National Bank, not stating the date or amount, on which the bank obtained judgment against Burnside and Selvey on March 26, 1907, with interest from August 9, 1906, and costs, and recites payment by Selvey's executors, for one-half of which it notifies defendant of a motion for judgment before the circuit court on the day specified therein. We think the notice in this respect is sufficient.

[5] The notice as prepared named Means, who it appears was curator and "committee administrator" of Armstrong's estate, as the person against whom judgment would be asked. His powers having ceased, the plaintiffs attempted to revive against Kunst, who in the meantime had become administrator. For this purpose they sued out a writ of scire facias, which was returned executed November 22, 1909, although the action had been revived in the usual manner on plaintiff's motion, by an order entered October 27, 1909. However, the proceeding was not, by any other order at any time, revived pursuant to the writ. But on January 30, 1911, Kunst appeared specially, and moved to "dismiss the action for the reason that no order reviving this motion as to him had theretofore been entered." The court having overruled the motion, he appeared generally, filing pleas and proceeding to trial, which terminated in a verdict for plaintiffs and judgment thereon. This, being a general appearance, operated as a waiver of the irregularity. *Moore v. Estes*, 23 Ark. 152; *Greer*

v. Powell, 1 Bush (Ky.) 489; Judy v. Ice Co., 60 Mo. App. 114. The revival "being an order which the court would have granted, the case will be treated as if the court then and there granted the order." Ferguson v. Wilson, 122 Mich. 97, 80 N. W. 1006, 80 Am. St. Rep. 543.

[1, 6] Defendant discusses the evidence introduced by plaintiffs, first, as to its competency, and, second, its sufficiency to establish the identity of the note, Armstrong's signature, and plaintiffs' payment of the judgment against Selvey and Burnside. There is, it is true, some evidence clearly incompetent, in addition to that excluded by the court—that of Nina Selvey, daughter of James W. Selvey. But other proof touching the same subject, not incompetent, but ample to sustain the finding of the jury, was introduced by plaintiffs. The court, not improperly, admitted in evidence the judgment obtained by the bank against Burnside and Selvey. This judgment ascertained and fixed the liability of these persons on the note, and formed the basis for Selvey's payment of the whole debt. The notice also mentioned it as the medium of enforced payment by the Selvey executors.

Although perhaps not necessary, as the informal pleadings, purporting to deny execution of the note by Armstrong, were not verified in any form, plaintiffs introduced witnesses who, after stating their familiarity with Armstrong's handwriting, expressed their belief in the genuineness of his signature to the note. Likewise Mallonee, president of the bank loaning the money on the note and cashier when the loan was first made, testifies as to repeated renewals thereof by all the makers, and that Selvey and Armstrong both said they were sureties for Burnside. This proof fully establishes the identity of the note, the relationship of the makers to one another, and their liability to the payee.

The evidence tending to establish payment by plaintiffs, while meager, is sufficient for that purpose. Nina Selvey, executrix, with Rector, of the James W. Selvey will, produces as a witness a note by J. W. Selvey, Sallie E. Selvey, and Charles H. Rector, dated February 18, 1908, for \$770.20, and payable to the First National Bank of Grafton, which bears indorsement, "paid by the executors of J. W. Selvey \$771.86 Aug. 27, 1908." She also produces and files a check dated August 27, 1908, for \$771.36, signed by herself and Rector as executors, and drawn in favor of the payee in the note, both note and check being, as she says, in payment of the bank judgment. Defendant did not object to this testimony because incompetent or for any other reason, nor does it in fact appear to be subject to criticism. But it is the sole proof of payment in discharge of the original liability of Selvey and Armstrong on the

Burnside note. The jury being satisfied to find thereon favorably to plaintiffs, and the court to sustain its finding, its verdict will not now be disturbed, as the record in its entirety carries a reasonable degree of assurance that the trial resulted in no injustice to either party.

[2] But reversal is also urged because the judgment on the verdict is against Kunst personally, as it merely describes him as administrator, and does not contain the additional words "to be levied of the goods and chattels of Adolphus Armstrong in his hands to be administered." It is in fact, by proper construction a personal judgment. Jones v. Reld, 12 W. Va. 350, 370, 29 Am. Rep. 455; Thomson v. Mann, 53 W. Va. 432, 435, 44 S. E. 246; Hanson v. Blake, 63 W. Va. 560, 562, 60 S. E. 589. The words quoted, or their equivalent, should have been inserted. The omission, however, is only a formal defect, readily correctible in this court.

[3] As we find no other reason requiring reversal, the judgment, will be entered here in proper form; and, as so corrected, the judgment below is affirmed.

MILLER and ROBINSON, JJ., absent.

CLARK v. NICKELL et al.

(Supreme Court of Appeals of West Virginia.
Oct. 28, 1913.)

(Syllabus by the Court.)

1. BONDS (§ 55*) — CASHIER'S BOND — CONSTRUCTION—INDEMNITY—"As."

A bond executed by a bank cashier, reciting his previous election as such, and stating the condition to be that he "shall well and faithfully apply and account for all moneys which may come into his hands as such cashier," is, when properly construed, an indemnity to the bank against loss by his default, although its officers are therein named as obligees, as president, and as directors of the bank in its corporate name.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 58; Dec. Dig. § 55.*]

For other definitions, see Words and Phrases, vol. 1, pp. 518-521.]

2. PRINCIPAL AND SURETY (§ 152*)—ACTION ON CASHIER'S BOND—PARTIES.

A suit in equity, by the bank, to enforce the obligation of such bond, should be brought jointly against the surviving, and the personal representatives of the deceased, obligors.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 416-419; Dec. Dig. § 152.*]

3. LOST INSTRUMENTS (§ 16*) — ACTION IN EQUITY—DISCOVERY PENDING SUIT.

If after diligent and unavailing search therefor plaintiff sues, when allowable, in equity, upon a lost bond, its discovery and production thereafter is immaterial upon his right to relief in a suit then pending.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 31-34, 39, 40; Dec. Dig. § 16.*]

*(Additional Syllabus by Editorial Staff.)***4. LOST INSTRUMENTS (§ 14*) — CASHIER'S BOND—JURISDICTION IN EQUITY.**

Equity has jurisdiction to enforce the liability of the obligors on the lost bond of a defaulting bank cashier.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. §§ 27-29; Dec. Dig. § 14.*]

5. EQUITY (§ 48*)—JURISDICTION — ENFORCEMENT OF CASHIER'S BOND.

Equity has jurisdiction to enforce the bond of a defaulting cashier according to its real intent and purpose, where the bond names a bank's officers as obligees instead of the bank; equity being the only sufficient source of relief in such case.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 156, 158; Dec. Dig. § 48.*]

6. INDEMNITY (§ 15*)—ACTION BY BENEFICIAL OBLIGEE—BURDEN OF PROOF.

Where plaintiff sues as beneficial obligee on a bond of indemnity, he must prove that he had an interest in the performance of the duty and that the duty was imposed either for his sole benefit or jointly for the benefit of himself and others.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 36-40, 42-47; Dec. Dig. § 15.*]

Appeal from Circuit Court, Monroe County.

Action by R. L. Clark, trustee, etc., against C. P. Nickell and others. From judgment for defendants, plaintiff appeals. Reversed and remanded.

John W. Arbuckle, of Lewisburg, G. C. Osborne, of Keenan, and R. L. Clark, of Union, for appellant. T. N. Read, of Hinton, and John L. Rowan, of Union, for appellees.

LYNCH, J. Denied relief upon a bill seeking to charge liability against the obligors on the lost bond of a defaulting bank cashier, plaintiff has appealed to this court. The defendants also cross-assign errors, the principal of which relate to the refusal of the court to sustain their demurrer to the bill.

The bond was executed in 1889 by J. W. McNeer, who had theretofore been elected and was at the time, and for two years prior thereto had been, cashier of the Bank of Union. The obligees were Frank Hereford as president and Cary P. Nickell, W. L. Swope, H. T. Houston, and J. D. Logan as directors of the bank. The obligors were McNeer, the cashier, Nickell, Swope, Logan, A. A. McNeer, and H. M. Brown. Thus, as readily appears, three of the parties to the obligation occupied the dual relation of obligors and obligees. The bill names, as defendants against whom recovery is sought, Nickell, Brown, Logan, and A. A. McNeer. McNeer, the principal, and Swope died before suit. The bill did not name their personal representatives as parties, or offer any excuse, as insolvency or other cause, for their absence as parties. Two grounds are assigned in support of the demurrer: Want of jurisdiction in equity, and the absence of the per-

sonal representatives of Swope and J. W. McNeer.

[4] The bill alleges loss of the bond and plaintiff's inability to find it after diligent search. This allegation is supported by affidavit. Equity has jurisdiction to enforce payment of a lost obligation. *Lyttle v. Cozad*, 21 W. Va. 183; *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118; *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. 423. By their answers the defendants deny loss of the bond. They copy it into their answers and aver its cancellation by an order of the board of directors and delivery to C. P. Nickell. But they do not produce the original. Of course, in passing upon a demurrer, the court ordinarily confines its examination to the pleading whose sufficiency is thus challenged. But these answers reflect light to some extent upon the question of jurisdiction. They tend to establish the necessity for resort to a forum whose rules and mode of procedure allow greater liberality than is permissible in actions at law. In an action to recover the penalty of a bond, the pleading must ordinarily make profert. If the bond is lost, its production is not possible. Of course the pleader may even then declare on it as a lost or destroyed instrument; or he may demand its production by his adversary, if in his possession, as it perhaps is in the case now under consideration. But the procedure in equity is more flexible and affords greater freedom. Consequently resort to it is frequently, though not always, permitted to establish and enforce payment of a lost instrument.

[3] As stated, the defendants do not produce the original bond. But even the subsequent production of a lost obligation will not operate to defeat jurisdiction, when once properly assumed. *Lyttle v. Cozad*, 21 W. Va. 183.

[1, 5] But still other important reasons besides loss support plaintiff's right to resort to equity to establish the bond and enforce its payment. The existence of the bond, it may be said, is sufficiently established. But from the copy it appears: (1) That the obligation is not directly payable to the bank but is payable to its officers as president and as directors, three of whom are also obligors; and (2) that, as appears from the answers, the three obligors who are also obligees assert cancellation of the bond and delivery thereof after cancellation to the defendant Nickell. These grounds make resort to equity the only sufficient and appropriate source of relief.

Although the bond does not expressly name the bank as obligee, yet, having evidently been executed to secure it against the cashier's default, a court of equity will construe it according to its real intent and purpose. The bond describes the obligees as president and directors of the bank and is therefore

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

apparently for its and not their protection. A bond was executed to Yeates and others, then overseers of the poor of Franklin county, Pa., who by statute were a corporation, and not to the corporation by name. The court held that the bond inured to the benefit of the corporation. *Greenfield v. Yeates*, 2 Rawle (Pa.) 158. In that case the successors of Yeates and others, as overseers, recovered judgment in an action at law on the bond. Besides, as seems reasonably obvious from its language and from the construction given to it by *Ross v. Milne*, 12 Leigh (Va.) 204, 37 Am. Dec. 646, *Clarksons v. Doddridge*, 14 Grat. (Va.) 42, *Jones v. Thomas*, 21 Grat. (Va.) 96, *Johnson v. McClung*, 26 W. Va. 659, and *Railway Co. v. Wilson*, 52 W. Va. 652, 44 S. E. 169, section 2, c. 71, Code, contemplates a remedy to the bank by suit or action upon the bond now under consideration. As paraphrased in *Johnson v. McClung*, cited, it provides that, "if a covenant or promise be made for the sole benefit of a person with whom it is not made, * * * such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise."

The consideration for the bond in this case moved directly from the corporation. McNeer was elected its cashier, not the cashier of its board of directors, the officary acting for it and not for themselves. The act of the board in the election of a cashier is an election by the bank. When elected, the cashier was an officer of the bank, and, by the bond, the board sought the bank's protection against the default of the cashier. Hence the conclusion that the bond, on its face, indicates an intent to indemnify the bank against loss occasioned by the dereliction of McNeer, its cashier. This conclusion is reinforced by the language of the obligation itself. The obligees are Hereford as president and Nickell and others as directors of the Bank of Union. "As president" and "as directors" are not words of mere description or identification of the person. The word "as" designates the official relation of the obligees to the real beneficiary, the bank. The word is so defined in *Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925. There Crane, acting as assignee under an assignment for the benefit of creditors, without authority of the court, under proceedings to foreclose a mortgage, entered into an agreement for the purchase, or redemption from enforced sale under a decree of court, of the property assigned. Having refused to comply therewith, the plaintiff sought by suit to enforce specific performance. The court held that his agreement as assignee was in effect an agreement in his character as trustee and not in his own right and therefore refused to grant the relief sought. The obligation, by its condition providing that, "if J. W. McNeer shall well and faithfully apply and account for all

moneys which may come into his hands as such cashier, then and in that case his bond is to be null and void otherwise to remain in full force and effect," further strengthens this construction. Whose money was to be protected from defalcation? Plainly not the money of the president and directors eo nomine; their money, of course, when by deposits it is commingled with that of other depositors and placed in the custody of the bank, then becoming, for all proper purposes, its money, subject to its control and disposition in the due administration of its legitimate business, by its proper officer, the cashier. He was its custodian for the bank; and the bond was required to secure its wrongful appropriation directly by him or indirectly by others through his disloyalty to the trust reposed in him. The president and the directors were the mere agents of the bank, its managing officers. What they did in their official capacity, they did for the bank. In taking McNeer's bond, they acted for the bank, not for themselves. Many authorities so hold, under like circumstances. "Where one subscribed for a certain share in a turnpike and promised to pay on demand to the agent of the corporation all assessments levied thereon, it was held that the corporation could bring assumpsit to recover the amount of such assessments." *Taunton Turnpike v. Whiting*, 10 Mass. 327, 6 Am. Dec. 124; *Worcester Turnpike v. Willard*, 5 Mass. 80, 4 Am. Dec. 39; *Essex Turnpike v. Collins*, 8 Mass. 292. "An action upon a note payable to the cashier of the Commercial Bank may be maintained by the bank as promisee; it appearing that the consideration proceeded from the bank." *Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280, and cases cited in note; *Gilmore v. Pope*, 5 Mass. 491.

In order to maintain an action or suit as a beneficial obligee, it seems necessary to allege and prove plaintiff's interest in the performance of the duty the failure of which gives rise to the remedy.

[6] When the plaintiff sues as beneficial obligee on a bond of indemnity, by reason of damage resulting from a breach of its condition, he should allege and prove that he had an interest in the performance of the duty and that the duty was imposed either for his sole benefit or jointly for the benefit of himself and others. *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352; *Id.*, 12 How. (U. S.) 284, 13 L. Ed. 990; *Ware v. Brown*, 2 Bond (U. S.) 267, Fed. Cas. No. 17,170; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169; *Harrington v. Ward*, 9 Mass. 251; *Raynsford v. Phelps*, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189; *Wood v. Ruland*, 10 Mo. 143; *Rome Bank v. Mott*, 17 Wend. (N. Y.) 554; *Houseman v. Girard*, 81 Pa. 256. In *Brown v. Lester*, 13 Smed. & M. (Miss.) 392, the appellate court held the clerk of a court liable on his official bond for his failure to place on the trial docket in its proper

order, as required by statute, a case the trial of which was thereby deferred until after the defendant became insolvent, thus resulting in loss of plaintiff's debt. We have no doubt of the propriety and justness of our conclusion that the bank in its corporate capacity may sue on the bond.

[2] But, in our opinion, all the surviving obligors, and the representatives of those who are dead, should be named as parties to the suit, unless their absence may be excused by reason of insolvency or other substantial cause; none being averred as the case now stands. Such joinder in equity we find sustained by reason and by competent authority. In a suit by the holder of a note to subject the estate of a deceased indorser to satisfy it, the representatives of the deceased maker and of another indorser should be made parties. *Duerson v. Alsop*, 27 Grat. (Va.) 230. Again in *White v. Kennedy*, 23 W. Va. 221, it is held that, "in a creditor's bill against the administrator and heirs of a decedent to enforce the collection of a debt secured to the plaintiff by the joint and several obligation of the decedent and another obligor, such obligor is a necessary party to such bill, although he may be a nonresident," because he "has the right to appear and make defense to such bill, and the administrator and heirs of such decedent have the right to require him to be made a party to the suit, so that, in case he should appear, his liability for such debt may be ascertained and determined as between him and such decedent." In *Mayor v. Murray*, 44 Eng. Rep. (reprint) 194, a suit in equity by one of three sureties on a treasurer's bond, some of whom had died, the purpose of which was to charge a fund received by one surety from the treasurer for his indemnity, it was held that "for the purposes of the suit a representative of the deceased surety was a necessary party." The chancellor said: "I shall not dispose of the case without having a personal representative of Renton before the court; and, though it is not the plaintiff's fault that there is not one, yet, as it is his business to procure one he must do so." See, also, *Findley v. Smith*, 42 W. Va. 300, 26 S. E. 370; *Jaluka v. Matejek*, 55 S. W. 395; *Roane v. Pickett*, 2 Eng. (7 Ark.) 510; *Loop v. Summers*, 3 Rand. (Va.) 511; *Foster v. Crenshaw*, 3 Munf. (Va.) 515; *Tidball v. Bank*, 98 Va. 768, 37 S. E. 318; *Ice & Dairy Co. v. Frick Co.*, 96 Va. 141, 30 S. E. 491. In cases of this character it is necessary to name as parties all persons living, and the personal representatives of those who are dead, whose interests are to be affected by the final determination of the cause, to the end that all matters may be

adjusted and complete justice done in one suit. Otherwise, if liability is fixed as to one or more and not all of the several obligors, those required to discharge and who do discharge the liability are obliged to seek by other litigation contribution from those jointly liable with them. And the fact that some are dead does not in equity excuse failure to join the personal representatives with those still living, although at law such joinder is not allowable. Where a creditor applies to a court of equity for its aid in the collection of his debt against sureties, the simple allegation of the death of the principal debtor or a cosurety and his insolvency will not excuse the omission to make his representative a party to the bill, unless it appears that no part of the debt could be made out of his estate. *Roane v. Pickett*, supra. The principal if living, and his estate thereafter, by the very nature of the undertaking, assumes the chief burden of payment.

While a judgment obtained in an action at law against all the obligors when sued jointly, as they may be, is enforceable against any one of them, it inures to the benefit of the one so discharging the obligation, who may enforce it by any proper process or proceeding against the principal or his estate or ratably against the cosureties. If at the date of the action or during its pendency the principal or any surety dies, separate actions against the survivors and the personal representatives of the deceased obligors may proceed to final judgment in both. But in equity, by reason of its flexible rules and procedure, all may with propriety be joined in the same suit and should be joined, unless completely insolvent at the time; and, to excuse the omission even for this cause, there must be averment and proof of insolvency, unless admitted by defendants.

The circuit court should therefore have sustained the demurrer on the ground of want of necessary parties. All persons interested in the subject-matter of the litigation, where rights may be affected by the final decrees, should be before the court, to the end that complete justice may be done and the litigation may be final and conclusive. Deeming this defect as to parties material, nothing need be said touching the merits of the case as presented to the court for final decree. The case, as presented on final hearing, was not perhaps, in some respects, fully sustained by proof. But the court's finding does not preclude plaintiff from an effort to charge the estates of other obligors on the bond.

We therefore reverse the decree of November 10, 1910, sustain the demurrer, and remand the cause.

SLAVEN v. RILEY et al.

(Supreme Court of Appeals of West Virginia.
Oct. 28, 1913.)

(*Syllabus by the Court.*)

HUSBAND AND WIFE (§ 187*)—WIFE'S SEPARATE ESTATE—SALE OF REALTY.

A contract by a married woman, living with her husband, for the sale of her real estate, to be enforceable, must not only be in writing, but signed and acknowledged by both of them.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 722, 723; Dec. Dig. § 187.*]

Appeal from Circuit Court, Pocahontas County.

Action by Mary F. Slaven against J. W. Riley and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Price, Osenton & Horan and T. S. McNeel, all of Marlinton, for appellant. L. M. McClintic, of Marlinton, for appellees.

LYNCH, J. The plaintiff, by bill to which her brother, J. W. Riley, and the children of a deceased sister, are the only parties defendant, asks partition of 150 acres of land, set apart in 1868 as dower of her mother, who resided thereon until her death in 1906. The brother denies her right to partition, and, as ground therefor, alleges a written contract with her in 1871 by which, as he claims she agreed to convey to him her interest for \$400, and with which he asserts compliance on his part and refusal by her to execute to him a deed in accordance with the agreement. He does not, however, pray any affirmative relief by specific performance. The court, on final hearing, dismissed the bill.

The sole question on this appeal, therefore, is whether the defense by J. W. Riley is

sufficiently established to bar plaintiff's right to partition, even if properly pleaded. While he does allege that the contract with his sister was in writing and that her husband joined with her therein, he does not prove that either of them signed and acknowledged it, as required by section 3, c. 66, Code. Therefore, without detailing the evidence, these facts alone determine the case adversely to the defense so asserted by defendant.

The decisions of this court firmly establish the principle that a married woman, living with her husband, can neither sell nor convey her real estate except in the manner prescribed by the statute cited—by deed or contract in writing, signed and acknowledged by her and her husband. Otherwise, it is ineffectual for any purpose, even where the purchaser has performed his part of the agreement and is in possession of the land sold. *McMullen v. Eagan*, 21 W. Va. 233, 246; *Watson v. Michael*, 21 W. Va. 568, 571; *Moore v. Ligon*, 22 W. Va. 292, 296; *Rosenour v. Rosenour*, 47 W. Va. 554, 557, 560, 35 S. E. 918; *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257; *Simpson v. Belcher*, 61 W. Va. 157, 56 S. E. 211; *Pickens v. Stout*, 67 W. Va. 422, 426, 68 S. E. 354; *Wiseman v. Crislip*, 78 S. E. 107, 110. See, also, *Radford v. Carwile*, 13 W. Va. 572, 669, 682; *Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 3 L. R. A. 826, 25 Am. St. Rep. 797; *Railway Co. v. Honaker*, 66 W. Va. 136, 66 S. E. 104, 27 L. R. A. (N. S.) 388.

The conclusion is that the court erred in dismissing the bill on final hearing. The decree of December 29, 1910, is therefore reversed, and the cause remanded for further proceedings therein, in accordance with the principles herein announced and otherwise according to law.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

DICKENSON et al. v. RAMSEY et al.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. ALTERATION OF INSTRUMENTS (§ 29*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

In a suit wherein complainants charged that a deed conveying land to their mother for life with remainder to themselves was despoiled, mutilated, and changed after its execution and before its recording by striking out the grant of the remainder, clear, cogent, and convincing evidence in support of such allegations was required.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 259-263; Dec. Dig. § 29.*]

2. FRAUD (§ 41*)—EVIDENCE—SUFFICIENCY.

Fraud must be clearly alleged and proved, as every presumption is in favor of innocence and not of guilt.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

3. ALTERATION OF INSTRUMENTS (§ 29*)—REMEDIES.

Where a deed granting land to a person for life, with remainder to her children, was altered after its execution and before its recording by striking out the grant of the remainder, a court of equity could grant relief to the remaindermen.

[Ed. Note.—For other cases, see Alteration of Instruments, Dec. Dig. § 22.*]

4. ALTERATION OF INSTRUMENTS (§ 29*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

In a suit wherein complainants claimed that a deed conveying land to their mother for life with remainder to themselves was altered after its execution and before its recording by striking out the grant of the remainder, evidence held insufficient to show that the deed when originally executed was as claimed by them; the record thereof purporting to convey a fee simple to the mother.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 259-263; Dec. Dig. § 29.*]

Appeal from Circuit Court, Russell County.

Suit by Charles Ramsey and others against Caroline Dickenson and others. From a decree for complainants, defendants appeal. Reversed.

Routh & Routh, of Lebanon, Vicars & Peery, of Wise, and R. S. Graham, of Norton, for appellants. W.W. Bird, of Lebanon, for appellees.

KEITH, P. The bill in this case is filed by the children of Eliza Ramsey, and in it they set out the following case: That Polly Ramsey, their grandmother, by deed date July 25, 1884, conveyed to their mother, during her life, and at her death to themselves as her children, in fee, a tract of land containing 150 acres, in Russell county, with reservation of a life estate to the grantor, and granting also a life estate to William Ramsey, the father of complainants; that the purpose of the said deed was, after the reservation of a life estate in Polly Ramsey, to convey the said tract of land to their mother for life, with a life estate to their father in case he should survive their mother, and then to complainants, as the children of Eliza Ramsey, in fee simple absolute; that what purports to be this deed is of record in the clerk's office of Russell county, and a copy of it is exhibited as a part of the bill. The complainants charge, however, that this is not a true record of the deed as executed by their grandmother, Polly Ramsey; as this deed contains no reference to themselves as the children of Eliza Ramsey; that portion of the deed having been fraudulently blotted out after the death of their grandmother and before the deed was admitted to record. The bill alleges that the deed was altered by striking or blotting out of it so much as referred to the children of Eliza Ramsey, and passed to them the fee-simple estate in the land in remainder, and that the fraud was perpetrated for the purpose of enabling their father and mother to convey a fee simple in the land to the purchasers thereof. The bill further charges that after the deed had been altered, their father and mother conveyed the land in dispute to divers persons, and

these grantees and their alienees are made parties defendant.

The answers of the defendants deny every material allegation in the bill, and upon the issues thus made many witnesses were examined, the case was heard and the decree rendered in accordance with the prayer of the bill, and is before us for review upon an appeal awarded by one of the judges of this court.

The law applicable to such cases has been recently and frequently the subject of consideration by this court.

In *Thomas v. Ribble*, 24 S. E. 241, 2 Va. Dec. 321, this court said: "Where the instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss, and its contents, should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. That courts of equity have the jurisdiction to set up lost deeds and wills, and establish titles under them, can certainly not be denied; but it is a dangerous jurisdiction, and so pregnant with opportunities of fraud and injustice that it will not be lightly exercised, nor except upon the clearest and most stringent proof. * * * It is the policy of the law, adopted with a view to prevent frauds, that title to lands shall pass only by written instruments; and the difference is more in name than in fact between giving effect to a parol conveyance of lands and establishing a title to lands under an alleged lost deed, upon parol testimony of its contents and loss, unless the proof be clear and conclusive. Certainly, the opportunities for fraud are just as great in the one case as in the other." See, also, *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329.

Thomas v. Ribble has been cited with approval by this court in numerous cases, the most recent of which is that of *McLin v. Richmond*, 114 Va. 244, 76 S. E. 301.

[1] The case before us is not that of a lost deed, but the charge is that the deed as originally executed has been so despoiled, mutilated, and changed since its execution by the grantor as to amount to a forgery.

[2] It is a fundamental principle of law that fraud must be clearly alleged and proven. Every presumption is in favor of innocence and not of guilt. *Engleby v. Harvey*, 93 Va. 445, 25 S. E. 225; *Schoemaker v. Chapman Drug Co.*, 112 Va. 612, 72 S. E. 121; *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497. But the citation of authority for so elementary a proposition is wholly superfluous.

To the same effect is the law as to lost instruments, and every consideration of policy which influences the courts to require clear and convincing proof in such cases applies with full force to the case before us.

[3] There is no question as to the jurisdiction of the courts to grant the relief prayed for by plaintiffs, but the proof must be clear, cogent, and convincing.

[4] A careful examination of the testimony in this case satisfies us that it falls far short of the degree of proof which the law requires. There is no occasion to impugn the sincerity and veracity of the witnesses. They are ignorant people, speaking of transactions which occurred more than 25 years ago. One of the principal witnesses, Mrs. Kiser, testified in chief that she had seen the original deed, of which that filed with the bill purports to be a copy, at her father's house, with whom it had been left for safekeeping, and that the original deed was "to Eliza Ramsey, and to her children, and to William Ramsey a lifetime estate." Upon cross-examination she says, in answer to the question, "Do you know or not whether the deed you saw is the one in controversy?" "I do not know it, but I believe it from what

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

people say. Q. You do not know, as I understand you, whether the deed you saw at your father's house is the one in controversy? A. No, sir; I do not know, but it appears to me that it must be that way." And again: "You do not undertake to say that the deed you saw was the same as the deed in controversy today? A. I do not. I do not know it, but I believe it awful strong. Q. How do you happen to believe it so awful strong? A. From what people say. Bill said it."

Another witness for the plaintiffs, Joseph Fraley, testifies that after Polly Ramsey's death, when negotiations were going on for a sale of a part of this land to one Hensdill, he heard the contents of this deed discussed, and that Hensdill was told by William Dickenson, with whom he advised with respect to the title, to take the deed back to Barnett, by whom it had been written, "and have it doctored on," for if he should buy it, "them heirs would give him trouble, and that the deed was doctored and returned to Hensdill and Dickenson, and then Hensdill bought it." Barnett utterly denies that the deed was ever brought to him for such a purpose, and it is only adverted to as throwing light upon the general character of the testimony relied on. The testimony of both Barnett and Amburgey is very vague and indefinite, though they both say that by the deed as written Eliza Ramsey was to have a life estate and at her decease then to her children.

If we turn to the deed as recorded, it will be seen that after the lapse of 27 years witnesses, however honest and intelligent (and these witnesses, however honest, were certainly not intelligent), might well be confused and mistaken with respect to its phraseology. The first clause of the deed recites that Polly Ramsey, in consideration of the natural love and affection she has for her daughter, Eliza, doth grant, with general warranty, unto her a certain tract of land. The second clause describes the land conveyed, and then follows: "Yet upon the following conditions, to wit: The said Polly Ramsey first reserves to herself a life interest in the above subscribed lands during her natural life, then the aforesaid lands go to Eliza Ramsey and her husband William Ramsey a life estate and full control of thereof in the land described above thereof, with all the appurtenances, forever." It may be that it was the intention of the grantor that Eliza Ramsey and her husband should take only a life estate, and that the scrivener failed properly to express that intention; but that is not the case made by the pleadings, nor does the evidence support it, and still less does it maintain the theory of spoliation and forgery with that certainty which the law demands.

For these reasons, we are of opinion that the decree of the circuit court should be reversed. Reversed.

WHITTLE, J., absent.

MAY et al. v. SHERRARD'S LEGATEES et al. (Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. WILLS (§§ 194, 751*)—REVOCATION—BEQUESTS AND DEVISES SUBJECT TO ADEMPMENT.

A testatrix gave a dwelling house and lot to be sold and equally divided between two grandnephews. In another clause she provided that, in the event of the death of one of such grandnephews, she willed one-half of such house when sold to a grandniece. A codicil stated that she had sold such house, and invested the proceeds in two other houses and lots. Held, that the gift to the grandnephews, whether treated as a gift of the house and lot itself, or as a gift of the proceeds of a sale thereof, was a specific legacy or devise, and in either case was revoked by the sale of the house and lot by the testatrix in her lifetime.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481-489, 1938; Dec. Dig. §§ 194, 751.*]

2. WILLS (§ 750*)—LEGACIES—SPECIFIC LEGACIES.

As a general rule, a legacy will not be construed as specific unless it appears clearly to have

been so intended, and whether or not it is specific depends wholly upon the language of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1938, 1937; Dec. Dig. § 750.*]

3. WILLS (§§ 194, 757*)—REVOCATION—DISPOSITION OF SUBJECT BY DEVISE OR LEGACY.

That a testatrix, who gave a house and lot to be sold and equally divided between two grandnephews, and who thereafter sold such house and lot and invested the proceeds in part in other real estate, stated in a codicil to the will that she had sold such house and lot and invested a portion of the proceeds in other real estate, did not prevent a revocation or ademption of the devise or bequest, since ademption depends upon a rule of law, and not upon the intention of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481-489, 1938-1939; Dec. Dig. §§ 194, 757.*]

4. WILLS (§ 461*)—CONSTRUCTION—INTENTION OF TESTATRIX.

A testatrix, after giving a \$600 certificate in a corporation to be equally divided between two grandnephews, stated that she had also a \$1,400 certificate in the same corporation on which no interest had been drawn, and added: "See that it is drawn by check. That I wish to go to." Held, that the provision as to this last-mentioned certificate was so vague and indefinite that it could not be determined with any degree of certainty what the testatrix meant, and hence it passed under the residuary clause, since there was no such manifest or clear intent to give it to the legatees of the \$600 certificate as would authorize the court to substitute "too" for "to," or to give "to" the meaning of "too."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 980; Dec. Dig. § 461.*]

5. WILLS (§ 461*)—CONSTRUCTION—INTENTION OF TESTATRIX.

Where a testator's intention is manifest from the whole will and surrounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language used will be subordinated to the intention, and to give effect to such intention one word may be substituted for another; but words cannot be rejected, supplied, transposed, or substituted, unless the testator's intention is clear or manifest from the context and the surrounding circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 980; Dec. Dig. § 461.*]

Appeal from Corporation Court of Staunton. Suit by Maria L. Sherrard's executor against Maria L. Sherrard's legatees and others. From the judgment, J. H. May, guardian ad litem of certain defendants, and others appeal. Affirmed.

Quarles & Pilson, of Staunton, for appellants. Timberlake & Nelson, Robertson & Robertson, and W. H. Landes, all of Staunton, for appellees.

BUCHANAN, J. [1] The principal object of this suit, which was brought by the executor of the last will and testament of Mrs. Maria L. Sherrard, was to have a construction of that instrument. The will is one of considerable length, containing 20 clauses and a codicil. The controversy here, however, is only as to the construction to be placed upon the second clause and a portion of the codicil. The provision of the second clause is as follows:

"Second—I give, bequeath and devise my dwelling house and the lot on which the same stands, situated on North New street, in the city of Staunton, Virginia, and now known by the street number of 307 North New street, to be sold and equally divided between Tate Boys Sterrett, of Hot Springs, Virginia, and John Bishop of Charlestown, West Virginia, great nephews of mine, and sons of Maria B. Sterrett of Hot Springs, Virginia, and Margaret Bishop of Charlestown, West Virginia."

The only other portions of the will which, it is claimed, throw any light upon the meaning to be given the clause quoted are contained in the fifth clause, which, after making certain bequests to Margaret Bishop, a greatniece of the testatrix, provides that, "in the event of the death of her brother, John Bishop, I will one-half of the 307 North New street house, when sold, to pass in fee simple absolute to Margaret Bishop of Charlestown, West Virginia;" and the codicil, which states, among other things,

that the testatrix had sold the house No. 307 North New street for \$3,500, and invested \$2,650 thereof in two houses and lots in the city of Roanoke, which were worth \$3,000 at the time the codicil was written. The trial court held that the devise or bequest made in the second clause was specific and not demonstrative, and that by the sale of house No. 307, mentioned therein, in the lifetime of the testatrix the gift made by that clause was adeemed or revoked, and that the devisees or legatees named therein took nothing under it.

The distinction made between specific and demonstrative gifts is well understood; but it is sometimes difficult to determine whether a particular gift belongs to the one class or the other. Definitions of these two kinds of legacies are found in the decisions and text-books, varying somewhat in phraseology, but generally substantially the same in meaning.

Mr. Pomeroy, in his work on Equity Jurisprudence, which is relied on largely by the appellants to sustain their contention that the legacy in question is not specific but demonstrative, defines a specific legacy as "a bequest of a specific article of the testator's estate, distinguished from all others of the same kind, as, for example, a particular horse, or piece of plate, or money in a certain purse, or chart, a particular stock in the public funds, a particular bond or other instrument for the payment of money." Volume 3 (3d Ed.), § 1130. He defines "demonstrative legacies" as "bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, not in themselves specific, but made payable *primarily* out of a particular designated fund or piece of property belonging or assumed to belong to the testator." Same volume, § 1133.

[2] The general rule is that a legacy will not be construed as specific unless it appears clearly to have been so intended (Corbin v. Mills, 19 Grat. [60 Va.] 438, 468), and that whether or not it is specific depends wholly upon the language of the will (3 Pom. Eq. Jur. § 1130).

Tested by these definitions and rules of construction, to which class does the gift in question belong? The language of the second clause is, "I give, bequeath and devise my dwelling house and the lot on which the same stands" (describing it so that there could be no doubt about its location and identity) "to be sold and equally divided between" the beneficiaries named. Whether this be a gift of the house and lot itself, and the sale directed was merely for the purposes of partition between the devisees, as the appellee insists, or a gift of the proceeds or fund arising from the sale of the house and lot, there can be no question that the thing given is so described, pointed out, and identified as to distinguish it from all the other property of the testatrix. It is not a gift of a certain sum of money or other thing "payable primarily out of a particular designated fund or piece of property." There is nothing in the language of the clause or of the will which manifests any intent to give the persons named in that clause any particular sum, or amount, or quantity, to be paid primarily out of the proceeds of the sale of the house and lot, and, if for any reason that fund should fail, then to be paid out of the general estate; but, on the contrary, the gift is either of the house and lot, or it is a gift of the fund arising from the sale. If it be a gift of the house and lot, it is manifestly a specific devise; if it is a gift of the fund arising from the sale directed, it is equally specific as it seems to us. That the testatrix intended the gift made by that clause as specific, either of the house and lot, or of the fund produced by its sale, is emphasized and made clearer, if possible, by the fifth clause of her will, which provides: "That in the event of the death of her brother John Bishop" (one of the beneficiaries under the second clause) "I will one-half of 307 North New street house, when sold, to pass in fee simple to Margaret Bishop. * * *

The conclusion that we have reached, that the gift in question is specific, and not demonstrative, is fully sustained by the case of King v. Sheffey, 8 Leigh (35 Va.) 614, in which the provision of the will construed was substantially the same as that now under consideration. In that case the testator, after having given to his wife one-third of the rents and profits of his Fincastle property for life, devised and bequeathed to the children of his son and daughter, Conally and Nancy Finley, "one-half of my personal property in the county of Washington aforesaid, also two-fifth part of the net proceeds of my estate in Fincastle aforesaid, which is to be sold at my beloved wife's death, at the discretion of my executors." He then gives two other fifths of the Fincastle property to Mitchell and wife, and the remaining one-fifth to Allen and wife. The testator's estate in Fincastle consisted of several houses and lots, which he sold within less than a year before his death upon one, two, three, and four years' credit, and he was the owner of the purchase-money bonds at the time of his death. The question in that case was whether or not the devise or bequest of the Fincastle estate or its proceeds was revoked or adeemed by the alienation of the testator in his lifetime. President Tucker, in delivering the opinion of the court, said, among other things: "It seems to have been assumed by the counsel for the appellee that these devises of the proceeds of the Fincastle estate were to be considered as legacies; but it was very properly admitted that as legacies they came within the description of specific legacies. And if they are legacies at all, in the strict sense of the term, they are strictly specific, and are not of that class of legacies of money or quantity which are said to be only in the nature of specific legacies, and which, if the fund be called in or fail, will be paid out of the general estate. 1 Roper on Legacies, 169. For here it is clear the testator had no design that his general estate should ever be charged with those legacies. * * * Moreover, it was not a bequest of a certain sum (as of \$500) chargeable upon the land, which, according to the case of Fowler v. Willoughby, 2 Sim. & Stuart, 354, might be charged on the general assets, if the land failed; but it was a devise of an uncertain interest, which would be more or less, according to the price for which the land might sell, the amount of which did not admit of being ascertained except by sale."

After holding that, if the gifts in that case were treated as legacies, they were specific, and were adeemed by the alienation of the Fincastle estate by the testator, he continues: "To come to a just understanding of this case, however, we must consider it more closely. This is a case of a devise, and a devise of real estate." After giving the reasons why the claim in question was a will of real estate, and citing authorities to sustain that view, he says: "So completely, indeed, is it a devise of the land to the three beneficiaries that, if it had not been sold, Finley, Mitchell, and Allen might now by their concurrent act demand a conveyance of the land itself, and arrest the sale, for a right to the whole proceeds of the estate is a right to the estate itself." After citing authorities to sustain that view, he says: "The devise, then, being of real estate—that is, of an equitable interest in land—was revoked by alienation. This principle is too plain to require support."

An attempt is made to distinguish that case from this, in this, that in the one the property to be sold is specifically designated, and in the other it is not. The fact that the testator in King v. Sheffey did not name or designate each house and lot which he directed to be sold, but described them as his "Fincastle estate," whereas, in this case the property is specifically designated and described, does not affect the question under consideration, for the property was as fully identified in the one case as in the other. It is also insisted that King v. Sheffey is contrary to the weight of authority in other juris-

dictions, is a very old case, and has never been cited or relied on by this court, and is in conflict with *Myers v. Myers*, 88 Va. 131, 13 S. E. 346.

If the gift in this case be treated as a devise of real estate, the whole current of authority is that it was revoked by the alienation of the house and lot by the testatrix. If it be regarded as a bequest or legacy, then the weight of authority is, it seems, in favor of the conclusion reached by this court in *King v. Sheffey*. The text-books generally, as we understand them, so state the rule, and the decided cases sustain that statement.

In discussing the subject of specific legacies, Mr. Roper, in his work (4 Am. Ed. p. 200), says that: "If a testator direct his freehold or his leasehold estates to be sold, and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the testamentary disposition will be specific, the money is sufficiently identified and severed from his other property, and, since he has sufficiently marked his intent to distribute the identical proceeds, the bequests are accompanied with all the requisites of specific legacies"—citing *Page v. Leasingwell*, 18 Vesey, 463.

In a note to 3 Pom. Eq. Jur. § 1130, at p. 2210, it is said that: "Where the testator deals with specific property belonging to himself, not by giving legacies or sums of money out of it, but by dividing and apportioning out the very property itself, or the proceeds of it, if it is directed to be sold and converted into money, then the bequests of the parts thus apportioned among the legatees will be specific"—citing *Page v. Leasingwell*, and other English cases.

In *Redfield on Wills*, it is said: "A distinction is made between legacies out of the issues of real estate, whether resulting from sale or otherwise, and legacies merely chargeable upon real estate. In the former case it has been regarded the same in effect as a devise of a specific proportion of real estate, and consequently as creating a specific devise, the same as if a portion of the real estate itself had been devised." 2 *Redfield on Wills*, p. 145.

In 18 Am. & Eng. Enc. Law (2d Ed.) p. 716, it is said: "A gift on a specific thing to be sold and divided in certain shares among several persons is a specific bequest." Also note 4, p. 720. See, also, note to the case of *Weed v. Hoge*, Ann. Cas. 1913C, 543, 546, etc., where numerous cases are cited. In the case to which that note is appended, it was held that a will directing the executors to sell the testatrix's property situated in the state, and to give a specified part of the proceeds to her husband absolutely, creates a specific legacy. It lays down the rule as general that "a gift or the proceeds of the sale of specific real estate or chattels is specific."

It is true, as contended, that *King v. Sheffey* is an old case, and that it has never been cited by this court, so far as we know. The fact that it is old does not affect its value or authority; that it has not been cited may be because our Reports do not contain many cases involving the question of the distinction between specific and demonstrative legacies, and none which involve the precise question involved in that case and in this, unless it be the case of *Myers v. Myers*, 88 Va. 131, 13 S. E. 346. That case makes no reference to *King v. Sheffey*, though the opinion seems to be in conflict with the decision in that case. The opinion in *Myers v. Myers* shows on its face that the question whether or not the gift in that case was specific or demonstrative was not very fully considered, and it can hardly be supposed that it was intended in that case to overrule *King v. Sheffey* without even referring to it, its reasoning, or the authorities upon which it was rested—a case in which the opinion was rendered by President Tucker, one of the most distinguished jurists that ever sat on this bench, and concurred in by all the other members of the court—*Cabell*, *Carr*, *Brockenbrough*, and *Brooke*.

The conclusion in *King v. Sheffey* that the gift in that case was specific, whether treated as a devise of real estate or a bequest of the pro-

ceeds of its sale, seems to us to draw the true distinction between specific and demonstrative gifts by will, and is in accord with the weight of authority, and should not be regarded as having been overruled by a subsequent case which makes no reference to it, and in which the question does not appear to have been carefully considered. There is nothing in our other cases referred to, as we understand them, which is not in harmony with the principles announced in *King v. Sheffey*.

Having reached the conclusion that the gift in question was specific, it follows that the appellants can take nothing under the second clause of the will, whether the gift be treated as a devise or a bequest; for the alienation of the property by the testatrix worked a revocation if it was a devise, and an ademption if it was a bequest. Liability to ademption is said to be the most distinctive feature of a specific legacy.

In *Hood v. Haden*, 82 Va. 588, 599, it was held that if the identical thing bequeathed was not in existence, or had been disposed of by the testator, so that it does not form a part of the testator's estate at the time of his death, the legacy is extinguished and the legatee's rights are gone.

In *Skipwith v. Cabell's Ex'r*, 19 Grat. (60 Va.) 758, in which one of the questions was whether or not certain stock given had been adeemed, it was held that a mere nominal or formal change in the thing given did not work an ademption. In that case the gift was of "my guaranteed bonds of the James River & Kanawha Company to be equally divided between" the beneficiaries. After the date of the will an act was passed which authorized the holders of the bonds of that company, for which the state was bound, to surrender them and receive in lieu thereof bonds of the state for the same amount, and under this act the testatrix exchanged her guaranteed bonds for state bonds, which she held at her death. While it was held in that case that there was no ademption, it was upon the ground that the thing given had been changed in name and form only and was substantially the same; but Judge Joynes recognizes fully the general rule that where the thing given is not in existence or has been alienated the bequest is adeemed. He says: "Where stock specifically bequeathed has been sold by the testator, * * * the subject of the bequest is extinguished or annihilated; nothing exists upon which the will can operate, and the legacy is adeemed and gone. But 'where the thing specifically given has been changed in name and form only, and is in existence, substantially the same, though in a different shape, * * * it will not be * * * adeemed by such nominal change.'" Page 795.

There are cases in other jurisdictions which hold that the sale or disposition by the testator in his lifetime of the thing given does not always work an ademption; but they are contrary to the general rule (see 3 Pom. Eq. Jur. § 1131, and notes 2 and 3; *Slater v. Slater*, 8 Ann. Cas. 141, and note p. 144, etc., and cases mentioned), and to the doctrine of our own decisions. In *King v. Sheffey* the purchase-money bonds of the property directed to be sold and the proceeds divided between the beneficiaries belonged to the estate, and yet, treating them as legacies, it was held that they were adeemed. This case is a stronger one for the ademption of the bequest than that, since in this case not only was the house and lot, given and directed to be sold and its proceeds divided, sold during the lifetime of the testatrix, but the proceeds in part were invested in other real estate, and the residue of the proceeds otherwise used or disposed of.

[3] The fact that the testatrix states in the codicil to her will what she had done with the Staunton property, and the disposition she had made of a portion of the proceeds, does not affect the question of ademption. Ademption with us, and generally, depends upon a rule of law, and not upon the intention of the testator. *King v. Sheffey*, 8 Leigh (35 Va.) 617; *Skipwith v. Cabell*, 18 Grat. (60 Va.) 794, 795; 1 *Roper on Legacies*, 329.

[4] The remaining question to be considered is whether or not the \$1,400 certificate of stock mentioned in the codicil was bequeathed to the appellants, Tate Boys Sterrett and John Bishop.

So much of the codicil as bears upon this question is in the following language: "Since then I have a \$600 hundred certificate Clover Manfc. Co., Clover S. Carolina invested May 10th, 1910, at 7 per cent, Mr. M. L. Smith, Treas. invested it. I wish that to be collected and equally divided with Tate Boys Sterrett of Hot Springs, Va., Bath County, son of Tate Sterrett and Maria Boys Sterrett, niece of mine. The other $\frac{1}{2}$ half of property I mention to go to John Bishop of Hagerstown, Md., son of Mrs. Margaret Smith now and mother of John Bishop, my nieces son of Hagerstown, Md. This is change must be I have also \$14 hundred certificate at Clover S. C. Manfc. Co., M. L. Smith, Treas. put there the 11th of April, 1910, and no interest as yet drawn at 7 per cent. See that it is drawn by check. That I wish to go to."

It is conceded by the appellants that if "to," the last word in the codicil, is to be treated as correctly spelled, the clause or sentence as to the \$1,400 certificate is meaningless; but it is insisted that, if the word "to" be treated as intended for the adverb "too," then the meaning is plain. The last property bequeathed in the codicil immediately before the clause in question was precisely the same kind of a chose in action as that disposed of, or attempted to be disposed of, by the last clause. The persons to whom the \$600 certificate, or its proceeds, is given are the same persons who claim that they are the beneficiaries intended under the last clause. If it had been the intention of the testator to give both certificates to the same parties and in the same proportions, why was it not done in one clause? The fact that she did not so dispose of them would tend to show that she did not intend to give the \$600 certificate and the \$1,400 certificate to the same persons. The codicil is wholly in the handwriting of the testatrix, and she was the owner of both certificates when it was written. Instead of the codicil, taken as a whole, showing a manifest intention on the part of the testatrix to give the \$1,400 certificate, as well as the \$600 certificate, to the same persons, it shows, as it seems to us, an intent not to do so.

[5] It is well settled that where the testator's intention is manifest from the whole will and surrounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language used will be subordinated to that intention, and in order to give effect to such intention one word may be substituted for another, as it asked to be done in this case. *Brewer v. Opie*, 1 Call (5 Va.) 212; *East v. Garrett*, 84 Va. 523, 9 S. E. 1112. 2 Minor's Inst. (1st Ed.) 1114-1116; 40 Cyc. 1399, 1401. But the right of the court in construing a will to mould its language by rejecting, supplying, transposing, or substituting words only exists where the testator's intention is clear or manifest from the context and the surrounding circumstances. 40 Cyc. 1399, 1400; 2 Min. Inst., 1112, 1114, 1115, and authorities cited. But in this case no such manifest or clear intent, or any intent at all, appears to give the \$1,400 certificate to the appellants, as would authorize the court to substitute "too" for "to," or give "to" the meaning of "too." Indeed, if such a change was made, it would not then clearly appear that the testator intended to give the \$1,400 certificate to the appellants.

We are of opinion that the corporation court did not err in holding that the clause in question is so vague and indefinite that it cannot be determined with any degree of certainty what the testatrix did mean, and that the \$1,400 certificate passes under the residuary clause.

Upon the whole case, we are of opinion that there is no error in the decree complained of, and that it must be affirmed.

Affirmed.

ALPHIN v. LOWMAN.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. EVIDENCE (§ 420*)—JOINT INDORSEMENT—AGREEMENT BETWEEN INDORSERS—STATUTES.

A showing aliunde that joint payees of a note jointly indorsed it on an agreement of one of them to indemnify the others, in case of default of the maker, is not prevented by the last sentence of the Negotiable Instruments Law (Code 1904, § 2841a) § 68, providing: "As respects one another indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees are deemed to indorse jointly and severally."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1732, 1795, 1800, 1804, 1815, 1821, 1929-1944; Dec. Dig. § 420.*]

2. FRAUDS, STATUTE OF (§ 21*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—INDEMNITY AGREEMENT BETWEEN INDORSERS.

The agreement of one of several joint accommodation indorsers of a note, whereby he induced the others to join in the indorsement, that he would indemnify the others in case of default of the maker of the note, is not within the statute of frauds (Code 1904, § 2840), as an undertaking to answer for the debt or default of another, but is his original undertaking or promise to answer for his own debt.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 33; Dec. Dig. § 21.*]

Error to Circuit Court, Bath County.

Action by one Lowman against L. C. Alphin. Judgment for plaintiff. Defendant brings error. Affirmed.

Geo. A. Revercomb, of Covington, and John W. Stephenson, of Warm Springs, for plaintiff in error. John T. Delan and H. H. Byrd, of Warm Springs, for defendant in error.

KEITH, P. The Citizens' National Bank of Covington, Va., held two votes, one for \$3,000 and one for \$5,000, drawn by one Gillespie and made payable to Alphin, Blakey, and Lowman as joint payees. These notes were renewed from time to time, but ultimately went to protest. Suit was brought upon them, and judgment recovered, upon which executions were issued and placed in the hands of the sheriff, who levied upon the property of Alphin, Blakey, and Lowman. The property of Lowman, which was levied upon, was sold and brought \$988.90, that of Blakey brought \$216, and the balance of the judgment was paid by L. C. Alphin; Gillespie, the principal, having in the meantime become a bankrupt. Lowman then instituted an action of assumpsit against Alphin to recover the amount which he had paid, and a like suit was instituted by Blakey.

To these suits Alphin pleaded nonassumpsit, and a special plea, in which he claimed that Lowman, Blakey, and he were joint indorsers on the notes, and as between themselves were each liable for one-third of the judgments and executions, and in this special plea Alphin set up the amount due him, and asked that judgment be given against Lowman for the sum of \$1,904.53%, which he claimed he had paid for Lowman, the plaintiff, on said executions.

At the trial Lowman proved that there

was a verbal agreement between himself and Blakey, on the one hand, and L. C. Alphin, on the other, whereby Alphin was to be responsible as between the indorsers for the whole of said notes, and was to stand liable for any amount that might be asserted against the plaintiff by reason of his becoming an indorser upon said notes. The specific promise was about in this form: That when Alphin approached Blakey and Lowman, and requested them to become joint payees or indorsers with him upon the note, he said to them: "Go ahead and indorse it; you need not be uneasy; Gillespie is all right. If he did not have a thing, you will never have a dollar to pay as long as I have got a dollar's worth of property."

The plaintiff in error objected to the admission of evidence tending to prove the verbal promise, and after the evidence was concluded the court at the instance of the plaintiff gave the following instruction:

"The court instructs the jury that they shall find for the plaintiff if it has been proven by a preponderance of the evidence that on or about April 26, 1906, the plaintiff at the request of the defendant indorsed the notes of C. D. Gillespie for \$5,000 and \$3,000 in order to help the defendant to get the Citizens' National Bank of Covington, Va., to loan said Gillespie the sum of \$8,000, and that at the time the plaintiff indorsed the said notes the defendant represented unto him and assured him that if he would indorse said notes he would never have to pay a cent on them so long as he—the defendant—owned a dollar's worth of property."

The plaintiff in error objected to the giving of this instruction; and, the jury having rendered a verdict on behalf of the plaintiff, plaintiff in error moved to set it aside, which the court refused to do, and entered the judgment which is now before us.

The entire defense of plaintiff in error turned upon the question whether or not the promise which the evidence shows that he made to Blakey and Lowman, and which induced them to become payees and indorsers of the notes, is within the statute of parol agreements, commonly known as the statute of frauds.

It may be well to state before going further that while both of these notes were originally given to the Citizens' National Bank of Covington, Va., one of them—the \$5,000 note—was finally transferred to the Bath County National Bank; but this circumstance we regard as immaterial, as the same rights and duties remain in the parties to the transaction when the note is in the hands of the Bath County National Bank as attached to it when in the hands of the first holder.

The question for decision is whether the promise made by Alphin, that he would save Lowman harmless if he would join him as indorser upon the note drawn by Gillespie, is within the statute of parol agreements, as being an undertaking to answer for the debt

or default of another, or whether it is an original undertaking or promise upon the part of Alphin to answer for his own debt.

The statute reads as follows: "No action shall be brought in any of the following cases: * * * Fourth, to charge any person upon a promise to answer for the debt, default, or misdoings of another; * * * unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence." Code, § 2840.

[1] It is earnestly contended by the plaintiff in error that the decision of this question is controlled by section 68 of the Negotiable Instruments Law (Code 1904, § 2841a), which reads as follows: "As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally"—the contention being that, the statute having declared that joint payees or joint indorsees who indorse are to be deemed as having indorsed jointly and severally, no evidence is admissible to show a different order or extent of liability; but to this argument we cannot accede.

The object and effect of that section is but to give statutory force to a principle already established.

In *Bank of United States v. Beirne*, 1 Grat. (42 Va.) 271, 42 Am. Dec. 551, the law upon this point is thus stated: "The legal effect of several successive indorsements is that each indorser has a right to look for indemnity to all the indorsers who precede him, whether they indorse for accommodation of the drawer or for value received, unless there be an agreement aliunde, different from that evidenced by the indorsements"—citing *Chalmers v. McMurdo*, 5 Munf. (19 Va.) 252, 7 Am. Dec. 684, and *Bank v. Vanmeter*, 4 Rand. (25 Va.) 553. "By a joint indorsement," says the same case, "for accommodation of the drawer, all the indorsers are cosureties, bound to contribution; and if such an indorsement had been made in this case, Beirne would have a right, by virtue thereof, to call on the others to share the burden, unless there was an agreement, proved by evidence aliunde, that he should bear the whole, or more than an aliquot part."

The first clause of the section under consideration establishes the *prima facie* order in which indorsers are to be held liable, but among themselves they are permitted to show that they have agreed otherwise. The clause with respect to joint payees or joint indorsees was added, not to deprive them of the right to prove by evidence aliunde that they had made an agreement among themselves

which varied the liability imposed by law, but we think out of abundant caution, to negative the conclusion that they were to be liable in the order in which they became indorsers; for when there are two or more joint indorsers, it is, of course, apparent that the mere affixing of their signatures must have been successive, one after the other.

[2] The principal defense, however, is that the promise relied upon is within the statute above quoted, and can only be maintained when evidenced by a written memorandum.

It is amazing how language, apparently so plain, should have been the cause of such interminable controversy and contrariety of opinion. Among the earliest cases dealing with the subject is that of *Thomas v. Cook*, 8 Barn. & C. 728, in which it was held that such a promise was not within the statute and could be proved by oral evidence. Shortly thereafter, in the case of *Green v. Cresswell*, 10 Adol. & E. 453, a contrary conclusion was reached, and *Thomas v. Cook* was overruled. The conflict between these two cases has led to the diversity of opinion which exists among the states of the Union; and, without a particular discussion of the English cases which have followed those cited, it may be conceded that subsequent English decisions have settled the law within their jurisdiction in accordance with *Thomas v. Cook*. It may be further conceded that the American cases, in number at least, preponderate upon the same side of the controversy; but among the cases which maintain that such promises of indemnity are not within the statute of frauds the most discordant reasons are given—reasons as irreconcilable among themselves as they are to those given in cases which adopt the opposite conclusion. The principal controversy seems to be waged around the proposition whether the promise of indemnity is an original or a collateral promise—whether or not, in the case before us, the promise of Alphin was to answer for his own debt, default, or miscarriage, or was collateral to the promise of Gillespie to pay the debt which he owed to the bank. Without doubt the primary obligation to pay the debt rested upon Gillespie. If he discharged that obligation, the debt was satisfied, and no burden was imposed upon the sureties or indorsers. If Gillespie failed to pay the debt, then the obligation arose, and the duty devolved upon the sureties.

In *Wolverton v. Davis*, 85 Va. 64, 6 S. E. 619, 17 Am. St. Rep. 56, the question was before this court, only three judges being present. In that case Thomas K. Davis was elected sheriff of his county, and executed an official bond, with W. W. Davis and Samuel Wolverton and others as his sureties. W. W. Davis had requested Wolverton to execute the bond as a surety, and promised orally to indemnify him against any loss arising from the suretyship. By reason of the default of the sheriff, Wolverton had to

pay a sum of money as such surety. He sued W. W. Davis on the parol promise of indemnity to recover that sum. At the trial he offered evidence of the parol promise, which the court excluded. There was a judgment for the defendant, and Wolverton appealed. The judgment was affirmed, the court resting its opinion chiefly upon *Green v. Cresswell*, 10 Adol. & E. 453, supra.

It appears, therefore, that that case is in principle identical with the one before us. It is true that *Wolverton v. Davis* was with respect to the liability of sureties upon a bond, while in the case before us it is as to the liability inter sese of indorsers; but the same principles are believed to apply to both cases.

In *Smith's Leading Cases* (8th Am. Ed.) p. 538, after discussing a number of cases bearing upon the subject, it is said: "Amidst the diversity of decision, it may be difficult to discover the true principle; but the result of the authorities, as a whole, seems to be as follows: A promise by a stranger to the debt, to indemnify a surety, is *prima facie* within the statute, because the principal is bound by an implied obligation to do that which the promisor agrees to do expressly, and the promise is, therefore, really to answer for the default of the principal. When, however, the promisor is directly or indirectly answerable for the debt independently of the promise, any engagement which he may make that it shall be paid, or that the surety shall not be compelled to pay it, will be regarded as contracted on his own behalf, and not for the debt or default of another, in the sense in which the term is used in the statute."

Now in the case before us the promisor, Alphin, is not a stranger to the debt, but is answerable for the debt, independently of the promise to Lowman, and therefore, when he undertook that Lowman should not be compelled to pay it, he is to be regarded as contracting in his own behalf, and not for the debt or default of another.

In *Barry v. Ransom*, 12 N. Y. 462, Judge Denio, delivering the opinion of the court, held, after citing the different adjudications upon the point, that those where the promisor was himself bound for the third person's default are uniform in holding that the contract is not affected by the statute.

In *Throop on the Validity of Verbal Agreements*, § 474, after an exhaustive consideration of the cases bearing upon the question, it is stated: "As the result of the conflict of authority upon this question, nothing can be regarded as definitely settled, except, perhaps, that where the promisor and the promisee are about to unite in an instrument as sureties for the third person, the promise to indemnify is not within the statute. With respect to the weight of argument, the side to which the balance preponderates is even more difficult to discover. If the question was merely whether the general policy of the

statute embraces such cases, probably few lawyers would hesitate to answer it in the affirmative."

Treating of this subject, at section 162, Browne on the Statute of Frauds (5th Ed.) uses the following language: "It would be unprofitable to trace the course of the American decisions here cited. It has manifestly resulted in the rejection, by the great preponderance of authority, of the doctrine of *Green v. Cresswell*, and the acceptance of the doctrine of *Thomas v. Cook*, a result reached after much vacillation on the part of courts of the same state, and not, it must be confessed, by reference to any clear and satisfactory ground of principle. Indeed, most of the decisions which reject the doctrine of *Green v. Cresswell* waive altogether the question of principle, and put it as a matter settled by authority that the 'promise to indemnify' is not within the statute. In other cases, it is put upon the ground that the plaintiff makes his engagement, relying upon the defendant's special promise, and not upon the third party's implied liability, that the former and not the latter is the foundation of the special contract, and that the decisive question is to whom credit was given by the plaintiff. But, as we shall have occasion to see hereafter, the application of the statute cannot safely be determined by the consideration that the plaintiff relied upon one obligation to himself rather than upon another, or even that he relied wholly upon the obligation of the defendant's special promise, giving 'credit' solely to him, if still a third party was really liable to the plaintiff to the same extent."

In 20 Cyc. pp. 178, 179, it is said: "In England it is practically settled that if one person, at the request of another and on his oral guaranty of indemnity against loss, assumes a responsibility for the discharge of a third person's obligation to a fourth, he may recover against the guarantor, although there is on the part of the third person a coexistent implied obligation to indemnify the promisee; and the weight of authority in this country is in accordance with the English view. In many states, however, a contrary view has been adopted, and a promise of indemnity given under such circumstances is held to be within the statute."

One of the most recent cases we have seen is that of *Rose v. Wollenberg*, 31 Or. 269, 44 Pac. 382, 39 L. R. A. 378, 65 Am. St. Rep. 828, in which it is held that a contract between cosureties, fixing the proportion and extent of their several or correlative liability as between themselves, is not within the statute of frauds. The court in its opinion said: "Seek where you will for a plausible footing upon which to found the obligation, so as not to come within the purview of the statute of frauds, the distinction, taken in *Green v. Cresswell*, of *Thomas v. Cook*, that the promisee became likewise bound upon the obligation with the promisor, as cosureties,

and for this reason, if not also for the reason upon which the second class is supported—that it is not an undertaking with the creditor—the indemnity is not within the statute, whether adequate or not, has taken deep hold in the judicial mind, and the undoubted weight of authority in this country is grounded upon it. Indeed, the doctrine is even regarded as settled. Mr. Throop, in his treatise on the Validity of Verbal Agreements (section 474), says: 'As the result of the conflict of authority upon this question (speaking generally of contracts of indemnity against a surety's liability), nothing can be regarded as definitely settled, except, perhaps, that, where the promisor and promisee are about to unite in an instrument as sureties for the third person, the promise to indemnify is not within the statute.' If a cosurety can, by a verbal undertaking, indemnify another in whole against the obligation of the latter, without suffering the interdiction of the statute, he may also in part, as the greater includes the less; and thus it is that cosureties may, by contract, agreement, or understanding between themselves, limit and fix the proportion and extent of their several or correlative liability, and it is competent to establish the agreement by parol. So we conclude that it was competent for the plaintiff and defendant to enter into such a contract or agreement as is set forth in plaintiff's complaint, and the fact that it is not in writing cannot be taken as an objection against its enforcement."

Turning for a moment to section 68 of the Negotiable Instruments Law, already cited, it is to be observed that the right of indorsers to show the order and extent of their real liability among themselves is recognized by the statute, a right which has been fully established by the decisions. See *Bank v. Beirne*, supra. And speaking of this principle, at section 475, Throop on Verbal Agreements says: "It cannot be restricted within the bounds implied by the rule, that several sureties upon the same instrument may regulate by contract their liability to contribution. For if it will suffice to defend an action for contribution, in favor of the verbi promisor against the promisee, we fail to see upon what principle it will not also suffice to maintain an action in favor of the promisee against the promisor, to recover the whole amount of damages which the plaintiff has sustained through a breach of the verbal promise. And no substantial reason is perceived why the right to maintain such an action should depend merely on the fact that the plaintiff and the defendant had united in the execution of the same instrument."

We have not undertaken to discuss the various authorities, but have contented ourselves with stating what seemed to be beyond question, that the great weight of authority has followed the English decision of *Thomas v. Cook*, supra, and held that such a promise of indemnity as that with which

we are here dealing is not within the statute of frauds.

There are cases of great weight that hold to the contrary. Among the most notable are *May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80; *Macey v. Childress*, 2 Tenn. Ch. 138; *Draughan v. Bunting*, 31 N. C. 10; *Bissig v. Britton*, 59 Mo. 204, 21 Am. Rep. 379; *Hartley v. Sandford*, 66 N. J. Law, 627, 50 Atl. 454, 55 L. R. A. 206. But the arguments pro and con are well balanced, and the authorities, as we have more than once said, strongly preponderate in favor of the validity of such agreements. We have not deemed it profitable to cite or comment upon the wilderness of cases touching the subject discussed, but have been content to ascertain and to state in what direction they preponderate. Those who desire to explore the matter still further will find them duly mustered and arrayed in *Browne on Stat. of Frauds* (5th Ed.) § 161c; *Throop on Validity of Verbal Agreements*, §§ 440-473; and most recently in 20 Cyc. p. 178.

Upon the whole case, it is not without hesitation that we have reached the conclusion that the case of *Wolverton v. Davis*, supra, must be disapproved, and the judgment of the circuit court affirmed.

Affirmed.

DAVIS v. COLE BROS.

(Supreme Court of Appeals of Virginia,
Nov. 20, 1913.)

1. EVIDENCE (§ 187*)—DOCUMENTS—BEST AND SECONDARY EVIDENCE.

Evidence held to show that an instrument offered in evidence was an original and not a copy and therefore was not objectionable on the ground that the original had not been sufficiently accounted for.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 874, 875; Dec. Dig. § 187.*]

2. APPEAL AND ERROR (§ 1050*)—EVIDENCE—PREJUDICE.

Defendant was not prejudiced by the answer to a question where he himself testified to the same fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

3. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

Where, in an action on notes for the price of a sawmill, defendant claimed that the mill had not been delivered, a question on cross-examination of one of the original parties to the transaction calling for the amount of money the witness had to pay for the mill on the day it was advertised to be sold, where he got the money, and what he did with it, was proper.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.*]

4. WITNESSES (§ 330*)—CROSS-EXAMINATION—EVIDENCE—FOUNDATION FOR IMPEACHMENT.

In an action on notes for the price of a sawmill, a question asked one of the parties to the transaction on cross-examination whether he did not give one of the plaintiff's as collateral to secure the notes sued on, a note signed by the witness' grandfather, and whether the latter had not afterwards denied his signature and claimed

that the note was a forgery, was admissible to lay a foundation for attacking the credibility of the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

5. SALES (§ 358*)—RECOVERY OF PRICE—EVIDENCE.

In an action on notes for the price of a sawmill "outfit," a letter written by plaintiffs admitting an offer to throw off \$150 if defendants would pay the whole debt and declining to take the "outfit" off defendants' hands showed on its face that it related to the transaction in question and was therefore relevant and admissible.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.*]

6. SALES (§ 358*)—ACTION FOR PRICE—EVIDENCE.

In an action on notes for the purchase price of a sawmill outfit alleged to have been secured by a note purporting to have been signed by defendants' grandfather but which he claimed never to have signed, whether one of the plaintiffs handed this note back to defendants and in doing so said that he had taken the note to defendants' grandfather and he had repudiated it and said it was a forgery was relevant and properly allowed.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.*]

7. SALES (§ 358*)—ACTION FOR PRICE—EVIDENCE.

In an action on notes for the price of a sawmill outfit, a question asked one of plaintiffs as to his knowledge concerning whether defendant D. sold any timber to his codefendants, S. Bros., to which the witness replied that he understood that he did sell a quantity of timber to S. Bros. for \$2,000, was admissible.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.*]

8. APPEAL AND ERROR (§ 499*)—BILL OF EXCEPTIONS—SUFFICIENCY—REVIEW.

A bill of exceptions to the admission of a letter in evidence, stating a general objection without any reason therefor, is not reviewable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.*]

Error to Circuit Court, Russell County.

Action by Cole Bros. against A. W. Davis and others. Judgment for plaintiffs, and defendant Davis brings error. Affirmed.

W. W. Bird, H. L. Kidd, and S. B. Quillen, all of Lebanon, for plaintiff in error. Finney & Wilson, of Lebanon, for defendant in error.

KEITH, P. In this cause we are called upon to review the proceedings upon a notice filed in the circuit court of Russell county by Cole Bros. against C. B. Smith, J. K. Smith, and J. W. Davis. Neither of the Smiths filed any plea, so that Davis is the only active defendant. The claim against him was based upon three notes, each for the sum of \$275, part of a series of six notes, three of which were not due when the suit was instituted and which were given for the purchase price of a sawmill with the various attachments belonging to it.

Davis filed a special plea, which is sufficiently stated by him in his petition as follows: That Cole Bros. sold to Davis "the sawmill in the plea described in considera-

tion that he would sign and assume payment of the notes sued upon, less \$150; that they failed to deliver him the sawmill, in consequence of which he was damaged, and which damage he offers to set off," etc.—to which plaintiffs replied generally.

The petition further states that the errors mainly relied upon by petitioner to obtain a reversal of the judgment against him grow out of rulings made by the judge in the admission of certain letters.

[1] The first bill of exceptions relates to a question asked the defendant J. W. Davis when testifying in his own behalf. After giving in full his version of the transaction, he goes on to say that H. C. Cole, one of the defendants, gave witness a paper at Bristol certifying that he (witness) was to have credit on the notes for \$150; that witness objected to the way the paper was written; that Cole said to witness, "You sign the notes and I will deliver the mill, put you in possession of the mill;" that Cole signed the paper; that witness objected to the paper and did not accept it but took the paper; that Cole said the paper would give witness credit for \$150, and that he (Cole) would give witness possession of the mill, and that he would come shortly and deliver the mill; that witness was to pay \$1,500 for the mill; that the mill had been on witness' place from May until October; that it had not been hurt; that witness did not suppose that the Coles would charge him interest until they turned him over the mill; that the paper above referred to was written by H. C. Cole; that he guessed that the paper could be found; that H. C. Cole wrote and handed him a paper that looked like a copy of the paper handed him by plaintiff's counsel; and that he (witness) thought it was a copy of the paper Cole wrote and handed to witness. After the introduction of this testimony plaintiff's counsel offered to read in evidence to the jury said copy and avowed that plaintiff would prove by further evidence the paper to be a true copy, which is in the words and figures following, to wit:

"In consideration of J. W. Davis indorsing four notes for \$275 each, dated April 7, 1911, and due as follows: One due July 20, 1911, one October 20, 1911, one January 20, 1912, and one April 20, 1912, executed by C. B. Smith and J. K. Smith for sawmill outfit, we hereby agree to give \$150 credit on note for \$275 dated April 7, 1911, and due July 20, 1912, when the series of six notes executed for the sawmill outfit by above Smith Bros. are paid in full. This October 25, 1911. Cole Bros."

To the reading of this copy the defendant, by counsel, objected; the court overruled the objection; and thereupon the defendant excepted.

H. C. Cole, one of the defendants in error, referring to the paper which is the subject of the exception under consideration, says that

he drew up a paper showing the transaction between them and handed the same to Davis, retaining a copy, being the same paper that was read in evidence to the jury over the defendant's objection and set out in bill of exceptions No. 1; that J. W. Davis took the paper and made no objection to and did not object to receiving it. It appears, therefore, from the evidence of Cole that the paper given to Davis and the reading of which was excepted to was not a copy but the original, and the account given by H. C. Cole does not at all contradict, but really confirms, the statement made by J. W. Davis in his testimony, and there was no error in allowing the paper to be read in evidence.

[2] Bill of exceptions No. 2 is taken to the ruling of the court permitting the witness J. K. Smith to answer the following question: "The sawmill was advertised under deed of trust for sale, wasn't it?" to which he replied: "Yes, the sawmill was advertised. We were there with the money to pay for it on the day it was to be sold, but nobody was there to sell the mill though."

This question and answer could not have injuriously affected the plaintiff in error, and in addition the same fact is testified to by the plaintiff in error himself. The assignment of error is overruled.

[3] Bill of exceptions No. 3 is taken to a question asked J. K. Smith as follows: "How much money did you have to pay for the sawmill on the day it was advertised to be sold, where did you get it from, and what did you do with it?" To which question and the answer of the defendant showing the source from which he claims to have derived the money with which to pay for the mill the plaintiff in error excepted.

The question was asked upon cross-examination of one of the original parties to the transaction, and we think it was properly admitted by the court; and this assignment of error is overruled.

[4] The fourth bill of exceptions was to the following question asked J. K. Smith upon his cross-examination: "Did not you give Mr. H. C. Cole, as collateral to secure the notes sued on, a note signed by your grandfather, Thomas Smith, and did not your grandfather afterwards say that he never signed the note, and that his signature to the note was a forgery?" To this question the defendant by counsel objected; the court overruled the objection and allowed the question to be answered as follows: "We told Mr. H. C. Cole we would give him a note signed by our grandfather, Thomas Smith, who lives in Scott county, Va., as collateral to secure the notes sued on. We sent this note to our grandfather to sign and then send it on to Cole Bros. We sent him the note to sign and after signing it to send it to Cole Bros., and I never saw the note any more. Mr. Cole told me that Thomas Smith said he never signed the note. I think my brother, C. B. Smith, has the note. I don't know how he

got it back, whether he got it from Mr. J. W. Davis or not."

This was admissible, if for no other reason, to lay the foundation for attacking the credibility of the witness; and the assignment of error to its admission is overruled.

[5] Bill of exceptions No. 5 is taken to the ruling of the court permitting a letter to be read in evidence which was addressed by Cole Bros. to Smith Bros. The bill of exceptions is as follows:

"Be it remembered that upon the trial of this cause and after the introduction of the evidence and the ruling of the court as set out and shown in bill of exceptions No. 1, in bill of exceptions No. 2, in bill of exceptions No. 3, and in bill of exceptions No. 4, the witness J. K. Smith, on his further cross-examination by plaintiffs by counsel, was offered by plaintiffs copies, or what purported to be copies, of two letters written by Cole Bros. to Smith Bros. under dates of October 30, 1911, and November 27, 1911, which were handed to the witness by counsel for plaintiffs. And thereupon counsel for the plaintiffs read to the witness before the jury what purports to be a copy of a letter purporting to have been written by Cole Bros. to Smith Bros., dated November 27, 1911, and which is in the words and figures following, to wit:

"Nov. 27th, 1911.

"Mess. Smith Bros., Castlewood, Va.

"Dear Sirs: Answering yours of 20th inst. sorry that we cannot help you and Mr. Davis further than we have.

"We have laid out of our money all summer, have two notes past due, and have been out of money and time without receiving a cent in return.

"If you cannot deal with the lumber firms with whom you have been in touch, we would not know where to cite you.

"We did tell Mr. Davis if he would get up the money and pay off the whole debt, we would give him \$150 off, and he said he would give you the benefit of the rebate if you got it paid.

"We do not know of any one who would take the outfit off your hands and pay us, and we are sorry we cannot take it off your hands ourselves. We have advertised your outfit twice, and we will say to you frankly, the next time it goes, and we cannot hold but a short time longer, trusting you can help us, we are,

"Yours truly, Cole Bros."

"This being the same copy offered and read to jury as shown hereafter in defendant's evidence.

"To the reading of which letter in evidence before the jury the defendant by counsel objected, because no defense was being made to this suit by Smith Bros. and because the Davis transaction was an independent transaction from the one with Smith Bros.; and the court thereupon over-

ruled said objection and permitted said letter to be read in evidence before the jury, and the defendant then and there, before the jury retired to consider of their verdict, excepted and tenders this his bill of exceptions No. 5 and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done this the 19th day of October, 1912."

It will be observed that the objection to the reading of the letter is not put upon the ground that it was a copy and no foundation had been laid for its introduction. The objection rests upon the proposition that no defense was made to the suit by Smith Bros. and because the Davis transaction was an independent transaction from the one with Smith Bros. We think that the contents of the letter itself show the propriety of its being introduced before the jury; and this exception is overruled.

[6] The sixth bill of exceptions sets out that Davis, being recalled as a witness for further cross-examination, was asked the following question: "Did not Smith Bros. send to Cole Bros., as collateral security, a note purporting to be signed by their grandfather, Thomas Smith, as security, which notes Thomas Smith never signed, and which he said his name had been forged to, and did not Mr. H. C. Cole afterwards hand you this note to be returned to Smith Bros., and did he not say to you in handing you this note that he had taken the note to Thomas Smith and that Thomas Smith had said that he never signed the note and repudiated it as a forgery?" And to this question the witness gave the following answer: "After the controversy between Mr. H. C. Cole and myself as to which notes I signed, Mr. Cole told me that he would give Smith Bros. a note for \$550, and if they would get their grandfather, Thomas Smith, to sign the same with them, as security, he would take it in the place of the notes I had signed and release me. He afterwards told me that he had given them the note; that it had been sent to him with Thomas Smith's name signed to it; that he became dissatisfied with it; that he went to see Thomas Smith about it; that Thomas Smith said that he did not sign the note and repudiated it; Mr. Cole then brought the note to me to give to Smith Bros., and prepared a new one for the same amount, and requested me to go with Smith Bros. to get Thomas Smith to sign same, and witness the signature of Thomas Smith, and then forward the note to Cole Bros., and notify them at once if the matter was so arranged. I gave Mr. H. C. Cole a receipt for the first-mentioned note which he said Thomas Smith had repudiated and returned the note to Smith Bros. as requested; and I tried to get C. B. Smith to go with me down to his grandfather's to get him to go on the note. He did not go; said that

his mother was sick and he could not leave her. I then wrote to Mr. Cole that I could not get the note fixed. The Thomas Smith note was to release me on the two notes I had signed for Smith Bros. as security." The plaintiff in error, by counsel, excepted to the question and answer, and its admission by the circuit court constitutes an assignment of error.

We think that the ruling speaks for itself; and this assignment of error is overruled.

H. C. Cole, having been introduced as a witness for defendants in error, was asked the following question: "After the mill was advertised for sale, did Smith Bros. give you a note with their grandfather, Thomas Smith, as security, for the sum of \$550, which note Thomas Smith repudiated as a forgery?" Cole then goes on to give substantially the same recital with respect to this transaction that we have just set out in the statement made by Davis; and this assignment of error is also overruled.

[7] The ninth bill of exceptions shows that H. C. Cole upon his examination was asked the following question: "Do you know whether J. W. Davis had sold Smith Bros. any timber?" to which he replied: "I understood from J. W. Davis and Smith Bros. that J. W. Davis sold timber to Smith Bros. for \$2,000." To the question and answer objection was made, which was overruled by the court, and the plaintiff in error excepted. We think the evidence was proper; and the assignment of error is overruled.

[8] The subject of the tenth bill of exceptions is as follows: H. C. Cole, being on the stand, proved that he had mailed to Smith Bros. two letters, one dated October 30, 1911, and one dated November 27, 1911. The letter dated November 27, 1911, was the subject of bill of exceptions No. 5, and the propriety of reading it before the jury was there decided. The letter of October 30, 1911, which is the other letter embraced in bill of exceptions No. 10, is proved by Cole to have been written by him and addressed to Smith Bros., at Castlewood, Va. It is not specifically stated that Castlewood, Va., was the post office of Smith Bros., or that the proper postage was placed upon the letter, nor was any objection made on these grounds. The bill of exceptions only states a general objection, without stating any reason whatever. Under date of Castlewood, Va., November 20, 1911, Smith Bros. addressed a letter to Cole Bros., which is a reply to their letter of October 30, 1911. We are of opinion that there was no error in the ruling of the court in this respect; and this assignment of error is overruled.

Bill of exceptions No. 11 sets out copies of a number of letters written by Cole Bros. to Davis. They are chiefly letters urging a settlement of their demands upon him and are proved to be copies of letters written

and mailed to J. W. Davis, none of which were replied to except those of October 24, 1911, and December 12, 1911, and which are the same letters set out in bill of exceptions No. 2, in which Davis promises to do what he can to meet his obligations. It is safe to say that their admission could not have prejudiced the plaintiff in error or have influenced the verdict of the jury.

The twelfth assignment of error is to the refusal of the court to set aside the verdict of the jury and grant a new trial. We are of opinion that the evidence fully warrants the verdict, and that there is no error in the judgment complained of, which is affirmed.

BUCHANAN and WHITTLE, JJ., absent.

YELLOW POPLAR LUMBER CO. v. GOBLE

(Supreme Court of Appeals of Virginia.

Nov. 20, 1913.)

1. MASTER AND SERVANT (§ 265*)—NEGLIGENCE—PROOF.

The happening of an accident is not evidence of negligence by the master; that being an affirmative fact to be established by the injured servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT — NEGLIGENCE — EVIDENCE—SUFFICIENCY.

The evidence offered to show negligence by a master must show more than a mere probability of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-962, 971, 972, 977; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 97*)—MASTER'S DUTIES.

An employer is not bound to foresee and obviate things which prudent men would not expect to happen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

4. MASTER AND SERVANT (§ 276, 278*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence, in an action by an employee for injuries sustained while making a tramway by a stump blown from the right of way striking him, held to show that defendant could not have reasonably anticipated or provided against the occurrence, and that it was an unavoidable accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 956-958, 960-972, 976, 977; Dec. Dig. §§ 276, 278.*]

Error to Circuit Court, Dickenson County.

Action by Frank Goble, by his next friend against the Yellow Poplar Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. C. Smith, of Clintwood, W. H. Rouse, of Bristol, and E. M. Fulton, of Wise, for plaintiff in error. Sutherland & Sutherland and Chase & Daugherty, all of Clintwood, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

CARDWELL, J. This action was brought to recover damages for personal injuries alleged by the plaintiff, Frank Goble, suing by next friend, to have been sustained by him as a result of the negligence of the defendant, the Yellow Poplar Lumber Company. Here was a verdict and judgment in favor of the plaintiff, which this writ of error brings under review.

In the view we take of the case it is only necessary to consider the last of the several assignments of error, which calls in question the action of the trial court in refusing to set aside the verdict as contrary to the law and the evidence.

It appears from the record that the plaintiff, a well-developed youth, at least 19 or 20 years of age, and of average intelligence, sought and obtained employment with the defendant company in its work of constructing a tram or logging road on Russell Prater creek, in Dickenson county. He was a man in size and appearance, and was therefore presumably capable of knowing and appreciating the dangers of the work in which he thus obtained employment, and he had worked for the defendant company a year before on like work upon another creek, and had been working at this particular place where he was injured about three days. The work of building this tramroad consisted mainly in first digging and blasting out the material, so as to make the roadbed, then in putting down the stringers and other superstructures. The work of making the roadbed was necessarily to be done first, and was followed by the laying of the stringers, etc., so as to make a complete superstructure over which logging trucks or cars were to be run, and the work of construction required a grading force or crew, a blasting crew, and behind them a stringer crew.

The plaintiff's employment was with the stringer force, and on the occasion of the injuries to him he had been at work with this force some distance behind, but in plain view of the place where the grading force were at work, and where the blast under a stump, which caused his injuries, was let off, of which timely notice and warning were given to him as well as to all others engaged in the work who might be or remain in a place of danger by reason of the blast. This blast was to be let off about 6 o'clock p. m., "quitting time," and the foreman of the grading crew, Ed. England, sent two men down to the point where the stringer crew was to tell them that the blast was to be let off, and all hands should get "plum out of the way." It was an established custom in such conditions to give the alarm of "fire" (which plaintiff clearly understood meant that a blast was to be set off), and when given the cry was taken up and repeated by others, and it was also the well-established rule of the defendant company (known to all engaged in the work) that, upon the alarm

of "fire" being given, all employees were to see that every one was gotten out of danger. With every crew engaged in this work there was a foreman and a number of other laborers of long experience; one Orville Belcher being the foreman of the stringer crew with which the plaintiff was at work. Ample time to get out of the way of danger from said blast was unquestionably given, and the warning "fire" was taken up and repeated by others, including one Tackett, another workman engaged with a grading crew further down the creek from where Belcher's crew had been at work, and it is upon this repetition of the alarm by Tackett that the plaintiff mainly relies for a recovery of damages in this action, since it is practically conceded that there was no cause of complaint of the conduct of England or his men.

Tackett's deposition was taken on behalf of and read in evidence by the plaintiff, and the reason for repeating the alarm is thus stated by him:

"Q. Why did you holler 'fire'?

"A. There were fellows below us coming up that way. I knew they were going to shoot up there, and didn't know whether they heard them or not."

All of the witnesses for the plaintiff as well as for the defendant company testify that, according to the established rules governing the conduct of this work, employees engaged therein were to run and get away as fast as possible when notice that a blast was to be set off was given, or the alarm "fire" heard, and that it was from four to five minutes after such notice or alarm was given until the blast would go off. The grading crew to which Tackett belonged were working in sight of plaintiff's crew the day of the accident to him, and there had been no blasting by Tackett's crew on that day, or within three or four days before, when England, who had been in charge of the blasting crew at work up the creek from where plaintiff's crew were at work, had "sent two men down the line to tell everybody to get out of the way," and had seen Belcher's men (including the plaintiff) quit work, hang up their tools, and start away before he left the stump that was to be blown out, came on down the line to about where Belcher's crew had been working, and then crossed over the creek, giving the signal to set fire to the blast just as he crossed over, and then went on till he reached a public road, a safe distance away, and about two minutes before the blast went off. The creek was somewhat swollen from a recent rain; but there was little or no trouble in crossing it as England did. Some of plaintiff's witnesses who at the time had been working with England's crew came down the line of work, and along with the plaintiff and others got under a cliff, or shelving rock (called the "Goble cliff"), where they considered themselves safe. Belcher got out from under a rock where he first stopped, and sought shelter 35 feet lower

down, and asked the men under the "Goble cliff" to come down to where he was; but "they said they were all right." These men under the "Goble cliff" had not only ample time to have gone to where Belcher was before the blast went off, but could have gone on 350 or 400 yards further away and beyond all possible danger.

The distance from the blast to where plaintiff had been at work was about 410 feet; from the cliff where plaintiff sought safety to the cliff under which Belcher, his foreman, and others stopped, was about 39 feet; from the cliff under which the plaintiff took shelter to the end of the spur where Tackett repeated the alarm of "fire" was 169 feet; and from the log drift in the creek over which England passed, just above where plaintiff had been at work, across through a bottom, and up the hillside to the county road, 455 feet. Plaintiff himself states that Tackett's crew "was working in sight that day, and there had been no blasting, and that he had passed up and down the creek two or three times that day before being hurt." He further states that "he was entirely under the rock ('Goble cliff'), but the stump bounced under and hit him." Other witnesses for the plaintiff who were with him at the time say that they got under the "Goble cliff" because they thought it safe, and the time fixed by them that they were under this cliff before the blast went off was about five minutes.

When the blast went off, the stump under which it had been placed and fired was blown into the air, and upon coming to the earth hit on the top or side of a cliff and caromed under it, striking and injuring only the plaintiff and that part of his body, viz., his legs, which were not fully protected by the overhanging cliff.

The foregoing are the salient facts shown in the evidence certified in the record, considered under the rule governing its consideration by this court, and upon which the defendant company is charged with negligence in causing the injury for which compensation is sought in damages.

The essential grievances stated in the declaration are that the defendant company failed to provide a suitable and safe place for the plaintiff to work; that sufficient rules and regulations had not been adopted by the company and enforced for the protection of the plaintiff while engaged in the work.

The evidence proves nothing in the situation to suggest danger to any one engaged in the defendant company's work at the time and on the occasion of the accident to the plaintiff which had not been duly guarded against by well-known rules governing employes engaged in carrying it on, and, as remarked, his right to a recovery in this action must rest alone upon the theory that the repetition of the alarm "fire" by Tackett confused the plaintiff and others, which caused them to seek shelter under the "Goble cliff," and not try to get further away from

danger. No one knew better than the plaintiff, as his statement shows, that no blast had been prepared by Tackett's crew that day, and it is therefore inconceivable that he could have been confused by Tackett's repetition of the alarm given by England's men, and which Tackett, prompted by the dictates of humanity, repeated to those whom he saw approaching from below, and that, too, upon the most reasonable assumption by Tackett, that those to whom his warning was directed had not heard the cry of "fire" that had been put out by England and his men, and there was not the slightest reason for him to suppose that this act of his would be misinterpreted by any one, especially as the stringer crew could see where he had been at work, and in the ordinary course of events would know, by observation, that there was no blast to be let off by his crew; certainly that there was no blast to be let off by him or his crew without, in accordance with the established rules of the company, sending some one up the line of work to give warning, as England had done.

It is inconceivable, as it appears to this court, that any management could have anticipated that an employe engaged in the work, as was the plaintiff, would become panic-stricken under such circumstances, and the fact, as disclosed by the plaintiff's own statement, is that he was not panic-stricken or confused by Tackett's cry of "fire," and thus prevented from seeking protection elsewhere than under the "Goble cliff," but stopped where he did because he considered it safe to do so. It was clearly not for the want of time that the plaintiff got no farther away from the blast. England, after sending out notice of the impending blast, had crossed the creek, and gone 455 feet, 150 yards, and over, out into a public road, and Belcher had gotten out from under the rock where he first stopped, and gone farther away, and could have gone 350 or 400 yards farther before the blast went off; therefore the plaintiff remained, as did others, under the "Goble cliff," not because of the want of time to go elsewhere and farther away, but because they considered themselves fully protected, and they were, with the exception of the plaintiff, who was injured by an occurrence which could not have been foreseen or expected to happen by the exercise of ordinary or even extraordinary care.

[1] It has been over and over repeated in the decided cases in this and other courts that the negligence of the master cannot be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not raise even a prima facie presumption that the master has been guilty of negligence or a breach of duty to his servant. Negligence of the master is an affirmative fact to be established by the injured servant.

[2, 3] "Negligence must be established by affirmative evidence, which must show more

than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, and, in determining whether or not an act or omission of the master was negligent, it must be borne in mind that the master is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen." *N. & W. Ry. Co. v. Witt*, 110 Va. 117, 65 S. E. 489; *N. & W. Ry. Co. v. McDonald*, 106 Va. 207, 55 S. E. 554, and authorities cited.

[4] Our view of the evidence in this case is that it but shows that the plaintiff's injuries resulted from a pure accident that was not to be anticipated or provided against by reasonably prudent men, and for which injuries the defendant company cannot be held liable.

The judgment complained of must therefore be reversed, the verdict of the jury set aside, and the cause remanded for a new trial thereof, if the plaintiff be so advised, to be had not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

CROGHAN v. WORTHINGTON HARDWARE CO., Inc.

(Supreme Court of Appeals of Virginia.
Nov. 20, 1913.)

1. FRAUDS, STATUTE OF (§ 103*)—CONTRACTS—MEMORANDUM.

A letter signed by the vendor of land stating that she would accept the offer made by complainant which was in writing is a sufficient memorandum to take the case out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 192-198, 200-208; Dec. Dig. § 103.*]

2. SPECIFIC PERFORMANCE (§ 53*)—RIGHT TO SPECIFIC PERFORMANCE—IMPOSITION.

Specific performance of a contract for the sale of realty will not be denied on the ground that the agent whom plaintiff had engaged to sell the property had wrongfully acted as agent for both parties, where the agent merely transmitted complainant's offer to defendant.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 160-171½; Dec. Dig. § 53.*]

3. SPECIFIC PERFORMANCE (§ 65*)—RIGHT TO SPECIFIC PERFORMANCE.

Where no fraud or imposition was practiced on a vendor of land and the contract was fairly entered into, the purchaser is entitled to specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 196; Dec. Dig. § 65.*]

Appeal from Circuit Court, Rockbridge County.

Suit by the Worthington Hardware Company, Incorporated, against Anna Croghan. From a decree for complainant, defendant appeals. Affirmed.

Chas. & Duncan Curry, of Staunton, for appellant. Fitzhugh Elder, of Staunton, for appellee.

KEITH, P. The appellant was the owner of a house and lot in Staunton, which she listed with the firm of Tannehill & McCray, real estate brokers, for sale, at the price of \$2,000. A short time after the property was placed in their hands, Tannehill & McCray wrote to appellant that they had a cash offer of \$1,200 for the property, which she declined to take, and some time thereafter they again wrote to her, stating that the person who had offered \$1,200 had increased his offer to \$1,500 cash, and in this letter the real estate agents stated that "the property is in a bad condition, and is full of very bad tenants; only a few days ago they were up in the police court and heavily fined for keeping a disorderly house. In our opinion this house will never be very desirable for a residence and considerable money will have to be spent to make it into a warehouse." Relying upon the representation that the property was in bad condition and depreciated in value, she wrote Tannehill & McCray as follows: "I accept the offer you made me for \$1,500.00 cash. Thanking you, I am

"Respectfully,

"Mrs. Anna Croghan."

Before the sale was closed, Mrs. Croghan went to Staunton, examined the property, and made inquiries about it, and found, as she claims, that the property was not in such condition as the agents had represented; that it was in good condition and repair, and was worth a good deal more money than she had been offered for it; and that on the market at public auction it would have brought from \$2,200 to \$2,500; and she declined to close the sale. Thereupon suit was instituted at the March term, 1913, of the circuit court of Rockbridge county by the purchaser, the Worthington Hardware Company, to compel a specific performance of the contract.

[1] The demurrer and answer of the defendant sets up two defenses: First, that no written memorandum of sale of the real estate in the bill mentioned is shown by the bill; in other words, she relies upon that provision of the statute of frauds which provides that "no action shall be brought upon any contract for the sale of real estate unless some memorandum or note thereof be in writing and signed by the party to be charged thereby or his agent." At the hearing, however, this ground of defense was very properly abandoned, as the letter from Mrs. Croghan just quoted is a sufficient compliance with the statute.

The second ground of demurrer is that Tannehill & McCray were acting as agents both for the complainant and the respondent, without it being made to appear from any

avermment in the bill that they were so acting with the intelligent consent of both complainant and respondent. This defense will be more fully dealt with when we come to consider the proofs in the cause.

A number of depositions were taken by the plaintiff and defendant, with the result that the court entered a decree in accordance with the prayer of the bill, specifically enforcing the contract, and from that decree this appeal was awarded.

[2] Looking to all the facts of the case, we are of opinion that there is no merit in the defense based upon the proposition that Tannehill & McCray were agents for both the buyer and the seller. It is true that in their depositions, both Tannehill, one of the agents, and Worthington stated that the real estate firm were the agents of the hardware company, if we look merely to an isolated question and answer; but when their depositions are considered as an entirety, and we perceive just what idea the witnesses mean to convey, it is plain that they merely mean to say that the firm of Tannehill & McCray, who had been employed by appellant to make sale of the property, and with whom she had listed it for sale, were also the agents of the Worthington Hardware Company to this extent, and to this extent only that they were to transmit the offer of the purchaser for acceptance or rejection to Mrs. Croghan. In this there was no impropriety.

The principal question in this case grows out of the statements in the letter from Tannehill & McCray to Mrs. Croghan in which they inform her that her property is in bad condition and is full of very bad tenants, who had recently been heavily fined in the police court for keeping a disorderly house. We have carefully considered the evidence bearing upon this matter, and we think that it fully warrants the statements and representations as to the condition of the property in question, and the statement as to the character of tenants by whom it was occupied is fully borne out by the proof.

[3] Upon the whole case we are of opinion that no fraud or imposition was practiced upon Mrs. Croghan, either actual or constructive; that the contract was fairly entered into with a purchaser who was ready, able, and willing to comply with its terms; and that the decree of the corporation court specifically enforcing it should be affirmed.

Affirmed.

YATES v. YATES.

(Supreme Court of Appeals of Virginia,
Nov. 20, 1913.)

1. DIVORCE (§ 184*)—ACTIONS—NONRESIDENT.

Unless the record on appeal shows that proper constructive service has been had on a nonresident defendant, the action of the trial

court in dismissing the case for want of jurisdiction will not be disturbed.

[Ed. Note.—For other cases, see Divorce, Cas. Dig. §§ 570-573; Dec. Dig. § 184.*]

2. DIVORCE (§ 79*)—ACTIONS—JURISDICTION.

In view of Code 1904, § 2258, declaring that the circuit and corporation courts shall have jurisdiction of suits for divorce, but that no suit shall be maintainable unless one of the parties has been domiciled in the state for at least one year preceding the suit, which shall be begun in the county or corporation in which the parties last cohabited, or in the county or corporation in which plaintiff resides, the courts without jurisdiction to grant a divorce against a nonresident wife, where it appeared that the complainant husband had been domiciled in the state only since the separation from his wife, and that he had taken up his domicile in a remote county, wherein he began the action of constructive service by publication, notwithstanding the fact that he knew the address of his wife in the foreign city.

[Ed. Note.—For other cases, see Divorce, Cas. Dig. §§ 258-263; Dec. Dig. § 79.*]

Appeal from Circuit Court, Rockingham County.

Bill by John C. Yates against Rebecca Yates. From a decree dismissing the complainant appeals. **Affirmed.**

Chas. A. Hammer, of Harrisonburg, for appellant. **Sipe & Harris, of Harrisonburg,** for appellee.

KEITH, P. John C. Yates filed his bill in the circuit court of Rockingham County, charging that his wife had deserted him for more than three years prior to the institution of the suit, and that she is now a nonresident of Virginia. The defendant was not served with process, and did not appear or plead in person or by attorney. Denials were taken to prove the allegations of the bill, and when the case came on to be heard the circuit court entered the following decree:

"For reasons expressed in writing and filed with the papers of the cause as part of the record, the court declines to enter jurisdiction of this cause and the same is dismissed from the docket of the court."

The opinion of the court, referred to in the decree, is in part as follows:

"The native domicile of these parties, plaintiff and defendant, was the District of Columbia, which was also the matrimonial domicile. The defendant is still a resident in the District of Columbia. The process was served on the defendant by order of publication, and there has been no appearance by defendant. * * * The plaintiff claims to be domiciled at Harrisonburg. He testifies that he resided in Alexandria from June, 1908, shortly after the separation with his wife in Washington, until December, 1911, when he became a resident of Harrisonburg. He is a Pullman car conductor. There is but one Pullman car running between Harrisonburg, and that one runs between Harrisonburg and Washington city, leaving

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Harrisonburg at 6:40 a. m., and leaving Washington city on the return trip about 1 o'clock in the afternoon and getting back to Harrisonburg at 9:00 p. m. What kind of a domicile the plaintiff has established at Harrisonburg, or what caused him to establish a domicile there, he does not say. He does say, though, that Harrisonburg became his place of residence in December last, and he record shows that he commenced this suit for a divorce in January. In his deposition he gives the exact place of residence of his wife in Washington city, but he proceeded against her by order of publication, though it would have been cheaper and quite as effectual, under our statute, to give her personal service of notice by an officer in the District of Columbia. He took depositions in Washington city, where his wife lives, but without notice to her, resting upon the sufficiency of the order of publication. He brings his mother and father from their home in Alexandria to Harrisonburg to testify as witnesses in his behalf, though it would have been as convenient for them to take their depositions at their place of residence, and probably more economical also.

"The court considers the fair inferences and implications from the facts stated to justify the conclusion that the plaintiff has sought this jurisdiction for the purpose of getting as far away from his wife as possible and of concealing this suit from her, and that he has come to this jurisdiction for the purpose of bringing this suit, and that he has not established a bona fide domicile in this county.

"The court will decline jurisdiction and dismiss the suit. Besides the reasons already mentioned for refusing to entertain jurisdiction of the cause, it may be further pointed out that the affidavit on which the order of publication was based is unintelligible and therefore insufficient."

[1] To these reasons moving the circuit court, we may add that there is no order of publication before us at all. There is a statement made by the notary public in the caption to the depositions taken by him on the 16th day of March, 1912, that the defendant had been proceeded against as a nonresident, and the order of publication against her had duly matured; but there is not one word from the clerk, the order of publication itself is not before us, there is no appearance of defendant by counsel, in person or otherwise, and the decree does not state upon what papers the cause was heard in the circuit court.

[2] The statute fixing the jurisdiction of courts in matters of divorce is found in section 2259 of the Code: "The circuit and corporation courts, on the chancery side

thereof, shall have jurisdiction of suits for annulling or affirming marriages, and for divorces. No suit for annulling a marriage or for divorce shall be maintainable, unless one of the parties has been domiciled in this state for at least one year preceding the commencement of the suit; nor shall any suit for affirming a marriage be maintainable, unless one of the parties be domiciled in this state at the time of bringing such suit. The suit, in either case, shall be brought in the county or corporation in which the parties last cohabited, or (at the option of the plaintiff), in the county or corporation in which the defendant resides, if a resident of this state, and if not a resident, in the county or corporation in which the plaintiff resides."

It seems that the parties never cohabited in this state, that the defendant is a non-resident of the state, and that the plaintiff claims a residence in Rockingham county, under the circumstances which we have already stated.

We agree with the circuit court that it properly refused, under the facts appearing in this case, to grant the decree prayed for. Its order refusing the divorce is affirmed.

Affirmed.

McCAULEY et al. v. GRIM et al.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. ACKNOWLEDGMENT (§ 55*)—IMPEACHMENT.

The taking and certifying of acknowledgments to a deed is a judicial act, and therefore the officers' determination has the force of a judgment and cannot be collaterally impeached on the ground that one of the grantors did not execute the instrument, even by the testimony of the certifying justice.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 290-300, 303-314; Dec. Dig. § 55.*]

2. HUSBAND AND WIFE (§ 198*)—COVERTURE—EQUITABLE ESTOPPEL.

Where a married woman, who had not joined in a conveyance of property in which she was a tenant in common by descent, stood by and saw the innocent purchaser make valuable improvements without the slightest intimation of her purpose to bring suit, waiting until after the death of her father, who was a tenant by the curtesy, she is estopped from claiming the land; the removal of the common-law disabilities of married women increasing their moral responsibilities of ownership at least in a court of conscience.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 733, 944; Dec. Dig. § 198.*]

3. JUDGMENT (§ 743*)—CONCLUSIVENESS—TITLE.

One whose right to land had been adjudicated in a previous suit wherein she claimed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that she conveyed it when an infant and so was entitled to disaffirm is concluded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1252, 1253, 1275-1277, 1284; Dec. Dig. § 743.*]

4. INFANTS (§ 99*)—ACTIONS TO DISAFFIRM—EVIDENCE—SUFFICIENCY.

In an action by an infant to disaffirm a conveyance of land, where at the time of making the deed he had nearly reached his majority and acted as an adult, making his own bargain and receiving the purchase money, the proof of infancy must be clear and satisfactory to warrant the court in depriving an innocent purchaser of the land of which he and his predecessors in title had been in undisputed possession for over 30 years, and the testimony of the complainant himself supplemented by his unsworn statement, made after the execution of the deed on which he obtained a marriage license, is insufficient.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 294; Dec. Dig. § 99.*]

5. INFANTS (§ 31*) — ADVERSE HOLDING — MERGER OF TITLE.

Where all of the heirs entitled to land in remainder after the life estate of their father, who was tenant by curtesy, joined in a conveyance to defendants' predecessors in title, and the grantees remained in undisputed possession under claim of title for many years, their possession in 15 years ripened into prescriptive title against the life tenant and the two estates merged, and hence one of the heirs, who claimed that at the time of the conveyance he was an infant, must disaffirm the contract within 15 years after the title of the life tenant has been barred by prescription.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41, 46, 50-63; Dec. Dig. § 31.*]

6. ADVERSE POSSESSION (§ 104*)—LOST GRANT—PRESUMPTIONS.

Where the origin of a possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is prima facie evidence from which the jury may presume a conveyance.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

Appeal from Circuit Court, Rockingham County.

Bill by Amanda C. McCauley and others against Jacob Grim and others. From a decree for defendants, complainants appeal. Affirmed.

Chas. A. Hammer, of Harrisonburg, and Bumgardner & Bumgardner, of Staunton, for appellants. Conrad & Conrad and Sipe & Harris, all of Harrisonburg, for appellees.

WHITTLE, J. Appellant Amanda C. McCauley filed her bill at the May term, 1911, of the circuit court of Rockingham county, against the appellees, Deihl and Baugher and wife and others, for partition of 120 acres of land situated on Shenandoah river in that county.

Plaintiff asserts title to an undivided share in the land as one of the heirs of her mother, Elizabeth Grim, who intermarried with her father, Thomas Becks. The bill contains no

specific denial that the plaintiff united with her husband and brothers and sisters in the deed of August 20, 1839, conveying the land in controversy to Polly Eutsaler, Benjamin Rice, and Jacob Grim, under whom the present owners claim; but contents herself with the allegation that the parties referred to executed the deed, and exhibits what purports to be a copy, presumably for the purpose of showing that she was not a party to the instrument. During the progress of the case, however, the original deed was put in evidence, from which the plaintiff's name appears as one of the grantors.

Appellees demurred to the bill and filed answers in which they averred that the deed was duly executed by the plaintiff and acknowledged before two justices whose certificates showed that on being examined by them privately and apart from her husband and having the writing fully explained to her she acknowledged it to be her act and declared that she had willingly executed the same and did not wish to retract it; that being the form of certificate required by statute at that time. The present owners also alleged that they were innocent purchasers of the land for value and without notice of plaintiff's claim, and Deihl proved that he had erected permanent improvements upon his part of the tract at a cost of upwards of \$3,000.

Though, as observed, no such case is expressly made by the bill, the plaintiff, over the objection of the defendants, sought to prove by parol evidence that she neither executed nor acknowledged the deed. Among other witnesses introduced for that purpose, one of the justices was relied on to impeach his own certificate. His deposition was taken 37 years after the date of the deed, and after the death of his associate.

[1] It is settled law in this state that taking and certifying acknowledgments to a deed is a judicial act, and therefore the certifying officers' determination of the matters involved has the conclusive force and effect of a judgment and imports absolute verity, and cannot be collaterally attacked.

"It cannot * * * be impeached, even directly, save in a court of equity, and not then except for fraud." 2 Minor on Real Property, § 1398.

Carper v. McDowell, 5 Grat. (48 Va.) 221, is a leading case in Virginia on the subject. Judge Baldwin, in his opinion, emphasizes the importance of giving conclusive effect to such certificates, and says: "It follows from the nature and purposes of such a jurisdiction (probate jurisdiction) that though its proceedings are often, and most generally, ex parte, yet that when perfected they are evidence for and against the whole world; that they cannot be impeached by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

xtrinsic evidence in collateral controversies concerning the rights to property; and that, as a general rule, they cannot be so impeached even directly in a suit instituted for the very purpose. If this were otherwise, the obvious result would be to defeat, in a great measure, the object of the probate jurisdiction, and to introduce much uncertainty and confusion into the administration of justice."

In *Building Association v. Groves*, 96 Va. 38, at page 140, 31 S. E. 23, Judge Buchanan remarks: "The object of the registry laws is to secure titles, and to prevent frauds. The certificate of acknowledgment is required to perfect the deed for recordation. As the record when made is constructive notice to all the world, public policy requires that it should import as near absolute verity as is consistent with a due regard to the rights of the parties interested. It would open the door to great abuses and gross frauds to make the validity of the registration of a deed depend upon the recollection, or the subsequent conduct of the party who took the acknowledgment." *Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Murrell v. Diggs*, 84 Va. 900, 6 S. E. 461, 10 Am. St. Rep. 893.

The present case furnishes an apt illustration of the mischievous consequences that would result from the relaxation of the rule which forbids that such certificates shall be drawn in question by parol evidence in collateral proceedings. The bill wholly fails to advise the defendants of the real ground upon which the plaintiff rests her case. The suit was brought 42 years after the date of the deed, and the evidence chiefly relied on to sustain plaintiff's contention is furnished by the depositions of herself and husband and one of the certifying justices, who was 79 years old when he gave his deposition, and he was testifying to a transaction which occurred 37 years before; and, besides, the developments in the case strongly tend to discredit him as a witness.

[2] Plaintiff lived in the immediate vicinity of the land, and stood by and saw an innocent purchaser making valuable improvements thereon, without the slightest intimation of her purpose to claim a share in the estate until she brought her suit. She seeks to excuse her conduct and long delay on the plea that she is a married woman, and also that her father, Thomas Becks, was tenant by the curtesy of the land, and that she filed her bill within four years after the life estate fell in. The common-law disabilities of married women with respect to their property rights have in large measure been removed by statute, and, in a court of conscience at least, their moral responsibilities of ownership should be proportionately increased. The effect of the alleged intervention of Thomas Becks' life estate will be con-

sidered in connection with Isaac T. Becks' petition.

Our conclusion upon this branch of the case is that the plaintiff is not entitled to relief, either upon the pleadings or evidence, and that her bill was properly dismissed.

[3] Elizabeth F. Tate and Isaac T. Becks, two of the other heirs, both filed petitions in the main case. They admit that they conveyed their interest in the land to grantors of the appellees, the former by her separate deed, and the latter by uniting in the deed of August 20, 1869, but they allege that they were infants when these conveyances were executed; and the object of their petitions is to repudiate their respective deeds on that ground, and to have partition of the land.

With respect to the claim of Elizabeth F. Tate, the record shows that she was a party to another litigation in which her title to the land was put in issue, which issue was determined against her by the court and her petition dismissed; hence the matter as to her is *res adjudicata*.

[4] The only direct evidence of Isaac Becks' age is furnished by his own deposition, supplemented by his unsworn statement, made after the execution of the deed, upon which he obtained a marriage license. The family Bible, in which was registered the ages of himself and his brothers and sisters, is in the possession of the plaintiff Mrs. McCauley; but the age register has been torn out, and was missing, it is said, when she received the book from her father. Isaac, at the date of the deed, was on the border line of his majority, and acted as an adult, making his own bargain and receiving his share of the purchase money. In such case it is no hardship to require that the proof of his infancy should be clear and satisfactory to justify a court in depriving an innocent purchaser for value and without notice of land of which he and his predecessors in title had been in undisputed possession for 30-odd years without any intimation of an adverse claim, though the claimant lived in the neighborhood. In a somewhat analogous case this court recently held the proof of infancy insufficient. *Hurt v. Blankenship*, 112 Va. 574, 72 S. E. 117.

[5, 6] But the decision need not be rested alone upon that consideration. Assuming that petitioner's statement that he was 21 years old on February 16, 1871, is true, and also conceding that he had the right to disaffirm his deed at any time within 15 years from that date (*Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381), nevertheless upon that basis his right would have expired on February 16, 1886, and he did not file his petition until July 30, 1906, a period of more than 20 years after he became of age.

But he seeks to avoid the effect of that

limitation on the theory that his father, as tenant by the curtesy, was entitled to a life estate in the land, and that his petition was filed within 15 years after his death.

If that contention be sound as a general proposition, as to which we need express no opinion, it cannot prevail under the facts before us. The predecessors of the appellees took complete possession of the land at the date of their deed, on August 20, 1869, with the knowledge of all concerned, including the life tenant, Thomas Becks. The land was transferred to them on the land books for the ensuing year, and they and those claiming under them have continuously paid taxes thereon, and have remained in the open, adverse, and undisputed possession until now. Thomas Becks never questioned their title or possession, and substantially declared that they were the rightful owners of the property. It is true no deed from him was produced; yet the court, under the circumstances, might well presume a conveyance.

"Where the origin of the possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is *prima facie* evidence, but only *prima facie*, from which a jury might or might not have presumed a conveyance." 2 Minor on Real Property, § 1035.

The defendants' possession was unquestionably under claim of title, and after the lapse of 15 years, to wit, on August 20, 1884, it ripened into a perfect title. On that date their title was as complete as if they had held the life estate by deed from Thomas Becks. They already had title to the remainder in fee simple, and the two estates in the same land having become vested in the common owners, under the common-law doctrine of merger, the lesser estate merged in the greater (1 Minor on Real Property, § 375), and the statute of limitations began to run against Isaac Becks at the time of the merger and not at the death of Thomas Becks. Upon this hypothesis, his right to disaffirm expired August 20, 1899.

In every aspect of the case the decree of the circuit court is plainly right and must be affirmed.

Affirmed.

GENT'S EX'X v. PRUNER'S ADM'R et al.
(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

HUSBAND AND WIFE (§ 133*)—WIFE'S SEPARATE ESTATE—EVIDENCE.

Evidence held to require a finding that defendant's decedent had no interest in certain real property purchased by his wife, but that the purchase money was furnished by her and

borrowed by her from her stepson, so that no part of the property was subject to decedent's debts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487-494; Dec. Dig. § 133.*]

Appeal from Circuit Court, Russell County. Action by J. C. Gent's executrix against Pruner's administrator and others. Judgment for defendants, and plaintiff appeals. Affirmed.

S. B. Quillen and H. A. Routh, both of Lebanon, for appellant. W. W. Bird, of Lebanon, for appellees.

KEITH, P. J. C. Gent, at the March term, 1887, of Russell circuit court, recovered a judgment against George A. Pruner for \$125, with interest from the 20th day of April, 1882, until paid. This judgment was docketed and has been kept alive by the issuance of executions, and at the second November rules of the circuit court of Russell county a bill was filed to subject to its payment a tract of land which it is alleged Pruner owned after the judgment was obtained against him.

This land had been sold during Pruner's lifetime to one J. P. Speer, and a deed was made for it, in which Fields and wife, from whom the land had been purchased, united with George A. Pruner and his wife so as to convey Speer a complete title. Speer sold the land to Hensdill, and the bill makes the representatives and heirs of George A. Pruner, deceased, J. P. Speer, W. A. Fields, J. D. Hensdill, and Virginia Pruner, the widow of George A. Pruner, parties defendant. None of the parties answered except Speer, Fields, and Hensdill. They deny that Pruner purchased from Fields or any one else the tract of land in the bill mentioned, but aver that the property was purchased by Mrs. Pruner, the wife of George A. Pruner, who paid the purchase money out of her own separate estate, and that George A. Pruner had no money with which to buy this or any other tract of land; and they claim that Mrs. Jennie Pruner was the sole purchaser of the property from W. A. Fields.

The facts seem to be as follows: Mrs. Virginia Pruner negotiated with Fields, who was the original owner of the house and lot in dispute, for its purchase. The bargain was made with her and the money in large part paid by her. Her husband was in very narrow circumstances, and the strong tendency of the evidence is to show that he never had the means to make, and did not make, payment for the land. As we have said, the negotiation for the purchase from Fields was made by Mrs. Pruner; the purchase price was \$825; she was unable to pay the whole of it and called upon Joseph A. Pruner,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

son of George Pruner by a former marriage, to aid her in the matter, which he did; and the whole purchase price was paid to Fields, but for some cause a deed was not promptly made to the purchasers by him. After a time the property was sold by Mrs. Pruner to J. P. Speer for the price of \$1,500, who paid for it by two checks on the Citizens' National Bank, Lebanon, Va., both of which are dated November 21, 1906, one payable to J. A. Pruner for \$800, and the other to Jennie Pruner for \$700. This distribution of the purchase money between Joseph A. Pruner and Jennie Pruner was in accordance with her direction. She made the sale to J. P. Speer, and she apportioned the purchase money between Joseph A. Pruner, her stepson, and herself, and Speer gave her checks in accordance with her direction. As far as we can gather from the facts, this was a just and proper settlement of the transaction by which Joseph A. Pruner was reimbursed for the advances that he had made, and Mrs. Pruner received that which he had paid. When the deed came to be made, the title still being in W. A. Fields, who had been fully satisfied by the payment to him of the price at which he had sold the land to Mrs. Pruner, he and his wife united in the deed to Speer in order to give him a complete title.

There is no satisfactory evidence that we have been able to discover of any money passing from George A. Pruner to his wife, or to W. A. Fields, or to any one else. He was a very old man, was a saddler and harness maker by trade, and so far as this record shows never had any money in advance of necessities of life which he could have applied to the purchase of this property. The only evidence of his having any money at all is that prior to his marriage to Virginia Pruner, which occurred when both he and she were well stricken in years, he sometimes gave to her trifling sums of money, the amount of which is nowhere stated. We have been unable to fasten upon anything in the record which shows that he ever made any such payment upon the land, or ever had any such interest in it as could be bound by the lien of the judgment against him. On the other hand, the strong preponderance of proof is that Mrs. Pruner bought the land in her own name; that she paid for it in part; that the residue of the purchase price was paid by her stepson, Joseph A. Pruner; that she negotiated the sale to J. P. Speer; that she was at that time regarded as the owner of the property; and that when sold the purchase price was properly divided between Joseph A. Pruner and herself, in accordance with their respective equities.

So that, upon the whole case, we are of opinion that the decree of the circuit court is right and should be affirmed.
Affirmed.

BUCHANAN and WHITTLE, JJ., absent.

TRIPLETT v. GUDEBROD.

(Supreme Court of Appeals of Virginia.
Nov. 20, 1913.)

1. SPECIFIC PERFORMANCE (§ 121*)—ACTION—SUFFICIENCY OF EVIDENCE—TERMS OF CONTRACT.

Evidence, in a suit of specific performance of an agreement to sell complainant a tract containing an orchard, *held* to show that the option to purchase contemplated that complainant paid the cost of certain labor, performed on the orchard tract, while the option was in force.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

2. VENDOR AND PURCHASER (§ 18*)—OPTION—ACCEPTANCE—COMPLIANCE WITH TERMS.

An option to purchase land could only be accepted upon the terms contained therein.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 10; Dec. Dig. § 18.*]

3. SPECIFIC PERFORMANCE (§ 121*)—ACTIONS—SUFFICIENCY OF EVIDENCE—COMPLIANCE WITH CONTRACT.

Evidence, in a suit for specific performance of an agreement to sell a tract containing an orchard, *held* to show that the complainant never offered to pay the cost of certain labor performed on the orchard tract, as required by complainant's option to purchase, and had no intention of doing so.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

Appeal from Circuit Court, Shenandoah County.

Suit by C. E. Gudebrod against J. I. Triplett. From a decree for complainant, defendant appeals. Reversed.

Tavener & Bauserman, of Woodstock, for appellant. R. T. Barton, of Winchester, and Walton & Walton, of Woodstock, for appellee.

BUCHANAN, J. This suit was brought by the appellee for the specific performance of an option for the sale of a tract of land containing about 68 acres. The trial court decreed specific execution, and from that decree this appeal was granted.

The option set up in the complainant's (appellee's) bill is as follows:

"Mt. Jackson, Va., March 11, 1911.

"Mr. C. E. Gudebrod, New York.

"My dear Sir:

"Referring to the memorandum agreement I gave you this A. M. I notice your arrange-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment of the payment of the \$60 M falls short \$10 M and if agreeable to you, may make this amount in two equal payments maturing in 300 and 360 days in keeping with the previous payments. Regarding other omissions made in our hastiness, viz.: The sale of the 68 acres of land of mine lying opposite my orchard and immediately east of the R. R., I herewith grant you an option on it in connection with that given on my orchard at seventy-five (75.00) per acre on terms equivalent to cash, the growing crops reserved. Then as the season for seeding the orchard to clover, the spraying of the trees and the setting of fillers, &c., is at hand it must be understood that I am to be reimbursed with the expense of same, at cost, as incurred during the existence of the option. Awaiting your reply, I am,

"Yours very truly, J. I. Triplett."

The following is a copy of the "memorandum agreement" (which was also in the form of a letter) referred to in the paper upon which this suit is based:

"March 11, 1911.

"In consideration of one dollar paid to me receipt of which is hereby acknowledged I hereby give you thirty days option to purchase my orchard situated east of land owned by the Strathmore Orchard Co. including 27 acres of land in northwesterly part thereof including all improvements and containing in all about two hundred and twelve acres of land more or less, together with right to operate a ram for obtaining water during such time as water flows over the dam of the pond adjoining said property owned by me, together with all crops and labor performed on said property together with the ram and piping now connected with the water supply four mules and all tools and 3 wagons, implements of all kinds including 4 sets harness for the sum of sixty thousand dollars, payable

\$ 1,000 one thousand dollars in	30 days.
4,000 four thousand	" " 60 "
5,000 five thousand	" " 120 "
5,000 five thousand	" " 180 "
5,000 five thousand	" " 240 "
10,000 ten thousand	" Oct. 1, 1913.
10,000 ten thousand	" Oct. 1, 1913, at 6%.
10,000 ten thousand	" Oct. 1, 1914."

Within 30 days after these options were given the appellant and appellee entered into a contract for the sale and purchase of the 212-acre parcel of land, known as the "Orchard tract" upon terms somewhat different from those set out in the option under which it was acquired. After the agreement for the sale of the orchard tract had been signed by the parties, and on the same day, the appellee claims that he exercised his right to purchase the 68-acre tract under his

option on that tract and paid the appellant the sum of \$20 thereon, as shown by a receipt given by the latter in the following language: "Received of Mr. C. E. Gudebrod twenty dollars on option of 68 acres and acct."

As will be seen from the option given upon the 68-acre tract, it provides, among other things, that "as the season for seeding the orchard, to clover, the spraying of the trees and the setting of fillers, &c., is at hand it must be understood that I am to be reimbursed with the expense of same, at cost, as incurred during the existence of the option." It is a concession in the case that there was no orchard on the 68-acre tract.

[1] The first question to be considered is whether or not the appellee accepted the offer for the 68-acre tract upon the terms submitted in the option; or, in other words, whether or not the minds of the parties met in making and accepting the offer. The appellee claims that when he agreed under his option to purchase the 68-acre tract, paid the \$20, and took the receipt therefor, his understanding of the matter, and his intention, was to pay \$75 per acre for the land in cash, or its equivalent, and to pay \$20 additional on account of certain ploughing, etc., that had been done on the 68-acre tract during the existence of the option. The appellant, on the other hand, claims that his understanding of the matter, and his intention, was that he was to receive for the 68-acre tract of land the price of \$75 per acre in cash or its equivalent, and the cost incurred by him in seeding the orchard tract in clover, spraying the trees, and setting out fillers, amounting to about \$500 during the 30 days the orchard tract option was in force.

After the receipt for the \$20 had been given, the attorney of the appellant, who was present, was directed to prepare an agreement embodying the terms of sale and purchase. On the next day, when the appellee returned to the office of the appellant to sign the agreement of sale, the parties differed as to that provision in the writing which provided for the payment of \$500, the orchard account or claim of the appellant. The appellee refused to agree to pay that account, and the appellant refused to enter into an agreement for the sale of the 68-acre tract unless the appellee did pay, or agree to pay, the orchard tract account, and the parties separated. Within the next 30 days the appellee, as he claims, made a tender of \$5,085.75, the purchase price of the 68-acre tract (67.81 acres) at \$75 per acre. The appellant declined to receive the money. Thereupon the appellee made a special deposit of the same money, or the same amount of money, in bank. The language of the spe-

cial deposit and the receipt of the bank therefor is as follows:

"Memo. of Instructions.

"To the Shenandoah Valley National Bank of Winchester, Va. Winchester, Va.

"I, the undersigned, C. E. Gudebrod, herewith deposit as a special deposit the sum of \$5,085.00 in gold coin of the United States, and seventy-five cents (\$.75) silver coin of the United States, to be held by said bank under the following instructions:

"1. Pay over and deliver the same to said J. I. Triplett, or his order, upon delivery by him to said bank for C. E. Gudebrod of a deed conveying in fee simple to the said C. E. Gudebrod the tract of 67.81 acres of land laying near Mt. Jackson, in Shenandoah county, Virginia, covered by the option and letter dated March 11th, 1911, free from all incumbrances, and with general warranty of title and covenant that the said grantor has the right to make a good and perfect conveyance thereof; and upon examination of said deed by the attorney of said C. E. Gudebrod.

"2. That upon the failure of said J. I. Triplett to deliver said deed then the said Shenandoah Valley National Bank shall pay over said fund to the clerk of the circuit court of Shenandoah county, Va., upon the institution of any suit by said C. E. Gudebrod hereafter against said J. I. Triplett for enforcement of the contract with regard to said 67.81 acres of land, to be held by said clerk subject to the orders of the court in said suit.

"Given under my hand this 11th day of May, 1911. Christian E. Gudebrod."

"Winchester, Va., May 11, 1911.

"Received May 11, 1911, of C. E. Gudebrod a special deposit of \$5,085.00 in gold coin of the United States, and 75 cents in silver coin of the United States, making in all the sum of \$5,085.75, with the following instructions:

"(1) Pay over and deliver the said to said J. I. Triplett, or his order, upon the delivery by him to said bank for said C. E. Gudebrod of a deed conveying in fee simple to the said C. E. Gudebrod the tract of 67.81 acres of land lying near Mt. Jackson, in Shenandoah county, Va., covered by the option and letter dated March 11th, 1911, free from all incumbrances, and with general warranty of title and covenant that the said grantor has the right to make a good and perfect conveyance thereof; and upon examination of said deed by the attorney of said C. E. Gudebrod.

"(2) That upon the failure of said J. I. Triplett to deliver said deed then the said Shenandoah Valley National Bank shall pay over said fund to the clerk of the circuit court of Shenandoah county, Va., upon the

institution of any suit by said C. E. Gudebrod hereafter against said J. I. Triplett for enforcement of contract with regard to said 67.81 acres of land, to be held by the said clerk subject to the order of the court in said suit.

"Given under my hand this 11th day of May, 1911. Jno. W. Rice, Cashier,

"Shenandoah Valley Nat'l Bank, Winchester, Va."

The appellant was notified of this action by the appellee. Upon the appellant's declining to comply with the terms and conditions of the special deposit, the money was turned over to the clerk of the court, when this suit was instituted, which was in June following.

According to the appellee's evidence, he never agreed to the terms of the option contract for the sale of the 68-acre tract. He testifies that when the proposition was made to him to pay the cost of sowing clover seed, spraying, etc., on the orchard tract, whether made when closing the option on the orchard tract or when the option on the 68-acre tract was accepted by him, he continuously and positively refused to entertain the proposition, and that the \$20 paid on option of 68-acre tract and account was made for plowing on that tract. The testimony of the appellant and his brother, who was present when the \$20 was paid and the receipt given, is equally positive that the "account" referred to in that receipt was for labor performed on the orchard tract.

[2, 3] The weight of evidence is in favor of the appellant's contention on this question. He and his brother sustain it. The appellee alone testifies to his understanding and intention when he paid the \$20 and took the receipt. The receipt itself tends to sustain the appellant's view. It shows that the \$20 was paid and received "on the option of the 68-acre tract and acct." There was no option on that tract except that which provided for the plaintiff's reimbursement of the expense incurred on the orchard tract. In the absence of parol evidence, the natural, if not the necessary, meaning to be placed upon the receipt is that the \$20 was paid on account provided for in the option on the 68-acre tract. Without the appellant's assent the appellee could not acquire the 68-acre tract, except upon the terms contained in the option. The fact that the labor, etc., the payment of which was provided for in the option, related to the orchard tract could not, as it seems to us, affect the question. The appellant had the right to impose such terms and conditions in that option as he saw proper; indeed, it appears that the principal object the appellant had in writing the letter of March 11, 1911, giving the option on the 68-acre tract, was to secure the

payment of the expense, which he testified he knew had to be, or should be, incurred in caring for the orchard tract during the existence of the option upon it. The option on the orchard tract, as prepared by the appellee, not only did not provide for the payment of that expense, as the appellant claims it should have done, but used language which excluded that item of expense in the purchase price of the land. This fact the appellant claims he did not know when he signed the option on the orchard tract. That paper shows on its face that it was prepared hurriedly, as does the parol evidence, certainly without much care, for it wholly fails to make provision for the time when the last \$10,000 of the purchase price was to be paid, or to make any reference to the 68-acre tract, which both parties seem to have considered had some connection with the orchard tract in their offers to buy and sell. It is true that when the terms of the agreement for the sale and purchase of the orchard tract were being considered, the item of expense for labor, etc., was mentioned, and the appellee refused to pay it. This, under the terms of his option on that tract, he clearly had the right to do, but when he determined to accept or take up the option on the 68-acre tract, he could not accept it upon any other terms than those which the option contained. He did not, at the time he claims to have accepted the option, offer or agree to pay the labor, etc., account; and he did not do so when he made the tender of the purchase price of the 68-acre tract, nor when he made the special deposit of the money so tendered in bank, nor when he filed his bill. On the contrary, the conduct of the appellee, as well as his words, clearly shows that he not only never offered or agreed to pay the labor, etc., account, whose payment was required by the terms of the option, but that he had no intention of doing so. The appellee never having accepted the terms of the option which gave him the right to purchase the 68-acre tract of land, he was not entitled to a specific execution thereof, and the trial court erred in so holding.

The decree complained of must be reversed, and the bill dismissed, with costs to the appellant, subject to a credit of \$20, the amount paid by the appellee to the appellant, as evidenced by the receipt of April 10, 1911.

Reversed.

DEVERS v. DEVERS.

(Supreme Court of Appeals of Virginia.
Nov. 20, 1913.)

1. DIVORCE (§ 37*)—GROUNDS—DESERTION.

Where complainant, who had promised to send his wife on a visit to her relations, failed to do so but consented to her making the trip upon the money being furnished by them and broke

off a correspondence between them, complainant is not entitled to divorce on the ground of desertion, even though the wife stated she would not live with him at the place he had made his home.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107-134, 136-138; Dec. Dig. § 37.*]

2. DIVORCE (§ 11*)—ALLOWANCE—PUBLIC POLICY.

It is against public policy to encourage divorce litigation, for the well-being and good order of society demand that husbands and wives shall endeavor in good faith to dwell in unity.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 13, 472; Dec. Dig. § 11.*]

Appeal from Circuit Court, Rockingham County.

Bill by Albert Warren Devers against Etta Pearl Devers. From a decree denying a divorce, complainant appeals. Affirmed.

Chas. A. Hammer, of Harrisonburg, for appellant.

WHITTLE, J. This case is satisfactorily discussed in the opinion of his honor, the judge of the circuit court, as follows:

"The parties are both natives of this country. They were married at Atlanta, in New York state, the home of the defendant at that time, on July 22, 1906. After they were married they lived at Newport News, Va., for a year, then at Cincinnati for a while, then returned to Tenth Legion, in this county, where both had formerly lived. Whether the parties were ever domiciled together after their return to Tenth Legion does not appear from the evidence. The plaintiff lived with his mother, and the wife, for a couple of weeks before she went away, was with her aunt. Whether a home was provided for the wife at the home of her mother-in-law or elsewhere has not been put in evidence. At the time the desertion by the wife is alleged to have taken place, the plaintiff testifies his wife came over to his mother's home from her aunt's where she was then staying and asked the plaintiff to help her to pack her trunk, whereupon he asked her, 'Where are you going?' to which she replied, 'I am going home.' And the witness testified this is all she said, and he asked her no more questions, and nothing more was said at the time.

"The witness testified that he and his wife were living in Cincinnati when the plaintiff decided that, on account of the state of his mother's health, he would have to return to his old home to care for her. His wife objected to this course, but he overruled her objections and persuaded her to come along with him, promising her that if she would wait until April he would send her home. He says she gave him no rest from the time he got home until she left, and that when he got back he did not have the money to send her home, and that she left before he could supply it, sending to her home for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

money. All of this looks very much like the plaintiff consented to his wife's going to her old home, whether because of her insistence or because he was not able to settle her in a home, or from the two causes combined, or from some other cause, makes no difference. The further conduct of the parties is to the same effect. The testimony of the plaintiff shows that his wife wrote to him on her arrival at her old home in New York, and he says he answered the letter. He also says he got other letters which he did not answer; the last one being received in October, 1908, nearly a year after she left. These letters were not put in evidence. The plaintiff says they were friendly. He also says he and his wife parted friends. He also says he never asked his wife to return to him. It is true the plaintiff testifies that either before they left Cincinnati or elsewhere, perhaps by letter (he does not specify), his wife said she would never live with him at Tenth Legion, but it does not at all appear that she meant to separate herself permanently from her husband or even contemplated that result as the probable consequence of her conduct. It seems pretty plain that the husband consented to her going. He has not only not sought to have her return but he discouraged and broke off the correspondence which she tried to keep up with him by letter, even to the extent of writing to him several letters that he never answered, and he seems never, either before or after her departure, to have made any provision to house her or take care of her."

[1] It is clear from appellant's own version of the matter, as given in his deposition, that the circumstances attending his wife's departure from Virginia did not amount to willful desertion or abandonment of her husband. He had agreed that, if she would defer her visit to her parents in the state of New York until the following April, he would pay her traveling expenses. With this promise he failed to comply, alleging by way of excuse that he did not have the money. She afterward obtained the necessary means from her own people and with the knowledge of her husband, who was present and assisted in packing her trunk, and who interposed no objection whatever to her going, left for the home of her parents. Appellant also testified that their parting was friendly. Continuing, he says: "She wrote me when she got home, and I answered the letter. I got something like two or three letters from her. The same as I would get from one of my relatives." Yet he admits that without cause he discontinued the correspondence and never wrote to her again. In answer to the question why he made no effort to induce his wife to return to Virginia and live with him, he replied: "I did not think it was any use, and the way she left me I was just

like you would have been, or any one else, a little too stout to ask her." This was his attitude toward his wife, whose only offense was that, with his consent, she had gone on a visit to her parents. He ignored her friendly letters and was too proud to admit that he wished her to return; but he was not ashamed to use her absence, brought about, in part at least, by his own misconduct, as an excuse for a suit for divorce on the ground of willful desertion.

[2] Under the circumstances detailed it was and still is the duty of appellant earnestly to endeavor to bring about a reconciliation with his wife, to prepare a home, however humble, for their habitation, and to invite her to return to her duty and share it with him. The well-being and good order of society demand that husbands and wives shall in good faith endeavor to reconcile their differences and dwell together in unity and peace rather than to make occasion for resort to the courts for redress. It is against public policy to encourage such litigation, and it is not the province of a court to grant relief to a plaintiff whose misconduct has contributed to bring about, if indeed he did not connive at, the condition of which he complains.

The decree of the circuit court is without error and must be affirmed.

Affirmed.

HOUSE v. UNIVERSAL CRUSHER CORPORATION.

(Supreme Court of Appeals of Virginia.
Nov. 20, 1913.)

1. COURTS (§ 116*)—RECORD—AMENDMENT.

Process to commence a suit is part of the record for the purpose of amendment, and the court will look to the return thereon, when necessary, not only to show the date of the return, but also the date of its execution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 369, 371-373; Dec. Dig. § 116.*]

2. EVIDENCE (§ 41*) — JUDICIAL NOTICE — TERMS OF COURT—COMMENCEMENT.

The time for the commencement of the terms of the several courts is fixed by general law, of which the court takes judicial notice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 56-60; Dec. Dig. § 41.*]

3. DISMISSAL AND NONSUIT (§ 58*)—POWER OF CLERK—DECLARATION—FAILURE TO FILE—TIME.

Code 1904, § 3241, provides that if one month elapses after process is returned executed as to any one or more of the defendants without the declaration being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared. Section 3236 provides that rules shall be held on the first and third Mondays in every month, but where the term of a circuit court of Richmond commences on the first or third Monday in a month, the rules which would otherwise have been held the first

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or third Monday, as the case may be, shall be held on the Monday of the preceding week. The December term of the circuit court of Richmond county commenced on the Tuesday after the first Monday, so that the December rules of that county were thrown back to the last Monday in November, which occurred on the 25th. Held, that, process having been returned on Monday, November 4th, the clerk had no power to dismiss the case for failure to file the declaration at the December rules; a month not having elapsed between the execution of the process and such rules.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 53.*]

Error to Circuit Court, Russell County.

Action by C. W. House against the Universal Crusher Corporation. Judgment for defendant, and plaintiff brings error. Reversed.

S. B. Quillen and W. A. Ayers, both of Lebanon, for plaintiff in error. Burns & Kelly, of Lebanon, for defendant in error.

KEITH, P. Plaintiff in error instituted in the circuit court of Russell county an action of trespass on the case against the Universal Crusher Company. Process was issued, returnable to the first November rules, 1912, and the clerk made the following entry upon his rule book:

"1912. 1st Nov'r Rules. Process executed and continued for declaration. 1912. 2nd Nov'r Rules. Continued for declaration. 1912. 1st December Rules. Dismissed for want of declaration."

At the ensuing term of the circuit court the plaintiff in error moved the court to be permitted to file his declaration, to which the defendant objected, whereupon the court rejected the motion and refused to permit the declaration to be filed, and the suit stood dismissed, and thereupon a writ of error was awarded by one of the judges of this court.

The petition insists that the return of the process "executed" is not sufficient, but is wholly void under section 3227 of the Code.

[1] We do not deem it necessary to pass upon the question thus raised, for its decision is immaterial to the proper disposition of this case. Process to commence a suit is part of the record for the purpose of amendment, and the court will look to the return thereon, when necessary, not only to show the date of the return, but also the date of its execution. *Sands v. Stagg*, 105 Va. 444, 52 S. E. 633, 54 S. E. 21.

Section 3241 of the Code provides that "If one month elapse after the process is returned executed as to any one or more of the defendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared."

In this case the writ was returnable on Monday, November 4th, which was the first rule day. The service of process was then

noted and the case was continued for a declaration. At second November rules it was again continued for a declaration, and at December rules it was dismissed.

Now section 3236 of the Code provides that rules shall be held on the first and third Mondays in every month and shall continue for three days, but that where the term of a circuit court or the chancery court of the city of Richmond, or of a corporation court designated for the trial of civil cases in which juries are required, happens to commence on the first or third Monday in a month, or on either of the two following days, the rules which would otherwise have been held on the first or third Monday, as the case may be, shall be held on the Monday of the preceding week.

[2] The time for the commencement of the terms of the several courts is fixed by general law, of which the court takes judicial notice.

[3] The December term of the circuit court of Russell county commences, according to law, on the Tuesday after the first Monday, so that the December rules were thrown back to the last Monday in November, which occurred on the 25th. The process having been returned on Monday, November 4th, and December rules occurring on Monday, November 25th, and the clerk having entered, as appears by the record, the dismissal of the case for want of declaration at first December rules, one month had not elapsed after the process was returned executed, and it follows that the case should have been restored to the docket and plaintiff in error permitted to file his declaration.

We are of opinion that the judgment must be reversed, and the case remanded, for further proceedings to be had not in conflict with this opinion.

Reversed.

WHITTLE, J., absent.

BURNER v. BURNER.

(Supreme Court of Appeals of Virginia.
Nov. 20, 1913.)

1. VENDOR AND PURCHASER (§ 120*)—PERFORMANCE OF CONTRACT.

Where the deed by which complainant conveyed to defendant provided that complainant should within five years from the date thereof go to defendant and ascertain whether he was satisfied with the transaction, and, if he was not, complainant should pay him a certain sum, and receive a reconveyance, a statement by defendant upon complainant's request whether he desired a reconveyance, that "I am about of the same opinion that I was when the transaction was had; get your money ready," meant that defendant was dissatisfied, and intended to reconvey and receive back the sum paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 215-217; Dec. Dig. § 120.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. VENDOR AND PURCHASER (§ 120*)—CONTRACT—CONSTRUCTION.

A deed provided that it was expressly understood by the parties that the grantor should within five years from the date thereof go to grantee, and ascertain whether he was satisfied with the transaction, and, if not satisfied, the grantor should pay him the amount received for the land, and grantee should reconvey the land to grantor, and, if grantor failed or refused to pay such amount to grantee, he agreed to convey to grantee another tract in addition to the tract herein conveyed. *Held* that, if grantee, when approached on the subject within five years from the date of the deed, declared that he was not satisfied with the transaction, grantor was entitled to a reconveyance upon paying grantee the price paid for the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 215-217; Dec. Dig. § 120.*]

3. VENDOR AND PURCHASER (§ 120*)—PERFORMANCE OF CONDITIONS—TIME OF PERFORMANCE.

Where a deed provided that grantor should within five years after date ascertain from grantee whether he was satisfied with the transaction, and, if he was not, grantor should pay him the price of the land, and grantee should reconvey, grantor was entitled to a reasonable time before the expiration of such five years to raise the money to perform his part of the contract, and seven days before the expiration of such period was a reasonable time, so that he could ascertain grantee's wishes seven days before that time in absence of objection at the time that the full five years had not expired.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 215-217; Dec. Dig. § 120.*]

4. VENDOR AND PURCHASER (§ 120*)—PERFORMANCE OF CONDITION—SUFFICIENCY.

Where, pursuant to a deed which provided that grantor should ascertain five years after the date of the deed whether grantee was satisfied with the transaction, and, if not, should refund the price, return and receive a reconveyance, grantee stated that he was dissatisfied when questioned on the subject seven days before the expiration of the five years, when grantor went to some expense and trouble in raising the money to pay for a reconveyance, grantee could not afterwards change his mind and refuse to reconvey on the ground that grantor did not wait until the exact expiration of the five-year period.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 215-217; Dec. Dig. § 120.*]

Appeal from Circuit Court, Page County.

Suit by David F. Burner against William E. Burner. From a decree dismissing the bill, complainant appeals. Reversed.

M. L. Walton, of Woodstock, and R. S. Parks, of Luray, for appellant. Leedy & Berry, of Luray, for appellee.

CARDWELL, J. David F. Burner, appellant, and William E. Burner, appellee, are brothers, and in April, 1907, were coterminous landowners in the Massanutton section of Page county, Va. In the early part of 1907 appellant was desirous of obtaining a loan of \$1,500 to meet certain business engagements, and had arranged for this loan from one Ashby Fultz, to be secured by deed of trust on a certain 14-acre tract of land ad-

joining the lands of himself and appellee. About four days after the arrangement agreed on with Fultz, but before it was consummated, appellant had a talk with appellee, telling him of the arrangement with Fultz and in that connection appellee suggested to appellant that it might be well for him (appellee) to borrow the money of Fultz, in which event he would loan it to appellant, and have him execute a deed to appellee for the 14 acres of land, upon terms and stipulations mutually agreed upon. The change in the transaction proposed by appellee was more desirable to appellant, as he states, first, because he would be borrowing the money direct from his brother rather than from Fultz, who was of no kin, and, second, because under the stipulations agreed on with his brother he (appellant) would have no interest to pay on the loan, as the brother was to take immediate possession of the land, and crop the same, which crops, it was considered, by reason of the quality of the land, upon proper cultivation, would afford ample compensation for the loan in lieu of the regular payment of interest that appellant would have been compelled to pay Fultz in the event that the loan was made by him.

Appellee borrowed the \$1,500 of Fultz, and turned the same over to appellant, who contemporaneously—that is, on April 20, 1907—executed the deed out of which this litigation arises, conveying to appellee, in consideration of the sum of \$1,500 cash in hand paid, and with covenants of general warranty of title, the said 14 acres of land, describing the same as to locality and boundaries, and stating sources of title, etc.; but said deed contains the following conditions and stipulations:

"It is expressly understood and agreed to by the parties to this conveyance that the said D. F. Burner shall within five years from the date of this deed go to Wm. E. Burner, and ascertain from him whether he is satisfied with this transaction or not. If the said Wm. E. Burner is not satisfied with the said transaction, then the said D. F. Burner shall pay him the sum of \$1,600 in cash, and the said Wm. E. Burner shall reconvey the land herein conveyed to the said D. F. Burner. If the said D. F. Burner shall fail or refuse to pay to the said Wm. E. Burner the said sum of \$1,600, then the said D. F. Burner agrees and binds himself to convey to said Wm. E. Burner another tract of land, containing 16 acres of upper land now owned by him, in addition to the tract herein conveyed. If the said D. F. Burner shall sell the said 16-acre tract of land within the next five years, he shall not sell it for less than \$500, and shall pay over the proceeds thereof to the said Wm. E. Burner when sold."

There are other conditions specifically set forth in the deed which required appellee to

fence and farm the land properly, and trim the apple trees, and to observe the rotation of crops, especially as to corn.

Said deed was promptly recorded, and appellee immediately took full possession of the land, and has ever since enjoyed all the benefits derived therefrom. It will be observed that not only was said conveyance of the 14 acres of land conditional, but expressly stipulated that within five years from its date the grantor (appellant) should have the right to redeem the land and secure a reconveyance thereof to him from appellee, provided he went in person "within five years from the date of this deed (April 20, 1907) to appellee, and ascertained from him whether he was satisfied with the transaction or not, and, in the event that appellee expressed himself not satisfied with the transaction, then appellant was to pay appellee \$1,600 in cash (\$100 of which was to be a bonus), and upon the receipt of which appellee was required to reconvey the land to appellant.

Appellant, being desirous and determined to secure a reconveyance of said land to him within the five years, provided he could raise the sum of \$1,600, which was necessary to accomplish this purpose, went to see appellee at his home on the 13th day of April, 1912, which was within five years from the date of the said deed, and within only seven days before the expiration of the said five years, and informed him as to the object of his visit, and propounded to appellee the question indicated in said deed, "whether he was satisfied with the transaction," and in reply appellee stated specifically, and without qualification or evasion, that "he had the same opinion with reference to the transaction that he had in the first place, and told appellant to get his money ready," meaning, unquestionably, the \$1,600 which it was necessary for appellant to raise in order to secure a reconveyance of the land to him, and within a few days after this appellant raised the \$1,600 by a loan from a bank at Luray, and carried it to the office of appellee's attorneys, where he was present, and proposed to turn over the \$1,600 to him upon his reconveyance of said land to appellant; but appellee, though not denying at any time that he had expressed himself as not "satisfied with the transaction," and told appellant to get his money ready, refused to receive the money and to execute a reconveyance of the land to appellant, stating at no time any reason for his refusal, except, "I have changed my mind, and intend to keep the land." Whereupon, appellant filed his bill in this cause, setting up the facts above recited and other facts as to the transaction between himself and his brother, appellee, and praying that the latter be required to specifically perform his contract with appellant touching the said land in strict conformity with the terms of their contract evidenced by said deed of April 20, 1907.

Upon the hearing of the cause upon the bill, the answer of appellee thereto, and depositions taken on behalf of the respective parties, the learned judge of the circuit court entered the decree, which is brought under review in this appeal, denying the relief prayed for in the bill, and dismissed the same, with costs to appellee.

Appellee, in his answer to the bill, while not specifically denying its allegations, takes the position that the conveyance of the 14 acres of land was a conveyance of an absolute title to the land to him, and in no sense intended as a security for the loan of the \$1,500 to the appellant, contending that by the terms of the deed a privilege was reserved to him of reconveying the land at the end of five years, and demanding the repayment to him of the purchase money; "but this privilege was accorded to him, and was left entirely to his discretion under the terms of said deed." His answer further states the position of appellee to be that he was not obliged to exercise his discretion as to whether he would keep the land or reconvey it to appellant until the end of the five years. He admits that the appellant came to him a few days before the expiration of the five-year period, and asked him what he was going to do about it (the land transaction), to which inquiry he then and there replied, "I am about of the same opinion that I was when the transaction was had; get your money ready," "intending further to tell him (while he was under no obligation to do so at that time) that he was satisfied, and did not expect to reconvey the land, unless some serious accident happened to the land between that time and the expiration of the said period of five years, such as a flood; but the said plaintiff immediately left, seemed to get in a tremendous hurry, and did not give your respondent time to say anything in explanation of his jesting remark."

It appears from the evidence that this 14 acres of land was liable to overflow when there was a freshet in the Shenandoah river, which might result in carrying off the fertile soil on the land, rendering it of little or no value, and the view taken by appellee apparently is that his brother, the appellant, had no rights under the terms of the deed, but he (appellee) could, up to the last moment of the five years, in case the land by reason of a flood or from any other cause became of less value or of no value at all, declare his dissatisfaction as to the transaction, and throw the land back on appellant. As to the statement that appellant was in such a hurry on April 13, 1912, that he (appellee) did not have time to explain "his jesting remark," appellant, when testifying in this cause, after stating that he had heard from several sources that his brother was dissatisfied with the land transaction, stated: "I was to go to him within five years and ascertain the question whether or not he was satisfied, and, if he

was satisfied, it would make a clear deed, and, if he wasn't satisfied, and throwed the piece of land upon me, that I was to go and raise the \$1,600, and pay it to him. I did so on the 13th day of April, 1912. When I went to him, I says, 'Willie, I have come to ascertain the question whether or not you are satisfied with the transaction of this land.' He says, 'I have the same opinion that I had when we made the deal.' I says, then, I says, 'Willie, then you have throwed that land upon me?' and he says, 'Yes, sir.' 'Well,' I says, 'then that settles it.' I waited about two minutes; I started right back by Willie Burner, and I says, 'Now, Willie, I am going to see whether or not I can raise this money, and, if I can't raise this money, I will come back to you in two or three days from now, and go and give you a clean deed for the 16 acres of land that I have mentioned in the deed. * * *' On the 16th day of April, 1912, I went down by my brother Willie E. Burner's house, and asked where he was, and he was over to the barn fixing to come to town. I went down to the barn, and told Willie Burner that I had the money ready to pay him the \$1,600 cash that I agreed to, and I wanted him to come to Luray, and make me a deed for the piece of land back. He says, 'I have studied over the matter, and I have agreed to hold it.'

Appellant further states that he then went to the bank in Luray, got the \$1,600, and, in company with one of his neighbors (who testified in this cause), went at once to the office of appellee's attorneys, where he met appellee, and said to him, "Willie, I have the \$1,600 here and to count the \$1,600 due you according to contract that I have with you; will you receive it?" and he said, "No, sir."

Two witnesses testifying for appellant prove that appellee, before the 13th of April, 1912, had on two separate occasions declared that he was not satisfied with the transaction had with appellant with respect to the land in question, and intended "to throw it up." J. Daniel Burner, a brother of appellant and appellee, testifies that on the same day, April 13, 1912, and after appellant had been to the home of appellee, witness saw the latter, and had a conversation with him about this land matter to the following effect: "Now state what that conversation was you had with him there and then. A. Well, I went to him, and told him that I had heard he had throwed up the land on David, and he said, 'Yes, sir.' I said, 'I think it was one of the worst day's work you have done.' He asked me what my authority was, and I told him that different men were waiting to get the land, and I was sorry to see anybody else get it. Q. Did William Burner tell you out plainly that he had thrown the land up, and was not going to keep it, and had so told brother David? A. He just told me that he had thrown it up, and that was all he said when I asked him."

[1] The whole defense of appellee to this suit rests upon his contention that he was actually entitled to hold said land for five years from the date of the deed, and in the meantime was not compelled to say whether he was satisfied or not, although that question was asked him by appellant. The fact that he did speak and exercise his right of option reserved to him in the deed when approached on the subject April 13, 1912, is wholly inconsistent with the contention he is now making. He doubtless might have said, and with propriety and reason, to appellant, "I have till the last day of the five-year limit to say whether I am dissatisfied and prefer to give up the land according to the terms of the deed," which privilege he did not exercise, but instead, as he admits, replied, "I am about of the same opinion that I was when the transaction was had; get your money ready," clearly meaning that he was dissatisfied, and intended to reconvey the land to appellant, and get the \$1,600 stipulated for in the deed.

[2] Whether the change of appellee's mind is due to not realizing an expectation that appellant could not raise the \$1,600, in which event he would be entitled to a conveyance of the additional 16 acres of land, or to information that had come to him that the 14 acres was worth more than the \$1,600, as the evidence in this cause clearly proves, is immaterial. The deed in question was doubtless written by a layman, and the terms of the agreement it purported to set out are not very clearly stated; but from a reading of the whole deed it is to be ascertained that it reserved to the grantor (appellant) certain rights in the land conveyed, including an option to take a reconveyance of the land to himself upon his paying to the grantee (appellee) \$1,600, provided that appellee, when approached on the subject within five years from the date of the deed, declared that he was not satisfied with the transaction recited therein.

[3, 4] It seems to us entirely reasonable that appellant went to appellee several days before the expiration of the five years to ascertain from him whether or not he was satisfied, for, if he declared himself dissatisfied, and proposed to "throw up" the land upon appellant, the latter was entitled to a reasonable time to raise the necessary money to perform his part of the contract, and the time he gave himself to accomplish that purpose was, we think, entirely reasonable. When appellee answered the question put to him by appellant on April 13, 1912, as he did, it was clearly the right of appellant, reserved to him by the terms of the deed, to then and there exercise his option to pay appellee the \$1,600, and call for a reconveyance of the 14 acres of land to him. By the deed of the 14 acres of land to appellee, it was made the imperative duty of appellant to go to him within five

years, and ask him if he was satisfied with this land transaction, and, this having been done within a reasonable time before the expiration of the time limit, and appellee having declared himself dissatisfied, and after appellant had, at some expense and trouble, raised the necessary money for him to carry out his option to take the land back, it would be unjust and contrary to equity and good conscience to permit appellee to change his mind, and refuse to reconvey the land to appellant.

We are therefore of opinion to reverse the decree appealed from, and to remand the cause for further proceedings to be had therein in accordance with the views herein expressed.

Reversed.

POWHATAN LIME CO. v. AFFLECK'S ADM'R.

(Supreme Court of Appeals of Virginia.
Nov. 20, 1913.)

1. NEGLIGENCE (§ 65*)—CONTRIBUTORY NEGLIGENCE—APPLICATION OF DOCTRINE.

The doctrine of contributory negligence implies the existence of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 83, 94; Dec. Dig. § 65.*]

2. MASTER AND SERVANT (§ 286*)—QUESTION FOR JURY—MASTER'S NEGLIGENCE—UNSAFE PLACE TO WORK.

On evidence in an action for injuries to a servant resulting in death, held, that the question of defendant's negligence in exposing deceased to risks different from those incident to his employment and for which he was unfitted because of his lack of experience was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1003, 1008, 1010-1015, 1017-1033, 1036-1042, 1046-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 230*)—CONTRIBUTORY NEGLIGENCE—SCOPE OF EMPLOYMENT.

The fact that, after the father of a minor consented to his employment on the understanding that he should not do work of a dangerous character, the master assigned him to dangerous work would not estop the master from setting up the defense of contributory negligence to defeat a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 687-700; Dec. Dig. § 230.*]

4. MASTER AND SERVANT (§ 289*)—PERSONAL INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant resulting in death, where it appeared that the east side of a track where he was killed was a dangerous place in which to put an inexperienced minor to work, that the west side was reasonably safe, and that he had been warned not to work on the east side, the question of his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1091, 1092-1132; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 240*)—CONTRIBUTORY NEGLIGENCE—DANGEROUS PLACE.

Where there was no chock under the wheel of a car on a siding next to an embankment on

the premises of a lime company and a servant gave a signal to move the car and walked across the track to the other side next to the embankment, where there was no necessity for his going and such position was the proximate cause of his injury, he was guilty of contributory negligence as a matter of law and could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. § 240.*]

6. TRIAL (§ 243*)—INSTRUCTIONS—INCONSISTENCY.

Where two instructions given on the issue of a servant's contributory negligence were irreconcilable, it would be impossible to say by which the jury was controlled, and the inconsistency constituted reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.*]

7. NEGLIGENCE (§ 98*)—CONTRIBUTORY NEGLIGENCE—COMPARATIVE NEGLIGENCE.

Where it appears that the negligence of a servant has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 165; Dec. Dig. § 98.*]

Error to Circuit Court, Shenandoah County.

Action by Affleck's Administrator against the Powhatan Lime Company. Judgment for plaintiff, and defendant brings writ of error. Reversed.

Marshall McCormick, of Berryville, P. E. C. Cabell, of Richmond, and M. L. Walter, of Woodstock, for plaintiff in error. Tavenner & Bauserman, of Woodstock, and C. B. Guyer, of Strasburg, for defendant in error.

KEITH, P. In this suit Affleck's administrator recovered a judgment against the Powhatan Lime Company, which is before us upon a writ of error.

The Powhatan Lime Company is a Virginia corporation, engaged in the quarrying of rock and in the manufacture of it into lime and marketing the same. It employs a number of servants, and one of its departments provides for the nailing of barrels. The declaration alleges that in the conduct of its business it uses complicated machinery and requires the performance of duties on the part of its employes, some of which are in their nature dangerous; that as a part of its enterprise the defendant requires its employes to move cars over its track from place to place preparatory to loading the same with lime for shipment, these cars being frequently moved down an incline on a spur track, and while they rested upon this track were held in place by tightening the brakes and by a scotch or wedge placed under the lower wheel of the car, and, when it was necessary to move the car, the brakes were of course loosened and the scotch or wedge taken out.

The declaration further avers that William L. Affleck, who was a minor, was employed by the limestone company with the consent of his father to labor at the work of nailing barrels and to do other like work

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Index

ot of a more dangerous character; that affleck was a boy 16 years of age, of small stature, and wanting in strength, experience, and capacity; that defendant assigned this infant to work, the dangers of which he was incapable of comprehending and avoiding, without any instruction as to the manner in which the same was to be performed and the dangers incident thereto guarded against.

On behalf of the defendant the facts now material to be considered are that at the place of the accident the tracks ran north and south, and on the right-hand side of the rack there was a bank or cut about six or even feet in depth; that a car projecting over the track would leave a space of only six or seven inches between the car and the bank; that owing to this condition it was dangerous to work upon the east side of the rack, and there is evidence tending to prove that the defendant instructed the plaintiff's intestate not to go upon the east side of the track at all but to perform his duties upon the west side, which there is evidence tending to show was a reasonably safe place. The plaintiff's intestate disregarded this instruction, went upon the east side of the rack, and, as the plaintiff in error contends, thus became the author of his own injury.

There were a number of exceptions taken during the progress of the trial to the admission of evidence, but we find no error in the rulings of the court with respect to them, and none of them presents any question of sufficient interest or importance to require further consideration. A number of instructions were offered, some of which were given and others refused, but in the main we think the rulings of the court with respect to these instructions were correct, and the instructions given were quite sufficient to enable the jury intelligently to consider the evidence, except with respect to two instructions which deal with the defense of contributory negligence, one of which was given at the instance of the defendant in error and the other at the instance of the plaintiff in error.

[1, 2] The doctrine of contributory negligence implies the existence of negligence. We are of opinion that the evidence tends to prove negligence on the part of the plaintiff in error. There is evidence which tends to show that the boy who was killed was only 16 years of age, a country lad, inexperienced in the use of machinery, mentally and physically undeveloped, and of small stature. There is proof that his father, in view of these facts, was careful to inform the plaintiff in error, and to make it a condition of the boy's employment, that he should not be placed in positions of danger; the father stating at the time that he did not care for him to go about machinery, as he never had had any experience. The result was an understanding with the plaintiff in error that he was to be employed in the barrel depart-

ment in nailing barrels or, if there was no regular work in that department, to pick up lime or unload coal.

From the facts we have stated, we think the jury might have fairly inferred that the defendant company had been guilty of negligence in exposing the boy to risks different from those incident to his contract of employment, in the performance of duties for which he was unfitted by reason of lack of experience and skill.

[3] The contention of the defendant in error is that, by reason of the contract of employment and its breach, the plaintiff in error was estopped to make the defense of contributory negligence; but in this view we cannot concur. Although the plaintiff in error may have been guilty of negligence, yet, if the contributory negligence of the defendant in error's intestate contributed to the injury, he cannot recover. As we have said, contributory negligence on the part of the person injured always implies negligence on the part of the person causing the injury.

In *Labatt on Master and Servant*, p. 3992, § 1387, the doctrine for which defendant in error contends is thus stated:

"It is said that the master's order to a servant to do work outside the scope of his original employment operates as an implied assurance that the new duties may be performed without incurring any abnormal risks. Under this theory it would seem that the master is virtually converted, for the time being, into a guarantor of the servant's safety. Upon the assumption that this is the effect of the Indiana decisions, they have been condemned in Alabama.

"The disapproval thus expressed is, in the opinion of the present writer, well founded. There is no valid ground for departing in this instance from the general principle discussed in chapter LXXX, ante [which deals with knowledge as an element of the master's liability]. It should be observed, however, that the effect of the sweeping language used by the Indiana courts is considerably qualified by the fact that the defense of an assumption of the risks is conceded to be a bar to the action if the evidence shows that those risks were, as a matter of fact, appreciated." See *Brazill Block Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171, 11 South. 897.

[4] This brings us to the defense of contributory negligence. There is evidence, as we have already said, which tends to show that the east side of the track was a dangerous place in which to put an inexperienced youth to work. The west side of the track, however, the evidence tends to prove, was one of reasonable safety, and plaintiff's intestate was warned not to work upon the east side but upon the west side only. At the instance of the defendant in error the court instructed the jury that: "Contributory negligence on the part of the decedent is such negligence

as contributes directly to and is the proximate cause of the accident or injury complained of, and that, if the defendant relies upon the defense of contributory negligence upon the part of the decedent, the burden of proof of such contributory negligence rests upon the said defendant, unless the contributory negligence appears from the plaintiff's own evidence, in which case the burden shifts."

[5] On behalf of the plaintiff in error the court instructed the jury that: "If it believes from the evidence that there was no chock under the wheel of the car next to the embankment, and that the plaintiff's intestate did give the signal to Funkhouser to move the car, walked across the track to the other side next to the embankment, when there was no necessity for his so doing, and this was the proximate cause of his injury, if the jury so believes, then this was contributory negligence, as a matter of law, and the plaintiff cannot recover. Such conduct need not have been the sole cause of his injury, but, if it contributed to his injury and subsequent death, this is sufficient and the verdict should be for the defendant."

[6] These two instructions are irreconcilable. The instruction asked for and given at the instance of the plaintiff in error is in accordance with numerous decisions of this court, while that given on behalf of the defendant in error is wholly at variance with it. We have held in numerous cases that, where such is the case, it would be impossible to say by which the jury was controlled, and it constitutes reversible error.

In *Richmond Traction Co. v. Hildebrand*, incorrectly reported in 98 Va. 22,¹ the court dealing with this subject uses the following language:

"The instruction now under consideration is, however, not merely defective but an entirely incorrect statement of the law well calculated to mislead the jury. The two instructions are inconsistent with or contradictory to each other, and it is impossible to say whether the jury was controlled by the good or the bad in reaching their conclusion.

"In *Thompson on Trials*, vol. 2, § 2326, it is said: 'The giving of instructions which are inconsistent with or contradictory to each other is error, for the reason that the jury will be as likely to follow the good as the bad, and it cannot be known which they have followed, and which way soever they go, if there is an appeal or writ of error, the judgment must be reversed. Therefore an erroneous instruction is not cured by another instruction on the same subject which is correct, unless the former is by the latter specifically withdrawn.'" See this case as reported in 99 Va. 48, 84 S. E. 888.

The same doctrine is maintained in *O. & O. Ry. Co. v. Whitlow*, 104 Va. 90, 51 S. E.

182, where it is said: "Where contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside as it cannot be said whether the jury were controlled by the one or the other."

And so in the case of *Southern Ry. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58: "If contradictory instructions on a material point in the case have been given, the verdict" of the jury "should be set aside, as it cannot be known by which the jury were controlled."

The same doctrine is stated in *Va. & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 84 S. E. 976; *N. & W. Ry. Co. v. Mann*, 99 Va. 180, 37 S. E. 849; *Richmond Pass. & Power Co. v. Steger*, 101 Va. 319, 43 S. E. 612.

[7] That the instruction given at the instance of the defendant in error does not correctly propound the law of contributory negligence as established appears from the following decisions:

In *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54, the law is thus stated: "It is not necessary to the defense of contributory negligence to show that but for it the accident would not have occurred. It is enough to show that the negligence of the plaintiff contributed to the injury. The question to be determined is not whether the plaintiff's negligence caused but whether it contributed to the injury of which he complains."

The position of this court is well stated in *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886: "The well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called 'contributory negligence.'"

Upon the whole case, our conclusion is that, while there is evidence tending to show negligence upon the part of plaintiff in error, there is also evidence tending to show contributory negligence upon the part of defendant in error's intestate; that, in submitting the case to the jury upon the defense of contributory negligence, the court erred in giving to the jury inconsistent instructions; that the instruction given at the instance of the defendant in error cannot be reconciled with the numerous decisions of this court dealing with this sub-

¹ Correctly reported in 84 S. E. 888.—Ed.

ject, while the instruction asked for and given at the instance of plaintiff in error is a correct exposition of the law.

For this error we are constrained to reverse the case and remand it to the circuit court for a new trial to be had in accordance with the views herein expressed.

Reversed.

STARKE v. STORM'S EX'R.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. EQUITY (§ 271*)—PLEADING—AMENDMENT—SUBJECT-MATTER.

Where the matter of amendment to a bill is similar to that contained in a bill and was either known to complainant or might well have been known to him prior to the argument of the demurrer to his original bill, but was not brought forward until the demurrer was sustained on a ground involving dismissal of the bill, the court properly refused to allow it to be filed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 558-560; Dec. Dig. § 271.*]

2. MASTER AND SERVANT (§ 1*)—CREATION OF RELATION—IMPLIED CONTRACT.

Where plaintiff at the age of 13 applied for the position of servant to deceased, who accepted him, and took him into his home and furnished him with shelter, food, and clothing, in return for small personal services, but there was no contract, express or implied, to pay plaintiff any money consideration for his services, no other relation than that of master and servant existed between the parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. MASTER AND SERVANT (§ 80*)—RIGHT TO WAGES—PRESUMPTION.

In such case the services were not rendered with the master's assent under such circumstances as raised a presumption that the infant plaintiff expected to be paid or the master to pay.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. § 80.*]

4. MASTER AND SERVANT (§ 76*) — SERVICES AND COMPENSATION — MASTER'S OBLIGATION.

In such case there was an implied obligation to feed, clothe, and lodge the infant servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 105, 106; Dec. Dig. § 76.*]

5. INFANTS (§ 50*)—CONTRACT—NECESSARIES.

Such contract by the infant servant was a contract for necessities, such as food, clothing, and lodging, which he had the right to make.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 8, 58-61; Dec. Dig. § 50.*]

6. GUARDIAN AND WARD (§ 6*)—"GUARDIAN DE FACTO"—"GUARDIAN DE SON TORT."

In such case, where the master did not take possession of any property belonging to the infant servant or agree to pay any wages for his services, the master did not become a "guardian de facto or de son tort," who is purely a creature of a court of equity and is one who takes possession of an infant's property without right or lawful authority and is required to account therefor.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 7; Dec. Dig. § 6.*]

7. MASTER AND SERVANT (§ 76*)—MASTER'S OBLIGATION—EDUCATION OF INFANT SERVANT.

In such case, where the infant servant was under no restraint and could have left at any time, there was no implied obligation that the master should have him educated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 105, 106; Dec. Dig. § 76.*]

8. EQUITY (§ 48*)—GROUNDS OF DEFENSE—REMEDY AT LAW.

Where an infant servant, after leaving the master's service, returned at the request of the master, who promised to pay him \$400 a year, any wages due the complainant for such services were recoverable by action at law, so that he could not file a bill asking that a court of equity award him such amount.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 156, 158; Dec. Dig. § 48.*]

Appeal from Circuit Court, Albemarle County.

Bill by W. F. Starke against Edward H. Storm's executor. From a decree dismissing the bill, complainant appeals. Affirmed.

Gilmer & Gilmer, of Charlottesville, for appellant. Hanckel & Hanckel and Perkins & Perkins, all of Charlottesville, for appellee.

HARRISON, J. In January, 1911, one year after the death of Edward H. Storm, and about four years after the cause of action, if any, arose, W. F. Starke filed this bill asking that a court of equity award him a decree against the estate of Edward H. Storm for the sum of \$6,736.84. Of this amount \$1,736.84 was alleged to be for services rendered by the complainant to the deceased during his lifetime, and the remaining \$5,000 was alleged to be damages due for the failure of Storm to provide complainant with an education. There was a demurrer to this bill, and thereupon the complainant tendered an amended bill, which was practically a copy of the original bill, except that it eliminated the claim for \$5,000 damages for failure to educate, and made W. F. Storm, a brother of the deceased, who was the sole beneficiary under his will, a party defendant. The circuit court refused to allow the amended bill to be filed, sustained the demurrer to the original bill, and ordered that it be dismissed. From that decree this appeal was taken.

[1] There was no error in rejecting the amended bill. It set forth no new matter that was not known at the time of the argument of the demurrer to the original bill, and the facts are practically identical with those contained in the original bill, and in the exercise of a sound discretion the court properly refused to allow it to be filed.

In the case of *Bowe v. Scott*, 113 Va. 490, 75 S. E. 123, the syllabus, which is sustained by the opinion, states the law as follows: "While courts are liberal in allowing amendments of bills, and have discretion in the matter, still this discretion is in no sense arbitrary or capricious, but is, at all times,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

hedged about and governed by rules which have long been established and recognized as binding upon the courts. Where the matter of amendment is similar to that contained in the bill, and was either known to the complainants, or might well have been known to them, prior to the argument of the demurrer to the original bill, but was not brought forward until said demurrer was sustained on a ground involving its dismissal, the motion to amend comes too late."

[2-5] The substantial facts as stated in the bill are as follows: That the complainant was born January 18, 1885, at Pavelsthowe, in Germany, and was at the age of 13 living with his maternal grandmother; his father, mother, and maternal grandfather being dead. About this time he learned that Edward H. Storm wanted a boy to wait upon him in the capacity of a servant. The boy, at the age of 13, voluntarily applied for the position, and was accepted by Storm, who took him into his home, furnished him with shelter, food, and clothing, dressing him in the livery of a servant, and in return receiving from the boy small services, such as cleaning shoes, brushing clothes, cleaning guns, picking up game when Storm was hunting, etc. There was no contract, either express or implied, to pay the boy a consideration in money for his services when he went to live with Storm. This relation continued between the parties, in Germany, until July, 1910, when Storm came to New York, bringing the boy with him. In February, 1901, they came to Albemarle county, where Storm bought a farm, upon which he and the boy lived in the same relation and upon the same terms until September, 1905, when the complainant, then 20 years of age, voluntarily left the service of Storm and entered the railroad service.

The bill alleges that during the period prior to September, 1905, when the complainant entered the railroad service, Storm had paid him at different times about \$120, and that more than half that sum had been paid to him during the last year before he went to the railroad. The complainant remained in the service of the railroad from September, 1905, until November, 1908, when he returned to the service of Storm, at the age of 23, where he remained until January, 1910, when Storm died. There is no allegation that the complainant ever asserted any claim for services against Storm during his lifetime. He alleges that when he returned from the railroad it was at the request of Storm by letter, saying that he would compensate him for work previously done, and would furnish him with board and lodging and pay him \$400 per year to work as he had done before. The letter referred to is not produced.

Upon the facts alleged we are of opinion that no other relation but that of master and servant existed between these parties. Storm wanted a boy to wait on him and do the work of a servant. The boy sought the posi-

tion and was accepted, not one word being said about wages. There was an implied obligation to feed, clothe, and lodge the servant, otherwise he could not have served. The services were not, however, rendered with the master's assent under such circumstances as raised a presumption that the infant expected to be paid or the adult to pay. It was a contract for necessities which the infant had the right to make, and which could be terminated at the will of either party.

The law is very well stated in Wood on Master and Servant (2d Ed.) p. 14, § 9, as follows: "The same rule prevails as to an infant as to an adult in reference to merely voluntary services. No recovery can be had by him unless there was an agreement, expressed or implied, to pay him for his services, or unless the services were rendered at the request of the person sought to be charged, or with his assent, under such circumstances as raise a presumption that the infant expected to have pay therefor, and that the adult expected to pay him. Thus in *Defrance v. Austin*, 9 Pa. 309, the plaintiff, who was a minor, when not at work elsewhere, lived in his uncle's family and rendered services for him as the children of the family did, and during such time was supplied by the uncle with food and clothing. It was held that no implied promise to pay him for his services could be raised, and that no recovery could be had by him therefor. In *Wilhelm v. Hardman*, 13 Md. 140, the plaintiff, an infant, contracted with the defendant to work for him for his support and schooling. After having remained in the defendant's employ for some time, he broke off the contract and left his service, and brought an action for his services. The court held that, inasmuch as the consideration for which the services were rendered was *actually necessary*, and as he had received the consideration *as fast as he performed his services*, and as he could not put the defendant in statu quo, he could not recover of him for such services, even though he offered to deduct therefrom *the value of the consideration received*."

In the case at bar, the relation between the parties being that of master and servant, and the contract arising under that relation having been fully performed, nothing more can be recovered.

[6] The complainant has sought to maintain the jurisdiction of a court of equity to entertain his suit upon the theory that the relation of guardian and ward existed between the parties, and in support of this theory has contended that Edward H. Storm was guardian de facto, or de son tort.

This position is not tenable. A guardian de facto, or de son tort is purely a creature of a court of equity, and is one who takes possession of an infant's property without right or lawful authority, and will be required to account therefor. 21 Cyc. p. 20;

Anderson v. Smith, 102 Va. 697, 48 S. E. 29; Watts v. Watts, 104 Va. 269, 51 S. E. 359.

In the case before us Storm did not take possession of any property that belonged to the complainant. It is not claimed that the complainant had a dollar of property when he entered Storm's service, but this difficulty is sought to be obviated by the contention that the wages alleged to be due constituted estate of the infant in the hands of Storm. It is unnecessary to decide in this case whether or not unpaid wages in the hands of an employer, due to an infant, can be treated as estate of such infant so as to hold the employer liable therefor as guardian de son tort, because, as already shown, there were no such wages in the hands of Edward H. Storm.

[7] There is no merit in the claim of \$5,000 damages for the failure of Edward H. Storm to have the complainant educated. No such obligation was implied in the contract of service; the complainant was under no restraint, and could have left the service of Storm at any time.

[8] As already seen, complainant left the service of Storm before he was 21, and did not return until he was 23. Storm died in little more than a year after such return. If there was anything due the complainant for services rendered during that period between his return from the railroad and the death of Storm, he had a plain and adequate remedy at law for its recovery.

We are of opinion that there was no error in sustaining the demurrer and dismissing complainant's bill. The decree appealed from must therefore be affirmed.

Affirmed.

BERNARD et al. v. McCLANAHAN.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. LANDLORD AND TENANT (§ 229*)—LIABILITY FOR RENT—PROPERTY OF UNDERTENANT—ATTACHMENT.

Under Code 1904, § 2791, making an undertenant's goods liable for rent, and section 2962, rendering goods liable to be distrained liable to attachment, the goods of an undertenant may be attached for rent not due, as well as for rent past due, where he has removed same from the leased premises in violation of the latter section.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 948-974; Dec. Dig. § 229.*]

2. ATTACHMENT (§ 91*)—AFFIDAVIT—CEREBIAL ERROR.

That an attachment affidavit was written on a printed form containing the name "Corporation Court," instead of "Court of Law and Chancery," at the top of the paper did not invalidate the affidavit, where such mistake was not repeated elsewhere in the paper, and the

clerk certified that the affidavit was filed in the court of law and chancery.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 231-237; Dec. Dig. § 91.*]

3. LANDLORD AND TENANT (§ 229*)—ATTACHMENT FOR RENT NOT DUE—RIGHT OF ACTION.

An undertenant's goods may be attached for rent under Code 1904, § 2962, authorizing the attachment, and section 2791, making goods of an undertenant on the premises liable for rent, though an action at law brought to recover the rent never matures for hearing.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 948-974; Dec. Dig. § 229.*]

4. LANDLORD AND TENANT (§ 229*)—ORDER—CONSTRUCTION—PERSONAL JUDGMENT.

Where an order in attachment for rent under Code 1904, § 2962, was in the usual form, and stated that the goods levied on were liable and ordered a sale, it was not open to objection on the ground that it was a personal judgment, instead of merely a judgment in rem, in an action wherein jurisdiction was not obtained over defendant's person.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 948-974; Dec. Dig. § 229.*]

Error to Law and Chancery Court of City of Roanoke.

Action by W. F. McClanahan against W. T. Bernard and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Hall & Woods, of Roanoke, for plaintiffs in error. Johnston & Izard, of Roanoke, and John W. Carter, of Martinsville, for defendant in error.

CARDWELL, J. This is a writ of error awarded W. T. Bernard, the Roanoke Hat Company, Incorporated, and the Bernard Dupuy Company, Incorporated, to a judgment entered by the law and chancery court of the city of Roanoke in favor of W. S. McClanahan, in an attachment proceeding for the recovery of rent.

It was conceded in the oral argument before this court that the writ of error was improvidently awarded as to the Roanoke Hat Company, Incorporated, and should be dismissed; and the only complaint of W. T. Bernard is that the judgment is a personal judgment against him, but he took no exception to any of the rulings of the trial court, and therefore this writ of error was improvidently awarded as to him also.

The material facts in the case are as follows: By written lease defendant in error, McClanahan, rented certain premises situated in Roanoke city to the Roanoke Hat Company for 12 months, from January 1, 1911, to January 1, 1912. In the spring of 1911, the Roanoke Hat Company wrote to McClanahan, requesting him to make certain repairs to the leased premises, and agreeing that if he would do so, it, the Roanoke Hat Company, would have a new company, which was proposed to be organized for the purpose of taking over the business of the Roanoke

Hat Company, execute a new lease for three years from October 1, 1911, at an increased rental. The repairs were made and the proposed new company was formed under the name of the Bernard-Dupuy Company, Incorporated, W. T. Bernard being its president, but this company refused to execute the lease for three years before mentioned, though it entered on the premises as an undertenant of the Roanoke Hat Company, paying rent at the increased rate to that company, and that company in turn paying the same rent to McClanahan; the new company having bought from the old all of its goods theretofore on the leased premises. This condition continued up to and after the expiration of the original lease (which contained no provision for renewal or extension), rent being paid to March 1, 1912, when the goods theretofore on the leased premises were removed, and shortly thereafter (within 30 days) the attachment in this case was issued, and was served upon the goods so removed in the city of Lynchburg, in the possession of the Bernard-Dupuy Company.

The learned judge of the trial court, to whom all matters of law and fact arising in the case were, by consent of parties, submitted for decision, upon the above facts took the view "that upon the expiration of the original term, and the continuance of the possession and the payment of rent by the Roanoke Hat Company to McClanahan, a new tenancy from year to year was created, beginning with the 1st day of January, 1912. The rent for the months of January and February (1912) having been paid, and the vacation of the property amounting to a notice of surrender, the amount of rent yet to become payable is for 10 months remaining of the year 1912."

In accordance with this view of the facts, the judgment here complained of was entered, the substance of which is that the plaintiff, W. S. McClanahan, is entitled to recover under his attachment for the amount of the rent to become due for the unexpired term of the lease, to wit, for 10 months, at the rate of \$100 per month, and that the goods levied upon under the attachment are liable therefor.

The errors assigned to the judgment raise the question: First, did the court err in its construction of section 2962 of the Code of 1904, whereby the writ of attachment was held valid as against the goods of the undertenant, the Bernard-Dupuy Company? Second, is the judgment a personal judgment against the Bernard-Dupuy Co.? And, third, was the affidavit upon which the attachment issued defective?

[1] Section 2962 of the Code provides that "on complaint by any lessor, his agent or attorney, to a justice or to the clerk of the circuit court of the county or of the circuit or any city court of the corporation in which the leased premises or a part thereof may be,

that any person liable to him for rent intends to remove, or is removing, or has, within thirty days, removed his effects from such premises, if such lessor, etc., make oath to the truth of such complaint to the best of his belief and to the rent which is reserved (whether in money or other thing) and will be payable within one year, and the time or times when it will be so payable, and also make oath either that there is not, or he believes, unless an attachment issues, that there will not be left on such premises property liable to distress sufficient to satisfy the rent so to become payable, such justice or clerk, as the case may be, shall issue an attachment for the said rent against such goods as might be distrained for the same if it had become payable, and against any other estate of the person so liable therefor."

When we turn to the statutes to ascertain what goods may be distrained for rent past due, section 2791 of the Code of 1904 very clearly answers the inquiry. In dealing with distress for rent, under the headline, "On what goods levied" it provides that "the distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days."

If the contention of the learned counsel for plaintiffs in error that, there being no privity of contract or contract liability as between the lessor and the assignee, or undertenant, the language of section 2962 limits the right to sue out the attachment to a case where a person liable by contract for the payment of rent is removing or intends to remove the property from the leased premises, could be sustained, then much of the language of the statutes providing a remedy for the collection of rent might as well have been omitted, or should be regarded as meaningless. The liability of an undertenant of leased premises, as in this case, does not arise out of contractual relations between him and the lessor, but by virtue of statute, whereby he, upon entering the leased premises as undertenant, subjects his property carried thereon to liability for the rent contracted to be paid by the lessee of the premises, and this liability of his property continues while on the leased premises, and for 30 days after the same is removed therefrom; provided, however, that such goods of the undertenant cannot be subjected to the satisfaction of more than one year's rent, due or to become due, from the lessee to the lessor, as provided by statute. Code, §§ 2791, 2792.

The statute (section 2791, *supra*) plainly makes the goods of the undertenant liable for the rent, just as though they were the goods of the tenant himself; and by section 2962 it is provided that if the goods are liable to be distrained, they may be attached.

In this case the sale by the lessee of its goods on the leased premises to its assignee or undertenant, the Bernard-Dupuy Com-

pany, was in gross, and though there was no rent due from the lessee, at the time of the sale, nevertheless there was a liability on the contract for the rent, and the goods were taken over by the assignee or undertenant subject to and liable for one year's rent reserved to the lessor in the contract.

The opinion in *Neff v. Ryman*, 100 Va. 521, 42 S. E. 314, says: "The principle is elementary, and has received the repeated approval of this court, that when the relation of landlord and tenant has once been established, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or mediately; and the succeeding tenant is as much bound by the acts and admissions of his predecessor as if they were his own. *Emerick v. Tavener*, 9 Gratt. 224 [58 Am. Dec. 217]."

The argument that to so construe the statutes as to maintain the right of a landlord to attach the goods of an undertenant of the leased premises for rent not due would be a hardship, since under such a construction an undertenant could not safely carry his goods upon leased premises without making them security for his landlord's rent for one year, is without force, since the same argument might as well be made with respect to the hardship of the statute giving the right of distress against the undertenant's property for rent due, for when his goods go on the leased premises they become liable to distress for past-due rent, not exceeding one year, though it may have accrued before his undertenancy began. In fact a greater hardship might have to be borne in the last-named instance than in the first, for, as said in *Burk's Pleading & Practice*, p. 12: "It will be observed that the landlord may distrain on the undertenant for the whole amount of the rent due by the tenant, regardless of the state of the account between the tenant and the undertenant—e. g., if the tenant owes \$1,000 rent, and the undertenant has contracted to pay only \$100 for the part of the premises occupied by him, the landlord may levy on the property of the undertenant found on the leased premises for the entire \$1,000 rent. The statute puts no limit on the extent of the liability of the assignee or undertenant."

It is clear, we think, that the intention of the Legislature was to give as effective remedy for rent to become due as for rent past due; and, the statutes being capable of a construction carrying this into effect, the courts must so construe them and hold, as did the lower court, that the goods of the undertenant in this case were subject to the attachment levied upon them.

[2] Neither is there any merit in the contention that the lower court erred in not sustaining the motion of plaintiff in error the Bernard-Dupuy Company to quash the attachment on the ground that upon the face of the affidavit and attachment it was im-

providently sued out and levied on the goods of the Bernard-Dupuy Company.

The clerk of the law and chancery court and the clerk of the corporation court of Roanoke city is one and the same person, and the clerk's office of the two courts is one and the same. It did happen, as it seems, that the clerk wrote the affidavit on a printed form, and the words, "In the Corporation Court of the City of Roanoke," appear at the top, but nowhere else in the paper. The clerk certifies in the attachment, that: "Whereas W. S. McClanahan has instituted in our court of law and chancery of the city of Roanoke an action on the case * * * against * * * (naming the defendants), and there having been filed in our clerk's office of our said court an affidavit that the claim of said plaintiff asserted in said suit is believed to be just, that the affiant believes that the plaintiff is entitled to and ought to recover one thousand, two hundred (\$1,200.00) dollars for rent reserved, and which is payable within one (1) year, and which is payable monthly," etc. Upon the face of the record the affidavit was unquestionably filed in the proper court by the proper officer, and his failure to substitute "Law and Chancery" for "Corporation" court was a mere clerical error, as to which plaintiff in error raised no objection in the lower court; and, if the objection could be raised in this court for the first time, we do not think it affords just ground of complaint.

[3] Nor does the fact that the action at law referred to in the clerk's certificate was never matured for hearing render the attachment for the rent void, for the attachment was good as a remedy for the collection of rent to become due under a contract, whether there was an action at law to recover it or not, since the right to sue out an attachment for rent is not dependent upon a pending action at law to recover the same.

As to the remaining ground of objection to the affidavit, namely, that all persons liable for the rent were made parties defendant, we deem it only necessary to say that the record shows that all of the defendants other than the Bernard-Dupuy Company had made themselves liable for the rent claimed in writing, and the Bernard-Dupuy Company was clearly liable therefor as an undertenant by virtue of the statute, as we have already observed.

[4] The remaining question requiring consideration is, Did the lower court enter a personal judgment against plaintiff in error the Bernard-Dupuy Company, the only defendant who did not acquiesce in the court's decision, but excepted thereto, and upon whom notice of the proceeding had not been personally served?

Reading the order of the court complained of as a whole, it conforms, as it appears to us, to the usual orders in such cases. So much of the order as is necessary to be quot-

ed here is as follows: " * * * The court being of the opinion that the plaintiff is entitled to recover under his attachment, and that the goods so attached are liable, and it being proven to the satisfaction of the court that the defendants are indebted to the plaintiff in the sum of \$1,000 for rent reserved by a contract on the premises known as Nos. 101 and 103 Commerce street, Roanoke, Va., and that the goods levied on in the attachment sued out in this case were removed from the leased premises within 30 days preceding the levy of said attachment, it further appearing to the court that the sergeant of Lynchburg, Va., has levied on certain goods, wares, and merchandise under said attachment, and that the same are now in the possession of the Bernard-Dupuy Company, Incorporated, a corporation in Lynchburg, it is ordered by the court that said sergeant sell said goods levied on, or as much thereof as may be necessary, as appears by his return on said attachment, upon the terms of said contract of rental of \$100 per month for 10 months, beginning March 1, 1912, for cash as to amount past due at the time of sale," etc.

Not only has counsel for defendant in error in the argument of the case in this court disclaimed that the order of the lower court was, or should be, regarded as a personal judgment against any of the defendants in the attachment proceedings, but the order, in the form usual in such cases, when read and construed as a whole, reaches, as we interpret it and as the authorities hold, the goods attached only.

The case of *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573, is in point. There the judgment was in an attachment proceeding against a nonresident, in the words: "That said plaintiff have and recover judgment against the defendant, Griffith, in the sum of \$134.52, with 8 per cent. interest on same from this date, and costs in this case, * * * and that the property attached (certain lots) * * * be sold to satisfy said judgment and costs." There, as in the case here, objection was made to the judgment, on the ground that it was a personal judgment, but the court in disposing of the objection said: "If the portion which directed the sale of the attached property had been omitted, the judgment would have been a personal one, and therefore void, but it stated the amount which the Harvester Company was entitled to recover, and that is essential in a judgment in rem. As an entirety it is sufficient, although perhaps not in the best form, to constitute a valid judgment against the land."

In 4 Cyc. p. 824, it is stated: "Some statutes contemplate the rendition of a judgment personal in form, even where no jurisdiction has been obtained over the defendant's per-

son, and it seems that such judgment will not be deemed void in any case, but that, whatever the form of judgment, it can have no further effect than binding on the property attached." *Waples on Attachments*, p. 511.

Other questions raised in this case, with which we have not specifically dealt, were either waived in the argument or are regarded as without merit.

The judgment complained of is affirmed. Affirmed.

KEITH, P., absent.

GRIEF v. KEGLEY, Judge.

(Supreme Court of Appeals of Virginia.
Sept. 11, 1913.)

1. TAXATION (§ 466*)—ASSESSMENT OF MINERAL LANDS—REVIEW AND CORRECTION—STATUTE.

Code 1904, § 437a, as amended by Acts 1910, c. 39, provides for a separate assessment of all mineral lands and for the certification thereof to the State Corporation Commission, which shall examine into the justice of the assessments and, if not assessed at its fair market value, direct the commonwealth's attorney to apply to have such assessment corrected, and that any person aggrieved by such assessment may also apply to have it corrected with the right of appeal. Code 1904, § 567, provides that any person aggrieved by an assessment may, "unless otherwise expressly provided by law," apply to the court for relief; section 568 provides for correction by the court; and section 573 that, if the auditor of public accounts shall deem the court's order erroneous, he may within one year thereafter file a petition for a rehearing. *Held*, that section 437a, as amended, furnished all the procedure for protecting the rights of the commonwealth in a proceeding to correct erroneous assessments of mineral lands; that section 567 excluded the correction of such assessments from the operation of that section and of sections 568, 573; and hence that the auditor of public accounts could not apply thereunder for a rehearing of a mineral land assessment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 829, 830; Dec. Dig. § 466.*]

2. PROHIBITION (§ 10*)—GROUNDS—WANT OR EXCESS OF JURISDICTION.

Prohibition, while not lying to correct error, lies to prevent a court from acting where it has no jurisdiction or is exceeding its jurisdiction; and hence a party petitioning for review and correction of an assessment on mineral lands under Code 1904, § 437a, as amended by Acts 1910, c. 39, which provides the exclusive procedure for correction thereof, was entitled to a writ of prohibition against the auditor of public accounts, whose petition to review such assessment instituted under Code 1904, § 573, was without authority.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

Prohibition by Max Grief against Hon. Fulton Kegley, Judge of the Circuit Court of Bland County. Writ awarded.

J. J. A. Powell, of Wytheville, for petitioner. The Attorney General, for Auditor of Public Accounts.

BUCHANAN, J. Max Grief filed his petition in this court praying that the Honorable Fulton Kegley, judge of the circuit court of Bland county, be prohibited from further proceeding upon a petition filed in said court by the auditor of public accounts, seeking to have reheard an order made by that court upon the motion of Max Grief correcting an alleged erroneous assessment of mineral land.

Section 437a of the Code, as amended by an act of assembly approved February 19, 1910 (Acts 1910, pp. 52-54, c. 39), provides for the special and separate assessment of all mineral lands, improvements, fixtures, and machinery thereon and for the entry of such lands on the land books separately from other lands charged thereon. It further provides that a copy of such assessment shall be certified to the State Corporation Commission with the name and post office address of each person, firm, or corporation in whose name any such lands or interests therein have been assessed upon the land books, with the amount of tax extended thereon. Upon receiving such copy it is made the duty of the State Corporation Commission to examine into the justice of such assessments, and, if it shall appear to the Commission that any tract of land or any part thereof or improvements, etc., thereon has not been assessed at its fair market value, the said Commission shall direct the commonwealth's attorney for the county or corporation wherein such land is situated, or any special attorney it may designate, to apply in the name of the commonwealth to the circuit court for the county or corporation court of the city to have said assessment corrected. It further provides that any person feeling himself aggrieved by such assessment may apply to the same court to have the assessment corrected.

Under the provisions of this act Max Grief, the petitioner in this case, moved the circuit court of Bland county to correct an alleged erroneous assessment of his lands lying in said county. Upon a hearing of his motion, which was defended by S. W. Williams, Jr., special attorney for the commonwealth, the court granted the relief prayed for by the landowner, Grief, by an order entered October 23, 1912.

On March 12, 1913, C. Lee Moore, auditor of public accounts, offered to file his petition for a rehearing of said order. His petition was objected to by Grief, the landowner, upon the grounds:

"(1) That section 573 of the Code, under which said petition by its terms is offered to be filed, has no application to mineral assessments but applies to general assessments.

"(2) That the auditor is not a proper party to make any motion in the matter, and that section 437a, under which the original notice was had, gives full proceedings in the matter by appeal at the instance of the Corporation Commission and not by the auditor."

These objections were overruled and the

petition by leave of the court, was filed.

By section 567 of Pollard's Code it is provided that any person assessed with taxes on lands, or other property, or a license tax, aggrieved thereby, may, "unless otherwise specially provided by law," apply within a time named for relief to the court in which the commissioner gave bond and qualified, or to which or to whose clerk such bond and the certificate of his qualification were returned. That section requires the attorney for the commonwealth to defend the motion, and that the commissioner making the assessment or his successor in office shall be examined as a witness touching the application, and the facts proved certified.

Section 568 provides when the court may order such assessment to be corrected and requires a copy of any order made under it correcting an erroneous assessment to be certified by the court to the auditor of public accounts and the treasurer of the state.

By section 573 of Pollard's Code it is provided that: "If from the statement of facts or other evidence the auditor of public accounts shall be of opinion that the order of the court granting the redress is erroneous, he may within one year from the time such order is made, file a petition for a rehearing of such application. Said petition, which is to be in the name of the commonwealth, is to be presented and the hearing conducted by the attorney for the commonwealth, and the case reheard as if there had been no previous hearing."

[1] It is clear, as it seems to us, from a comparison of the provisions of section 437a of the Code, as amended by the act of February 19, 1910, with the provisions of sections 567, 568, and 573 of the Code, that the petition filed by the auditor for a rehearing of the application of Max Grief, and the order entered in that proceeding by the circuit court at its October term, 1912, is without authority of law. The manner in which erroneous assessment of mineral lands may be corrected is specially provided for by section 437a of the Code and amendments thereto, and therefore, by the express provisions of section 567, the correction of mineral land assessments is excluded from the operation of that section and sections 568 and 573.

By section 437a and amendments thereto, copies of the assessments of mineral lands or interests therein are to be certified to the State Corporation Commission. Upon receipt of such copies it is made the duty of that Commission to examine into the justice of any such assessments, and if it shall appear to the Commission that any tract of land, or any part thereof, or the improvements, fixtures, or machinery thereon, or any right or interest in the same, or any part thereof, has not been assessed at its fair market value, the Commission is required to direct the commonwealth's attorney for the county or corporation where the assessment was made, or any other special attor-

ney it may designate, to apply in the name of the commonwealth to the proper court to have the assessment corrected. The original assessment is made by the assessor or commissioner of the revenue, as the case may be, subject to the action of the State Corporation Commission, and the Commission is authorized to employ for the purposes of the act "such person or persons as may be necessary to make, with the assessor or commissioner of the revenue, such inquiry into the value and such examination of the property and interests required by this act to be separately assessed, and of the improvements, fixtures, and machinery thereon, as it may deem necessary." That section further provides: "That the person or persons employed by the State Corporation Commission may be required to give aid to the commonwealth's attorney or any special attorney that may be employed by the said Commission in prosecuting or defending any application for the correction of any assessment under this act by obtaining and giving information of facts, names of witnesses or otherwise." From the decision of the trial court in the proceeding to correct such erroneous assessment, both parties are expressly given the right of appeal.

The provisions of section 437a, as amended, furnish all the necessary machinery for fully protecting the rights of the commonwealth in proceedings to correct erroneous assessments of mineral lands. They clothe the Corporation Commission with the power and impose upon it the duty of seeing that the mineral lands of the commonwealth are assessed at their fair market value.

Section 437a, as amended, confers no power and imposes no duty upon the auditor of public accounts to represent the commonwealth in the proceedings provided by that section for the correction of erroneous assessments of mineral lands. It confers that power and imposes that duty upon the State Corporation Commission, and it is manifest, when that section is read in connection with chapter 24 of the Code, that the Legislature never intended that under the provisions of section 573 of the Code the auditor of public accounts should also represent the commonwealth in proceedings for the correction of erroneous assessments of mineral lands and have the right to have reheard any decision in such a proceeding which he might deem erroneous, although the State Corporation Commission might be fully satisfied that the decision was correct.

The next question is: Is this a proper case for a writ of prohibition?

[2] It is well settled that the writ of prohibition does not lie to correct error but to prevent the exercise of the jurisdiction of the court by the judge to whom it is directed, either where he has no jurisdiction at all or is exceeding his jurisdiction. If the court

or judge has jurisdiction to enter any order in the proceeding sought to be prohibited, the writ does not lie. *Fidelity, etc., Co. v. Beale, Judge, 102 Va. 295, 303, 46 S. E. 37* Burks' Pleading & Practice, 777-779, and cases cited.

The averments of the petition of the auditor show that it is a proceeding under section 575 of the Code. As we have seen, that section gives the auditor no authority to file a petition in any proceeding instituted under the provisions of section 437a, as amended, for the correction of an erroneous assessment of mineral lands. Neither has the district court jurisdiction to consider or grant any relief in such a proceeding upon a petition filed by the auditor. As the auditor has no right to file a petition to rehear the order entered in the proceeding instituted by the auditor under section 437a of the Code, as amended, for the correction of the erroneous assessment of his mineral lands, and as the district court has no jurisdiction to enter any order in such proceeding upon the petition of the auditor, it follows that the petitioner is entitled to a writ of prohibition, as prayed for.

Writ awarded.

GENERAL BOARD OF STATE HOSPITALS FOR THE INSANE v. ROBERTSON

(Supreme Court of Appeals of Virginia
Nov. 20, 1913.)

1. INSANE PERSONS (§ 93*)—RIGHT OF ACTION—GUARDIAN.

Under Code 1904, §§ 1697, 1702, declaring that the committee of an insane person shall be entitled to his custody and control, shall have possession of and manage his estate, and may sue and be sued in respect thereto, the committee of an insane person committed to a hospital for care, maintenance, and treatment, who is a beneficiary of a trust fund held and administered by the hospital, may maintain a suit to enforce the trust and protect the property against misappropriation.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 163; Dec. Dig. § 93.*]

2. STATES (§ 191*)—SUITS AGAINST—CONSENT TO BE SUED.

A suit against a state hospital for the insane in its public governmental capacity is a suit against the state which cannot be maintained by an individual unless the state waives its immunity and submits itself to the jurisdiction of the courts.

[Ed. Note.—For other cases, see *States*, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

3. STATES (§ 191*)—SUITS AGAINST—HOSPITAL FOR INSANE—ENFORCEMENT OF TRUST.

A state hospital for the insane, which in its private capacity has accepted a testamentary trust, stands upon the same footing with respect to it as any other trustee, and is suable by a beneficiary.

[Ed. Note.—For other cases, see *States*, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

4. STATES (§ 87*)—PROPERTY OF STATE INSTITUTIONS—CONTROL BY STATE.

As to property held by public corporations for public purposes the power of the Legislature is supreme, but, while it may prohibit such corporations from accepting property as trustee or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Index

er a private grant, yet when the trust has once been accepted it cannot divert it to purposes other than that of the trust.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 87.*]

CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS OF LAW—DEPRIVATION OF BENEFICIAL INTEREST IN TRUST PROPERTY.

Where land was given to a state hospital in trust to provide extra comforts for patients therein, act of the General Assembly approved February 20, 1906 (Laws 1906, c. 48), directing a special board of directors, under supervision of the general state board, to construct on such land buildings suitable for a colony of epileptic patients, and Act March 12, 1908 (Laws 1908, c. 195), providing that if the general board shall think it proper the hospital should sell such land and purchase other land for the same purpose, were unconstitutional and void as a deprivation of property rights in the trust fund without due process of law, and would be so whether the trust was legal or not, since if unlawful the property would be in the heirs of the donor.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 763, 765, 767-770, 772-777, 779-806, 808-810, 816-824, 907-924, 942; Dec. Dig. § 278.*]

INSANE PERSONS (§ 92*)—SUIT—PARTIES.

Where a will gave real property in trust to a hospital for specified purposes and was duly admitted to probate, and in an action by the committee of an insane patient of such hospital to protect his beneficial rights and prevent a misappropriation of the fund the validity of the will was not questioned, the heirs at law were not necessary parties.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 161, 162; Dec. Dig. § 92.*]

COSTS (§ 96*)—PERSONS LIABLE — PUBLIC OFFICERS.

The trustees of a state hospital and the general board of the state hospital for the insane, who are public officers of the state represented by the Attorney General, and having no personal interest in a suit to protect the beneficial rights of a patient in a trust fund held by the hospital, were not liable to costs where an adverse judgment was rendered against them.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 380; Dec. Dig. § 96.*]

Appeal from Circuit Court, Augusta County.

Action by A. Stuart Robertson, committee of Joseph S. Rowe, an insane person, against the General Board of State Hospitals for the Insane, the Western State Hospital, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The facts leading up to this litigation are these: The will of Sidney R. Murkland, which was duly admitted to probate in the circuit court of Amherst county, Va., after providing for the payment of funeral expenses and debts, gives "To 'Trustees State Hospital, Staunton, Va.," where my son Sidney Price Murkland is now cared for, the entire balance of my property, real and personal, the income from which to be used by said trustees for purchase extra comforts patients said Hospital for all time."

Testator's estate consisted of a small amount of personal property and some real estate in the city of Lynchburg, and a farm containing 150 odd acres situated in Amherst

county. The Western State Hospital, having accepted the trust, brought suit in the corporation court for the city of Lynchburg against the administrator with the will annexed, the other beneficiaries under the will, and creditors, to administer the estate. The Amherst county property was sold by a decree of the court to the Western State Hospital for \$17,025, of which sum the hospital paid to the court's commissioner \$3,500, the amount necessary to discharge the unpaid indebtedness of the estate and costs and expenses of litigation. The court in confirming the sale decreed that the balance of the purchase money "is under the will of S. R. Murkland, deceased, the property of the said Western State Hospital," and therefore directed a conveyance of the land to be made to the hospital, which was accordingly done.

By an act of the General Assembly, approved February 20, 1906 (Laws 1906, c. 48), the special board of directors of the Western State Hospital were authorized and directed, under the supervision and control of the general Board of Directors of the State Hospitals of Virginia for the Insane (hereinafter called the General Board), to "erect on the Murkland land" suitable buildings, etc., for the establishment of a colony for the reception, care, treatment, training and employment of 300 epileptic patients. No action was taken under the foregoing act, and at the next session the General Assembly passed another act, approved March 12, 1908 (Laws 1908, c. 195), which provided that if in the opinion of the General Board it should appear proper the Western State Hospital should sell and convey the whole or any part of the "Murkland land," and with the proceeds purchase other lands in Amherst county for the purposes of said epileptic colony. Thereupon the General Board directed the Western State Hospital to make sale of the "Murkland land" for the purposes aforesaid.

The Western State Hospital then filed its bill in the circuit court of the city of Richmond against the General Board, reciting the foregoing facts and charging that the "Murkland land" in its hands was impressed with a trust in favor of the inmates of the Western State Hospital, as declared by the will of Sidney R. Murkland, deceased, under which to the extent of \$14,000 the land was acquired, that the trusts declared in the will were clear, definite, and legal, and that complainant was competent to execute the trusts, etc. The object of that suit was to determine the question of the power of the General Assembly to enact the foregoing statutes authorizing the General Board to divert the trust property from the purposes to which it, or its proceeds, had been dedicated by the testator's will.

The General Board demurred to the bill upon the ground that the suit was in effect a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

suit against the state, and a suit by one branch or arm of the state government against another branch or arm of the state government, and therefore that the circuit court of the city of Richmond was without jurisdiction to hear and determine the case. The circuit court sustained the demurrer and dismissed the bill, and its decree was affirmed on appeal to this court. *Western State Hospital v. General Board of State Hospitals for the Insane*, 112 Va. 230, 70 S. E. 505.

Caskie & Caskie, of Lynchburg, and the Attorney General, for appellants. Timberlake & Nelson, of Staunton, for appellee.

WHITTLE, J. (after stating the facts as above). The present suit was instituted by the appellee, A. Stuart Robertson, committee of Joseph S. Rowe, an insane person, against the Western State Hospital, trustee under the will of Sidney R. Murkland, deceased, the General Board, and the individual members thereof. The bill alleges that Joseph S. Rowe had been adjudged a lunatic in the county of Augusta, the place of his residence, and had been committed to the Western State Hospital for care, maintenance, and treatment, and still is an inmate of that asylum, and that he is one of the beneficiaries of the trust created by the Murkland will, and has such property interest in the trust subject as to entitle his committee to invoke the jurisdiction of a court of equity to establish the trust and protect the trust property from the misappropriation sought to be made of it by the General Board under the authority of the acts of the General Assembly above mentioned; that said acts are not only in contravention of the state Constitution, but are also violative of the fourteenth amendment of the Constitution of the United States, in that they deprive the lunatic of property rights without due process of law and deny to him the equal protection of the law; and that the proposed diversion is tantamount to taking private property for public use without just compensation. The bill prays that the will be construed and that its true meaning and intent be declared; that the land conveyed by the commissioner of the corporation court of Lynchburg to the Western State Hospital be held to be impressed with the trust declared by the Murkland will in favor of the lunatic Joseph S. Rowe, and other inmates of the asylum similarly situated; that the Western State Hospital as trustee be required to administer the trust in accordance with the provisions of the will; and that the General Board be declared to be without lawful authority to direct any disposition of the land in conflict with the disposition thereof made by the testator in his will.

The General Board and the Western State Hospital demurred to the bill, and appealed from two decrees of the circuit court of Augusta county; one overruling the demurrer

(but giving the defendants leave to answer the bill), and the other granting the relief prayed for.

Several grounds of demurrer are assigned, but, as interpreted by appellants in their petition for appeal, they practically resolve themselves into two propositions, namely: (1) That the committee has no authority to maintain the suit, because the estate of the lunatic is not involved; and (2) that this is "a suit against a public corporation or board, created and existing for purely governmental purposes, and as mere agencies of the state, composed exclusively of persons who have no personal interest in the subject-matter, and are only acting as an arm of the commonwealth, whatever its form, is in effect a suit against the state."

[1] 1. The statute provides for the appointment of a committee for a person found to be insane (Code, § 1697), and declares that such committee "shall be entitled to the custody and control of his person (when he resides in the state, and is not confined in a hospital or jail), shall take possession of his estate, and may sue and be sued in respect thereto. * * * He shall take care of and preserve such estate and manage it to the best advantage. * * *" Section 1702.

In *Bird's Committee v. Bird*, 21 Grat. (62 Va.) 712, it was held that every suit respecting the person or estate of the lunatic must be in the name of the committee, unless his interests are adverse to the lunatic, in which case it shall be brought in the name of the lunatic by his next friend approved by the court.

We need hardly stop to discuss the proposition that the right of maintenance, either entire or partial, in a trust fund, constitutes such a proprietary right in the fund as entitles the beneficiary to the protection of the courts with respect to it. The contrary doctrine would outlaw all settlements made for support and maintenance and lead to untold mischief.

[2, 3] 2. The vice in the second ground of demurrer is that it fails to distinguish between a suit against the Western State Hospital in its public governmental capacity, and a suit against it in its private capacity as trustee under the Murkland will. In the former character a suit against it would be a suit against the state, and such suit cannot be maintained by an individual unless the state chooses to waive its immunity and submit itself to the jurisdiction of the courts. On the other hand, that the Western State Hospital, in its private capacity, is suable, is equally plain. In this instance it has seen fit to accept the trust, and stands upon the same footing with respect to it as any other trustee. *Vidal v. Girard*, 2 How. 128, 11 L. Ed. 205; *Barnum v. City of Baltimore*, 62 Md. 293, 50 Am. Rep. 219; *Regents v. Detroit Young Men's Society*, 12 Mich. 138; *Philadelphia v. Fox*, 64 Pa. 169.

The foregoing distinction has been repeatedly recognized by the decisions of this court. Thus, in *Dunningtons v. President and Directors of the Northwestern Turnpike Road*, 6 Grat. (47 Va.) 160, it was held that the defendant, a public corporation, was liable to be sued for work and labor performed and materials furnished for the corporation by the plaintiff.

So also, in *Eastern Lunatic Asylum v. Garrett*, 27 Grat. (68 Va.) 163, an action of trover was maintained against the asylum for food supplies taken from the plaintiff during the Civil War by the United States forces and sent to the asylum and used for the support of the inmates. And in *Blanton, Com., v. Southern Fertilizing Co.*, 77 Va. 335, the same principle was maintained. See, also, *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623.

In *Mala's Adm'r v. Eastern State Hospital*, 97 Va. 507, 34 S. W. 617, 47 L. R. A. 577, it was held that the asylum was not liable in damages for personal injuries inflicted on one of the inmates by the negligence of persons administering the powers of the corporation. But in that case the decision in *Eastern Lunatic Asylum v. Garrett*, supra, is expressly approved.

Appellants claim much wider scope for the decision in *Western State Hospital* against the General Board than is warranted by the opinion. In that case the court merely held that the circuit court of the city of Richmond possessed only such equity jurisdiction as is conferred upon it by statute, and rested the decision on the ground that it was without jurisdiction to entertain the suit in the particular case; the parties to the record both being public corporations created for governmental purposes.

[4] We deem it unnecessary to prolong this opinion by a more extended review of the authorities. With rare exceptions they recognize the obvious distinction between the control which the Legislature may exercise over property held by a public corporation for public purposes, and of property held by such corporations as trustee under private grant, with restrictions and trust limitations imposed by the grant. In the former case the power of the Legislature over the property is supreme; in the latter, it may prohibit the public corporation from accepting the trust, but, when once accepted, the trust subject must be applied to the purposes to which it has been dedicated by the grantor.

[5] On the merits of the case we entertain no doubt that the two acts of the General Assembly authorizing the General Board to divert to a distinctly different object private property donated by the Murkland will to a well-defined valid trust are wholly unconstitutional and void. The subject-matter of

the trust was the absolute property of the testator, who saw fit, through the medium of a trustee of his own selection, to appropriate the income arising therefrom to a designated class of unfortunate persons, and not to the public. In these circumstances, it would indeed be a dangerous doctrine to hold that the General Assembly has power to seize upon private property thus dedicated and appropriate it to a wholly different purpose, however meritorious such purpose may be. If the trust declared by the Murkland will is lawful, the beneficiaries have property rights in the trust subject which cannot be taken away from them by the Legislature. If, on the contrary, the trust is unlawful, the property belongs to the heirs at law of Sidney R. Murkland, deceased, and is equally under the protection of the law. So that, in no aspect of the case, can the contention of appellants prevail.

[6] The Attorney General for the first time in his closing argument raised the question that the decree should be reversed because the heirs at law were not made parties. It would have been better practice had this objection been made at the beginning of the litigation rather than at the close; but the objection is without merit. The will has long since been duly admitted to probate and its validity is not questioned, and the contentions of both litigants rest upon the validity of the donation. In such case, the heirs at law of the testator are not necessary parties.

[7] The last assignment of error goes to that part of the decree which awards costs against the defendants. Appellants are public officers of the state, and have no personal interest in the litigation, and were represented by and acted under the advice of the Attorney General. We are of opinion that costs ought not to have been awarded against them. To that extent, therefore, the decree of October 28, 1911, will be amended, and with that amendment the two decrees appealed from must be affirmed.

Affirmed.

MUTUAL FIRE INS. CO. v. TURNER.

(Supreme Court of Appeals of Virginia.

Nov. 20, 1913.)

1. INSURANCE (§ 195*)—FIRE INSURANCE—MUTUAL COMPANIES—NOTICE OF ASSESSMENT.

Where the charter of a mutual assessment fire company, which was made a part of the contract between the parties, provided that each member of the association should be notified of the assessment, at least 30 days before the last day of payment, by mailing such notice to the post office address given by the member in the application for insurance, and that in case of change of address the member should in writing furnish the secretary with his new address, and the insured, who was not then living at her old address, had not notified the secretary of any change, the fact that the company sent the notice, which it had previously sent on postcards

that might be forwarded, in an unsealed letter which could not be forwarded, and for that reason it was not received, will not relieve insured from a forfeiture of her policy because of non-payment of assessments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 427-429, 433, 434; Dec. Dig. § 195.*]

2. INSURANCE (§ 195*)—FIRE INSURANCE—WAIVER.

Where the charter of a mutual fire insurance company merely required it to give notice of assessments by mail, the fact that for the past two years it had given notice by postcard is not a waiver of its right to give notice by second-class mail which cannot be forwarded as a postal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 427-429, 433, 434; Dec. Dig. § 195.*]

3. INSURANCE (§ 669*)—ACTION—INSTRUCTIONS—FORM OF INSTRUCTIONS.

In an action against a mutual assessment fire company where it was contended that the method of giving notice of assessment to the insured was not proper, the instructions should submit the issue in that form and not whether the notice should have been given in the manner previously followed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.*]

4. INSURANCE (§ 669*)—FIRE INSURANCE—ACTIONS—INSTRUCTIONS.

In an action against a mutual assessment fire company, instructions requested by defendant on the necessity for the insurer to give notice of assessments held correct and improperly refused.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.*]

5. INSURANCE (§ 392*)—FIRE INSURANCE—WAIVER OF FORFEITURE.

Where a mutual assessment fire company reinstated insured's policy after default in payment of assessments, the reinstatement which came after the insured had discharged a lien on the premises is a waiver of the original ground of forfeiture on account of the lien.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.*]

6. EVIDENCE (§ 441*)—PAROL EVIDENCE TO VARY WRITTEN INSTRUMENTS—ADMISSIBILITY.

In an action on a fire policy, parol evidence that the written application did not contain some of the terms found therein at the time the insured's agent signed it is inadmissible, being an attempt to vary a written instrument by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

Error to Circuit Court, Clarke County.

Action by Harriot S. Turner against the Mutual Fire Insurance Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

A. Moore, Jr., of Berryville, Edward Nichols, of Leesburg, and Moore, Barbour, Keith & McCandlish, of Fairfax, for plaintiff in error. Ward & Larrick, of Winchester, and F. B. Whiting, of Berryville, for defendant in error.

HARRISON, J. This suit was brought by Harriot S. Turner to recover of the plaintiff in error \$1,000, the amount of an insurance policy, against loss by fire issued by it upon certain real estate owned by the plaintiff.

Two defenses were made by the defendant company: (1) That the plaintiff failed to pay an assessment ordered by the board of directors, which was due December 31, 1910, and that after that date, under the terms of the policy, it was suspended and had no force or effect at the date of the loss; (2) that, contrary to the plaintiff's statement and representation in her application for the insurance, there was, at the time of such application, a lien on the property created by the plaintiff.

There was a verdict and judgment in favor of the plaintiff, which we are asked to review.

The defendant is a mutual fire insurance company, organized under a charter granted by the state of Virginia. Acts 1897-98, p. 17. The application for the policy sued on contains the following covenant: "That this application and the policy to be issued, embracing the property above described, shall be taken and construed in connection with the charter of said company, its constitution and by-laws, as embodying the entire final contract between the undersigned and said company." The defendant company has no paid-up capital. Persons insuring pay a premium in advance for the first year's insurance and also give to the company what is termed a premium note, which is subject to such assessments as may be necessary, in the discretion of the board of directors, to discharge the obligations and liabilities of the company. All persons insured by the company become members thereof and are bound to the company and to each other to make good their proportionate amount (which shall be in proportion to the amount of their several premium notes) of any loss or damage by fire or lightning for which the company is liable. The purpose is not to make money but by means of the organization to secure protection against fire at the least possible cost. To accomplish this, prompt payment of assessments to pay losses is essential. Under the method of operation adopted by the company, all premiums on all policies were calculated to the 1st day of January every year, and all assessments were made in advance and made payable on or before the 31st day of December of each year, and, unless paid on or before that day, the insurance became suspended under the provisions of the contract.

The sixth by-law provides, "In the event of default in the payment of any assessment which may at any time be made on the premium notes given to and held by this company on or before December 31st of each year, as to the annual assessment, * * * then the policy of such delinquent member shall be

suspended and be not binding on the said company until payment of such assessment or assessments shall be made;" and further provides, "But payment of such delinquent assessment or assessments shall, in no case, entitle the assured to the benefit of a loss or damage sustained during such suspension;" and provides further that notice of such assessment shall be mailed to the assured at least thirty days before the final or last day for payment thereof."

This by-law is enacted in pursuance of the express authority to that effect contained in section 12 of the act of incorporation. Section 11 of the charter provides that the board of directors "shall before the commencement of each fiscal year, at such time as it deems proper, make an approximate estimate of the amount of money which said company is likely to need during the next fiscal year * * * and how much of said premium note or bond will probably be required to discharge all said liabilities, losses, claims and demands, and shall call on the insured to pay the same by such time as may be specified in the order or by-laws."

* * Each member shall be notified of the rate of assessment, payment of which is called for and the time in which it is required to be made, at least thirty days before the final or last day of payment. Mailing such notice to the post office address given by the member in the application for insurance (and in case of change of the name, such address as the member shall in writing furnish the secretary) shall in all cases be sufficient notice to such member."

The application of the insured contains the stipulation and agreement that all the answers to the questions therein propounded shall be construed as material in all cases.

The record shows that on October 7, 1907, George E. Pfaster, acting on behalf of his mother-in-law, the plaintiff in this suit, made application in writing to the defendant company for insurance to the amount of \$1,000 on a certain tenant house situated on her farm in Clarke county. The policy was issued in the name of the plaintiff, Harriot Turner, and a premium note for \$200 was executed in her name by Pfaster. The cash payment made at the time of the insurance carried the policy for 14 months and 23 days to January 1, 1909; as already seen, all premiums being calculated to that day on each year and made payable on or before December 31st. It appears that the insured did not pay her premium assessed in the year 1908 for 1909 until some time after it was due. She did, however, subsequently pay it, and thereupon her policy, which had been suspended, was reinstated. The premium assessed the next year (1909) for the year 1910 was paid within the time prescribed by the by-laws. The next premium due was that assessed in 1910 for the year 1911. This premium was due December 31, 1910, and

was not paid, and the policy became suspended. The premium remained unpaid, after the policy was suspended, until January 9, 1911, when the property insured was destroyed by fire. It thus appears that the plaintiff was called upon but three times after she became a member of the company to pay her annual assessment, and that on two of these occasions she was in default. Her indifference to paying her premiums when due is further shown by her own testimony, wherein she admits her knowledge of the fact that, under the rules of the company, the premium for 1911 was due and payable on or before December 31, 1910, and yet she took no notice of it, saying: "Why should I bother myself about their business; it is their business to notify me and I don't intend to pay until I am notified."

In her application for insurance the plaintiff stated, in answer to a question, that her post office address was "Bluemont, Va." This information for the guidance of the company was acted upon, and each of the three notices of assessment that the company was called upon to give the plaintiff was sent to that address. The record shows that the plaintiff had a home at Bluemont, Va., where she lived a large part of the year. Her son-in-law, George E. Pfaster, and his wife, her daughter, lived at this home with her. She also maintained a home in the city of Washington, where she spent a portion of her time. She appears to have spent much of her time traveling about and was absent from her Bluemont home at the time the third and last assessment was sent to that address in accordance with the directions contained in her application for insurance. Before leaving home she directed the postmaster at Bluemont to forward her mail. The record shows that her home at Bluemont was on a free delivery route, with a mail box in front of her house with her name upon it, and that the notice now in question was delivered there and received by her son-in-law. The two first notices of assessment sent to the plaintiff were by postal cards, and it appears that it had been the practice of the company generally to send these notices in the form of postal cards. The third notice now in question was mailed to every member of the company, including the plaintiff, in the form of a printed circular inclosed in an open one-cent envelope, with the return request of the company printed thereon. It also appears that postal cards are first-class mail matter and, upon request of the addressee, can be forwarded from one post office to another, whereas printed notices mailed in unsealed stamped envelopes with a one-cent stamp on them cannot be forwarded without the payment of additional postage, but that in all other respects they are treated as first-class matter.

[1] Upon these facts bearing on the giving

of the notice by mail, as submitted by the charter, the circuit court, over the objection of the defendant, gave instruction No. 1 for the plaintiff, as follows: "If the jury believe from the evidence that the defendant had, before November, 1910, sent its notices of assessment by postal card or in such way that the mail could be forwarded by the local postmaster and such had been its custom and practice, and that the plaintiff had received such notices and they were so stamped that they could be forwarded, and that Mrs. H. S. Turner, the plaintiff, had directed the postmaster at Bluemont to forward her mail to her, and he had forwarded all of her mail which under the post office regulations could be forwarded, and that the defendant company in 1910 changed its rule and, instead of sending notice of assessment by postal or in such a way that such notices could be forwarded the addressee, it sent such notices in a printed circular and put it in a one-cent envelope which was not forwardable under the post office regulations, and that she (the plaintiff) had no notice of such change and did not receive the printed circular, and she had relied upon the custom and practice of the company in the ordinary course of business to mail its assessment notices to its policy holders in first-class mail, and such method was the proper and ordinary course of business to pursue, which reasonable and ordinary business prudence required, if because of the change of method of mailing the notice was not forwarded to and received by the plaintiff, or any one authorized by her to receive the same, then this change of method of mailing was not sufficient and is not a good defense to this action."

We are of opinion that this instruction is erroneous and should not have been given. It ignores the contract between the parties, which was that: "Mailing such notice to the post office address given by the member in the application for insurance (and in case of change of the same, such address as the member shall in writing furnish the secretary) shall in all cases be sufficient notice to such member." Charter, § 11.

It is not pretended that the plaintiff ever intimated to the company in writing or otherwise that she had changed her post office address as given in her application. This provision of the contract shows that it was within the contemplation of the parties that, if the insured changed her post office address, it was her duty to notify the secretary of the company, so that notice could be sent her without extra expense. Giving notice in writing to the secretary of the company of any change in the plaintiff's post office address was, under the express terms of the contract, essential in order to impose any duty upon the company with respect to such new address. The company had no knowledge that

the plaintiff was absent from home or that she had instructed the postmaster at Bluemont to forward her mail, and if it had known these facts it would have been under no contract obligation to put sufficient postage upon the notice to enable the postmaster to forward the same to such address as the plaintiff might direct. The company discharged its entire contract obligations with respect to this notice when it placed the envelope inclosing the same in the post office at Waterford, Va., its home office, with sufficient postage thereon to secure its transmission to the post office at Bluemont, Va., the post office address given by the plaintiff in her application.

[2, 3] The facts do not justify the suggestion of this instruction that the jury might consider whether the defendant had waived its contract rights by some previous habit of the company to send out notices by postal card, or that the company had changed its rule with respect to mailing notices by postal card. The contract by which the parties are bound contains no provision obligating the company to send these notices by postal card or in any other designated way. The evidence does not show any rule of the company on the subject, nor does it establish any custom with respect to the method. So far as the plaintiff is concerned, she had only received two notices prior to the one in question, which was wholly insufficient to justify her in supposing that the company had adopted as a rule the postal card method of sending notices and would never employ any other method. This instruction is further erroneous in submitting to the jury the question whether or not mailing notices by first-class mail was the proper and ordinary course of business to pursue which reasonable and ordinary business prudence required. If any question of reasonableness should have been submitted to the jury at all, it should have been the reasonableness, not of a rule that had not been followed in the case then before them, but the reasonableness, under all the circumstances, of the method which was followed. It was, however, not a question of the reasonableness of either method. The only question was whether or not the defendant had deposited the notice in the post office with sufficient postage paid thereon to insure its delivery at the post office which the plaintiff had given. This was all that the contract required and all that the plaintiff was entitled to demand.

[4] The converse of the propositions contained in instruction No. 1, for the plaintiff, is contained in the following instructions asked for by the defendant, which the court refused to give:

"(L) The court instructs the jury that if they believe from the evidence that the plaintiff, at the time of her application for the policy in litigation, either by herself or through her agent, gave as her post office

address Bluemont, Va., and that she has not since, by written notice to said company, directed a change to be made in such address, and if they further believe from the evidence that on or before the 30th day of November, 1910, a notice setting forth the rate of assessment fixed by the board of directors to meet the expenses of the company for the year 1911, and the time by which the assessment was to be paid, was put in an envelope addressed to the plaintiff at Bluemont, Va., and deposited in the post office at Waterford, Va., the place of the home office of the defendant company, for transmission to the plaintiff, duly stamped, and that the plaintiff did not prior to the occurrence of the fire by which the building insured was destroyed pay to the defendant said assessment, then they shall find for the defendant; the court instructing the jury that it is immaterial whether or not said notice was actually received by the plaintiff or not."

"(M) The court instructs the jury that mailing such form of notice of assessment as has been proven to have been used by the defendant company in this case, in giving its members notices of the assessment for the year 1911, inclosed in an unsealed envelope with a one-cent postage stamp attached, constitutes a sufficient mailing of such notice, if the jury further believe from the evidence that such notice was addressed to the plaintiff at the post office address furnished to the company in accordance with its by-laws and regulations at least 30 days before the said assessment became payable."

"(N) The court instructs the jury that in the application of the assured for membership in the defendant company, which is the foundation of the policy sued on in this case, the post office address of the assured is given by her as Bluemont; and the court further instructs the jury that there is no evidence in this case tending to show that said post office address was subsequently changed by means of notice in writing to the defendant company; and if the jury believe from the evidence that the board of directors of the defendant company fixed the assessment on its members for the year 1911, and that the by-laws of the company prescribed that the same should be paid on or before December 31, 1910, and that on or before the 30th day of November, 1910, the defendant company caused printed notice of the rate of said assessment and the time fixed for payment of the same to be deposited in the post office at Waterford, Va., addressed to the plaintiff at Bluemont, with sufficient postage thereon to pay for its transmission to Bluemont, Va., and that the said plaintiff failed to pay the said assessment prior to the date of the destruction of the insured building, they will find for the defendant; the court instructing the jury for the purposes of this case that it is immaterial whether the

said plaintiff ever actually received said notice or not."

Without further comment it is sufficient to say that these three instructions asked for by the defendant correctly state the law of the case presented by the record and should have been given.

[5] The action of the circuit court in giving instruction No. 3, asked for by the plaintiff, is assigned as error. That instruction is as follows:

"No. 3. The jury are instructed that, if the plaintiff had paid off and discharged the deed of trust on the property in October, 1909, and that thereafter the policy was regularly continued in force by payment of the premium in 1909, and neither since that date nor at the time of the fire was there any lien on the property, the jury are instructed that the existence of the lien at the time of the policy worked no forfeiture thereof."

The objection to this instruction is not well taken. The record shows that the lien which was on the property at the time of the issuance of the policy was paid off on October 27, 1909, and that after it was so paid off the company collected the premium for 1910 and reinstated the policy and assessed it as a policy in force for 1910. Under the constitution and by-laws, which are a part of the contract between the parties, the payment of each annual assessment is a renewal of the policy. When, therefore, the plaintiff paid in 1909 the premium for 1910, it renewed the policy for another year, and at the time the insurance was thus renewed for the year 1910 there was no lien upon the property and none has been created since.

[6] It is further insisted that the court erred in permitting the witness George E. Pfister, who signed the application and the premium note on behalf of the plaintiff, to testify that both the application and the note were in blank when he signed them, and further to testify that the word "none," in answer to the question in the application with respect to incumbrances, was not in his handwriting and was not put there at his direction. This evidence was not objected to until the witness had left the stand, when the court was asked to exclude it upon the ground that it was an attempt, by parol evidence, to alter and vary the terms of a written contract.

The evidence was clearly inadmissible. *Southern Mutual Ins. Co. v. Yates*, 28 Grat. (69 Va.) 585. The learned judge of the circuit court recognizes that this evidence was not admissible, certifying in bill of exceptions No. 1 that it was all excluded by instructions Nos. 2 and 3. Those instructions do not in terms exclude the evidence, but their effect is to do so. Further consideration of this matter is, however, unnecessary, because the case must be remanded, and, if another trial is had, the evidence objected to will not be admitted.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded to the circuit court for a new trial, if the plaintiff be so advised, to be had not in conflict with the views expressed in this opinion.

Reversed.

ISAACS v. ISAACS et al.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

DIVORCE (§ 256*)—DECREE FOR ALIMONY—LIEN OF DECREE.

Where a wife was given a decree of divorce from bed and board, with an award of a specified monthly sum as permanent alimony, and decreeing a lien on the husband's lands therefor, as well as for the unpaid temporary alimony formerly granted and for counsel fees and costs, such lien cannot be affected by a decree of absolute divorce rendered in another state in favor of the husband, even though the foreign court had jurisdiction of the parties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 725, 726; Dec. Dig. § 256.*]

Appeal from Circuit Court, Russell County.

Suit by S. F. Isaacs, as guardian, against G. G. Isaacs, in which Minnie L. Isaacs, who was made a party defendant, filed a cross-bill against S. F. Isaacs and others. From a judgment for complainant, defendants appeal. Reversed.

Vicars & Peery, of Wise, and W. W. Bird and Routh & Routh, all of Lebanon, for appellants. Finney & Wilson, for appellee.

KEITH, P. The bill in this case was filed by S. F. Isaacs as guardian of certain infant defendants, setting out that G. G. Isaacs, the former guardian of the infants, had confessed a judgment as such guardian in the circuit court of Russell county for the sum of \$1,811.75, with interest from March 13, 1909, and praying that certain real estate of the defendant in the counties of Russell and Wise might be sold and the proceeds applied to its satisfaction. This bill was filed at the first April rules, 1909, and on the 18th day of May of that year Minnie L. Isaacs filed her petition, in which she alleges that the judgment set forth in the bill is fraudulent and void, so far as her rights are concerned, and was confessed for the purpose of hindering and delaying her in the enforcement of a decree for alimony and suit money, rendered in her favor upon her bill filed in the circuit court of Wise county, in which G. G. Isaacs was defendant.

In the divorce suit J. H. Darter was appointed to receive any money decreed to Minnie L. Isaacs for her support and that of her infant children, and the prayer of her petition is that she and J. H. Darter may be made parties defendant to the bill filed by S. F. Isaacs for the enforcement of his judgment against G. G. Isaacs.

The pleadings are in a confused state by reason of the several bills, answers, and cross-bills which were filed, and without going into them in detail we shall content ourselves with stating that in the divorce suit in Wise county a decree was entered on the 11th of July, 1908, enjoining and restraining G. G. Isaacs from selling or in any way disposing of any of the property, either real or personal, set forth in the bill of complaint, "so the said property both real and personal, and said estate shall be forthcoming to meet any decree which may be made in this cause."

On the 11th of January, 1909, a further decree was entered in the divorce suit in Wise county, in which it was decreed that the defendant pay to J. H. Darter, receiver, the sum of \$40, "temporary alimony for the month of January, \$10 having been paid in cash to complainant, and that the said defendant pay to J. H. Darter, on the first day of each month until the further order of this court, the further sum of \$50 per month for temporary alimony for complainant; and the said J. H. Darter is hereby ordered to pay unto said complainant the sum of \$10 in cash each month out of the said money received by him for the defendant and to furnish to complainant such wearing apparel and supplies as complainant may desire for herself and children to the amount of \$40 each month, the residue of the said alimony hereby directed to be paid; and the said J. H. Darter is directed to furnish an itemized account of the supplies and wearing apparel furnished complainant pursuant to this order, and to file the same in the papers of this cause on the first day of the next term of this court."

Next in order after these decrees comes the confession of judgment set out in the original bill filed by S. F. Isaacs, dated February term, 1909, for \$1,811.75, with interest from the 12th of March, 1909, and costs.

On the 4th of February, 1910, a further decree was entered in the circuit court of Wise county, in which it is adjudged and ordered that "Minnie L. Isaacs be and she is hereby granted a divorce from bed and board from the defendant, G. G. Isaacs, and the complainant and defendant be and they are hereby perpetually separated. And it is further adjudged, ordered, and decreed that the restraining order heretofore rendered herein on the 11th day of July, 1908, be and the same is hereby perpetuated, and that the defendant, G. G. Isaacs is perpetually enjoined and restrained from in any way interfering with said complainant and her infant children mentioned in said bill of complaint, or of doing any violence to them, or either of them, and that said defendant is also perpetually enjoined and restrained from selling or in any way disposing of any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the property, real or personal, named and set forth in said bill of complaint, during the lifetime of complainant, and that said property, both real and personal, be and the same is hereby held as security for the payment of the alimony hereinafter decreed in favor of complainant, as well as the alimony heretofore decreed in favor of complainant, and the costs of this suit, and the unpaid attorney's fee adjudged to be paid by the defendant, G. G. Isaacs, to counsel of complainant for their services in the prosecution of this suit. And it is further adjudged, ordered, and decreed that the defendant, G. G. Isaacs, do pay to complainant the sum of \$50 per month, due and payable on the first day of each and every month from the date hereof during the lifetime of complainant, as well as the alimony heretofore decreed to be paid to her, and that said defendant shall pay unto Vicars & Peery and H. A. Routh, attorneys for complainant, the sum of \$150 counsel fees, the said defendant having heretofore paid to the said Vicars & Peery on account of counsel fees the sum of \$50, the court being of opinion that the sum of \$200 is a reasonable sum to be paid by the said G. G. Isaacs, defendant, as counsel fees to the said attorneys of complainant for their services in the prosecution of this suit. And it further appearing to the court, from the report of J. H. Darter, receiver, filed herein, that the defendant, G. G. Isaacs, has only paid the sum of \$140 on account of temporary alimony heretofore adjudged and decreed to be paid by him to the said J. H. Darter, receiver, for the benefit of complainant, by decree rendered herein on the 11th day of January, 1909, and that the said G. G. Isaacs has refused to pay the said alimony and comply with the terms of said decree of January 11, 1909, aforesaid, and that there remains now unpaid on account of said temporary alimony the sum of \$510, with interest thereon from the date hereof, it is therefore adjudged, ordered, and decreed that complainant recover against defendant the said sum of \$510, with interest thereon from the date hereof, and her costs about the prosecution of this suit in this behalf expended * * *—and the decree further directed that, unless the sum decreed were paid within 30 days, H. A. Routh should sell the property in the bill and proceedings mentioned, or a sufficient part thereof, at public outcry at the front door of the courthouse of Russell county, at Lebanon, to satisfy and discharge the said sum of \$510, with interest, and the costs of the suit, and the sum of \$150 decreed to be paid as attorney's fee for the complainant, and all of the unpaid alimony due and unpaid at the time of the sale, under the terms of the decree of February 4, 1910.

Such was the condition of affairs when G. G. Isaacs, in a supplemental answer to the cross-bill filed by Minnie L. Isaacs in the Russell county suit, appeared with what

seems to be the transcript of the record of a suit in the circuit court of Harlan county, Ky., from which we gather that on or about March 21, 1910, George G. Isaacs, claiming to be a resident of and domiciled in Harlan county, Ky., filed his petition, setting forth his marriage with the defendant, Minnie L. Isaacs, that she had abandoned and deserted him, and had been guilty of adultery with certain persons, one of whom is named in the petition. An amended petition was filed setting out his case more at large. The defendant was cited to appear, and did appear by counsel, and filed her answer, in which she denies that the plaintiff ever had any residence in the state of Kentucky, denies all charges of abandonment and adultery made against her, sets forth the proceedings in the circuit court of Wise county; and in fact, we may say, she puts in issue every allegation of the petition, with the result that the Harlan county court entered a judgment dissolving the bond of matrimony theretofore existing between the plaintiff and defendant and restoring the plaintiff, George G. Isaacs, to all the rights and privileges of an unmarried person, and further adjudging that "the parties hereto, and each of them, are ordered and directed to restore to the other all property not disposed of at the commencement of this action which they may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof."

On December 13, 1910, in the circuit court of Russell county, the cases of S. F. Isaacs, Complainant, v. G. G. Isaacs, Defendant, and Minnie L. Isaacs, Complainant, v. G. G. Isaacs and Others, Defendants, on cross-bill, were brought on to be heard together, upon depositions taken and filed in the cause, and upon the supplemental answer of Isaacs to the cross-bill, upon the exhibit of Harlan circuit court proceedings filed with the answer, to the filing of which supplemental answer Minnie L. Isaacs objected and filed exceptions, and upon the agreement of counsel representing all parties in interest. Thereupon the court, without passing upon the objection of Minnie L. Isaacs to the filing of the supplemental answer, or to the validity of the plaintiff's judgment asserted in the original bill, or to the validity of the decree for alimony, referred the case to a commissioner to ascertain and report "what land the said G. G. Isaacs is now seised of, subject to the liens asserted against him in this cause, what of the lands have been sold that are set forth and described in complainant's bill since the original bill was filed in this cause, and to whom sold and for what purpose, and upon what debts, if any, what said land brought, and what purchase money has been paid, and to whom paid, and rental value of all lands now owned by the said G. G. Isaacs in the counties of Russell and Wise, whether or not there are any unpaid taxes

thereon, and all liens of all character against the said G. G. Isaacs, together with what land he owns subject to said liens."

On the 17th of April, 1911, the commissioner in chancery filed the report called for in that decree. To this report Minnie L. Isaacs excepted, because it reports against G. G. Isaacs a judgment alleged to have been confessed at the February term, 1909, of the circuit court of Russell county, and the charge made by exceptant in her answer and cross-bill that this judgment was confessed for the purpose of hindering, delaying, and defrauding her in the collection of the amounts decreed in her favor by the circuit court of Wise county is reiterated.

This exception was overruled by the circuit court, and its decree in that respect is hereby affirmed. The evidence adduced in the record is insufficient to establish the charge of fraud.

The report was excepted to also by S. F. Isaacs and G. G. Isaacs, because the commissioner, as lien No. 2, reports the judgment in the circuit court of Wise county for the sum of \$50 a month from the 11th day of January, 1909, and the further sum of \$200, with interest from the 4th day of February, 1910, subject to certain credits stated in the report. This lien is excepted to: First, because it has been paid; and, second, because the decree under which it was asserted has been set aside and annulled. These exceptions the decree appealed from sustained, but no reason is assigned in the decree for the action of the court.

We are unable to discover in the record evidence that the decrees in favor of the appellant in the divorce suit have ever been paid and satisfied to her.

The next ground of exception is because the decree under which said lien is asserted has been set aside and annulled. The exception refers, we presume, to the proceedings in the circuit court of Harlan county, Ky. Whatever may have been the effect of the decree of that court upon the personal status of the parties, plaintiff and defendant, we shall not undertake to inquire or decide. Let it be conceded that while the Virginia court only went so far as to grant a mere separation—a divorce from bed and board and not from the bonds of marriage—the Kentucky decree rightfully, under the circumstances and proofs before it, went further and dissolved the marriage theretofore existing between the parties. It can in no wise, we think, affect the rights of property established by the courts of this state, which had full jurisdiction over the parties and the subject-matter of the suit.

We are of opinion, therefore, that notwithstanding the proceedings and judgment in the circuit court of Harlan county, Ky., the decrees of the circuit courts of Wise and Russell counties with respect to the alimony

awarded Mrs. Isaacs and the counsel fees decreed to be paid to her attorneys remained in full force and effect, and that the exception filed by S. F. and G. G. Isaacs to lien No. 2, as reported by the commissioner should have been overruled.

That the lien, to the extent that it is reported by the commissioner in favor of Mrs. Minnie L. Isaacs, is a valid and subsisting one we have no doubt; and we are not prepared to say that the chancery court, having acquired jurisdiction over the subject-matter and over the parties in the Wise county suit, and having granted a divorce from bed and board and fixed the permanent alimony of Mrs. Isaacs at \$50 a month during her life, does not override and take precedence of the judgment confessed by G. G. Isaacs after the institution of the suit and the entry of the decrees of the 11th of January, 1909, and of February 4, 1910. The question is one of great interest and importance, and should only be decided after full investigation by counsel and the court. We shall therefore content ourselves for the present with reversing the decree appealed from, in so far as it sustains the exceptions taken by S. F. and G. G. Isaacs, and will enter a decree to that effect, and directing the circuit court to refer the case to a commissioner to ascertain and report what amount is due for alimony and suit money upon a statement of the decree upon the basis heretofore considered by the commissioner in his report, and what amount would be due as alimony and suit money if the court should be of opinion that the monthly installments of alimony accrued and accruing under the decrees heretofore entered in the divorce suit constitute a primary charge upon all the real estate of G. G. Isaacs within the jurisdiction of the court.

Reversed.

BUCHANAN and WHITTLE, JJ., absent.

BRIDGEWATER MFG. CO. v. FUNKHOUSER, Revenue Com'r.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. TAXATION (§ 319*)—ASSESSMENT—IRREGULARITIES.

One whose property is liable to assessment for taxes may not evade payment for errors, omissions, or irregularities in the assessment thereof which do not prejudice his rights.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 514, 527-529, 532-534; Dec. Dig. § 319.*]

2. TAXATION (§ 378*)—PROPERTY SUBJECT TO TAX—MILLER—MANUFACTURER—CAPITAL.

Under Code 1904, p. 2195, § 8, schedule C, providing for the taxation of all capital of incorporated joint-stock companies not otherwise taxed, that when taxed in Virginia the shares of stock in the hands of individual stockholders shall not be further taxed for state purposes, and that real estate belonging to such companies shall not be held to be cap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ital, but shall be listed and taxed as property and not as capital, etc., capital employed in the business of a miller or other manufacturer is subject to taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 626-628, 632; Dec. Dig. § 378.*]

3. TAXATION (§ 378*)—PROPERTY SUBJECT TO TAX—CORPORATE CAPITAL—DEFINITION—"CAPITAL."

Code 1904, p. 2195, § 8, schedule C, subsec. 3, provides that the capital of incorporated joint-stock companies not otherwise taxed shall be assessed, and subsection 4 provides for the taxation of capital of individuals invested in any business not otherwise taxed, and that all solvent claims contracted during the preceding year shall be held to be capital in such business and shall be taxed as such. *Held*, that the word "capital" was used in subsections 3 and 4 to signify money and other property adventured in the business, whether borrowed or not, and was not limited to the original capital paid in by the shareholders on purchase of stock, less the amount invested in real estate and money borrowed by the company to be used in conducting its business (citing Words and Phrases, vol. 1, pp. 954-958; vol. 8, p. 7595).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 626-628, 632; Dec. Dig. § 378.*]

Error to Circuit Court, Rockingham County.

Proceeding by the Bridgewater Manufacturing Company against one Funkhouser, as Commissioner of the Revenue. Judgment for defendant, and plaintiff brings error. Affirmed.

Conrad & Conrad, of Harrisonburg, for plaintiff in error. The Attorney General, for defendant in error.

HARRISON, J. This proceeding was instituted in the circuit court of Rockingham county by the Bridgewater Manufacturing Company to have corrected an alleged erroneous assessment of taxes imposed upon it, which relief was denied by the circuit court.

The record shows that the complainant is a corporation, with its chief office and place of business located in Bridgewater, Rockingham county. The chief business of the company is the operation of two flour mills and one woolen mill at Bridgewater. This company paid for the year 1912 the assessments collectible through the Corporation Commission, but did not report anything and was not assessed with anything on the personal property assessment books for that year. At the November term of the circuit court, a special grand jury was impaneled to examine the books of assessment as required by section 578 of the Code of 1904. Among the persons summoned before the grand jury was the manager of the complainant company, who informed the jury that the total running capital of the company invested in its business as of July 1, 1912, was \$16,708; that of this sum \$14,000 was borrowed money; that the company could not tell what amount it had in its business as running capital as of February 1, 1912, but that it was not less than it was on

July 1, 1912. Thereupon the grand jury directed the commissioner of the revenue for Ashby district, in which the company and its business was located, to assess the company for taxation with \$16,708, the amount it had in its business as running capital during the year 1912. The aggregate tax imposed upon this assessment was \$229.64, being \$58.45 for state purposes, \$66.81 for county purposes, and \$104.38 for district purposes.

[1] The complainants make several technical objections to the time and method of this assessment, insisting that it was not made according to law. These objections are without merit. The underlying principle in such cases is that a person whose property is liable to assessment for taxes shall not be permitted to evade payment of his just proportion of the public burden by any errors, omissions or irregularities that do not prejudice his rights. *Stevenson v. Henkle*, 100 Va. 591, 595, 42 S. E. 672; *Yellow Poplar Co. v. Thompson*, 108 Va. 612, 62 S. E. 358; *Coles v. Jamerson*, 112 Va. 311, 71 S. E. 618.

It is clear from the record that the objections are not well taken and that the complainant suffered no prejudice from the method of assessing the taxes it now seeks to avoid.

[2] There is no foundation for the contention that the law does not tax the capital employed in the business of a miller or other manufacturer. That such capital is taxed clearly appears from schedule C, section 8, of the tax bill, Code, p. 2193.

[3] Upon the merits of this controversy, the complainant contends that under subsection 3 of section 8, schedule C of the tax bill, Code, p. 2195, the capital taxed is the original capital paid in by the shareholders on the purchase of their stock, less the amount invested in real estate and the money borrowed by the company to be used in conducting its business. This position cannot be sustained. The nominal capitalization of the company which is divided into shares and sold or distributed to shareholders does not necessarily bear any relation or proportion to the actual amount of capital used in the business. A corporation may and often is doing an enormous business with a vast capital employed, although its stockholders have paid in little or nothing. The capital stock of a company must be clearly distinguished from the amount of capital invested in its business, or the amount of property possessed by it. 1 Cook on Corporations, § 8.

The third and fourth subsections of section 8, schedule C, of the tax bill are as follows:

"Third. Capital of incorporated joint-stock companies not otherwise taxed; and when all of such capital is taxed by the state of Virginia, the shares of the stock in the hands of individual shareholders shall not be further taxed for state purposes; but real estate belonging to such companies shall not be held

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to be capital, but shall be listed and taxed as property, and not as capital.

"Fourth. Capital of individuals invested, used or employed in any trade or business not otherwise taxed. Moneys and credits actively used and employed in carrying on the trade or business; materials, goods, wares and merchandise on hand, and all solvent bonds, demands, or claims, made or contracted in the course of business during the preceding year, shall be held to be capital in such trade or business, and shall not be taxed otherwise than as such capital; but real estate shall not be listed as such capital, but shall be assessed and taxed as other specific property."

Subsections 2, 3, and 4 of section 8 of the tax bill each deals with capital; subsection 4 defining the term "capital" to be investments "used or employed in any trade or business not otherwise taxed. Moneys and credits actively used and employed in carrying on the trade or business; materials, goods, wares and merchandise on hand, and all solvent bonds, demands or claims made or contracted in the course of business, during the preceding year, shall be held to be capital in such trade or business, and shall not be taxed otherwise than as such capital; but real estate shall not be listed as such capital, but shall be assessed and taxed as other specific property."

The term "capital" is found in two other sections of the tax bill—that relating to merchants' licenses (Code, p. 2220), and in the section relating to oyster packers' licenses (Code, p. 2222)—and in each of these sections the foregoing definition of "capital" is repeated. Subsections 2, 3, and 4 of section 8 of the tax bill appear together, and in the last the term "capital," which is used in each, is defined. There being nothing in the context to show a contrary intention, it would seem to be clear that the meaning of "capital," as defined in subsection 4, was intended to apply also to capital as used in the preceding subsections 2 and 3.

It is a rule of construction that, when the same word is used in different parts of the same statute, the presumption is that it was used in the same sense throughout the statute, unless a contrary intention clearly appears. *Postal Tel. Co. v. Farmville, etc.*, 96 Va. 661, 664, 32 S. E. 468.

To say that the meaning of "capital" as defined in subsection 4, applied only to individuals would be to hold that the General Assembly intended to impose a less tax on corporations than on individuals for carrying on the same business. The provisions of the tax bill under consideration furnish no ground for such a conclusion. There is no difference between a business as conducted by a corporation and the same business as conducted by an individual that would warrant any different meaning to be given to the term "capital" in the two cases. Any such

discrimination would be a violation of the requirement of the Constitution that "all property, except as hereinafter provided, shall be taxed; all taxes whether state, local or municipal, shall be uniform upon the same class of subjects." Va. Const. art. 13, § 168 (Code 1904, p. cclxii).

It seems clear that the Legislature intended that the meaning given by it to the term "capital," in subsection 4, should apply to corporations as well as to individuals, and that it did not mean to limit the taxable capital of corporations to the original input of the shareholders on the purchase of their stock.

Both subsections 3 and 4 of section 8 of the tax bill provide that real estate shall not be held to be capital, but shall be listed and taxed as property. There is, however, no warrant in the statutes for the contention that, in arriving at the subject of taxation, the complainant is only liable for taxes upon the net balance of capital after deducting the money borrowed by the company to be employed in conducting its business. Whether or not such a deduction is permissible rests entirely with the Legislature, and is to be determined by reference to the revenue laws. We find but one instance in which by express provision of the statute the deduction of debts is allowed. This occurs in schedule C, section 8, of the tax bill (Code, pp. 2193, 2194), where in taxing bonds, notes, and other evidences of debt, it is provided that there shall be deducted from such choses in action certain indebtedness of the taxpayer. In the section relating to merchants' licenses (Code, p. 2220), there might perhaps be an implied allowance arising from the use of the word "net." Neither of those instances have any application, however, to the case under consideration, as to which the Legislature has made no provision for any deduction whatever. Ordinarily and in common parlance, the word "capital," when used in reference to commerce or trade, including manufacturing, signifies the money and other property adventured in the business. 6 Cyc. 347; 1 Words & Phrases, 954. As said by the learned judge of the circuit court, when used in this sense, it can make no difference whether the capital, or part of it, is borrowed or not. It is none the less capital of the user, and employed for his profit and at his risk. The statute, as already seen, defines what shall constitute capital in any trade or business, and provides that the specifications made shall not be taxed otherwise than as capital. We would be no more justified in reading into the statute a deduction of indebtedness against these specifications constituting capital than we would be in making a like allowance against the value of land or chattel property.

It is illustrated by the evidence in the present case that large business enterprises are often carried on chiefly, and sometimes

wholly, with a borrowed working capital, and if this indebtedness, whether temporary or permanent, is to be deducted in ascertaining the capital for taxation, such enterprises would escape their just share of the burdens of government, though they were actually earning large profits. There is no reason why such a discrimination should be made in favor of manufacturers and others falling in the same class, and there is nothing in the statutes to justify the conclusion that any such favor was intended. The lawmaking power alone must determine whether such an allowance shall be made or not in ascertaining the just amount of taxable property, and, if made, against what forms of property the deduction shall be allowed and to what extent. As against the capital employed by the complainant in its business, the lawmaking power has provided for no deduction of its indebtedness, and the idea that it intended to do so is negatived by the fact that, in the same statute, a deduction is expressly allowed in taxing another and different form of property. *Expressio unius exclusio alterius est.*

There is no error in the judgment complained of, and it is affirmed.

Affirmed.

DENNIS v. JUSTUS et al.

W. M. RITTER LUMBER CO. v. JUSTUS et al.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. EQUITY (§ 226*)—PLEADING—OBJECTIONS TO BILL—MULTIFARIOUSNESS.

The court should dismiss a bill for multifariousness on its own motion, though not objected to on that ground by defendant, so that it was immaterial that an objection of multifariousness was made by only one of defendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 504; Dec. Dig. § 226.*]

2. EQUITY (§ 148*)—BILL—"MULTIFARIOUSNESS."

"Multifariousness" in a bill means the improper joining therein of distinct and independent matters, as the union of several unconnected matters against one defendant or the demand of several distinct and independent matters against several defendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4616-4618.]

3. EQUITY (§ 148*)—BILL—MULTIFARIOUSNESS—INDEPENDENT CLAIMS.

The bill alleged that B. owned a 60-acre tract which he conveyed to the predecessor in title of complainant's father from whom complainant ultimately derived title by a deed recorded prior to January 1, 1901, and that the land was improperly assessed for taxes against complainant's father for the year 1901 and was sold for taxes claimed to be due from the father, and that defendant lumber company became the purchaser under a tax deed made by the clerk. The bill further alleged that defend-

ant D. on September 18, 1908, filed an ex parte petition under the statute providing for proving recorded papers before a commissioner, to set up title in himself to the 60 acres under a deed from B. and, by intermediate conveyances, to defendant D. by conveyance dated June 23, 1903, and that none of such deeds were intended to include the 60-acre tract owned by complainant, and the prayer was that the lumber company, defendant D., and others be made parties defendant and a decree entered declaring the tax deed to the lumber company void, and an order entered restraining defendant D. from proceeding further in his petition before the commissioner. *Held*, that the bill was demurrable as multifarious, as joining distinct claims against several defendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

Appeal from Circuit Court, Buchanan County.

Suits by one Justus and others against W. L. Dennis and against the W. M. Ritter Lumber Company. Decree for complainant, and defendants appeal. Reversed.

S. M. B. Coulling, of Tazewell, M. O. Litz, of Welch, and J. W. Flannagan, Jr., of Grundy, for appellants. Chase & Daugherty and A. A. Skeen, all of Clintwood, for appellees.

KEITH, P. For the purposes of this case the averments of the bill may be stated as follows: That Daniel Blankenship was the owner of a tract of 60 acres of land, in the county of Buchanan, which he conveyed by deed to one of the predecessors in title of J. L. Justus; that by intermediate conveyances from divers grantors the title to this land was vested in J. L. Justus, the father of complainant, who by his deed conveyed it to Melvin Justus and his brother, Ephraim Justus; and that by proceedings in a chancery suit this land was sold and conveyed to John C. McCoy by J. H. Stinson, a special commissioner, and by McCoy's deed title ultimately vested in the complainant, Melvin Justus, whose deed went to record prior to the 1st of January, 1901; that the land was improperly assessed for taxation against J. L. Justus, father of complainant, for the year 1901; and that by proceedings, which need not be specifically stated, it was sold for taxes alleged to be due by J. L. Justus, the Ritter Lumber Company became the purchaser, and a deed was made to it by Joseph Hibbits, the clerk.

Without going into details, we will content ourselves with the statement that the averments of the bill make out a case for relief against the Ritter Lumber Company, and that if those averments were established by proof the deed from the clerk should be set aside as improperly constituting a cloud upon complainant's land.

The bill goes on then to state that W. L. Dennis, on the 18th of September, 1908, filed an ex parte petition before R. E. Williams, commissioner, acting under sections 3340

and 3341 of the Code, to set up title in himself to the 60 acres of land derived by complainant, as aforesaid, from Daniel Blankenship; that W. L. Dennis claims title under a deed of trust from Daniel Blankenship to J. H. Stinson, trustee, dated February 27, 1894, and recorded the following day, a deed from J. H. Stinson, trustee, to J. F. Barnes, and by deed from J. F. Barnes and her husband to W. L. Dennis, dated June 23, 1903. The bill alleges that none of these deeds included or intended to include the 60-acre tract of land owned by him, and, if the averments of the bill be true, a case for relief is made by the plaintiff against W. L. Dennis.

The prayer of the bill is that the Ritter Lumber Company, W. L. Dennis, J. L. Justus, and Ephraim Justus be made parties defendant; that a decree may be entered vacating and declaring void the deed from Joseph Hibbits, clerk, to the Ritter Lumber Company, for the reasons hereinbefore set out; and that an order may be entered restraining the said W. L. Dennis from proceeding any further with his petition before Commissioner Williams.

We have, then, a bill which sets out the plaintiff's title to a 60-acre tract of land, which he seeks to protect from the claims of the Ritter Lumber Company under a tax deed, and from W. L. Dennis, who is proceeding to establish title in himself to this tract of land by proceedings before a commissioner by virtue of the statute hereinbefore referred to.

The bill was demurred to as being multifarious; the demurrer was overruled; the defendants answered; depositions were taken and proofs filed; and the court, by the decree which is appealed from, granted the relief sought, vacated the deed from Joseph Hibbits, clerk, and restrained Dennis from proceeding any further with his petition before Commissioner Williams.

The first error assigned is that the demurrer to the bill was overruled, and the appellee contends that the charge of multifariousness was not set forth with sufficient clearness as a ground of demurrer by the Ritter Lumber Company and was not relied upon by W. L. Dennis; in the circuit court Dennis and the Ritter Lumber Company being the only appellants.

[1] This contention need not be passed upon, as the charge of multifariousness made by the Ritter Lumber Company is sufficient in form and, if well founded, is fatal, whether united in by its coappellant or not, for, as we shall see, the authorities hold that it is the duty of the court, of its own motion, to dismiss a multifarious bill, although not objected to on that ground by the parties defendant.

We have gone very far in sustaining bills where this charge has been made, but in the present case we are constrained to the conclusion that we must either hold the bill to be

multifarious or declare that this ground of demurrer can no longer be availed of in this jurisdiction.

In *Seefried v. Clarke*, 113 Va. 365, 74 S. E. 204, the most recent expression of opinion by this court upon this subject, it was held that in a bill for partition "the courts may set aside a deed to one of the parties of a part of the land to be divided, either because the grantor had no power to make the deed or because of his mental incapacity; and that the fact that both grounds for setting aside the deed are alleged in the bill for partition does not render the bill multifarious. Such a bill attains the desired end in a way convenient to all concerned and does no serious injury to any one of them." A number of cases decided by this court are there considered, and the question of convenience was carried as far as we deem it proper to extend it.

[2] In *Dunn v. Dunn*, 26 Grat. (67 Va.) 295, section 271 of Story's Eq. Pleading is quoted and approved as follows: "A bill should not be what is technically termed multifarious, for, if it is so, it is demurrable and may be dismissed by the court of its own accord, even if not objected to by the defendant. By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants, in the same bill. In the latter case the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection."

[3] This statement of the law is peculiarly apposite in the case under consideration, for the very evil which the quotation points out is well illustrated by the magnitude of the record before us. The claims of the Ritter Lumber Company and of W. L. Dennis are wholly separate and distinct. They have no sort of connection the one with the other. The case against each is sufficiently stated in the bill to entitle the plaintiff to relief if established by proof.

In *Washington City Savings Bank v. Thornton*, 83 Va. 157, 2 S. E. 193, it is said to be impossible to lay down any rule, applicable to all cases, as to what constitutes multifariousness. "It is well settled, however, that a bill is demurrable in which are united several distinct rights, each sufficient, as stated, to sustain a bill against one defendant, or in which there is a demand of several matters, distinct in their nature, against several defendants, who are unconnected in interest and liability."

The decisions of this court bearing upon the subject are fully collated in *Seefried v.*

Clarke, *supra*, and no further citation of authority is deemed necessary.

The decree of the circuit court must, for the reasons stated, be reversed; and this court will render such decree as the circuit court should have entered.

Reversed.

BUCHANAN and WHITTLE, JJ., absent.

CABLE CO. v. MATHERS et al.

(Supreme Court of Appeals of West Virginia.
Oct. 14, 1913. Rehearing Denied
Nov. 25, 1913.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 23*)—SUFFICIENCY—STENOGRAPHER'S TRANSCRIPT.

A skeleton bill of exceptions, incorporating into it the stenographer's transcript of the testimony by any description or designation thereof that makes its identification reasonably certain, is sufficient.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 30; Dec. Dig. § 23.*]

2. JUSTICES OF THE PEACE (§ 175*)—DEPOSITIONS—RIGHT TO USE ON APPEAL.

Depositions regularly taken and read as evidence on the trial before a justice of the peace may be read in the circuit court on appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 694-698; Dec. Dig. § 175.*]

3. DEPOSITIONS (§ 107*)—OBJECTIONS—TIME FOR MAKING.

It is too late, after trial begins, to object to the reading of depositions on any ground that can be cured by a retaking.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 309-319; Dec. Dig. § 107.*]

4. PRINCIPAL AND AGENT (§ 145*)—LIABILITY OF PRINCIPAL—"TRADEE."

To constitute one a trader, within the meaning of section 13, c. 100, Code 1906, he must be both a buyer and a seller, or a barterer of goods, for profit.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7048-7053.]

5. PRINCIPAL AND AGENT (§ 145*)—LIABILITY OF PRINCIPAL—"TRADEE."

One to whom pianos and organs are consigned by the owner, to be sold on a commission, who buys and carries no goods for sale on his own account, is not a trader within the meaning of said section.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.*]

6. PRINCIPAL AND AGENT (§ 145*)—CONSIGNMENT OF GOODS—LIABILITY FOR DEBTS—"BARTEER."

That such consignee occasionally accepted old musical instruments in part payment for new ones does not constitute him a "barterer" within the meaning of said section.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.*]

7. PRINCIPAL AND AGENT (§ 145*)—PRINCIPALS—GOODS—LIABILITY FOR AGENT'S DEBTS.

Property of another in the hands of an agent who is not himself a trader, for sale on a commission, is not liable for the agent's debts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.*]

Error to Circuit Court, Wood County.

Action by the Cable Company against J. W. Mathers and others. Judgment for defendants, and plaintiff brings error. Reversed.

E. L. Coleman, of Corpus Christi, Tex., for plaintiff in error. F. H. McGregor and Kreps & Russell, all of Parkersburg, for defendants in error.

WILLIAMS, J. This writ of error is to a judgment of the circuit court of Wood county rendered, on appeal from a justice, in favor of a number of attaching creditors of A. L. Barker, and against the Cable Company, a corporation, claimant of the property attached. After the suits were brought, and attachments levied upon certain organs and pianos in a building in the city of Parkersburg, formerly occupied by said Barker, the Cable Company appeared before another justice, and claimed the attached property. The justice decided the question in favor of the Cable Company, and directed the constable to turn the property over to it. Defendants appealed the cases to the circuit court, and, the issue in each case being the same, the parties agreed to submit all of them to the jury to be tried together, which was done.

[1] But, before passing to a discussion of the merits of the case, it is necessary to determine a preliminary question raised in brief of counsel for defendant in error, which is whether bill of exceptions No. 1 sufficiently identifies the evidence to make it a part of the record. It is what is commonly called a skeleton bill, and was signed by the judge in vacation, within 30 days after the adjournment of the term, and was made a part of the record by a vacation order. It certifies, in part, as follows, viz.: "All the proceedings on said trial, and all the evidence considered by the court, were reduced to writing, and are embodied in the transcript made by John T. Harris, official stenographer of the court, and referred to therein, and styled 'Transcript of Testimony,' and filed in these causes, and all the said rulings and decisions of the court, and all of the exceptions taken and contained in said transcript of testimony, are made part of the record and this bill of exceptions, with the same effect and intent as though the same were fully and at large herein copied as a part of this bill of exceptions No. 1." The words "transcript of testimony," by which the transcript of evidence is identified, do not appear at the beginning of the evidence; but instead of those words are the words "Tes-

timony on Behalf of the Plaintiff." Then following this heading, and between it and the certificate of the official stenographer is found the testimony of witnesses, which appears to have been taken in the case. We do not think the omission of the words "transcript of testimony" is fatal, because the stenographer's transcript is sufficiently identified by its character and by reference in the bill of exceptions to the stenographer's certificate appended to the transcript. From the character of the evidence we see that it applies to this case, and the judge's certificate designates it as having been reduced to writing by John T. Harris, official stenographer of the court. We find, at the end of the transcript, a certificate signed by John T. Harris, as official stenographer, styling this case, and certifying that the evidence was taken in the trial of it. We are morally certain that the transcript is the same mentioned in the judge's certificate, or skeleton bill of exceptions, and therefore hold that it is properly a part of the record. *Marshall v. Stalnaker*, 70 W. Va. 394, 74 S. E. 48; *Darnell v. Wilmoth*, 69 W. Va. 704, 72 S. E. 1023.

It is also urged that certain other papers appearing in the record, following the certificate of the official stenographer, are not parts of the record. They are what purport to be copies from the docket of the justice who tried the attachment suits, out of which the present suit respecting the ownership of the attached property and its liability for A. L. Barker's debts grew. The justice testified as a witness in this case, and identified these papers; it appears that they were offered, as parts of the record, in the trial of this case in the circuit court. The marks these papers bear, as "J. H. R. Nos. 1, 2, 3, 4," etc., correspond with the designation the witness gave to them in his testimony. This, we think, is quite sufficient to identify them as copies of the same papers admitted at the trial. It was not necessary to read them to the jury, because they were official papers, and did not present a question to be determined by the jury.

[2, 3] The court permitted certain depositions that had been taken and read before the justice of the peace to be read as evidence on the appeal, over objection of defendant, and this is cross-assigned as error. These depositions are identified by El. L. Coleman, in his testimony, as the same that were read at the trial of the case before the justice. Therefore, assuming that they were duly taken and properly certified, they were admissible as evidence on the appeal. Section 168, c. 50, Code, requires the justice within 20 days to transmit the depositions, together with a transcript of his docket, to the clerk of the circuit court. For what purpose are the depositions to be transmitted, if not to be used as evidence in the trial in the circuit court? If they were ob-

jected to on some ground that could be cured by a retaking, it was then too late to object. Objection on such grounds must be made before trial begins. *Supply & Contracting Co. v. Consolidated Light & Ry. Co.*, 42 W. Va. 583, 26 S. E. 189.

[4, 5] There is no proof that A. L. Barker was ever at any time the owner of the property in question, and the proof is conclusive that it was owned by the Cable Company. But defendants' counsel contend that said Barker was a "trader," and dealt with the property as his own in such manner as to make it liable for his debts. The case turns altogether upon the question whether Barker was a trader within the meaning of that term as used in section 13, c. 100, Code 1906. The property had been consigned to him by plaintiff for sale on a commission. He rented a storeroom in Parkersburg, and put up his sign over the door, which read, "A. L. Barker, Planos and Organs." No other sign was displayed in or about the building, and there was nothing to inform the public that he was not sole owner of the property which he was advertising to sell. There is no proof that he carried any other stock for sale than the pianos and organs consigned to him by plaintiff. The contract between him and plaintiff provided that the pianos and organs were to be held on consignment until sold, and such sale approved and accepted by the plaintiff. He was also to keep the property insured for the benefit of plaintiff, and to guarantee all notes taken in payment of goods sold. The contract was not recorded in Wood county. Barker appears to have become a resident of Ohio at the time the attachments were levied. It is proven that he, two or three times, took old organs in part payment for new ones; that, on two occasions, he received horses in part payment for pianos or organs; and that sometimes he received checks payable to his own order for them. But it does not appear what disposition he made of the property taken in exchange, or that he was engaged in the business of bartering. His chief business, and the only business which he advertised, was apparently selling pianos and organs; neither was he a licensed auctioneer or commission merchant. So far as it appears from the record, he bought no goods for sale, and sold no other goods than the pianos and organs received by him for sale from plaintiff. In view of these facts, he was not a trader within the meaning of section 13, c. 100, Code, which reads as follows: "If any person shall transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or 'and Co.' and fail to disclose the name of his principal or partner by a sign in letters, easy to read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the town

or county wherein the same is transacted, or if any person transact such business in his own name, without any such addition, all the property, stock, choses in action, acquired or used in such business, shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant." The statute is designed to make the property of another, in the hands of a trader, liable for his debts, when such trader fails to comply with certain requirements, none of which appear to have been observed by Barker in this case. The statute is therefore in derogation of the common-law rights of property, and should receive a strict construction.

[8, 7] If Barker was not a trader, within the strict definition of that term, the property of the Cable Company, which was consigned to him only for sale, is not liable for his debts. But, if he was a trader then it is liable. Webster defines "trader" as: "One who engages in trade or commerce; one who makes a business of buying and selling or of barter; a merchant." The Century Dictionary defines the word thus: "One who is engaged in trade or commerce; one whose business is buying and selling, or barter; one whose vocation is to buy and sell again personal property for gain." There is no proof that Barker bought; he only sold personal property. To constitute him a trader, in the sense in which that term is used in the statute, it was essential that he should have been both a buyer and a seller for profit. That he sometimes received other property in part payment for pianos or organs sold by him is not sufficient to make his case an exception to the rule. He was not in the business of bartering.

The facts in this case are very similar to the facts in *Brown Manufacturing Co. v. Deering*, 35 W. Va. 255, 13 S. E. 383, in which it was held that: "A party whose entire business consists in selling agricultural implements, wagons, etc., as agent for the manufacturer thereof, receiving a commission for his services in disposing of the same, cannot be regarded either as a trader or commission merchant."

The term "trader" has been similarly construed in the following cases, viz.: In *re New York, etc., Co.* (U. S. D. C.) 98 Fed. 711; In *re Tontine Surety Co.* (D. C.) 116 Fed. 401.

A. L. Barker not being a trader within the meaning of section 13, c. 100, Code, it follows that the court erred in refusing to give plaintiff's instructions Nos. 2, 6, 7, and 8, and also erred in refusing to set aside the verdict, and grant plaintiff a new trial.

The judgment is reversed, the verdict of the jury set aside, and the case remanded for a new trial.

LYNCH, J., absent.

McDONALD et al. v. McDONALD PLANING MILL CO. et al.

(Supreme Court of Appeals of West Virginia. Oct. 28, 1913.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 269*)—ACTION TO SET ASIDE—PLEADING.

A fraudulent conveyance will not be set aside unless attacked by proper pleading, supported by proof. The court will not set it aside on proof alone.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 789-795; Dec. Dig. § 269.*]

2. CORPORATIONS (§ 559*)—INSOLVENCY—CONFESSION OF BILL—EFFECT.

Creditors of an insolvent corporation, who suffer a bill to be taken for confessed, filed against them and the corporation by its stockholders to wind up its affairs, averring that a deed of trust upon its property creates a lien thereon in favor of a certain creditor, thereby admit the validity of such lien.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2241-2252, 2259; Dec. Dig. § 559.*]

3. CORPORATIONS (§ 557*)—INSOLVENCY—PLEADING.

Unsecured creditors who have not attacked such lien for fraud, by proper pleading putting it in issue, cannot do so before a commissioner to whom the case has been referred to ascertain and report the debts and their priorities.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. § 557.*]

4. EQUITY (§ 181*)—ANSWER—REJECTION.

An answer, tendered after a final decree has been rendered upon bill taken for confessed, is properly rejected when not accompanied by affidavit showing good cause for delay.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 417; Dec. Dig. § 181.*]

Appeal from Circuit Court, Ohio County.

Action by J. F. McDonald and others against the McDonald Planing Mill Company and others. From the judgment the Federal Lumber Company and others appeal. Affirmed.

C. E. Morris and W. B. Casey, both of Wheeling, for appellants. Edward F. Horstmann and Noyes & Ritz, all of Wheeling, for appellees.

WILLIAMS, J. J. F. McDonald, Charles Booth, Edward Feinler, John B. Rose, and J. L. McDonald, being the owners of all the capital stock of the McDonald Planing Mill Company, brought this suit to wind up its affairs, alleging its insolvency. The corporation and its creditors were made parties defendant. On the 9th of December, 1909, the court appointed a receiver to take charge of its property and collect outstanding claims due it; and on the 13th of April, 1910, it referred the cause to a master commissioner, to ascertain and report its debts and their priorities and the amount of money in the hands of the receiver. The commissioner

listed debts, aggregating \$17,545.47, and reported that there were no priorities among them, and found that there was in the receiver's hands the sum of \$9,682.52. The Germania Half-Dollar Savings Bank, one of the defendants, excepted to the report because the commissioner had reported its debt of \$2,332.37, as a debt of the general class, and not as a lien upon the company's property, as it claimed it was. The court heard the cause upon the report and exceptions thereto, of the 11th of February, 1911, and sustained the bank's exceptions, and decreed its debt as a lien of the second class; a debt of \$225 in favor of the Wheeling Terminal Railroad Company, as to which there is no controversy, having been ascertained by the court to be the first lien. From that decree a number of the creditors, whose debts were placed in the general class, have appealed, assigning as error the sustaining of said exceptions. The bank's debt was secured by a deed of trust executed in 1903, upon the McDonald Planing Mill Company's property, consisting of machinery and lumber then on its yards, which, in the nature of the company's business, was constantly changing. The lumber constituted its largest asset. Following the case of *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361, 36 L. R. A. (N. S.) 1181, holding that a deed of trust upon a stock of merchandise kept for sale which allowed the grantor to retain possession and continue to sell and replenish the stock, was fraudulent as to creditors, the commissioner held that the deed of trust to secure the debt due the aforesaid bank was fraudulent and void, and reported the bank's debt in the general class.

[1, 2] But no question of fraud was raised by the pleadings. It was therefore not presented to the court for decision. The case was not referred to the commissioner to enable defendants to establish a fraud; nor, indeed, could it have been properly referred for that purpose. The question of fraud not having been presented by pleadings and passed on by the lower court, we have no right to review it on this appeal. Therefore we do not say whether the deed of trust is in fact fraudulent. All we do say is that it is valid between the parties, and good also as to creditors, until it is attacked, and that no creditor has yet assailed it. The bill admits the debt and avers that it is secured by a deed of trust on the company's property and that it is the first lien thereon. All of the appellants, 13 in number, were made parties defendant to the bill, *eo nomine*, except one, the Flint Irving & Stoner Company, and were served with process, and failed to appear. The bill, as to them, was properly taken for confessed. In effect they have admitted the truth of the averment in the bill. An answer expressly admitting it could have no greater effect against them. A deed of

trust, though fraudulent in fact, will not be set aside for the benefit of creditors who do not attack it. In *Bumgardner v. Barnard*, 92 Va. 188, 23 S. E. 229, a case wherein some of the creditors of the grantor attacked the conveyance made by him, on the ground that it was voluntary and therefore fraudulent as to existing creditors; and others, on the ground that it was fraudulent in fact, the statute of limitations having been pleaded, the court found that the deed was fraudulent in fact, but more than five years having elapsed before the bringing of the suit, which was a bar to the right of attack on the ground of voluntariness, it set it aside as to those creditors who had alleged and proved fraud in fact, but refused to set it aside as to those who had alleged that it was only voluntary. That court there applied a well recognized rule of practice, which is that a court will grant relief only when both pleadings and proof justify it; it will not do so on proof alone.

[3] Appellants here sought to raise before the commissioner a question not presented by the pleadings, a question of cross-relief between codefendants. Plaintiffs were not interested in it. The bill simply asked that the business of the insolvent corporation in which they were stockholders, be wound up and its assets applied to the payment of its debts. Whether some of its creditors should be paid in full and others only in part, or whether the assets should be applied to the debts of all, *pro rata*, is immaterial to them. It is purely a question relating to the granting of cross-relief between codefendants, which was held in *Dudley v. Buckley*, 66 W. Va. 630, 70 S. E. 376, could not be done without proper pleadings. The only pleading in this case, is the bill which, for failure of answer, is admittedly true.

[4] Some of the appellants complain because the court refused them right to file answers; and another, who was not a party to the bill, because he was denied the right to file his petition in the suit and be made a party. But the offer to file these pleadings was not made until five days after the decree appealed from was rendered. Defendants were in default, and seem to have offered no excuse therefor. They tendered no affidavits excusing their delay, as the statute requires in such case. Chapter 125, § 3, Code; *McLaughlin v. Sayers*, 78 S. E. 105. Moreover, the rejected answers are not in the record, and we do not know what they contained. The court may have rejected them because of improper, or insufficient matter. We must assume that they were properly rejected, for error will not be presumed.

For the same reason we cannot see how the court erred in rejecting the petition of Flint Irving & Stoner Company.

The decree will be affirmed.

WILSON v. SHRADER.

Supreme Court of Appeals of West Virginia.
Oct. 28, 1913.)

(Syllabus by the Court.)

JUDGMENT (§ 128*)—TIME TO ANSWER—AFTER OFFICE JUDGMENT.

The office judgment, in an action in which writ of inquiry is necessary, does not become final on the last day of the next succeeding term of the court, and the defendant may plead to the declaration at any time before execution of the writ of inquiry.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 237, 238; Dec. Dig. § 128.*]

JUDGMENT (§ 150*)—PLEADING (§ 199*) — OFFICE JUDGMENT—DEMURRER TO DECLARATION.

The defendant in an action at law, in which the office judgment has become final, but as not been entered by the court, may demur to the declaration, notwithstanding the lapse of the statutory period and the finality of the judgment, and, if the demurrer is sustained, formal judgment on the office judgment cannot be entered. In such case, the office judgment becomes a nullity, if the declaration is not amended or cannot be cured by amendment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 261; Dec. Dig. § 150; * Pleading, Cent. Dig. §§ 464-469; Dec. Dig. § 199.*]

ASSIGNMENTS (§ 26*)—ASSIGNABILITY—ACTION FOR PENALTY.

A right of action for a penalty, given by section 7 of chapter 79 of the Code 1900, is not assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 48-52; Dec. Dig. § 26.*]

ASSIGNMENTS (§§ 120, 131*)—ACTION FOR PENALTY—PARTIES—DEMURRER.

A claimant of such penalty by an attempted assignment from the person entitled to sue herefor cannot maintain an action for it in the name of his alleged assignor, and the objection of nonassignability of the claim is available on a demurrer to the declaration.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 206-209, 220-226; Dec. Dig. §§ 120, 131.*]

ACTION (§ 28*)—TRESPASS—WAIVER OF TORT—ELECTION OF REMEDIES.

Where a trespass has been committed upon real estate, and property severed therefrom and sold by the defendant or converted to his own use, the owner may waive the trespass and sue for the value of the property, and the law will imply a promise to pay for it.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28.*]

APPEAL AND ERROR (§ 522*)—RECORD—EVIDENCE.

To make the evidence in an action at law part of the record, it is only necessary to use such means of identification in the bills of exception and orders as make the adoption thereof reasonably certain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2367-2371; Dec. Dig. § 22.*]

APPEAL AND ERROR (§ 522*)—RECORD—EVIDENCE.

The evidence in an action of debt, dependent upon the same issues of fact as those involved in another action of assumpsit, is made part of the record in the latter by the following agreement filed therein: "The parties hereto agree that the facts in this case are as follows: (Here insert the transcript of the evi-

dence as certified by Henry Garfield Chaney, the official stenographer of this court, as reported in the same styled case, marked 'Debt No. 1,' tried at the September term of this court, 1908.)"

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2367-2371; Dec. Dig. § 522.*]

8. APPEAL AND ERROR (§ 1175*) — REVIEW — JUDGMENT—TRIAL BY COURT.

Submission of an action of assumpsit to the court in lieu of a jury upon evidence so brought into the case is equivalent to a joinder in a demurrer to evidence, and the judgment upon a writ of error thereto is treated and dealt with as a judgment upon a demurrer to evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

(Additional Syllabus by Editorial Staff.)

9. ASSUMPSIT, ACTION OF (§ 8*)—NATURE AND SCOPE—"ASSUMPSIT."

Assumpsit is not the proper form of action for the recovery of damages for a mere wrong. It lies only to recover from the defendant that which is in his hands and belongs to the plaintiff.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 42-54; Dec. Dig. § 8.*]

For other definitions, see Words and Phrases, vol. 1, pp. 587, 588; vol. 8, p. 7584.]

Robinson, J., dissenting as to point 2.

Error to Circuit Court, Barbour County.

Action by Henry S. Wilson against Samuel W. Shrader. Judgment for plaintiff, and defendant brings error. Reversed and dismissed.

John L. Hechmer, of Grafton, for plaintiff in error. J. Hop Woods, of Philippi, for defendant in error.

POFFENBARGER, P. Henry S. Wilson, suing for the benefit of Samuel V. Woods, instituted his three several actions in debt against Shrader for recovery of the penalty given by section 7 of chapter 79 of the Code against a coterminous landowner for mining coal within five feet of the line of the adjacent owner without his consent in writing, and an action of assumpsit for the recovery of the value of the coal taken out of the adjacent land. Each of the three actions of debt was founded upon a violation of the statute, separate and distinct from those upon which the others rested; there having been three trespasses respecting the same tract of land, or one trespass at three different places. The evidence taken in one case was used in all of them, and there was a judgment for \$500 in each of the actions of debt and for \$5,000 in the action of assumpsit.

The declarations were all filed at April rules, 1902, and the common orders were confirmed at May rules, 1902, and a writ of inquiry awarded in the assumpsit action. At the May term, 1902, the defendant appeared, and orders were entered purporting to file pleas and counter affidavits, without indi-

cating the character of the pleas; but a paper was filed in each case, bearing the style of the action, and having the form and substance of an affidavit, denying any indebtedness upon the demand or demands stated in the declaration. Nothing further was done until the 29th day of September, 1905, when the plaintiff moved the court to enter judgment for him in each of the three actions of debt, treating the papers filed as pleas, and counter affidavits as being only affidavits, and the judgments as having become final on the last day of the May term of court, 1902, for want of pleas. These motions were overruled, and leave given the defendant to demur to the declarations. On the 2d day of March, 1907, the plaintiff filed an amended declaration in each of the four cases, and sued out process thereon. On the 10th day of May, 1907, the court entertained and sustained demurrers to the original declarations in all of the cases, and overruled demurrers to the amended declarations therein.

[1] The office judgment in the action of assumpsit did not become final on the last day of the May term, 1902, for the case was one in which a writ of inquiry was necessary and proper and had been awarded. In such cases, the office judgment does not become final before execution of the writ of inquiry. *Walls v. Zufall & Co.*, 61 W. Va. 166, 56 S. E. 179.

[2] If the declarations in the actions of debt set forth no causes of action, and were wholly and incurably bad, it is immaterial whether the affidavits filed therein as pleas, or having the double features of pleas and affidavits, can be treated as pleas or not, for there can be no judgment without a declaration. "If a defendant wishes to contest both law and fact, he can at the same time both demur and plead. The court will entertain his demurrer; but it confesses the fact, and his nonappearance further confesses it. If the demurrer is overruled at the first term, he can plead any matter of fact admissible; but, if overruled at a later term, he cannot plead any plea of fact. If the demurrer is held good, and the case is dismissed, the office judgment amounts to nought, and judgment in court is not entered." *Bank v. Burdette*, 61 W. Va. 636, 638, 57 S. E. 53, 54. This case allows the office judgment to stand pending the test of the sufficiency of the declaration and the process of amendment at the bar of the court. But, if the declaration is bad and not amended, or is incurably bad, the office judgment dies. In *Bank v. Burdette*, the demurrer had been filed at the first term; but no reason is perceived why it cannot be filed at a later term, provided formal judgment has not been entered. The office judgment, though final under the statute, is not a finished or complete judgment. It is final in the sense of foreclosure of issues of fact; but it must be entered to be

complete. A demurrer leaves it standing as to matters of fact, but carries the case over as to the issue of law. The office judgment confers right to a formal judgment at the first term; but, if the plaintiff sees fit to forego this right, the issue of law, or the right to raise it, remains open to the defendant. The office judgment is potentially final, giving right to a complete judgment, if no demurrer is filed before entry thereof, and on a good declaration, if there is a demurrer. No harm can result from this. If there is a demurrer for formal defects in the declaration, an amendment at the bar of the court will cure them, and judgment may then be entered, and if the declaration sets forth no cause of action at all, and is incurably bad, there ought not to be any judgment on it. This construction of the statute makes it work out equitable and just results. The opposite one works an unjust and absurd result in those instances in which no good case can be made on the matter found in the declaration.

[3] Samuel V. Woods, the real plaintiff in these actions, claims the penalties given by the statute, as assignee of Henry S. Wilson, the nominal plaintiff. If the rights of action for the penalty are not assignable, the declarations are wholly and essentially bad. They set forth no causes of action, the benefit of which the assignee can take. A vital inquiry, therefore, is whether penalties under the statute here involved are assignable. Prior to the 8th day of February, 1901, Henry S. Wilson owned a small tract of land containing five acres, in which there was coal, and which he conveyed to Samuel V. Woods on said date. Adjacent thereto lay another tract of land which Geo. C. Lee and wife conveyed to Samuel W. Shrader, by deed dated August 1, 1899, and Shrader by his deed dated March 14, 1901, conveyed it to the Tygarts Valley Coal & Coke Company, a corporation. While Shrader owned the adjacent tract of land, mining operations were conducted on it which extended, at three different points, not only within five feet of the line, but to the line and beyond it into the property owned by Wilson, by reason of which he had rights of action, or at least a right of action, against somebody for the penalty given by the statute. In his deed to Woods, he endeavored to assign these rights of action, as well as one for the coal taken from the land.

The assignability of statutory rights, not all of which are penalties by any means, is said to depend upon the language of the statute conferring them. "If the statute forbids the assignment of a right conferred by it, or if the legislative intent, as shown by the act, is to confer a right strictly personal to the person upon whom it is conferred, then such act is not assignable. In the absence of such express or implied prohibition, the assignability or nonassignability of rights

conferred by statute is to be governed by the principles governing the assignability or nonassignability of choses in action in general. Statutory rights giving compensation for property loss suffered are, generally, said to be assignable, whereas, rights to recover penalties and rights given by statute for the redress of personal wrongs are not assignable." 4 Cyc. 26. Obviously the penalty given by the statute here in question is not intended as compensation for coal taken or damage to property. It may be incurred without the taking of any coal from the land of the party entitled to sue. The taking of any coal at all within five feet of the division line, and out of land belonging to the taker himself, inflicts the penalty. The foundation of the right of action, therefore, is not benefit obtained by the defendant from the plaintiff. It rests upon no consideration, nor is it given as compensation for any actual injury. The enactment of it seems to have been nothing more than an exercise of the police power of the state, and the penalty to have been prescribed by way of sanction for the enforcement of the policy declared by the statute. It does not stand in lieu of the right of action for injury to the land by the mining of coal therefrom, or a right of action for the value of coal taken, nor take the place of either. Nothing in the terms of the statute suggests any such consequence or result. It is not a common-law right of action, made assignable by statute, for the statutes giving survival to rights of action, and so impliedly and incidentally making them assignable, contemplate only rights of action founded upon, or growing out of, contracts, such as were enforceable in equity, before the statutes relieved the defect in the common law, so as to permit assignees to sue in the law courts. "The words 'choses in action' mean nothing more and can have no broader signification than the words 'rights of action,' and it has been uniformly held that these latter words, 'rights of action,' only include rights of action founded on contracts, or for injuries to property, and not rights of action for torts, which are purely personal, such as the action for slander, which dies with the person, and never survives to the personal representative." *Dillard v. Collins*, 25 Grat. (Va.) 343. The right of recovery given by this statute is not a right of action of that sort, for it is neither founded upon contract, nor is it given for injury to property. The statute which gives it is of comparatively recent enactment, and was not in existence at the date of the enactment of the statute legalizing assignment of choses in action. Hence there is no ground for the assumption of legislative intent, in the passage of the older statutes, to make it assignable. In *Fraker v. Cullum*, 24 Kan. 679, *Brewer, J.*, said: "It cannot justly be said that an action to enforce a forfeiture or recover a penalty is

one founded on contract, no matter who is the party chiefly benefited by the recovery." In that case, an effort was made to set off a forfeiture under an act of Congress against a national bank in an action on a note. The claim of right to set off the forfeiture or penalty was based upon the theory that, as the penalty was given by statute, the right of recovery was a right arising out of contract. This theory was utterly repudiated and condemned by the court. Proceeding, *Judge Brewer* said: "There is, to be sure, an implied obligation resting upon every member of society to break no law, and do no wrong to his neighbor; but this obligation is not the implied contract of which the law books speak as one whose breach gives a cause of action upon contract." The analysis of the statute, its provisions and purposes, and these authorities, deny to the penalty the quality of assignability under the statute imparting it to choses in action. Obviously it is not in any sense a chose in action. It is a mere naked right of action given by statute by way of punishment for a specific unlawful act, an act made unlawful by the statute itself. Such rights of action are not assignable, unless the statute makes them so. In *McBratney v. Railroad Co.*, 17 Hun (N. Y.) 385, the assignability of penalties inflicted upon railroad companies for excessive charges was involved. After citing authorities, the court said: "But it is unnecessary to pursue the subject further; the fact that the statute which creates the penalty gives the right to sue for it to the party paying the excessive fare, and to no one else, seems to lead necessarily to the conclusion that the cause of action cannot be assigned." Such is the character of the statute involved here. It gives the right of action only to the person injured, saying: "If any person violate this section, he shall forfeit five hundred dollars to any person injured thereby who may sue for the same." Construing and interpreting this statute, this court has held that the person injured and entitled to sue is the person who was the owner of the land at the time of the violation of the statute, or a tenant thereof, or any person then having an interest therein. *Selvey v. Coal Co.*, 79 S. E. 658, not yet officially reported; *Shinn v. Coal Mining Co.*, 78 S. E. 104; *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839. An assignee of such person is clearly not the injured person. He claims not in his own right, but through another, and is not within the terms of the statute. It does not say the person injured or his assignee may sue. It is a highly penal statute, and falls under the rule of strict construction. Such statutes do not include anything beyond their letter, even though within their spirit. *Reeves v. Ross*, 62 W. Va. 7, 17, 57 S. E. 294. Nothing can be added to their terms even for the plausible purpose

of covering what seems to be within their purpose and spirit. The assumption of assignability of this right of action can rest upon nothing other than the further assumption that the Legislature intended the penalty to be paid at all hazards and to make it an asset in the hands of any person that may be able to obtain an assignment of it. This is an assumption founded upon an assumption. Not a word in the statute suggests or intimates such intent on the part of the Legislature. There is no more reason for the assumption in this case than in any other case in which a penalty is inflicted, and the reasons that preclude the assignability of mere personal rights, such as actions for slander, assault, and battery, and other pure torts, obviously apply here. Assignability of such claims encourages litigation and strife. The same principle of public policy forbids the conversion of penalties into commodities or assets. The Legislature failed to make the right assignable, because such action would have been violative of its policy.

[4] In resistance or avoidance of the result foreshadowed by this conclusion, *Stevens v. Brown*, 20 W. Va. 450, is relied upon. It says the assignor, in an action brought by one person for the use of another, is the legal plaintiff, and invalidity of the assignment, being immaterial, is not matter of defense. The claim in that case, a judgment, was an assignable one, no matter what sort of a cause of action it arose out of. To apply this doctrine to a nonassignable right would defeat the policy of the law, since it would make every right assignable. Though in such case the assignor is the legal plaintiff, he is not the real nor substantial plaintiff. He is not responsible for costs. Nor can he dismiss or control the action or receive the money. *Clarksons v. Doddridge*, 14 Grat. (Va.) 42; *Tolson v. Elwes*, 1 Leigh (Va.) 436.

Upon these principles and conclusions, we are clearly of the opinion that the trial court should have sustained demurrers to the amended declarations in all of the three actions of debt, and that it rightly sustained demurrers to the original declarations therein.

In action of debt No. 1, there was a trial by jury and a verdict, upon which judgment was rendered. Action in debt No. 2 was submitted to the court in lieu of a jury, upon the evidence taken in action No. 1, and the same procedure was had in action of debt No. 3. For the reasons stated, the judgments in all of said three actions will be reversed, the verdict set aside in said action No. 1, the demurrers to the amended declarations in all of them sustained, and the actions dismissed; it appearing that the declarations cannot be so amended as to give the plaintiff a right of action in the capacity in which he sues.

The demurrer to the amended declaration in the action of assumpsit, containing the common counts, including one for money had

and received to the use of the plaintiff, and a special count for coal mined from the plaintiff's land, carried away, sold, and converted into money by the defendant, was properly overruled. There is a verbal inaccuracy in the special count; but it relates to form rather than substance. Instead of saying the defendant, being indebted to the plaintiff for such coal, in consideration thereof promised to pay its specified value, the declaration, after stating the facts, says: "The said defendant thereby promised to pay and become liable to the plaintiff," etc. Notwithstanding this departure from the usual form, the count shows how the defendant became indebted and alleges a promise to pay the amount of the indebtedness. It does not omit the essential averment, the promise.

[5] In passing upon the ruling upon the demurrer to the declaration, it became necessary to inquire as to the propriety of the remedy invoked. Ordinarily trespass on the case is the form of action resorted to for injuries to real property; but this is not for injury to the land. Its basis is a right to demand from the defendant money had and received for the use of the plaintiff, and, to recover, it is necessary to trace money or value into the hands of the defendant which in equity and conscience belongs to the plaintiff.

[6] Assumpsit is not the proper form of action for the recovery of damages for a mere wrong. It only lies to recover from the defendant that which is in his hands and belongs to the plaintiff, and he may have such a fund derived from timber severed from the plaintiff's land or coal dug therefrom, as well as from the proceeds of sale of personal property wrongfully taken from the plaintiff. In *Powell v. Rees*, 2 N. & P. Rep. 571, Lord Denman, C. J., said Lord Mansfield had correctly laid down the distinction, in *Hambly v. Trott*, Cowp. 371, in the following terms: "There is a fundamental distinction: If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man etc., there the person injured has only a reparation for the delictum in damages, to be assessed by a jury, but where, besides the crime, property is acquired, which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees; but, for the benefit arising to his testator for the value or sale of the trees, he shall." In *Powell v. Rees*, the action of assumpsit was allowed for the value of coal taken by the defendant's decedent from the plaintiff and sold. For further precedents, see *Dowds v. Finnegan*, 58 Minn. 112, 59 N. W. 87, 49 Am. St. Rep. 488; *Hagaman v. Neitzel*, 15 Kan. 383; *Evans v. Miller*, 58 Miss. 120, 30 Am. Rep. 313.

[7] Denial of right to test the correctness of the court's finding upon the issue of fact

s based upon alleged absence of the evidence; the sufficiency of the bill of exceptions being challenged. As has been stated, the evidence in action of debt No. 1 was taken for use in all of the other cases. The agreement for submission of the action in assumpsit to the court in lieu of a jury was in writing, and has been certified by the clerk. An order entered in the action of assumpsit says it came on "to be heard upon the stipulation and agreement of counsel heretofore made, and filed herein, and the proceedings in said action No. 1 now being part hereof thereby." This says not only that the agreement was filed in the cause, but that it made the proceedings in action No. 1 part of the proceedings in the action of assumpsit. The agreement itself says: "The parties hereto agree that the facts in this case are as follows: (Here insert the transcript of the evidence as certified by Henry Garfield Chaney, the official stenographer of his court, as reported in the same styled case, marked 'Debt No. 1,' tried at the September term of this court, 1908.)" The clerk has certified as part of the record of the four causes a certificate or transcript of evidence made by Henry Garfield Chaney in the action of debt No. 1. As the agreement bears date January 11, 1909, and the action of debt had been tried at the September term of court, 1908, the evidence referred to in the agreement as having been transcribed was no doubt in existence at the time, and the agreement identifies it. That agreement calls for a paper entitled "Transcript of the Evidence," and as having been certified by Henry Garfield Chaney, the official stenographer of the court. Turning to it, we find the paper relied upon as the evidence in the case and so certified by the clerk has both of these marks of identification. It is said the agreement relates only to the facts proved; but it calls for insertion of the transcript of the evidence. Hence the parties must have used the word "facts" in the sense of evidence. Aside from this agreement, each of the two bills of exception, made a part of the record by a proper order in action of debt No. 1, refers to a certificate of evidence, and makes it a part thereof, and a paper signed and sealed by the judge is found in the record. It is skeleton in form, and calls for insertion of the plaintiff's evidence as shown by the transcript of the stenographer's notes "hereto attached," and also for the insertion of the defendant's evidence "as shown by the attached transcript of the stenographer's notes." It would be difficult to devise a clearer and more effective method of identification than that of attachment of the paper itself to the paper purporting to adopt it. Though this skeleton paper is not labeled "Certificate of Evidence," it is such in fact. It bears the style of the action, and is signed and sealed by the judge, who certifies in it that "the foregoing is all the evidence that

was introduced on the trial of the foregoing case." Bill of exception No. 1 adopts and makes a part of it "the certificate of evidence filed in this case." Bill of exception No. 2 does likewise. These papers clearly bring the evidence into the record.

From what has been said concerning the grounds upon which this action of assumpsit is maintainable, under the circumstances disclosed here, it is obvious that the evidence, to warrant recovery, must go to the extent of proving the defendant got the plaintiff's coal and converted it into money or to his own use in some manner. It is not enough that he owned the adjacent land, and permitted somebody to mine over the line. That the coal was mined out of the plaintiff's land through the Shrader land after Shrader purchased it, and before he sold it, are facts well established by the evidence. But Shrader denies that he did the mining. He says the mine was operated by a copartnership consisting of Eliza J. Shrader, his mother, J. W. Miller, and R. O. Dunn, and he managed the mine for them, and further that he purchased the land and took the title in his own name as trustee for them. According to his testimony, the firm did business under the name of Tygarts Valley Coal Company, and other witnesses say the business was run in that name. He says the articles of copartnership were prepared by the plaintiff's attorney, and the men were paid by check bearing the firm name, and that shipping cards and store orders bore it, as well as a notice at the mouth of the mine. He denies that he was a member of the firm, and that he had any money invested in it, and says he represented the interests of R. O. Dunn and Eliza J. Shrader. He admits that he had an interest through his mother, Eliza J. Shrader, but does not define that interest. At the same time he repeats his denial that he had any interest in the firm. In this connection he says: "Only a small interest, simply managing the company for these people." This answer was followed by the question: "Well, you were a member of the company? A. In a way; yes." His evidence, taken all together, falls short of an admission of membership in the firm as a partner, and there is no other evidence of his membership thereof. That the work was done by a copartnership is established by his testimony. He says the articles were in writing and prepared by the plaintiff's attorney; but the paper was not introduced, nor were its contents shown. At the date of the conveyance by Lee to Shrader the mine was open and running, and its operations were continued, with Shrader in charge of the work, until the copartnership was formed soon afterwards; but no coal is shown to have been taken from the Wilson land before the firm was organized, and Shrader says he held the land only as trustee, and was working on a salary. In our

opinion, the evidence fails to sustain the declaration, and the court below should have found for the defendant.

[8] As the case was submitted to the court upon an agreement that the evidence in another case should be taken and treated as the evidence in it, the rule applicable to demurrers to evidence governs its disposition, and calls for the entry here of the judgment the trial court should have rendered.

Accordingly the judgment complained of will be reversed, and the action dismissed, with costs to the plaintiff in error both here and in the court below.

ROBINSON, J. (dissenting as to point 2 of the syllabus). It seems anomalous that there may be right to demur after final judgment in any case, particularly when, as in this case, the party granted that right is grossly in default. So to hold is wholly out of accord with ordinary principle, to say nothing of the plain terms and the well recognized spirit and purpose of secs. 46 and 47, ch. 125, Code 1906.

The statute provides that an office judgment which is not set aside in the manner therein provided shall become a *final judgment* at the end of the first term after which the office judgment is taken. Surely this does not mean that the judgment is merely final as to matters of fact and still not of final character as to matters of law. It plainly means that the suit is ended, except as to the mere ministerial act of entering the judgment in the order book. It means final judgment as the words are ordinarily understood—the end of the case. “A final judgment is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues.” Black on Judgments, sec. 21. The statute was meant to give a defendant ample time for defense and then to foreclose him from any defense, if he did not present it in that time. Always, everywhere, it has been conceded that this statute was made to hasten the end of litigation. Yet the decision herein permits one to come after final judgment, as under general law he can do in no other case, and take further steps even without showing good cause for his delay. Quite out of harmony is this with the very provisions of the statute itself, which provides that even at the term at which the defendant may set aside the office judgment, if he is so far in default that the judgment has been entered or a writ of inquiry executed, he must show good cause before he can have the judgment set aside. Post v. Carr, 42 W. Va. 72, 24 S. E. 583; Wilson v. Kennedy, 63 W. Va. 1, 59 S. E. 736.

That the judgment has not been entered in the order book does not give a defendant right to appear at a subsequent term and

re-open the litigation by entering a demurrer to the declaration. The statute expressly makes the judgment final at the end of the first term, though not entered in the order book. The case, by the force of the statute, is then judicially closed. The court has no further judicial power in regard to it. It has no jurisdiction to entertain a demurrer. Is not this what was held in *Marsteller v. Ward*, 52 W. Va. 74, 43 S. E. 178? That case plainly holds that nothing but ministerial duty remains in the court. If no judicial power remains in the court after the end of the term at which an office judgment becomes a final judgment, how can the court entertain and pass on a demurrer to the declaration? Speaking of the provisions of the statute, Judge Brannon, in the case last above cited, says: “These provisions mean something. They mean that the defendant has had ample time to appear, two rules and one term, and by his default he has confessed the demand, and it only remains for the court to record judgment, if certain other things which are required of the plaintiff by other provisions of section 46 are done by him, that is, if a certain affidavit is filed or proof of the demand furnished. But those things are required of the plaintiff; the statute does not enable the defendant, after that day, to *make any defense*.” Further on in the opinion he says that after the first term all defense is denied, that the court has no further jurisdiction, and that any further step in the cause is coram non jure. In *Bank v. Burdette*, 61 W. Va. 636, 57 S. E. 53, relied on in the majority opinion herein, Judge Brannon wrote nothing to the contrary. Nowhere therein does he even intimate that a demurrer may be entered at a term subsequent to the one at which the office judgment becomes a final judgment. He was dealing with a case in which a demurrer was entered before the office judgment became a final judgment. He does say that “if the demurrer is held good, and the case dismissed, the office judgment amounts to nought,” but plainly he is not there speaking of the *final* judgment which the law gives at the close of the term. He is speaking of the *office* judgment, the judgment entered at rules. He does not mean the final judgment, for that is not an office judgment, but a judgment of the term—by lapse of the term. So he is speaking of proceedings within the term, not of something done at a subsequent term. He tersely says: “In short, whether there is, or is not, a demurrer, no other defense can be made after the first term.” The point he was called upon to decide was whether the entry of the demurrer before the office judgment became a final judgment had the effect of setting aside the office judgment. He held that it did not—that it was not the character of plea that would set aside the office judgment. And though it was there held that a demurrer

entered at the first term would not even operate to prevent the office judgment from becoming a final judgment, yet my associates now give a demurrer entered at a later term the effect absolutely to annul a judgment that has become final under the statute.

Certainly if a demurrer is in time it may avail as a defense. But the defendant must put it in seasonably, or it may not avail him. If entered and rightly sustained before the office judgment becomes a final judgment it will annul the office judgment. Yet simply its entry after office judgment will not prevent finality if it is not sustained before the end of the first term. The defendant, if tardy in demurring, must recognize this and not rely alone on his demurrer if there is danger of the first term going by without the court's judgment on his demurrer. He must plead his matter of fact also, file his counter affidavit, and thereby set aside the office judgment so that when his demurrer is acted on the law will not have pronounced final judgment against him. For, the finality of the judgment pronounced by the statute at the close of the first term, cuts off a pending defense by demurrer entered after office judgment. There is no hardship in this. Only the default of the defendant makes the demurrer to be pending at so late a time. A demurrer filed in term, after office judgment at rules, is one filed after default. The entry of the office judgment at rules is a pronouncement of default. To one in default the law does not accord extraordinary grace. It will let him in to be heard, provided his tardiness does not delay. *Reynolds v. Bank*, 6 Grat. (Va.) 183. Were not this rule recognized and enforced, litigation would be extended and become vexatious. Dilatoriness would be honored. Even an answer filed at the first term after default at rules will not delay, unless good cause for the tardiness is shown. *McLaughlin v. Sayers*, 78 S. E. 355. A defendant who has been so neglectful in answering the summons of the court as to allow a confession by office judgment at rules to be entered against him, is not to be rewarded by allowing a demurrer thereafter entered by him to retard the advance of the proceedings under the strict provisions of the statute of which he has all the time had notice. When he is summoned to rules, if he finds a demurrer a proper defense, he should there enter it. His appearance and the entry of a demurrer at rules prevents default—prevents an office judgment—and thus saves him wholly from the risk of a final judgment at the end of the first term. *Bank v. Blair*, 77 S. E. 274. If he comes later, it is his own fault. He may readily prevent an office judgment by entering his demurrer at rules. If he does not do so, but allows office judgment against him and waits until the term to demur, he must take such chances on his late demurrer being heard as the short time before the day of final judgment avails him.

On what principle can a distinction be made between defense of law and defense of fact so that the latter may be foreclosed by final judgment and the former admitted after final judgment. A final judgment forecloses everything in the case. All matters of law or fact, raised or that might have been raised, are settled and merged into it. It is too late for demurrer or plea. After final judgment nothing is open to the unsuccessful party but proceedings under the statute for correction of errors, writ of error, or appeal. He can not reopen the judgment simply by a demurrer as to which he was in default long before the judgment became final. The substantiality of a final judgment can never be tested by a demurrer to the declaration. If the declaration is so defective as not to sustain the judgment, the defendant must show that on error or appeal. The proposition that after final judgment right to demur, to plead, or to take further steps, is cut off, is so uniformly recognized, so consistent with reason and principle, that no citation of authority is necessary to support it.

If a demurrer may be put in after final judgment why may not a plea in abatement be then filed as well? We have held that a plea in abatement is not such issuable plea as will set aside an office judgment, since it does not go to the fact of the debt sought to be recovered. If everything is not ended by the final judgment, if it only forecloses the question of fact and its standing is conditioned on matters outside of fact, why may not a plea in abatement be available even after the finality of the judgment—at a subsequent term?

Further, suppose a demurrer, entered after final judgment, is sustained and the plaintiff permitted to amend his declaration. Shall not the defendant then be permitted to plead to the amended declaration? Why not? He has had no prior opportunity to do so. No such pleading has been in the case before. New matters are alleged by way of amendment. The defendant is not in default as to them. He could not answer them earlier. Shall he not be given an opportunity to plead to that for the first time presented? Shall the judgment be supported by an amendment of the declaration and the defendant denied a hearing as to the truth of the amendment? If so, though he is successful in his demurrer it avails him nought. Then why allow it at all? But if he is granted the right to plead and an issue is made on the amended declaration, there must be trial. What then has become of the final judgment that the statute gave? What has become of the speedy operation of the statute?

The court, as one of original jurisdiction, is wholly without power over a judgment that has become final under the force of the statute. So held Judge Moncure, as to a similar statute, in *Enders' Ex'rs v. Burch*, 15 Grat. (Va.) 64. After the final judgment it

can take cognizance of no further steps in the case tending to defeat the judgment, except proceedings for the correction of error under Code 1906, ch. 134. "All proceedings in an action at law after an office judgment in favor of the plaintiff has become final are a nullity, or should be set aside so as to give the plaintiff the benefit of the final judgment in his favor." *Gring v. Lake Drummond Canal and Water Co.*, 110 Va. 754, 67 S. E. 360.

It is elementary that defenses of law or fact must come before final judgment.

MILLS v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of West Virginia.
Oct. 28, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 485*)—FIRES—INSTRUCTIONS.

In an action against a railway company for destruction of property by fire alleged to have been started by sparks emitted from a locomotive, it is error to instruct the jury that the presumption of negligence, which arises from proof that the fire started from sparks so emitted, may be repelled by proof that the locomotive was equipped with an approved spark arrester, without more.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1747-1756; Dec. Dig. § 485.*]

2. RAILROADS (§ 480*)—FIRES—PRESUMPTION OF NEGLIGENCE—PROOF TO REBUT.

In such case, the presumption of negligence, which arises from proof that sparks from the locomotive started the fire, can only be repelled by proof that the locomotive was constructed, equipped, and operated in a reasonably safe way in relation to danger of fire therefrom.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1709-1716, 1733; Dec. Dig. § 480.*]

3. RAILROADS (§ 454*)—NEGLIGENT EQUIPMENT—SPARK ARRESTER.

It is not required that the locomotive be equipped with the best and most approved spark arrester, but only with an approved and reasonably safe one.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1668-1671; Dec. Dig. § 454.*]

Error to Circuit Court, Mercer County.

Action by C. W. Mills against the Norfolk & Western Railway Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial awarded.

Hale & Pendleton, of Princeton, for plaintiff in error. A. W. Reynolds, of Princeton, for defendant in error.

ROBINSON, J. Mills sued the Norfolk & Western Railway Company, demanding damages for loss of property by fire alleged to have been negligently set out on his premises by sparks from a passing locomotive. At the trial of the action, the jury found for defendant, and plaintiff comes assigning errors to his prejudice.

That erroneous instructions were given on

behalf of defendant is plain from the record. That by their binding character they were prejudicial to plaintiff is likewise clear.

[1,2] Plaintiff's evidence tended to establish a prima facie case of negligence. From his evidence the jury were warranted in believing that the fire which destroyed plaintiff's property was set out by the sparks from a passing locomotive of defendant. If the jury so believed, then a presumption of negligence on the part of defendant arose, which the defendant was obliged to repel in order to acquit itself, by proving that the locomotive was properly constructed to avoid setting out fire on premises adjoining the railway by being equipped with an approved and reasonably safe spark arrester, and that as so constructed and equipped it was operated in a reasonably safe way in relation to danger of fire therefrom. *Jacobs v. Baltimore & Ohio Railroad Co.*, 68 W. Va. 618, 70 S. E. 369; *Wilson Bros. v. Bush, Receiver*, 70 W. Va. 26, 73 S. E. 59; 33 Cyc. 1364-1367.

Now, defendant introduced evidence tending to prove that the locomotive was equipped with an approved and reasonably safe spark arrester, but it offered no evidence tending to prove operation of the locomotive so equipped in a reasonably safe way. The best appliance may be so negligently used as to fail to furnish the protection for which it is intended. The mere statement of the engineer that he had been running for seven years is not enough. On this occasion he may have been negligent. For instance, he may have had greater draught on the engine than necessary. Defendant, therefore, did not fully repel the presumption of negligence arising from the evidence offered by plaintiff. Yet the court virtually instructed the jury that the use of an approved spark arrester alone would repel that presumption. It gave two binding instructions to the effect that the jury should find for defendant if they believed that such a spark arrester had been used, without more. The court thereby told the jury to find for defendant notwithstanding plaintiff's prima facie case was not rebutted by defendant. The court thus took from plaintiff the benefit of his prima facie case. By binding instructions it directed the same to be rebutted by that which was insufficient in law to do so. Only by showing proper construction, equipment, and operation of the locomotive is the presumption repelled. *Wilson Bros. v. Bush, Receiver*, supra. Nothing else will disprove the presumption of defendant's negligence. "In addition to exercising care and precaution in selecting and keeping in repair the machinery and appliances the company must not be guilty of negligence in operating that machinery, for if it so negligently operates machinery that fires result, it will be liable." 3 Elliott on Railroads, sec. 1225. It was this principle that the court had in mind when it used

the term "competent servants" in *Jacobs v. Railroad Co.*, supra.

Defendant argues that negligence in operation of the locomotive is not within the averments of plaintiff's declaration. We find it otherwise. Under the averment of negligence in that pleading plaintiff's prima facie case was clearly admissible. When it was made out the burden was on defendant.

[3] Plaintiff says the court erred in refusing three instructions for which he asked. We find the first two erroneous and properly refused, because they use the words "best and most approved" in relation to the kind of spark arresters that a railroad company must use to avoid liability. *Wilson v. Bush, Receiver*, supra. This same error was in the instructions given for defendant which we have held bad, but of course plaintiff can not complain of that. The other instruction asked by plaintiff was properly refused. It puts a higher duty on the railway company than the law of the case recognizes. We do not think it essential to discuss the point.

The judgment will be reversed, the verdict set aside and a new trial awarded.

WRIGHT et al. v. PITTMAN et al.

(Supreme Court of Appeals of West Virginia.
Oct. 28, 1913.)

(Syllabus by the Court.)

1. PARTITION (§ 83*)—ISSUES—RIGHT TO DETERMINE TITLE.

In a partition suit, the court may determine title between conflicting claimants of an undivided interest in the land.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 228, 229; Dec. Dig. § 83.*]

2. APPEAL AND ERROR (§ 69*)—DECISIONS APPEALABLE—PARTITION.

A decree rendered in a partition suit, establishing a lost deed and settling a question of disputed title, is appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 352-366, 386, 409, 410; Dec. Dig. § 69.*]

3. APPEAL AND ERROR (§ 871*)—TIME FOR TAKING APPEAL—PARTITION.

Such decree cannot be reviewed by this court on an appeal from a final decree, taken more than a year after the former was rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3526-3529; Dec. Dig. § 871.*]

4. PARTITION (§ 113*)—PARTIES—DECREE SETTLING TITLE.

The owner of an oil and gas lease, holding under conflicting claimants of the land, and not colluding with either, has the right of appeal from a decree settling the title, when the matters involved in the appeal relate to the jurisdiction of the court.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 424-439; Dec. Dig. § 113.*]

5. EQUITY (§ 181*)—ANSWER—EFFECT.

An answer, filed after the term of court has ended at which an appealable decree was rendered, cannot raise an issue upon the questions determined by such decree.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 417; Dec. Dig. § 181.*]

6. PLEADING (§ 165*)—REPLICATION—PARTITION.

A replication is unnecessary if the answer admits the allegations of the bill.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 321, 323; Dec. Dig. § 165.*]

7. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR—BILL IN PARTITION.

This court will not reverse a decree determining title and partitioning land for an error in taking the bill for confessed as to a nonresident defendant, who was personally served with process out of the state, when no substantial injustice is done to such nonresident.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

8. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—APPOINTMENT OF RECEIVER—NOTICE.

In a case proper for a receiver, this court will not reverse a decree appointing him, after he has performed his duties, for failure to give the notice required by statute.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.*]

Appeal from Circuit Court, Wetzel County.

Suit in partition by Albert Wright and others against Timothy Pittman and others. From the decree the Hope Natural Gas Company appeals. Modified and affirmed.

A. B. Fleming, Charles Powell, and Kemble White, all of Fairmont, for appellants. Thomas P. Jacobs and Thayer M. McIntire, both of New Martinsville, for appellees.

WILLIAMS, J. Claiming that their ancestor Charles P. Garrett, deceased, acquired, in his lifetime, by deed from Timothy Pittman, Jacob Pittman, and Isaac Pittman 3 undivided tenths of 214 acres of land of which their father, Elias Pittman, died seised, which deed, it is alleged, was duly made and delivered, but was never recorded and is now lost, the heirs of said Charles P. Garrett have brought this suit for a partition of 36½ acres of land, it being that part of the 214 acres which was assigned to Rebecca Pittman, widow of Elias Pittman, deceased, as her dower, to have the lost deed restored, as a muniment of their title, and for an accounting of plaintiffs' alleged share of the gas rental and royalty oil.

There are a producing oil well and a producing gas well on the land; the former being owned by Hervey and McNaught, and the latter by the Hope Natural Gas Company. Their respective rights therein are admitted in the bill. The Hope Natural Gas Company, claiming to be the owner of the gas well under separate leases from the adverse claimants of the aforesaid three undivided tenths of land, has refused to account to plaintiffs for the annual rentals therefor, and the Eureka Pipe Line Company has likewise refused to turn over to them the three-tenths of the royalty oil in its pipe lines, until the title to said three-tenths of the land is settled between the Garrett heirs and the three aforementioned Pittmans. Therefore the above-named companies

were made parties, and the bill prays for an accounting against them. On the 2d June, 1910, the chancellor heard the cause upon bill taken for confessed as to all the adult defendants, and determined the question of title to the said three-tenths of the land in favor of plaintiffs, and restored the lost deed by giving his decree the effect of a deed, and directing its recordation in the county court clerk's office. By decrees made at subsequent terms of court partition was made of the land, except the oil and gas, by a sale thereof and the ascertainment of each co-owner's share in the proceeds; it having been found that partition in kind could not be made without detriment to the interest of all parties concerned. Division was also accordingly made of the accumulated royalty oil and gas rentals, and provision made for the payment of future rentals and the delivery of royalty oils to the parties according to their several interests, which the decree determined.

The Hope Natural Gas Company was granted this appeal to all those decrees, about seven in number. It does not deny its liability to account to plaintiffs, if they are the true owners of the three-tenths of the land. But it insists that the chancellor did not acquire jurisdiction to pronounce the decrees complained of, for want of sufficient allegations in the bill, and for lack of jurisdiction over the persons of Timothy Pittman and Milly C., his wife, who were personally served with process in the state of Ohio, where they then resided. Jurisdiction is necessary to give validity to judicial proceedings; and, if there was lack of jurisdiction to pronounce the decrees complained of, they are void, and appellant, having such interest as entitles it to have the disputed title to the land settled, before it could properly be compelled to pay rental to either of the adverse claimants, has a right to appeal therefrom for its own protection. Its right of appeal is analogous to what it would have been if it had filed a bill of interpleader, calling upon the adverse claimants of the land to litigate their respective claims.

The Eureka Pipe Line Company and the Hope Natural Gas Company are the only parties that appeared to the bill. They appeared on the 4th of May, 1910, at a regular term, and demurred to the bill, assigning nothing in support thereof. Plaintiffs joined in the demurrer, and the issue of law thereon was heard on the 1st of June, 1910, and the demurrer overruled. Demurrants were given until the next day to answer; and, failing to answer, the cause was heard on the 2d of June, 1910, upon bill taken for confessed as to all of the adult defendants, and upon the answers of the guardian ad litem of the infant defendants, and a decree entered, finding that the three aforesaid Pittmans had conveyed their undivided three-tenths interest in all of the land of which their father had died seised, by deed made and delivered to Charles P. Garrett, plaintiffs' ancestor, in

1877, and further finding that said deed was lost and was never recorded. The decree also restored said lost deed in the manner above stated, and canceled two deeds, one executed by Isaac W. Pittman and wife to J. A. Pittman, and another by said J. A. Pittman and wife to Sarah A. Pittman the wife of Isaac W. Pittman, for the undivided one-tenth interest in said 38½ acres of land.

[1-3, 7] Appellant insists that it was error to take the bill for confessed as to Timothy Pittman and his wife, who were residents of the state of Ohio, and had been personally served with process in that state. True it was error, but the decree adjudicating title to the land and restoring the lost deed is appealable, and no appeal was taken therefrom for more than a year. The appeal as to it will have to be dismissed as having been improvidently awarded. The time of appeal is now limited to one year instead of two, as formerly. Acts 1909, c. 40. Moreover, the error does not relate to jurisdiction. The location of the land and the subject-matter of the suit gave the court jurisdiction to pronounce the decree. The nonresidency of Timothy Pittman and wife could not defeat jurisdiction. So far as it relates to restoring the lost deed, the suit was in its nature in rem, and the location of the land gave the circuit court of Wetzel county jurisdiction to pass on questions affecting the title. *Tennant's Helrs v. Fretts*, 67 W. Va. 569, 68 S. E. 387, 29 L. R. A. (N. S.) 625, 140 Am. St. Rep. 979. Error in taking a bill for confessed as to a nonresident personally served out of the state, instead of hearing the cause, as to such nonresident, upon order of publication completed, is not jurisdictional error. The suit was primarily for partition, and the court had the right to settle the question of title to the land, and rights to the royalty oil and gas well rentals, as incident thereto. Section 1, c. 79, Code 1906; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557; *Irvin v. Stover*, 67 W. Va. 356, 67 S. E. 1119. Moreover, the decree is a default decree, and no application was made to the court below to have it corrected. This is an additional reason why the appeal, as to the decree of June 2, 1910, will have to be dismissed. Section 5, c. 134, Code. All the matters, respecting which relief was given, were well pleaded, and there was no lack of jurisdiction in the court to pronounce any of the decrees complained of.

[5] At a special term of the court held on the 5th of July, 1910, the Hope Natural Gas Company and the Eureka Pipe Line Company were permitted to file their answers and demurrers to the bill. Those answers came too late to raise an issue concerning any of the matters determined by the decree of June 2d. The term of court at which that decree had been entered had adjourned, and the appealable matter thereby determined was no longer controvertible. Such matter was no longer in the breast of the court.

[8] It is insisted that it was error to appoint a special receiver to take charge of the royalty oil and gas rentals, without notice to the parties, as required by section 28, c. 133, of the Code. Granting that it was error, this court will not now reverse for such error alone. It only relates to procedure; and, seeing that the case is one in which it was proper to appoint a receiver, and that he has performed his duties in the manner required by the decree appointing him, such decree will not be reversed for failure to give notice of application for a receiver. The Hope Natural Gas Company was required to turn over to the special receiver the gas rentals in its hands, less the one-fifth thereof which the decree found to belong to it, and the Eureka Pipe Line Company to turn over to him all the royalty oil in its possession belonging to the owners of the royalty interests, the amount of which was ascertained to be 326 barrels. This the special receiver was directed by the decree to sell. The Hope Natural Gas Company appears to be the owner of a one-fifth of the royalty oil, as well as one-fifth of the gas rentals, and it is insisted that the decree of distribution, made on the 26th day of May, 1911, is erroneous, in that it fails to direct the special receiver to pay over to it its share of the proceeds of royalty oil. The proceeds thereof amounted to \$423.78 at that time, and was properly taxed with its proportion of the costs of suit. It, therefore, appears that appellant's pecuniary interest, being the one-fifth, is less than \$100. Moreover, it appears to be an error of record, which could have been corrected by the court below, because plaintiffs' bill admits that appellant is a one-fifth joint owner in the royalty oil, as well as a like owner in the gas rentals. The decree also recognizes its interest in the royalty oil, but does not expressly direct the receiver to pay it over to it. This is not an error calling for reversal, but is one which can be corrected here.

[8] It is insisted that it was error to hear the cause without replication to appellant's answer, no proof having been taken. No replication was necessary. The only averments in the bill, concerning which it could be said the answer raised an issue, were in relation to those matters that had been determined by the appealable decree, rendered June 2, 1910, upon bill taken for confessed. The answer came too late to make an issue as to them; and it did not controvert, but expressly admitted, all other material allegations in the bill. The failure to reply is an admission of the truth of the answer. But the answer in this case did not deny, but admitted, the truth of the only allegations of the bill which defendant could, at that time, have denied; and a replication was therefore wholly unnecessary.

[4] It is said that W. E. Lemasters, who is

interested in the oil and gas royalties, was not made a party to the suit. But we find that he is a party plaintiff, by the name of E. M. Lemasters. His correct name, W. E. Lemasters, appears in the bill, and in the decree distributing gas rentals and proceeds of royalty oil, in which he is given a life interest in the one-sixth.

Cross-assigning error in brief, Timothy Pittman and Milly C. Pittman, his wife, insist that it was error to take the bill for confessed as to them; they being nonresidents and personally served with summons in a foreign state. This was error, but not an error affecting jurisdiction. The court had jurisdiction to enter the decree which it did enter, upon order of publication executed; and personal service out of the state is made the equivalent thereof. Moreover, application should have been first made to the court below to have the error corrected. Section 5, c. 134, Code.

The decree of May 26, 1911, making distribution of the proceeds of oil and gas rentals, will be corrected, directing the special receiver to pay to the Hope Natural Gas Company its one-fifth of the proceeds of sale of royalty oil, after deducting from said one-fifth its proportion of the costs provided for in the decree; and, as so corrected and modified, it and all other decrees appealed from will be affirmed, with costs to appellees.

HARTMYER et al. v. EVERLY et al.

(Supreme Court of Appeals of West Virginia.
Oct. 28, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Where under the case as presented, as a matter of law the judgment could only be that which has been entered, the appellate court will not reverse for errors in instructions to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

2. EJECTMENT (§ 12*)—TITLE OF PLAINTIFF—CONSTRUCTION OF DEED—OTHER INSTRUMENTS.

In ejectment, the plaintiff can not extend the description in his deed by reference to a patent or other paper not referred to or adopted for description in the deed.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 47-55; Dec. Dig. § 12.*]

3. EVIDENCE (§ 390*)—PAROL EVIDENCE—CONSTRUCTION OF DEEDS—EXTRINSIC EVIDENCE.

Description of land in a deed, free and clear from ambiguity, cannot be varied, controlled or contradicted by parol or extrinsic evidence. It is conclusive as to what land is intended to be conveyed by the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1721, 1723-1728; Dec. Dig. § 390.*]

Error to Circuit Court, Preston County.

Ejectment by Christian Hartmyer and others against John L. Everly and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

P. J. Crogan and Hughes & Conley, all of Kingwood, for plaintiffs in error. Lazzelle & Stewart, of Morgantown, for defendants in error.

ROBINSON, J. [1] The action is ejectment. The jury found for defendants, and judgment followed accordingly. If the theory of the case advanced by plaintiffs was sound, several instructions given to the jury over the objection of plaintiffs would be so erroneous and prejudicial as to warrant the reversal which they seek. But we find that theory not supported by the record. Plaintiffs proved no title to the land in controversy. In no event could they recover. Though instructions to the jury were erroneous, yet, since no other judgment than the one entered could have been rightly given, plaintiffs are not prejudiced. *Reilly v. Nicoll*, 72 W. Va. 189, 77 S. E. 897. If a verdict had been returned for plaintiffs, it could not have stood. As a matter of law, they could not recover without showing title in themselves.

Plaintiffs argue the error in instructions on the assumption that their evidence tended to prove a case. The case should never have been submitted to the jury. In any event, defendants were entitled to the judgment which was entered in their favor. In this opinion, we need only to discuss the total insufficiency of plaintiffs' evidence to make any case at all.

That a plaintiff in ejectment must ordinarily recover on the strength of his own title is elementary. That in this case the burden was on plaintiffs to show paper title to the land sought to be recovered, counsel will no doubt concede. It is quite true that title by adverse possession will suffice for recovery in ejectment. But here plaintiffs rested not on actual possession by enclosure or direct occupancy of the land in controversy. No evidence offered tended to prove such actual possession by them. They sought to hold the land as within the bounds of their title papers.

The land in controversy is a small parcel of about ten acres, lying between tracts of land which unquestionably belong to plaintiffs and defendants respectively. Plaintiffs say that it is within the proper bounds of their land; defendants say it is not within the bounds of plaintiffs' land, but that however this may be they have title by long adverse possession. As to whether the last mentioned claim of defendants is well founded we have no concern, under the case as it presents itself for decision. Since plaintiffs have proved no title to the parcel, it matters not to whom the same actually belongs.

The boundary of land which plaintiffs say embraces the parcel in controversy came to them and a brother of theirs by descent from their father. The brother, before the institution of this suit, conveyed his interest to one of the plaintiffs. To the ancestor, William Hartmyer, the boundary was conveyed by William Hagans, the deed containing a description by specific metes and bounds, calling for one hundred and eighty-nine and one-quarter acres, more or less, and reciting that the land conveyed is the same that was conveyed to William Hagans by Brown and Hagans, commissioners, by deed of record. To William Hagans it had been conveyed by Brown and Hagans, special commissioners in a chancery suit, the deed containing a description by exactly the same definite metes and bounds and calling for the same number of acres as the metes and bounds and number of acres given in the other deed to which we have referred. This deed of the special commissioners shows that they conveyed the land pursuant to a decree to fulfil certain contracts for the sale of land made by Harrison and Elisha M. Hagans, then deceased, and that the conveyance was upon a contract for the sale of the land therein mentioned made by Harrison and Elisha M. Hagans to one Thomas J. Collins, who had assigned his right thereunder to the grantee, William Hagans. The deed recites that the tract thereby conveyed is one that had been contracted to Collins. And, as we have said, it specifically describes the tract by metes and bounds, and gives its acreage as one hundred and eighty-nine and one-quarter.

Now, plaintiffs introduced these two deeds in the chain of their father's title, but conceded that the calls as given in them, which we may iterate were the same in each deed, would not take in the small parcel in dispute. But they claimed that these deeds contained mistakes in the specific descriptions which they uttered, and they sought to amend the same by reference to a written contract for the sale of the land made by Harrison and Elisha M. Hagans to Collins. The court permitted the introduction of that contract. The description of the land given in it is brief and general. It is for two tracts of land in a locality named, "the one tract known as the Faw Tract, and the other lying adjoining it on the south; supposed to contain in the aggregate, two hundred and twenty acres." Then plaintiffs introduced a patent from the Commonwealth of Virginia to William Faw, dated Aug. 11, 1788, containing a description by metes and bounds of a tract of land in the same locality. Plaintiffs claimed that the deeds were meant to contain the same description as that given in the patent, and that the deeds so read would embrace the parcel in dispute. The trial court evidently adopted such a theory, and permitted plaintiffs to rely upon the deeds as amended in description by the patent. These papers

make the only showing of title that plaintiffs presented, other than the admission by all parties at the beginning of the trial that their respective titles would run back to a common source.

[2] The deeds spoke for themselves. They could not be changed by the patent. Those deeds contained independent particular description of the land and in no way adopted or referred to the patent in aid of the particular description which they contained. True, the deed of the special commissioners recited that it was made to carry out a contract for the sale of land made by Harrison and Elisha M. Hagans to Collins, but it by no means referred to the contract for a description of the land conveyed. It did not even say that the contract was a written one. It gave its own description of the land the contract should cover, and that description was definite and particular by metes and bounds. If the contract had been referred to for further description, the particular description in the deed would prevail over it; for, as we have seen, it contained only the most general terms of description. It does say that one of the tracts sold by it is the Faw Tract, but it does not refer to any patent for a description of the tract. The tract could be called the Faw Tract as it was and still not be all the land originally patented there to William Faw. How often do tracts of land called by a general name like this lose a part by conveyance and still retain the name?

[3] A court itself in a chancery suit carrying out this contract for the sale of land evidently ascertained the specific boundary the contract embraced and caused the same to be conveyed by special commissioners in fulfillment thereof to William Hagans as the assignee of Collins. William Hagans as such assignee by his acceptance of the deed gave practical construction to the meaning of the contract as to the particular boundary intended by its general description. How can we say that he meant the description to be different or that a mistake was made by the court or its duly appointed special commissioners in ascertaining what should be conveyed by the contract? William Hagans seems to have been satisfied that the description in the deed to him embraced all that he was entitled to as holder of the contract, though the deed called for a much smaller number of acres. He was bound to know just what the description in the deed to him embraced. So was the ancestor of plaintiffs when he took a conveyance from William Hagans by the same metes and bounds. There is nothing referred to in either deed

which will control or change the same particular description given in each. The calls in the patent, or the patent itself, was not resorted to in the contract for description of the land. The contract was not resorted to in either of the deeds for description. In none of the papers was the patent referred to in any way. The parties plainly were not conveying by the patent, but by clear description independent therefrom, written into and adopted by their deeds. Then from these papers what speaks any intention of the parties to convey what the Faw patent had conveyed? There is clearly no ambiguity in the deeds. Looking to them, we find them certain as to meaning in the description of the land. Not a single term indicates that they were meant to convey the land by the description in the patent. They cannot be changed by the assumption that they are wrong, nor by extrinsic evidence when they are unambiguous. No part of the description in them is inconsistent with any other part. Where a part of the description in a deed is inconsistent with the remaining part, and thus shown to be erroneous, it may be rejected; or, when the description given is uncertain and ambiguous, parol or extrinsic evidence will be admitted to show to what it truly applies. But where terms are used in a description which are clear and intelligible, the court will put a construction upon those terms, and parol or extrinsic evidence will not be admissible to control the legal effect of such description. Devlin on Real Property and Deeds, sec. 1042; Bond v. Fay, 12 Allen (Mass.) 86. Plaintiffs could not change the terms of their deeds by extrinsic evidence, as they were permitted to undertake to do. They could not, in ejectment, reform the deed by which they held their land, so as to take in the parcel sought to be recovered. This case is controlled by a well known general rule which has been concisely stated as follows: "Where the description in a deed of the premises intended to be conveyed is clear and free from ambiguity, it cannot be varied, controlled, or contradicted by parol or extrinsic evidence. In such case the deed must be held to be conclusive evidence as to what land is intended by the grantor to be conveyed, the quantity of land, and likewise the conclusive evidence of his intention to include in or exclude from the instrument particular land." 17 Cyc. 616.

Plaintiffs' evidence did not appreciably tend to make a case. The jury having reached the verdict that the court should have directed, the judgment entered thereon will be affirmed.

**MARION COUNTY LUMBER CO. v.
HODGES.**

(Supreme Court of South Carolina. Nov. 10, 1913.)

1. DEEDS (§ 138*)—"EXCEPTION" AND "RESERVATION"—CONSTRUCTION AND OPERATION.

While there is a well-defined and established difference between an exception and a reservation in a deed, the use of the word "exception" or "reservation" will not control the manifest intention, as they are often used interchangeably and synonymously.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 456; Dec. Dig. § 138.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2538-2544; vol. 8, p. 7656; vol. 7, pp. 6140-6144; vol. 8, p. 7787.]

2. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—EXCEPTION OR RESERVATION.

Under a deed conveying the standing timber on a plantation of 1,112 acres except such as might be necessary for plantation use, rails, wood, and board, enough timber should be left to supply both the present and future needs of the plantation, and the grantor's right to timber was not limited to a right to cut timber for plantation uses until the timber was removed by the grantee, especially where it appeared that the method of cutting and removing timber adopted by lumber companies almost invariably, if not necessarily, left scattered saw timber sufficient to supply the ordinary demands of a plantation.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

3. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—EXCEPTION OR RESERVATION.

Under a deed granting the standing timber on a plantation except such as might be necessary for plantation use, no particular body of timber was excepted or reserved, and the grantor could not set aside a tract of timber and exclude the grantee therefrom unless such tract with all other uncut timber was necessary to satisfy the exception.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

4. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—EXCEPTION OR RESERVATION.

Under a deed conveying the standing timber on a plantation of 1,112 acres, 350 of which were then in cultivation, except such as might be necessary for plantation use, only so much timber was reserved as was necessary for the needs of the plantation as it then existed, although the grantor thereafter increased its needs by bringing additional land into cultivation.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

5. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—RESERVATION—PLANTATION USES—EVIDENCE.

In an action between the grantor and grantee of standing timber on a plantation of 1,112 acres, 350 of which were in cultivation, except such as might be necessary for plantation use, evidence on an application for a temporary injunction held to show that a tract of 94 acres of timber from which the grantor had excluded the grantee was not necessary for plantation uses.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

6. APPEAL AND ERROR (§ 1180*)—REVERSAL WITHOUT PREJUDICE.

A deed conveying standing timber excepted such as might be necessary for plantation use. The grantee construed this to mean that it

might remove all of the timber and that the grantor could only use timber for plantation use until it had so removed it, and refused to agree to leave any timber. The grantor set apart a tract of timber and forcibly excluded the grantee therefrom. The grantee obtained a temporary injunction against interference with the removal of the timber which was dissolved, and both parties were enjoined from cutting timber pending the suit. The evidence showed that the tract set apart was not necessary for plantation uses. Held that, each party having misconceived his own as well as his opponent's rights, the reversal of the order granting such injunction would be without prejudice to the respective rights of the parties as adjudicated by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4626-4631, 4658, 4659; Dec. Dig. § 1180.*]

7. INJUNCTION (§ 132*)—TEMPORARY INJUNCTION—SCOPE.

In an action between the grantor and grantee of standing timber, except such as might be necessary for plantation use, in which both parties were enjoined from cutting timber pending the suit, the injunction improperly restrained the grantee from removing timber already cut, even though the grantor was entitled to an injunction against further cutting.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

8. INJUNCTION (§ 148*)—TEMPORARY INJUNCTION—CONDITIONS ON GRANTING—BOND.

It was error to grant a temporary injunction without requiring an injunction bond as a condition thereof, since the statute requires such bond and the courts have no power to dispense with it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 323-334; Dec. Dig. § 148.*]

Appeal from Common Pleas Circuit Court of Marlboro County; T. H. Spain, Judge.

Action by the Marion County Lumber Company against C. P. Hodges. From an order dissolving a temporary injunction granted on plaintiff's application and granting a temporary injunction restraining both parties, plaintiff appeals. Reversed and remanded.

M. C. Woods and A. F. Woods, both of Marion, for appellant. W. J. Montgomery, of Marion, and D. D. McColl, of Bennettsville, for respondent.

HYDRICK, J. In 1904, William Evans conveyed to Cape Fear Lumber Company "all the timber, except such as may be necessary for plantation use, rails, wood and board," on a plantation containing 1,112 acres, 350 of which were then in cultivation, together with the rights of way necessary for its removal. The grantee is to have ten years from date of the deed to cut and remove the timber; and, if it has not done so at the end of that time, it is to have ten years longer, by the payment of 6 per cent. on the purchase price. Plaintiff is the successor of Cape Fear Lumber Company in title to the timber, and defendant has acquired the title of William Evans to the land. In 1912 plaintiff began to cut and remove the timber. Defendant tried to get plaintiff to come to some agreement as to what amount

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of timber should be left under the exception in the deed, which is quoted above; but plaintiff declined to make any agreement, contending that it has the right to cut and remove all the timber on the land, and that defendant's right is limited to the use of timber for the purposes mentioned in the deed only so long as it lasts, in other words, until plaintiff has cut and removed it. Thereupon, under the advice of counsel, defendant had five disinterested landowners of the community to view the premises and set off to him the quantity of timber which, in their judgment, would satisfy the exception. Assuming that the exception embraced enough timber to satisfy the needs of the plantation not only in its condition at the date of the deed, but also as they supposed that it would be after more of it had been brought into cultivation as the result of having had the timber removed from it, and assuming also that those needs must be supplied, until a new growth of timber would attain sufficient size to supply them, which they estimated would require from 25 to 30 years, these gentlemen set off to defendant the timber on 94 acres of the tract. Defendant had the boundaries of the body of timber so set off to him marked, and notified plaintiff not to cut any of it. Defendant and his witnesses say that plaintiff's agent agreed to let defendant know, before going upon said tract to cut—presumably that he might have opportunity to take such steps as he might be advised to protect his interests—and that, for some time, while they were cutting the timber on other parts of the plantation, they observed the boundaries of the part set off to defendant. But on the night of July 28, 1912, in defiance of defendant's notice and contrary to their said agreement, they laid their logging railroad on said tract, and began cutting the timber early the next morning with such a great force of hands that, by 11 o'clock in the forenoon, they had cut and carried away 14 car loads of logs, aggregating 50,000 feet of timber. On discovering that plaintiff was thus endeavoring, as he supposed, to defeat his rights, defendant took with him an armed force of men, and drove plaintiff's logging crew out of the woods, threatening to shoot any who dared to remain to cut or remove any more of the timber. He also tore up 240 yards of plaintiff's logging railroad which had been laid on said tract. Thereupon plaintiff brought this action for injunction, and, on an ex parte showing, his honor, Judge Spain, issued an order enjoining defendant from "interfering with plaintiff's laborers, logging equipment, and railroad, and otherwise interfering with plaintiff in the cutting and removal of the timber." Under protection of this order, plaintiff resumed its operations, and was cutting and removing the timber on said tract at the rate of about 100,000 feet a day, when defendant obtained a rule re-

quiring plaintiff to show cause why the order enjoining him should not be dissolved, and, in the meantime, restraining further operations by plaintiff. On hearing the return, and the affidavits pro and con, his honor dissolved the injunction which he had issued against defendant, but enjoined both parties, pending the litigation, from "cutting, removing, or in any wise interfering with any of the timber" on said 94 acres. From this order plaintiff appealed.

[1] Counsel for both parties agree that the case depends upon the proper construction of the clause in the Evans deed which, for the sake of convenience, we have referred to as the exception, although, in legal effect, it is perhaps more nearly a reservation. It is not material, however, whether we call it an exception or a reservation. While there is a well-defined and established difference between the two, the courts, with practical unanimity, agree that the use of the technical word "exception" or "reservation" will not be allowed to control the manifest intention, for they are often used interchangeably and synonymously. 13 Cyc. 674; 11 A. & E. Enc. L. (2d Ed.) 555. It is our duty therefore to give the clause in question a fair and reasonable interpretation, and, having ascertained the intention of the parties to the deed, to give effect to it.

[2] Thus construing the exception, we cannot sustain plaintiff's contention that it has the right to cut and remove all the timber from the plantation, and that defendant has no right, except to use thereof so long as it lasts. The language is plain, and the intention is clearly expressed to except from the grant so much timber as may be necessary for plantation purposes. In view of the ever present and well-known necessity for timber and its products to supply the various needs of a large plantation, it is highly improbable that the grantor would have intentionally conveyed all the timber on his plantation so that he would then, if the grantee had exercised the right to cut immediately, or afterwards, the cutting having been deferred to a later date, be compelled to go into the market and buy timber for his plantation uses. The words "such as may be necessary" look to the future as well as the present, and we think the intention was that enough timber should be left to supply both the present and future needs of the plantation. The deed fixes no limit of time—how long such needs must be supplied—and we should therefore fix such as appears, from the language used and all the circumstances, to be the most reasonable and most probably that which was within the contemplation of the parties to the contract.

The plaintiff's own testimony strongly supports the construction which we have adopted; for it tends to show that the method of cutting and removing timber adopted by such companies is such that, for various reasons,

almost invariably, if not necessarily, scattered saw timber enough is left to supply the ordinary demands of a plantation, and that no trees under ten inches in diameter are cut, and that this case has been no exception to the rule. It is not improbable, therefore, that the parties had in mind this method and custom of cutting, and contracted with reference to it.

[3] The same reasons point to the conclusion that it was not the intention to except or reserve any particular body of timber or that on any particular part of the plantation. If so, it would have been easy to set it apart by description in the deed, and that would most probably have been done. Therefore, after execution of the deed, neither party could say to the other, "This tree is mine, and that is yours," or, "This body of trees is mine and the rest is yours." It follows that defendant had no right to have the timber on the 94 acres set off to him, mark around it, and exclude plaintiff therefrom, unless he can make it appear that it will take all the timber thereon, including that which has been left on other parts of the plantation, to satisfy the exception, as herein interpreted. For while it is true, as we have said, that the intention was not to except the timber on any particular part of the plantation, yet the exception must be given practical effect, and if, in doing so, it is found that all the timber has been cut, except that on the 94 acres, and if it takes all that to satisfy the exception, the fact that it is all in one body is an immaterial incident. Enough must be left to satisfy the exception, whether it be scattered about over the plantation, or in one body.

[4] In the absence of language, or of facts and circumstances, indicating a contrary intention, the deed must be construed as referring to the needs of the plantation as it existed at the date thereof. The construction contended for by defendant might result in the grantee taking nothing by the grant; because it is conceivable that, within the time allowed to cut and remove the timber, the grantor could bring enough additional land into cultivation, or in other ways so increase the needs of the plantation for timber, that it would require all the timber thereon to satisfy them. Such a result could not have been intended. Therefore plaintiff must leave only enough timber to supply the needs of the plantation as it existed at the date of the deed, and as it was then used. *Midland Timber Co. v. Pegues*, 93 S. C. 82, 76 S. E. 32; 13 Cyc. 677, and note.

[5] Upon examining the record to ascertain the showing made by the parties respectively at the hearing, we find that five of defendant's neighbors, who are farmers, and are therefore supposed to know the needs of a plantation, testified that they are familiar with his plantation, and have thoroughly examined that part of it which has been

cut over by plaintiff, and that enough timber has been left thereon for the use of the plantation for an unlimited time, without regard to the future growth of timber; and they further say that defendant's claim to the timber on the 94 acres is utterly unreasonable. Three of plaintiff's witnesses, who are experts in estimating timber, swear that an abundant supply has been left on the land already cut over for all plantation purposes for an unlimited time; some of them say that as much as 200,000 feet have been left, enough to build 25 good tenant houses, and they all say that there is on the 94 acres at least a million feet of merchantable timber, enough to build 250 tenant houses. It appears that no timber under ten inches in diameter has been cut, except a small quantity for cross-ties, and we know that trees of this size and even smaller are fit for many plantation uses. It also appears that there are now on the plantation ten good tenant houses with the usual necessary outbuildings. The defendant furnishes no evidence to the contrary, except he says, in his own affidavit, that practically all the timber has been cut off the land that has been cut over, and that nothing of any consequence or value has been left. The five neighbors who set off the 94 acres to him do not swear that so much is necessary. They only certify that it is.

[6] It appears therefore that, upon a proper construction of the deed and consideration of the showing made at the hearing, defendant was not entitled to an order of injunction. *Kelly v. Tiner*, 86 S. C. 104, 6 S. E. 465. But, as each party misconceived his own as well as his opponent's rights under the deed, the reversal of the order of injunction is without prejudice to have their respective rights, as herein adjudicated, observed and protected.

Appellant contends that the order was also erroneous, because it enjoined plaintiff from the enjoyment of its easements, and the right to use its railroad across the 94 acres to get out other timber about which there was no dispute. Plaintiff has misconstrued the order. It enjoins only the cutting, removing or interfering with the timber on the 94 acres. Nothing is said about the easement or the use of the railroad. Nor does it appear that defendant objected to the plaintiff's use of its easements and railroad for the purpose of getting out any timber, except that on the 94 acres. The record shows that the whole contest before the circuit judge centered upon the right to cut and remove that body of timber. Naturally, therefore, the order was directed solely to that matter.

[7] The order does, however, enjoin the removal of about 85,000 feet of timber that had been cut, and was lying on the ground when the restraining order obtained by defendant was served. Without regard to defendant's right to injunction on other grounds, under the circumstances of this

case, it was error to enjoin the removal of the timber which had already been cut. *Lumber Corporation v. Burton*, 89 S. C. 143, 21 S. E. 820.

[8] His honor also erred in not requiring an injunction bond, as a condition of granting the injunction. The statute requires it, and the courts have no power to dispense with it. *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227; *Water Co. v. Nunamaker*, 73 S. C. 50, 53 S. E. 996; *Ex parte Zeigler*, 83 S. C. 78, 64 S. E. 513, 916, 21 L. R. A. (N. S.) 1005; *Life Ins. Co. v. Mobley*, 89 S. C. 189, 21 S. E. 817; *Groce v. G. S. & A. R. Co.*, 94 S. C. 199, 78 S. E. 888.

The order appealed from is therefore reversed, and the case is remanded to the circuit court for such further proceedings as may be necessary, not inconsistent with the views herein announced.

Reversed.

GARY, C. J., and FRASER, J., concur. WATTS, J., was absent at the hearing and did not participate in the decision of this case.

SMITH v. SOUTHERN RY. CO. et al.

Supreme Court of South Carolina. Nov. 11, 1913.)

1. TRIAL (§ 139*)—JURY QUESTIONS—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Where there is any evidence in favor of plaintiff, its weight and sufficiency should be left to the jury and a directed verdict not given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 39.*]

2. TRIAL (§ 168*)—DIRECTED VERDICT.

The rules governing nonsuits govern the direction of verdicts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. § 168.*]

3. APPEAL AND ERROR (§ 1194*)—LAW OF CASE.

Where the evidence on the second trial was the same as that on the first, the reversal of a judgment of nonsuit establishes the law of the case against defendant's right to a directed verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4648-4656, 4660; Dec. Dig. § 1194.*]

4. MASTER AND SERVANT (§ 187*)—INJURIES TO SERVANT—VICE PRINCIPAL.

The acts of a vice principal are those of a master, and, if he negligently directs the servant to work at an improper machine, the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 422-426; Dec. Dig. § 187.*]

Appeal from Common Pleas Circuit Court of York County; T. S. Sease, Judge.

Action by Henry D. Smith against the Southern Railway Company and Southern Railway Company—Carolina Division. From a judgment for plaintiff, defendants appeal. Affirmed.

B. L. Abney, of Columbia, and McDonald & McDonald, of Winnsboro, for appellants. J. Harry Foster, of Yorkville, for respondent.

HYDRICK, J. [1] This is the second appeal in this case. The facts are fully stated in the opinion of the court on the first appeal (93 S. C. 115, 76 S. E. 109), which resulted in the reversal of a judgment of nonsuit. The evidence on the second trial was not materially different from that on the first, except in quantity. Therefore the court did not err in refusing to direct a verdict for defendant. It makes no difference that defendant had more evidence to sustain its contentions of fact than it had at the first trial, because, where there is any evidence to sustain a material fact in issue, in a law case, the weight or sufficiency of it is exclusively for the jury, except in so far as the trial judge may consider that feature of it on a motion for new trial.

[2, 3] In *Jackson v. Railway*, 84 S. C. 299, 66 S. E. 181, it was held that, as the rules which govern the granting of nonsuits govern also the direction of verdicts, this court could not consistently sustain the direction of a verdict for defendant on the third trial, when it had sustained the refusal of a nonsuit on each of the previous trials on substantially the same evidence. Applying that principle here, the reversal of the judgment of nonsuit on the first appeal concludes this appeal in so far as it questions the ruling of the court in refusing defendant's motion for the direction of the verdict, because the evidence was practically the same in each case.

What we have said is especially applicable to the question whether Douglass was a superior agent or officer, or person having the right to control or direct the services of the plaintiff with regard to the particular business about which they were engaged, when the injury occurred, because that was the main question considered on the first appeal.

[4] Appellant argues another question: Whether plaintiff's recovery can be sustained, when it appeared that his injury resulted from the use of a machine which was not provided for him by defendant, and not intended by defendant for his use in the performance of his duties, and was not being used for the purpose for which it was intended and furnished by defendant. A moment's reflection suffices to show that this question is involved in and depends upon the decision of the principal question, to wit, whether Douglass was a superior agent or officer, or person having the right to control or direct the plaintiff's services. If he was—and the verdict says he was—he was the representative of the defendant, and the machine which he furnished and the orders which he gave the plaintiff were, in law, the same as if they had been furnished and given by the defendant.

The other questions raised by the excep-

tions were not argued, presumably because, on mature consideration, they were found to be without merit.

Affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

CRAIG & WILSON v. STEWART & JONES.
(Supreme Court of North Carolina. Nov. 19, 1913.)

1. TRIAL (§ 141*)—INSTRUCTIONS—EVIDENCE.

Where, in an action on an accepted order, the uncontradicted evidence showed that defendants agreed to pay on the order whatever they owed the debtor, if they owed him anything, it was error to submit to the jury the question whether the order was unconditional.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

2. BILLS AND NOTES (§ 83*)—ACCEPTANCE OF ORDER—CONSTRUCTION—LIABILITY.

Where persons accept an order upon the condition that they will pay on it, if they are indebted to the drawer, the amount of their indebtedness, and it develops that they owed him nothing at the time of the acceptance, they are not liable; but, where it develops that they owed him something, they are liable to the extent of such indebtedness, not exceeding the amount of the order and accrued interest.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 123, 143-148; Dec. Dig. § 83.*]

3. BILLS AND NOTES (§ 93*)—ACCEPTANCE OF ORDER—CONSIDERATION.

The release by the drawer of an order is a sufficient consideration for an acceptance of the order.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 108, 109; Dec. Dig. § 93.*]

4. TRIAL (§ 252*)—INSTRUCTION—APPLICABILITY TO EVIDENCE.

Where, in an action on an accepted order, the evidence conclusively showed a conditional and not an absolute promise to pay, it was error to instruct that plaintiffs would be entitled to recover if defendants "promised to pay it and accepted it."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

In an action on an accepted order, an instruction, erroneous because not addressed to any particular issue, was harmless, where the issues were simple, and the jury, in the light of the other instructions, could not have been misled thereby.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

6. TRIAL (§ 296*)—INSTRUCTIONS—GROUND FOR REVERSAL.

Where two instructions, one good and the other bad, are so blended and applied to a single issue as not to be separable, and it is impossible to determine under which instruction the jury answered the issues, the case will be reversed on appeal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

Appeal from Superior Court, Gaston County; Webb, Judge.

Action by Craig & Wilson against Stewart & Jones. From judgment for plaintiffs defendants appeal. New trial.

This action was brought to recover an amount of money alleged to be due the plaintiffs on an order given by one N. L. Lancaster to them, and addressed to defendants, which is claimed, were indebted to Lancaster for work and labor done. The order is not set out in the record, but we gather from the evidence that it required or requested defendants to pay the amount named in the order to plaintiffs. When the order was presented to defendants, they agreed to pay it "out of anything they owed Lancaster," or "out of what might be due Lancaster by them;" and this expression, in substance at least, ran through the whole of the evidence. The jury returned this verdict: "(1) Are the defendants indebted to the plaintiffs? Answer, Yes. (2) If so, in what amount? Answer, \$61.50." The judge charged the jury that if the acceptance of the order by the defendants was unconditional, the defendants were bound to pay it, whether they owed Lancaster anything or not, and, if they so found, their answer to the first issue should be, "Yes," and to the second issue, "\$61.50"; or, if they found that it was accepted conditionally, it is, upon condition that defendants would pay it "out of any money that is due Lancaster by them," and they further find that, at the time they accepted the order, there was money due Lancaster to that amount, or that they owed Lancaster the amount after the day on which the order was presented, they should answer the first issue, "Yes," and the second issue, "\$61.50"; but, if they found that the defendants owed him nothing and the acceptance was conditional, their answer would be "No," to the first issue. Exceptions were duly taken to these instructions, and a motion for a new trial based upon them, and each of them, as erroneous, was overruled. Judgment and appeal by defendants.

Mangum & Woltz, of Gastonia, for appellants. Carpenter & Carpenter, of Gastonia, for appellees.

WALKER, J. (after stating the facts as above). [1] There was error in the charge to the jury. After a careful examination of the evidence, we can find none which tends to prove that the acceptance of the order was unconditional. The testimony of the witnesses on both sides was to the effect that defendants agreed to pay the order, if they owed Lancaster, or whatever amount they owed him. As there was no evidence to support the first branch of the instruction as to the unconditional character of the acceptance, the judge should not have submitted that as a phase of the case, to the jury. *Worley & Logging Co.*, 157 N. C. 490, 73 S. E. 107. The trial judge should not charge the jury upon an aspect of the case which is not supported

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Index

the evidence. *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Jones v. Insurance Co.*, 153 N. C. 388, 69 S. E. 266, and authorities therein cited. He is required "to state in a plain and correct manner the evidence, and declare and explain the law arising thereon." *Pell's Revisal*, § 535, and notes.

[2] If defendants accepted the order upon the condition that they would pay it if they were indebted to Lancaster in that amount, that they would pay any amount owing to him, and it turned out that they did not owe him, there would, of course, be no liability to plaintiff; but if they did owe him, and the order was presented to them, or they were notified of it, and especially if they promised to pay it out of any money due Lancaster, they would be liable to the extent of the indebtedness, not exceeding, though, the amount of the order and accrued interest. *Brem v. Covington*, 104 N. C. 539, 10 S. E. 06. In that case it was held that the order, when duly brought to the notice of the defendant, was in effect an equitable assignment of the amount ordered to be paid, if so much was in the hands of the person upon whom it was drawn.

[3] Plaintiff can recover also upon the acceptance of the order, not treated as an equitable assignment, if the defendants owed Lancaster, as the acceptance would constitute a promise to pay, founded upon a sufficient consideration, viz., the release of Lancaster, and the fact that they owed him which would also support the promise to pay the amount thereof to the plaintiffs, instead of to Lancaster. *Brem v. Covington*, supra; *Mason v. Wilson*, 34 N. C. 51, 37 Am. Rep. 612. The last case decides that the statute of frauds has no application where defendants had property of the debtor in their hands with which to pay the debt. If defendants owed Lancaster, plaintiffs will be entitled to recover, in addition to the principal amount, interest from the date on which the order was presented, if the debt to Lancaster was then due. *Brem v. Covington*, supra.

[4, 5] The jury were further instructed that, if defendants "promised to pay it and accepted it, then they are bound, and the plaintiffs would be entitled to recover." This is erroneous, as there was no evidence to show an absolute promise, but only a conditional one, and, besides, it is objectionable in form, as not addressed to any particular issue. *Farrell v. Railroad*, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; *Baker v. Brem*, 103 N. C. 72, 9 S. E. 629, 4 L. R. A. 370. But in a case like this one, where the issues are so simple, we would not grant a new trial on that account, as, in view of the other parts of the charge, it did not mislead the jury, but sufficiently directed their thoughts to the particular issue, though very general in form. The charge should be so framed as to bear upon the issues, and not confined to the right of either party to recover,

as if the case was being tried upon the general issue.

[6] The error first pointed out was of such a nature that it passed into the verdict and vitiated it, as we are unable to say under which instruction the jury answered the issues, and must presume, in such a case, that it was the erroneous one. This is the rule where two instructions are so blended and applied to a single issue that the good one is inseparable from the bad. *Beam v. Jennings*, 96 N. C. 82, 2 S. E. 245; *Holmes v. Godwin*, 71 N. C. 306; *Rowe v. Lumber Co.*, 133 N. C. 433, 45 S. E. 830.

There also was evidence in this case that defendants owed Lancaster nothing at the time the order was presented or afterwards. They paid him \$250, "in compromise and settlement," to get rid of him and in this way buy their peace, as he had threatened them with a lawsuit. We need not consider the question whether an unconditional parol acceptance would be binding, as founded upon a sufficient consideration and not affected by the statute of frauds, as there is no evidence now of such a promise. We have referred to *Mason v. Wilson*, where it is held that, if the drawee has money belonging to the drawer, the latter's promise to pay the debt of the former to a third person, who is his creditor, is an original and independent one, based upon a new consideration and binding upon the promisor, and not being, therefore, within the statute of frauds. Justice Ashe, in *Mason v. Wilson*, refers to what is said by Chancellor Kent in *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 28, 39 (5 Am. Dec. 317), which is as follows: "There are, then, three distinct classes of cases on this subject, which require to be discriminated: (1) Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration than that moving between the creditor and original debtor. (2) Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. The cases of *Fish v. Hutchinson*, 2 Wils. 94, of *Charter v. Beckett*, 7 Term Rep. 201, and of *Wain v. Warlters*, are samples of this class of cases. (3) A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are with-

in the statute of frauds, but the last is not. 1. Saund. 211, note 2." He then says: "In construing this statute (our act of 1819), it may be laid down as a general rule 'that a promise to answer for the debt, default or miscarriage of another for which that other remains liable, must be in writing to satisfy the statute of frauds; contra, when the other does not remain liable.' 1 Smith, L. C. 371. But there are numerous exceptions to the rule." The learned justice also quotes with approval what is said by Judge Pearson in *Stanly v. Hendricks*, 35 N. C. 86: "The principle is this: When, in consideration of the promise to pay the debt of another, the defendant receives property and realizes the proceeds, the promise is not within the mischief provided against; and the plaintiff may recover on the promise or in an action for money had and received. For although the promise is in words to pay the debt of another and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action."

The same principle was enforced in *Threadgill v. McLendon*, 76 N. C. 24; *Hicks v. Critcher*, 61 N. C. 353; *Hall v. Robinson*, 30 N. C. 56; *Draughan v. Bunting*, 31 N. C. 10; and more recently in *Voorhees v. Porter*, 134 N. C. 591, 47 S. E. 31, 65 L. R. A. 736, where it was held that a creditor may sue directly a party holding a fund which his debtor has dedicated to the payment of his obligation, the transaction not being within the statute of frauds, but the promise of the holder of the fund or property of the debtor being an original one and not merely super-added to that of the debtor, leaving the latter also liable. In the still more recent case of *Peele v. Powell*, 156 N. C. 553, 73 S. E. 234, Justice Allen classifies those cases within and those cases without the statute with fine discrimination, and it renders further discussion of the matter superfluous.

For the error in the charge, the case must be tried again.

New trial.

TURLINGTON v. AMAN.

(Supreme Court of North Carolina. Nov. 19, 1913.)

1. EXECUTION (§ 425*)—EXECUTION AGAINST THE PERSON—JUDGMENTS ON WHICH AUTHORIZED.

Where the complaint alleged a cause of action justifying an arrest and the jury in response to the issues found the facts as alleged, a judgment, providing that, "the jury having responded to the issues as copied in the minutes of this term, now, upon the verdict, pleadings, exhibits, and admissions of the parties, it is considered, ordered, and adjudged that plaintiff recover," etc., made the findings a part thereof with sufficient certainty and formality for the is-

suance of an execution against the person, if the plaintiff was otherwise entitled thereto.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1224-1228; Dec. Dig. § 425.*]

2. EXECUTION (§ 425*)—EXECUTION AGAINST THE PERSON—WHEN AUTHORIZED.

Under Revisal 1908, § 625 (Code, § 447, as amended by Acts 1891, c. 541), providing that, if the action be one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued after the return of an execution against his property unsatisfied in whole or in part, but that no such execution shall issue unless an order of arrest has been served, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement be necessary to the cause of action or not, to justify an execution against the person, the jury must find the cause for the arrest.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1224-1228; Dec. Dig. § 425.*]

3. EXECUTION (§ 433*)—EXECUTION AGAINST THE PERSON—PREVIOUS ISSUE AND RETURN OF EXECUTION AGAINST PROPERTY.

Under Revisal 1908, § 625, providing that, if the action be one in which defendant might have been arrested, an execution against his person may be issued, after the return of an execution against his property unsatisfied in whole or in part, a motion to insert in the judgment an order that plaintiff was entitled to such an execution was properly denied as premature, especially where there was no finding that defendant was insolvent; his remedy being by motion before the clerk for such execution, upon return of an unsatisfied execution against property.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1232-1236; Dec. Dig. § 433.*]

4. EXECUTION (§ 433*)—EXECUTION AGAINST THE PERSON—DENIAL—REVIEW ON APPEAL.

Where, upon the return of an execution against property unsatisfied, the clerk refuses a body execution in a proper case, the judgment creditor may appeal and have the clerk's decision reviewed.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1232-1236; Dec. Dig. § 433.*]

Appeal from Superior Court, Sampson County; Allen, Judge.

Action by J. H. Turlington against A. W. Aman. From a judgment in his favor for insufficient relief, plaintiff appeals. Affirmed.

The judgment rendered was as follows: "This cause coming on for hearing before Hon. O. H. Allen, judge, and a jury, and the jury having responded to the issues as copied in the minutes of this term, now, upon the verdict, pleadings, exhibits, and admissions of the parties, it is considered, ordered, and adjudged that plaintiff recover of the defendant the sum of \$469.62, with interest from March 18, 1907, and the costs of this action. It is adjudged that the plaintiff is not entitled to an order of arrest or execution against the person of the defendant."

This is a motion for execution against the person of the defendant, based on the following facts: A. W. Aman was sheriff of Sampson county in 1901, 1903, and 1905, and he was also, by virtue of his office, the treasurer of the county. He gave bond for the performance of his official duties, the collection

of state and county taxes among them, with plaintiff and others as his sureties. In January, 1907, having defaulted, he executed a deed of assignment for the benefit of his creditors, and fled from the state. In the assignment he preferred the sureties on his official bond, and then provided for the payment of his general creditors, who, in the month of January, 1907, about five days after the execution and registration of the assignment, filed a petition in the proper United States court to declare him a bankrupt, alleging therein the assignment, with its preferences as an act of bankruptcy. The sureties, as a measure of prudence preventing the setting aside of the assignment and saving the property, so conveyed for the benefit of themselves and the other creditors, entered into a compromise with the creditors who filed the petition, under the provisions of which the latter were paid off with the proceeds of the property in the hands of the assignee, leaving a balance of \$22,000 unpaid, and of this amount plaintiff had to pay \$469.22. Plaintiff claims that, as the state and county taxes were paid by the sureties, his share being the amount just stated, he is substituted exactly and fully to the rights and remedies of the creditors, and entitled to a personal execution against defendant, which was one of their remedies, while defendant insists that, as the plaintiff and his cosureties gave up their priority under the assignment by the compromise, which was made with their consent, and as they would have been fully indemnified but for such action on their part, they have waived their right to such an execution. Plaintiff replies that if the compromise had not been made, the property would have been sacrificed, or they would have been subjected to considerable loss in selling the insolvent estate, and, besides, that the filing of the petition and the adjudication of bankruptcy annulled the assignment, and, if not, that it would have been set aside or declared void by the court under the bankruptcy act; the petition having been filed within a few days after the date of the assignment. Defendant admitted the debt.

Issues were submitted to the jury, and answered as follows:

"(1) Did the defendant, A. W. Aman, as sheriff and tax collector and treasurer ex officio of said county of Sampson, make default as such officer, and did he fraudulently convert the public tax money to his own personal account and misapply the same? Answer: Yes.

"(2) Was the plaintiff a surety on said bond, and what amount was he compelled to pay by reason of the fraudulent conduct of the defendant? Answer: \$469.62 and interest from March 18, 1907.

"(3) Did the plaintiff and other sureties of A. W. Aman direct F. R. Cooper, assignee of said Aman, to pay off the store creditors of said Aman out of the order of preference

named in the deed of assignment? Answer: Yes.

"(4) What amount of money was paid to said store creditors by said assignee under the direction of the plaintiff and other sureties? Answer: \$5,000.

"(5) Did plaintiff and the other sureties of A. W. Aman direct Cooper, assignee, to pay off the store accounts of A. W. Aman to prevent A. W. Aman from being thrown into bankruptcy, and said deed of assignment from being set aside? Answer: Yes."

Plaintiff, in due time, objected to the third and fourth issues as irrelevant to the case. The court refused to sign the judgment tendered by the plaintiff, directing that in case the debt could not be levied out of the property, an execution against the person should be issued. Judgment having been entered without this clause, plaintiff excepted and appealed.

Faison & Wright, of Clinton, for appellant.

WALKER, J. (after stating the facts as above). [1] There are three kinds of executions: One which is issued against the property of the debtor; another against his person: and still another for the delivery of the possession of real or personal property, or for such delivery with damages, for unlawfully withholding the same. Revisal, § 616. An execution against the person of the debtor may be issued, after the return of an execution against his property unsatisfied, if the action be one in which the defendant might have been arrested. Section 625. Turning to the provisions in regard to arrest and bail, we find that a defendant may be arrested and held to bail, when as a public officer he has received money or property and embezzled or fraudulently misapplied the same, or when he has been guilty of any misconduct or neglect in office. Revisal, § 727. The complaint in this case alleges that defendant embezzled or fraudulently misapplied public funds which had come into his hands as sheriff of the county, which, of course, is also misconduct in office, and the jury, in response to the issues, have found the facts as alleged in the complaint, and the court, in its judgment, refers to these findings, and expressly makes them a part thereof, and this is done with sufficient certainty and formality for the issuance of an execution, if the plaintiff otherwise is entitled thereto.

[2] But we do not think that, in any view, the request of the plaintiff should have been granted—at least as a matter of right—and this brings us to consider the nature of an execution against the person and when it should issue. Our statute once provided that where the right to arrest is determined by the nature of the action, or, in other words, where facts stated in the complaint and necessary to support the cause of action are such as to authorize an arrest, no order

of arrest need be obtained before judgment in order to authorize an execution against the body, and, conversely, no execution against the person can issue upon a judgment where no order of arrest has been previously obtained in the action, unless the facts stated in the complaint necessarily import liability to arrest, and unless the cause of action and the cause of arrest are identical. If the grounds of arrest are extrinsic to the cause of action, and the cause of action is not one which of itself would entitle the plaintiff to a body execution, without a prior order of arrest having been granted, the fact that the complaint contains allegations which would entitle the plaintiff to an order of arrest will not authorize the issuance of such an execution. It is not necessary or proper to set forth such facts in the complaint, because they constitute no part of the cause of action, and are not relevant or necessary to be proved. 8 Enc. of Pl. & Pr. p. 622. But this has been somewhat changed by the act of 1891, chapter 541, so as to make it sufficient for the issuance of a personal execution that the complaint alleges a cause of arrest, "whether the same be necessary to the cause of action or not." Pell's Revisal, § 625.

The procedure in all such cases has been fully discussed and settled by us in *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969, 10 L. R. A. (N. S.) 362, and we adhere to what is there said. That case is in perfect accord with *Peebles v. Foote*, 83 N. C. 102, *Huntley v. Hasty*, 132 N. C. 280, 43 S. E. 844, and *Kinney v. Laughenour*, 97 N. C. 326, 2 S. E. 43, when the facts of the several cases are considered, for they differ materially. In the *Peebles* Case, the statement of the cause for the arrest was not an essential allegation of the principal cause of action, and the court refused the writ because no order of arrest had been previously served, assigning the case to the second class of those in which such an execution can issue, upon the ground that the cause of arrest is collateral and extrinsic to the cause of action. In the *Kinney* Case, the cause for arrest and the cause of action were identical, seduction of plaintiff's daughter, which was found by the jury, which finding passed into the judgment and was the basis of it. The *Huntley* Case is in the same category; the two causes being the same, assault and battery. The same may be said of *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874. The question whether it was necessary that there should be an affirmative finding by the jury of the cause for the arrest upon an issue submitted to them was not therefore presented in those cases, as in three of them such fact was found, and in the *Peebles* Case the court held that plaintiff was not entitled to the execution, because there was no proper allegation in the complaint, and no order of arrest had been served. We are satisfied with the reasons

given in *Ledford's Case* for requiring a finding by the jury of the cause for the arrest. It is evidently approved in *Stewart v. Bryan*, 121 N. C. 50, 28 S. E. 20, in which the court said: "It will not do to carry the doctrine of *Peebles v. Foote*, under section 447 of the Code, as amended by the act of 1891, to the extent contended for in the argument of plaintiff—that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be, in effect, to nullify the Constitution." Of course, the judgment referred to is one based upon such a finding of fact, for no one would ever suppose that a plaintiff would be entitled to any kind of execution if he failed to recover in the action. We have discussed this matter, because it might be inferred (Pell's Revisal, § 625, and note) that the *Ledford* Case was not altogether in harmony with the other cases, when, as we have seen, there is not the least conflict between them, but the other cases fully sustain *Ledford v. Emerson*. The following authorities sustain the same view: *Elwood v. Gardner*, 45 N. Y. 354, 355; *Smith v. Knapp*, 30 N. Y. 581. As to the general practice in such cases, 8 Enc. of Pl. & Pr. p. 622 et seq. We think that *McAden v. Banister*, '63 N. C. 478, is virtually to the same effect. It was there determined that the right to a body execution depended upon what appeared in the judgment. Justice Rodman (who was formerly one of the Code Commissioners) says in that case: "The execution must be based on what appears on his docket and nothing else. It may be asked, Was a copy of the affidavit and order of arrest a material part of the justice's judgment, and therefore required to be docketed with it? We are of opinion that, for the purpose of enabling him to issue a personal execution, they were; for this purpose they materially qualified the judgment, and gave it an effect it otherwise would not have. For the issuing of an execution against the lands of the defendant they are not material parts of the judgment, as for this purpose they neither added to nor impaired it."

[3, 4] But it is unnecessary to prolong the discussion of this subject. Assuming, for the sake of argument, that plaintiff is entitled to a personal execution, his motion that an order for it be inserted in the judgment was properly denied, as being premature. The statute prescribes that such an execution can be issued only after a return of an execution against the property unsatisfied in whole or in part. Revisal, § 625. The court could not anticipate such a juncture. There is no finding that the defendant is insolvent. But the statute points out the remedy. It is by motion before the clerk, upon return of the unsatisfied execution, for process against

the person. If he refuses it, in a proper case, plaintiff may appeal and have his decision reviewed and reversed. Such was the practice adopted and approved in *Kinney v. Laughenour*, supra, and *Huntley v. Hasty*, supra, 8 Enc. of Pl. & Pr. pp. 631, 633. We express no opinion as to plaintiff's right to a personal execution, when properly applied for. He contends that his cause of action is so closely and intimately connected with defendant's wrongful acts, for which he could be arrested, that they form really a part of its "warp and woof," and for that reason he is entitled to the process, citing in support of this view *Brandt on Suretyship and Guaranty*, section 180, p. 259, and section 177. Again, it may be observed that plaintiff is but one of several sureties on the sheriff's bond, and the question is raised whether he can sue alone, and without them as joint plaintiffs, if he relies upon the equitable doctrine of subrogation. See 1 *Brandt, S. & G.* (3d Ed.) § 317, and notes, especially note 19 and cases; *Hall v. Myers*, 90 Ga. 674, 16 S. E. 653; *Sheldon on Subrogation*, § 27. Must the entire indebtedness be paid and all of the sureties join in one action against the sheriff? Another question is whether the doctrine of subrogation applies to such a case at all, so as to invest the paying surety or sureties with all of the creditor's rights and remedies, so that they may, as one of the remedies, arrest the defendant. *Sheldon on Subrogation*, §§ 86, 87, 136; *Brandt, S. & G.* (3d Ed.) §§ 317 (and note), 324, and 328; *King v. Kirby*, 28 Barb. (N. Y.) 49. These and perhaps other questions may arise in the further progress of the case, but we will express no opinion upon them until they are thus reached, and we are required to do so.

There was no error in the judgment, nor in the other rulings to which exception was taken.

No error.

STATE v. ISLEY.

(Supreme Court of North Carolina. Nov. 19, 1913.)

MASTER AND SERVANT (§ 67*)—BREACH OF CONTRACT—CRIMINAL LIABILITY—INTENT—EVIDENCE.

Where accused obtained supplies from prosecutor on the promise to pay therefor in labor, evidence that he failed to perform the labor, and, on being requested to do so, replied that he "had to get shoes for his children," was insufficient to show an intent to defraud so as to sustain a conviction for obtaining supplies under a promise to pay therefor in labor and willfully failing to perform without lawful excuse and with intent to cheat and defraud.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. § 67.*]

Appeal from Superior Court, Randolph County; Long, Judge.

David Isley was convicted of obtaining supplies under a contract to pay therefor in

labor and not furnishing the labor, and he appeals. Reversed.

The defendant was indicted under the following bill of indictment: "The jurors for the state, upon their oaths, present that David Isley on the 1st day of June, A. D. 1912, did willfully and unlawfully and with intent to cheat and defraud J. A. Ellis obtain certain advances in money, fertilizers, corn, flour, provisions, goods, wares, and merchandise from said J. A. Ellis, upon and by color of a certain promise and agreement that the said David Isley would begin work and labor for said J. A. Ellis, from whom said David Isley obtained said money, goods, provisions, merchandise, etc., and the said David Isley making said promise and agreement did unlawfully and willfully fail to commence and complete said work as aforesaid according to contract without a lawful excuse, contrary to the form of the statute in such case made and provided." The defendant entered the plea of not guilty, and on the trial the following evidence was introduced: J. A. Ellis, witness for the state, testified that defendant was his tenant; that he let defendant have certain advances in merchandise, etc., upon defendant's promise to pay for same in work; that defendant failed to do said work, and when witness asked him why he did not come and do the work, defendant said that he had to get some shoes for his children. State rested, and the defendant demurred to the evidence and moved to dismiss under the act of 1913. Motion overruled; defendant excepted. There was a verdict of guilty, and, from the judgment pronounced, the defendant appealed.

R. C. Kelly, of Asheboro, for appellant. Attorney General Bickett, for the State.

ALLEN, J. The decision of this appeal is controlled by *State v. Griffin*, 154 N. C. 611, 70 S. E. 292, in which the statute under which the defendant is indicted was fully discussed in an elaborate and learned opinion by Associate Justice Brown, and upon the authority of that case the judgment is reversed, with directions to dismiss the action under chapter 73, Public Laws of 1913.

Reversed.

MARTIN v. CLEGG.

(Supreme Court of North Carolina. Nov. 19, 1913.)

1. LANDLORD AND TENANT (§ 196*)—RENT—FAILURE TO DELIVER POSSESSION—DAMAGES—"RENTAL VALUE."

The landlord on breach of a contract by failure to pay rent and on a holding over by the tenant is not confined to the rent stipulated in the lease, but may consider the fair rental value of the property; such "rental value" being, not the probable profits that might accrue to the landlord, but the fair rental value as ascertained by proof of what the premises would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 79 S.E.—70

rent for, or of facts from which the fair rental value might be determined.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 737-740; Dec. Dig. § 193.*]

For other definitions, see Words and Phrases, vol. 7, p. 6094.]

2. LANDLORD AND TENANT (§ 285*)—EXAMINATION—BRINGING OUT WHOLE TRANSACTION.

In a landlord's action to recover the possession of leased property from the tenant holding over, where the landlord was permitted to show that the fair rental value of the premises from November 1, 1909, to January 1, 1913, above the stipulated rental was a certain amount, it was error to exclude defendant's evidence that the rental value since November 1, 1909, was much less than that claimed by the plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1187, 1193-1197, 1199-1204; Dec. Dig. § 285.*]

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by H. T. Martin against W. F. Clegg. Judgment for plaintiff, and defendant appeals. New trial.

Civil action tried upon these issues: 1. What sum, if anything, is the plaintiff entitled to recover of the defendant on account of rents as stipulated in the contracts? Answer: \$2,563.56. 2. Did the defendant commit a breach of his contract by failure to pay rents, as agreed in the contract? Answer: Yes. 3. If so, what sum, if anything, is the plaintiff entitled to recover of the defendant, by way of damages for wrongful detention of the premises in controversy? Answer: Nothing. 4. Did the defendant, by his conduct and delay for six years or thereabouts, waive the penalty stipulated in the contract? Answer: Yes. 5. If not, what sum, if anything, is the defendant entitled to recover of the plaintiff, on account of the penalty, \$20 per month, stipulated in the contract? Answer: Nothing. 6. Did the defendant, before breach of his contract, install in Martin's building radiation as alleged? Answer: No. The defendant excepted and appealed from the judgment rendered.

A. L. Brooks, of Greensboro, for appellant. King & Kimball, of Greensboro, for appellee.

BROWN, J. This action is brought to recover the possession of certain property known as Clegg's Hotel in the city of Greensboro. On October 29, 1909, defendant was served by the sheriff with a written notice by the plaintiff to vacate the premises, for neglect, after due notice, to make payments of rent as stipulated. Defendant, in consequence of this notice, refusing to vacate, but continuing in possession, action was instituted in the superior court on August 28, 1911, to eject the defendant and to recover damages for his holding over.

There are 29 assignments of error, but it is necessary to consider only the fifteenth, six-

teenth, and seventeenth. These assignments show error upon the part of the court because, as stated in the brief of defendant, "after he had opened the door, and permitted plaintiff to show what the reasonable rental of the property was from July, 1909, to January 1, 1913, declined to permit the defendant to testify with relation to the location of the place, and that it was so situate that you could not always keep it rented, and that there was not always a continuous demand for the stores, and that, in fact, for about three years of the time, one of the stores was not rented." This extract from the brief is borne out by the record. Defendant was sworn as a witness in his own behalf, and upon the question as to the actual rental value of the property after October, 1909, his counsel asked him how much the storeroom was vacant, and he answered, "Three years." This was excluded. The witness was then asked: "Q. Is it a place where you can always keep it rented?" Objection by plaintiff. Sustained. Exception by defendant. And again: "Q. Is there a demand for that store continuously at that rental?" Objection by plaintiff. Objection sustained. Defendant excepts.

[1] The court charged the jury: "If you do not find that he had forfeited his contract, had broken its contract, why then the plaintiff would be entitled to recover simply the stipulated price, \$92.51 a month. But if you are satisfied by the greater weight of evidence that the defendant had broken his contract by not paying the rent, then, from that time after he was notified and held over, the plaintiff would be entitled to recover what was a reasonable rental value of the property. To get at that, you will have to take the evidence of the witnesses, together with the stipulated price, that is some evidence of what it was worth, but it is not binding." Again at the request of the plaintiff, the court charged: "The court charges you that if you shall find that the defendant committed a breach of his contract, as alleged, then the plaintiff would be entitled to recover from the time of such breach the fair market value of the premises, as you may find the same to be from the evidence, and by its greater weight."

There is no doubt the jury well understood that after October, 1909, when the notice to vacate was served, that, in assessing the rents, they were not to be confined to that stipulated in the contract of lease, but were permitted to consider under the first issue what was the fair rental value of the property. The rule is recently stated by this court in *Sloan v. Hart*, 150 N. C. 275, 63 S. E. 1039, 21 L. R. A. (N. S.) 239, 134 Am. St. Rep. 911, as follows: "By rental value is meant, not the probable profits that might accrue to plaintiffs, but the value, as ascertained by proof, of what the premises would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rent for, or by evidence of other facts from which the fair rental value may be determined."

[2] The testimony rejected—that defendant was unable to find occupants for the store-rooms for three years; that the place is one not readily rented and not much in demand—is very pertinent upon the fair rental value of the property. The plaintiff was permitted to testify: "That the fair rental value of the premises from November 1, 1909, to January 1, 1913, over and above the rental stipulated in the lease, is \$1,529.64." Why the defendant should be prohibited from proving that the rental value since November 1, 1909, is much less than claimed by the plaintiff, we are unable to see. The court erred in excluding such evidence upon the part of the defendant.

New trial.

WHITE SEWING MACH. CO. v. I. W. BULLOCK & CO.

(Supreme Court of North Carolina. Nov. 19, 1913.)

SALES (§ 381*)—BREACH OF CONTRACT—BURDEN OF PROOF—FRAUD AS DEFENSE.

Where, in a seller's action for the breach of a contract for the sale of sewing machines, the defense was that the contract was procured by fraudulent representations of plaintiff's agent, the burden was on defendants to prove that they were induced to contract by such representations, that in consequence thereof they declined to perform, that such representations were calculated to deceive, and did deceive, and that defendants lost something thereby.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1095; Dec. Dig. § 381.*]

Appeal from Superior Court, Granville County; Peebles, Judge.

Action by the White Sewing Machine Company against I. W. Bullock & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

Hicks & Stem, of Oxford, and T. T. Hicks, of Henderson, for appellant. B. S. Royster, of Oxford, for appellees.

HOKE, J. The action was to recover for breach of contract, evidenced by written order, for the sale of 150 sewing machines at the price of \$28, of date October 12, 1910. The defendants admitted the execution of the contract alleged and offered proof tending to show that the same was procured by the false and fraudulent representations of the plaintiff's agent. At a former trial of the cause, the judge below being of opinion that there was no evidence tending to support defendants' position, there was recovery by plaintiff. On appeal, this ruling was reversed, and in an opinion by Associate Justice Walker, containing a full statement of the facts and the principles of law applicable, it was held that the issue as to fraud must

be submitted to the jury. See case reported in 161 N. C. 1, 76 S. E. 634. This opinion having been certified down, there was verdict on the issue for defendants, and from judgment on the verdict the present appeal is taken.

The evidence on the part of the defendants tending to establish the alleged fraud is substantially the same as before, except that it now is rather more explicit and direct, and there are some additional supporting facts; and, while there was much testimony in contradiction on the part of the plaintiff, the issue has been fairly submitted to the jury, under the principles laid down as controlling on the former appeal, and we find no reason for disturbing the results of the trial.

It was urged in the argument for plaintiff that the facts in evidence tended clearly to establish that the defendants had decided to break their contract before they were aware of the facts constituting the alleged fraud, and that these facts, therefore, should not be available on the issue; but there was direct evidence on the contrary offered by the defendants, and, in the charge, the disputed fact involved in this position was expressly referred to the jury, and it was determined against the plaintiff.

Again, it was insisted that it was not shown that defendants were in any way damaged by reason of the alleged fraudulent representations. Undoubtedly it is a correct general proposition that fraud without resultant damages does not form the basis for a cause of action; but, if it be conceded that the principle applies here, there was evidence of the defendants tending to show such damage, and the charge of the court was in express recognition of plaintiff's position. On this question the jury were directed as follows: "Now, upon that issue the burden is upon the defendants to satisfy you by the greater weight of evidence that they were induced to sign that order by the false and fraudulent representations of Mr. Massey, and that, in consequence of those false and fraudulent representations, they declined to perform that contract, and that those false and fraudulent representations were calculated to deceive, and did deceive, and intended to deceive, and that the defendants lost something thereby."

On careful perusal of the record, we find no reversible error, and the judgment for defendants must be affirmed.

Affirmed.

McIVER v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Nov. 19, 1913.)

1. LANDLORD AND TENANT (§ 296*)—SUMMARY REMEDIES—EJECTMENT.

A summary proceeding in ejectment under Landlord and Tenant Act, Revisal 1905, § 2001, and the following sections, to oust ten-

ants holding over after the expiration of their term, can only be maintained where the relation of landlord and tenant exists between the parties.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1272-1275, 1283; Dec. Dig. § 296.*]

2. LANDLORD AND TENANT (§ 308*)—SUMMARY EJECTMENT—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

Evidence, in a summary proceeding in ejectment under the landlord and tenant act, held not to show that the relation of landlord and tenant existed between the parties.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1314-1316; Dec. Dig. § 308.*]

3. LANDLORD AND TENANT (§ 315*)—SUMMARY PROCEEDINGS—APPEAL—DISMISSAL OF PROCEEDINGS.

If the relation of landlord and tenant is not shown to exist, so that a summary proceeding in ejectment under Landlord and Tenant Act, Revisal 1905, § 2001, and the following sections could not be maintained, the proceeding should be dismissed by the superior court, on appeal from the justice of the peace, and plaintiff required to bring ejectment in the superior court if he claims title; a new action being necessary even though the superior court had general jurisdiction of both actions.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1328-1335; Dec. Dig. § 315.*]

Clark, C. J., dissenting in part.

• Appeal from Superior Court, Lee County; Bragaw, Judge.

Summary proceedings, under Landlord and Tenant Act, Revisal 1905, § 2001 et seq., by Duncan E. McIver against the Seaboard Air Line Railway, before a justice. From a judgment in the Superior Court dismissing the proceeding on appeal, plaintiff appeals. Affirmed.

At the conclusion of the evidence, the court held that the title to land was in controversy, and that the justice of the peace had no jurisdiction under the landlord and tenant act, and dismissed the proceeding. Plaintiff excepted and appealed.

A. A. F. Seawell and C. L. Williams, both of Sanford, and L. D. Robinson, of Wadesboro, for appellant. Walter H. Neal, of Laurinburg, for appellee.

BROWN, J. [1] The summary remedy in ejectment provided by the statute for the ousting of tenants who hold over after the expiration of the term is restricted to cases where the relation between the parties is that of landlord and tenant. *Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693; *McCombs v. Wallace*, 66 N. C. 481; *Hughes v. Mason*, 84 N. C. 472.

As said in *McDonald v. Ingram*, 124 N. C. 274, 32 S. E. 677: "The only question the court can try under the statute in this proceeding is: 'Was the defendant the tenant of the plaintiff, and does she hold over after the expiration of the tenancy?'"

There is no evidence whatever of a tenancy in this case.

The most that we can make out of the evidence, taking it in its most favorable view for the plaintiff, is that the small piece of land in controversy is covered by a part of the defendant's cotton platform in Sanford; that it was originally constructed by the Cape Fear & Yadkin Valley Railway Company; that the plaintiff claimed the land, but that it was vacant and unoccupied by any one; that the plaintiff told Fry to go ahead and construct his platform over the property; that it was his property. There is no evidence that the Cape Fear & Yadkin Valley Railway Company or this defendant, or any one duly authorized, ever rented the property from the plaintiff, or claimed under him. Not even nominal rent has ever been claimed by the plaintiff or paid by the defendant. The plaintiff, being asked when this indefinite and uncertain transaction took place, says: "I have used every effort to definitely state when this transaction took place, but I cannot do that. My best impression is that it was '96, '97, possibly '95. I do not think, now, it was as late as 1898." There is evidence that at that time the property was claimed and possessed by the defendant under a deed from John Scott to the Raleigh & Augusta Air Line Railroad dated July, 1876.

[2] The evidence is not sufficient to prove that the defendant company ever held possession of the property as a licensee of the plaintiff, much less as a tenant. There is no evidence that this defendant claims under the Cape Fear & Yadkin Valley Railway or succeeded it.

[3] We think if the plaintiff claims title, he should pursue his action of ejectment against the defendant in the superior court.

Affirmed.

CLARK, C. J. (dissenting in part) concurs in the opinion of BROWN, J., except in the intimation in the last paragraph that the plaintiff may be put out of court for want of jurisdiction and bring a new action in the superior court. It is contrary to the spirit of our present system of procedure, when a case has gotten in the superior court by appeal, or otherwise, to put the plaintiff out of that court which has full jurisdiction of the cause, because of defect of jurisdiction in the lower court, and tell him to come back into the same court in another method. Cui bono shall this be done when he is already in the proper court? The superior court is a court of general jurisdiction. When a case had been tried in a lower court and gets into that court by appeal, the court is seized of full jurisdiction, and should proceed to dispose of the cause on the merits. This has been required by statute when the appeal is from the clerk to the superior court. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

spirit of the Constitution is the same when the appeal is from any other tribunal to the superior court. It is true the practice has been usually otherwise, but not uniformly. *McMillan v. Reeves*, 102 N. C. 559, 9 S. E. 449, and other cases cited in *Wilson v. Ins. Co.*, 155 N. C. 177, 71 S. E. 79. But such practice it seems to me should not be followed.

This point has heretofore been discussed in *State v. McAden*, 162 N. C. 578, 77 S. E. 298, citing *Cheese Co. v. Pipkin*, 155 N. C. 401, 71 S. E. 442, 37 L. R. A. (N. S.) 606; *Unitype Co. v. Aschraft*, 155 N. C. 71, 71 S. E. 61; *Wilson v. Ins. Co.*, 155 N. C. 177, 71 S. E. 79. It may be that if the matter is called to the attention of the Legislature appropriate legislation may be had in conformity to the Constitution and the spirit of our present procedure, as has been done in regard to appeals from the clerk to the superior court. Or the court may some day so hold, for legislation ought not to be necessary under our Constitution.

The present practice in that matter has not been required by any statute, or by any provision of the Constitution. It has been merely the following by the courts of the procedure which was very proper under the former system of practice. The court at any time can refuse to longer follow it, or the Legislature may require that the practice in this respect shall conform to the spirit of our modern procedure.

CANNON-TORRENCE CO. et al. v. MARLOTT et al.

Appeal of SOUTHERN POWER CO.

(Supreme Court of North Carolina. Nov. 19, 1913.)

TRIAL (§ 253*)—INSTRUCTIONS—APPLICABILITY—EVIDENCE.

Where, in garnishment of \$55, which defendant was claimed to owe M., defendant claimed that it was not indebted, in that M. had defrauded it out of \$95 by forging vouchers upon defendant for W., and collecting money ostensibly to reimburse M. for paying the vouchers to W., there was some evidence that W. authorized M. to collect his bill from defendant, which only amounted to \$63, an instruction that, if M. was W.'s agent to collect his bill, the \$55 belonged to M. was erroneous for ignoring the \$32 which M. wrongfully obtained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Appeal from Superior Court, Mecklenburg County; Webb, Judge.

Action by the Cannon-Torrence Company and H. A. Rhyne against W. H. Marlott and others, in which the Southern Power Company was summoned as garnishee. From a judgment for plaintiffs, the garnishee appeals. Reversed, and new trial ordered.

Two actions were commenced before a justice of the peace against the defendants, one in favor of the Cannon-Torrence Com-

pany, and the other in favor of H. A. Rhyne, and were tried on appeal in the superior court. When the cases were called, they were, by order of his honor, consolidated and tried together.

The plaintiffs brought their actions against the defendant W. H. Marlott, and at the same time issued attachments or garnishment against any funds in the hands of the Southern Power Company that might be due Marlott. Marlott had been employed by the Southern Power Company as a patrolman of its power lines at Mount Holly, at a salary of \$55 per month. At the time of the commencement of these suits, and the issuing of the attachment against the Southern Power Company, Marlott had just lost or quit his job, and it was the intention of the plaintiffs to attach his salary of \$55 for the last month he had worked, to wit, August, 1912. The Southern Power Company filed its return to the notice, denying that it was indebted to Marlott in any sum whatsoever. The power company admitted that Marlott had not been paid his salary of \$55 for August, 1912, but undertook to show that by means of fraud and false vouchers he had obtained from the power company an amount greatly in excess of this \$55, and contended that it should be allowed to set these amounts off against its indebtedness to Marlott.

There was evidence tending to prove that, in the course of his employment at Mount Holly, Marlott frequently had occasion to use teams in patrolling the lines of the power company. These teams he hired from one Alex West. He was supposed to pay for these teams out of funds in his hands, and obtain a receipt or voucher from West for the amount paid. Marlott would present this voucher or receipt of West to the auditor of the power company, and the power company would then reimburse him the amount shown by the voucher to have been paid West. Until Marlott lost his job, the Southern Power Company was under the belief that Marlott had been paying West cash for the teams he hired, and getting the money back from the power company in the manner indicated; but at this time West came over to the Charlotte office of the power company, and informed its general manager that he had a bill against the power company for about \$60, for teams furnished Marlott. This was just before Marlott's salary check for the month of August had been paid him. It then developed that, instead of paying for the teams, as the power company had supposed, Marlott had been charging them to the power company. The vouchers or receipts which he had been presenting to the power company purporting to represent money he had paid out in its behalf to West for these teams, and purporting to be signed by West, had not been signed by West at all, but had been forged by Marlott. The amount obtained by Marlott on account

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of these false vouchers amounted to over \$95. When the power company discovered that it owed West over \$60 on account of teams, which Marlott represented to it that he had paid for, and when it discovered that Marlott had defrauded it of over \$95, it refused to pay Marlott his salary of \$55 for August, 1912; the salary being less than the amount obtained by Marlott from the power company.

The claim of West against the power company for hire of teams remaining unpaid amounted to \$63.25, which was settled by the payment of \$50.

There was evidence on the part of the plaintiffs, which was controverted by the defendant, that Marlott was authorized by West to collect his claim of \$63.25.

His honor charged the jury, among other things, as follows: "So, gentlemen, it all turns to the question of agency. If you find that Marlott was the agent of West, and West authorized him to collect this money in the way and manner it was done, and Marlott went and got the money as agent of West, and West authorized him to do it, and he failed to pay it to West, why, then, the court charges you that the power company was no longer indebted to West, and that the \$55 belonged to Marlott. But if you find, as I say, that West did not authorize Marlott to collect this money in the way and manner he did; if you find that he did not authorize Marlott to sign his name to these vouchers—why, then, the court charges you that Marlott would be indebted to the power company, and the plaintiff could not recover."

The jury returned the following verdict:

"(1) Was the defendant, the Southern Power Company, in the proceedings of attachment and garnishment in this action, indebted to the defendant, Marlott, in the sum of \$55, or any sum? Answer: Yes; \$55.

"(2) Is the defendant, the Southern Power Company, indebted to plaintiffs? If so, in what amount? Answer: \$55."

Judgment was rendered in favor of the plaintiffs, and the power company excepted and appealed.

Osborne, Cocke & Robinson, of Charlotte, for appellant. Brevard Nixon and Campbell Fetner, both of Charlotte, for appellees.

ALLEN, J. The plaintiffs claim that Marlott, an employé of the defendant power company, is indebted to them, and they seek to collect their debt by attaching \$55, which they allege the power company owes Marlott as salary for the month of August, 1912. The power company denies that it owes Marlott any sum, because it says he wrongfully collected and misappropriated \$95 belonging to it, and that this is more than enough to offset the claim for salary. The plaintiffs reply that the sum of \$95 paid to Marlott did not go into his hands as money of the power company; that it was paid to him as

the agent of West, and was the money of West, and when it was paid to Marlott it settled his claim, because received by his authority.

His honor submitted these contentions to the jury; but he failed to give any consideration to the evidence of the plaintiffs that the claim which West authorized Marlott to collect amounted to \$63.25, and to that of the defendant that he wrongfully collected \$95.

If this evidence is true, Marlott collected \$63.25 for West, and in addition wrongfully obtained \$31.75 of the defendant's money, which could be used as a set-off against the claim for salary.

This view was not presented to the jury, and, on the contrary, the jury was instructed that, if Marlott was the agent of West, "the \$55 belonged to Marlott."

In this instruction there is error, because, if he was only authorized to collect \$63.25, and he wrongfully collected \$95, the defendant would owe Marlott \$55, less the difference between the two amounts.

A new trial is ordered.

New trial.

ALLISON et al. v. KENION.

(Supreme Court of North Carolina. Nov. 19, 1913.)

1. EVIDENCE (§ 460*)—PAROL EVIDENCE—CONSTRUCTION OF DEED—BOUNDARIES.

Where a corner in a deed was established by the parties at the time it was executed, parol evidence is admissible to show at what particular place the corner was established; such evidence being always admissible when there is a latent ambiguity in boundaries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

2. BOUNDARIES (§ 3*)—DESCRIPTION—MONUMENT—CONTROLLING ELEMENTS.

Where the parties at the time of the conveyance of land actually made a corner setting up a monument, the boundaries by the monument will govern, notwithstanding errors in the description of the deed when run by courses and distances.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 47*)—ESTOPPEL TO DISPUTE.

Where the grantee wrote the deed, measured and located the land, and planted the monument and, so long as he continued the owner, acquiesced in grantor's possession up to the monument, the grantee's grantee is estopped from claiming land of the grantor beyond the point of the monument.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 227-231; Dec. Dig. § 47.*]

Appeal from Superior Court, Orange County; Peebles, Judge.

Action by Amy Allison and others against W. T. Kenion. From judgment for defendant, plaintiffs appeal. Reversed and remanded.

Civil action involving title to land. It was agreed that the judge should find the facts.

Frank Nash, of Hillsboro, for appellants.
John W. Graham, of Hillsboro, for appellee.

BROWN, J. It appears from the record that William Allison acquired title in fee simple to a lot of land in Hillsboro and on May 17, 1897, conveyed a part of it to E. L. Cooley, who conveyed to Forrest in 1899, who conveyed to defendant in 1905. The only dispute between the plaintiffs and defendant is the location of the dividing line between them, the plaintiffs' southern and the defendant's northern line. The description contained in each of the deeds is as follows: "Commencing at the northwest granite abutment of Eno railroad bridge, near the Hillsboro railroad station, and measuring from point north up Occoneechee street 654 feet on the east side of said street is the established northwest corner of said lot."

The plaintiffs contend that a rock buried one foot in the ground and one foot out of the ground is the true corner and offered evidence to show that, after Cooley had written the deed in William Allison's house, he and Cooley went out, placed that rock where it is now, and told William Allison that the rock was the end of the 654 feet from abutment of bridge, and was southwest corner of Allison's lot. This evidence in due time was objected to by the defendant, and the judge excluded the same. The plaintiffs excepted.

The evidence excluded is as follows: Amy Allison, having been duly sworn, testified: "I am the wife of William Allison, who is now dead, and one of the plaintiffs in this action. Dr. Pride Jones conveyed this land to my husband (the plaintiff had before this introduced the deed of Pride Jones and wife to William Allison, dated September, 1878). We went there to live the November before the deed was made, and we lived there continuously to the death of my husband; and I have lived there continuously since. We cultivated the land in controversy as a garden spot and after my husband's death I cultivated it as such up to April, 1912, when the defendant, Mr. Kenion, took possession of it. I know Mr. E. L. Cooley. He is a business man, and not a lawyer, and is living now, but is out of the state. My husband and I executed the deed to him. (The deed from William Allison and wife, Amy, to E. L. Cooley, dated May 17, 1897, and duly recorded, had been introduced in evidence by the plaintiff.) He came to our house the day the deed was executed; we lived on Occoneechee street; and my husband sold him the lot. He stepped the distance from the abutment of the bridge to the point to which we agreed to sell him, and he said it was 654 feet. The ground from the abutment to the point was very rough, cut up with gullies and full of bushes. Mr. Cooley came in our house, which was near by, and wrote the deed, and we signed it. We then went out to where Mr. Cooley said the measurement stopped, and he put a rock down there, dug a

deep hole, and put it (the rock) about one foot in the ground and about one foot out. I asked him if that was the line, and he said it was; 'everything was right and straight, and you will have no more trouble with it;' that rock is still there. Mr. Cooley moved a house out to the lot he bought from us, put up some outbuildings there, and rented it to some mill people, I think. All of the houses were then and are now south of the line running east from the rock on Occoneechee street to the river; and we have cultivated up to the rock line until Mr. Kenion interfered in April, 1912. Mr. Forrest bought this lot from Mr. Cooley, don't know exactly when Mr. Forrest had a well dug, and told me that if I could furnish some hands he would have it dug on the line. I furnished a hand and it was dug on the line running east to the river from the rock (the line claimed by plaintiff as the true line). Mr. Forrest afterwards sold this lot to the defendant, Mr. Kenion, and he was in possession of it up to the rock line, when, last April, after a measurement by Mr. Webb, the county surveyor, he claimed that the 654 feet ran beyond, north of the rock line, and he took possession of the land in controversy at that time and cultivated it for the year 1912. The annual rental value of this piece of land is \$25."

[1] We are of opinion that his honor erred in excluding this evidence.

It appears upon the face of the deed that the northwest corner, which is the vital point in this controversy, was established by the parties to the Cooley deed at the time that deed was executed, and it is permissible to prove by parol evidence at what particular place that northwest corner was established by them.

In *Sherrod v. Battle*, 154 N. C. 353, 70 S. E. 838, Mr. Justice Walker quotes with approval a clear and succinct statement of the law from the New Jersey court: "In settling a question of boundary, when there is a latent ambiguity in the description contained in the deed or a doubt as to the true location of the lines, evidence aliunde is admissible to show where the lines are. Boundaries may be proved by every kind of evidence admissible to establish any other fact. The question of construction is a question of law to be decided by the court upon the terms of the instrument itself, and when no latent ambiguity exists it must be decided without evidence aliunde; but a question of location or the application of a grant to its proper subject-matter is a question of fact to be determined by the jury by the aid of intrinsic evidence." *Opdyke v. Stephens*, 28 N. J. Law, 83.

[2] The evidence is admissible upon another ground. It has been held continuously since *Cherry v. Slade*, 7 N. C. 82, that whenever it can be proved that there was a line actually run and marked, and a corner made at the time of the execution of the

deed, for the purpose of establishing the location of the land, the party claiming under it shall hold accordingly, notwithstanding a mistaken description of the land in the deed. In commenting upon that rule, Justice Ashe says in *Baxter v. Wilson*, 95 N. C. 144: "This construction has been adapted by our court, to carry out the intentions of the parties, when it is clearly made to appear; and, to effect that object, course or distance will be disregarded, if the means of correcting the mistake be furnished by a more certain description in the same deed, and especially will it be so when some monument is erected contemporaneously with the execution of the deed."

The rule is again stated by Henderson, C. J., in *Reed v. Shenck*, 13 N. C. 415, to be: "Parol evidence, to control the description of land contained in a deed, is in no case admissible, unless where monuments of boundary were erected at the execution of the deed. If the description in the deed varies from these monuments, the former may be controlled by the latter."

In *Shaffer v. Gaynor*, 117 N. C. 16, 23 S. E. 156, it is held that; "Though parol proof is not, as a rule, admissible to contradict a plain, written description, it is always competent to show by a witness that the parties by a contemporaneous, but not by a subsequent, survey agreed upon a location of lines and corners different from that ascertained by running course and distance." This rule, whether wisely or not, has been recognized and applied in an unbroken line of cases in this state since 1819. *Deaver v. Jones*, 119 N. C. 598, 26 S. E. 156; *Fincannon v. Sudderth*, 144 N. C. 587, 57 S. E. 337; *Elliott v. Jefferson*, 133 N. C. 207, 45 S. E. 558, 64 L. R. A. 135; *Higdon v. Rice*, 119 N. C. 623, 26 S. E. 256.

This question was last discussed by Justice Hoke in *Clarke v. Aldridge*, 162 N. C. —, 78 S. E. 216, where it is held that: "Where parties, with a view of making a deed, go on the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, such land will pass, at least as between the parties or volunteer claimants who hold in privacy, though a different and erroneous description may appear on the face of the deed." Whatever may be thought at this day of the wisdom of this rule of evidence, it must be admitted that it is thoroughly ingrafted upon the jurisprudence of this state.

In line with our precedents, the Supreme Court of Indiana was held that, in a controversy involving the location of a boundary line, fixed by commissioners of partition, monuments fixed at the time and mentioned in the report will control distances, and that in such a case parol evidence is admissible to explain an ambiguity arising from

"the omission to describe the monument at one corner." *Hedge v. Sims*, 29 Ind. 574. This case is cited with approval in *Baxter v. Wilson*, supra.

It is true that an actual survey by a surveyor was not made of the land conveyed by William Allison to Cooley, but, what is equally as effective, the two parties themselves went on the land, and Cooley himself, if the rejected evidence is to be believed, planted the monument at the northwest corner in Allison's presence and with his consent. Cooley himself wrote the deed, and this was done contemporaneous with its execution, and the deed so written calls for an established northwest corner.

The plain intention of the parties at the execution of the deed was to convey the land up to that rock which they had planted as a muniment of boundary. This is further manifested by the fact that Allison and the plaintiffs, who are his widow and heirs at law, occupied and cultivated the land up to the rock from the date of the Cooley deed in 1897 to 1912, when this defendant, who had purchased from Forrest in 1905, for the first time claimed the parcel of land in controversy.

[3] There is another principle of law, in the nature of an estoppel, which may be invoked in behalf of the plaintiffs. Cooley, the grantee in the deed, wrote the deed, measured and located the land, and planted the monument, and, as long as he owned the land, acquiesced in plaintiff's possession up to it as did his grantees. Having himself surveyed the land, so to speak, under designated lines and corners, marked and established by himself, Cooley and those claiming under him are bound by his own admissions and acts and cannot be permitted to controvert the legal effect of his own conduct to the prejudice of the plaintiffs, especially after long acquiescence. *Barker v. Railroad*, 125 N. C. 599, 34 S. E. 701, 74 Am. St. Rep. 658. It is said in that case: "There is a clear distinction between cases where the parties themselves have definitely located the land and where it is merely sought to locate it by outside testimony not in the nature of admissions. We think this distinction is recognized inferentially in *Massey v. Belisle*, 24 N. C. 177, where the court says: "The stakes may be real boundaries when so intended by the parties, but it is a settled rule of construction with us that when they are mentioned in a deed simply, or with no other added description than that of course and distance, they are intended by the parties, and so understood, to designate imaginary points." If the facts are true, as testified upon the trial, we think the plaintiff is clearly estopped from denying his location of the land and therefore cannot recover. In his concurring opinion in the same case, Chief Justice Faircloth, while differing as to what constitutes color of title, agrees that the plaintiff, having marked the corners

at the time, is estopped to contest his own location of the land.

The case we have is much stronger than that, for here the deed itself contains evidence upon its face that a northwest corner was established by the parties, and the parol evidence excluded does not contradict or vary the terms of the description but only tends to locate the spot where that corner was established. How far this would avail against a bona fide purchaser for value without notice it is needless to discuss, as this defendant does not occupy that position. The deed itself put him upon notice that there was an established northwest corner, and the evidence, if believed, shows that William Allison and those claiming under him occupied and cultivated the land continuously to the rock up to 1912.

His honor having erroneously excluded the evidence offered, his findings and judgment are set aside, and a new trial awarded.

New trial.

SMITH v. DARE COUNTY COM'RS.

(Supreme Court of North Carolina. Sept. 17, 1913.)

Appeal from Superior Court, Perquimans County; Whedbee, Judge.

Action by B. F. Smith against the Commissioners of Dare County. Judgment for plaintiff, and defendants appeal. Affirmed by equally divided court.

Ehringhaus & Small and E. F. Aydtlett, all of Elizabeth City, and J. S. McNider, of Hertford, for appellants. Chas. Whedbee and P. W. McMullan, both of Hertford, Bond & Bond, of Edenton, and Ward & Thompson, of Elizabeth City, for appellee.

PER CURIAM. In this case Justice ALLEN did not sit and took no part in the decision of the court. Justice BROWN and Justice HOKE voted to affirm the judgment; Chief Justice CLARK and Justice WALKER voted for a new trial. The court being evenly divided, the judgment stands affirmed.

ALABAMA GREAT SOUTHERN R. CO. v. BROWN.

(Supreme Court of Georgia. Nov. 13, 1913.)

(Syllabus by the Court.)

1. JURY (§ 149*)—MISTRIAL—GROUNDS — DISQUALIFICATION OF JUROR.

On the trial of the case a jury was stricken and the plaintiff had introduced a part of his evidence. The court ordered a recess until the next morning. During the recess, and for the first time, the defendant's counsel learned that one of the jurors was and had been the guest of the local resident attorney for the plaintiff at his home in the town where the case was being tried. This fact was brought to the attention of the defendant's counsel by the plaintiff's leading counsel, whereupon the counsel with whom the juror was staying brought the matter to the attention of the court, who had the juror informed not to go again to the home of the counsel with whom he was staying, and the juror went elsewhere. Defendant's coun-

sel proposed to plaintiff's counsel that the juror be withdrawn and the trial proceed with 11 jurors, which proposition was declined. On the next morning counsel for defendant brought the foregoing facts to the attention of the court, stating that he was willing for the juror to be withdrawn and for the trial to proceed with 11 jurors. This was again refused by the counsel for the plaintiff. Defendant's counsel then moved that the court declare a mistrial, which motion was overruled. Held, that the court erred in not declaring a mistrial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 635-637; Dec. Dig. § 149.*]

2. GROUNDS FOR NEW TRIAL.

Whether receiving the verdict of the jury after the court had ordered a recess until the next morning and, in the absence of the defendant and its counsel, will require a new trial is not decided, as the same facts are not likely to occur on the next trial.

3. EVIDENCE (§ 471*)—ADMISSIBILITY—CONCLUSIONS.

The general rule is that a nonexpert witness must state facts and not his opinion, and a nonexpert witness may give his opinion, accompanied by his reasons therefor. It is error for the court to admit an answer of such a witness which states a mere conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

4. TRIAL (§ 256*)—INSTRUCTIONS—DUTY TO REQUEST.

The assignments of error dealt with in the fourth and fifth divisions of the opinion are without substantial merit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by J. P. Brown against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. Foust & Payne, of Chattanooga, Tenn., for defendant in error.

HILL, J. Brown sued the Alabama Great Southern Railway Company for damages for personal injuries to himself and to his team of horses and wagon in which he was riding, alleged to have been caused by the negligent running of its engine and cars. The defendant denied the material allegations of the petition and averred that, if the plaintiff sustained any personal injuries or loss of any property at the time and place alleged in his declaration, it was brought about by his own fault and carelessness and not by the fault of the defendant. The jury found a verdict in favor of the plaintiff. A new trial being denied, the defendant excepted.

[1] 1. After a jury was stricken and the plaintiff had introduced a part of his evidence, the court took a recess until the next morning. During the recess, and for the first time, the defendant's counsel learned that one of the jurors "was and had been the guest of the local resident attorney for plaintiff at the home of said attorney in the town" where the trial was in progress. This fact

was brought to the attention of defendant's counsel by plaintiff's leading counsel, who informed defendant's counsel that the juror was the guest of associate counsel for plaintiff. The leading counsel for plaintiff stated to defendant's counsel that he had just learned the fact by hearing the juror say to associate counsel that he was "ready to go home with him." This being brought to the attention of the court by counsel with whom the juror was staying, the court had the juror informed not to go again to the home of counsel, and the juror then went elsewhere. Defendant's counsel proposed to plaintiff's counsel that the juror be withdrawn, and that the trial proceed with 11 jurors. This proposition was refused. On the next morning counsel for the defendant brought the foregoing facts to the attention of the court, stating that he was willing for the juror to be withdrawn and for the trial to proceed with 11 jurors. Plaintiff's counsel refused to accede to this proposition, whereupon defendant's counsel asked the court to declare a mistrial. To the refusal of the court so to do the defendant filed its exceptions *pendente lite* and assigns such refusal as error. We think that a mistrial should have been declared under the facts stated, which are taken almost literally from the exceptions *pendente lite*. We construe the statement to mean that the juror had been impeached when the statement was made that he "was and had been the guest of the local resident attorney for the plaintiff." This being true, a mistrial should have been granted as asked for.

In the case of *Foster v. Brooks*, 6 Ga. 287, 298, Judge Nisbet said: "But to warrant a new trial it is not necessary to show that the juryman acted corruptly. The law will guard the trial by a jury from the chances of being corrupted."

In *Walker v. Walker*, 11 Ga. 203, 206, Judge Warner said: "It is true the affidavit of the juror was produced, in which he states that his verdict was not influenced by the kindness and hospitality of the caveator. But we place our judgment on the principle of the common law, which we consider a safe and salutary rule. When a juror has been impeached to try a cause, and during the trial, and before he has rendered his verdict, he shall be entertained, by either of the parties, at their expense, and the verdict be in favor of the party so entertaining the juror, the verdict will be set aside. * * * This rule is indispensably necessary to preserve the purity and integrity of jury trials in our courts and cannot be too strictly enforced."

In *Springer v. State*, 34 Ga. 379, page 381, where one of the counsel for the prosecution kept free of charge the horses of some of the jurors for a night, Judge Harris said: "The honor of the bar and the perfect purity of a jury alike demand their entire separation,

in their personal and social intercourse, whilst trials are progressing. However harmless in themselves, as was the conduct of our respected brethren in these cases, we feel ourselves called upon, in this and in every case where this separation is not preserved with the utmost care, to evince, in the most decisive manner, our purpose to shut up every avenue through which corruption or the influence of friendship could possibly make an approach to the jury box."

In *Salter v. Duffield*, 42 Ga. 64, 80, Chief Justice Lochrane said: "There is nothing in which courts will go farther than in their protection of the jury box. Here every precaution is necessary for the proper and pure administration of justice. But in the jury box, if purity and integrity are not preserved, every principle of right and virtue dies. This court has been vigilant in protecting the jury from even the suspicion of injustice."

In *Walker v. Hunter*, 17 Ga. 364, 414, it was said by Justice Benning: "It is hardly in the power of affidavits wholly to free this affair from suspicion. It is not in the power of affidavits to show that the two jurors were not consciously or unconsciously affected by it."

In *Rainy v. State*, 100 Ga. 82, 27 S. E. 709, it was held: "Where, during the trial of a criminal case, the jury dispersed, and one of them was entertained at dinner free of charge by an attorney for the state, such conduct on the part of the latter is cause for a new trial, although the counsel for the accused knew of the same before the verdict had been returned. In such case the trial court should not, and this court will not, inquire whether injury resulted to the accused or not, but the verdict, upon principles of sound public policy, will be set aside, to the end that the purity of jury trial may be preserved unimpaired."

In *Central Ry. Co. v. Hammond*, 109 Ga. 383, 384, 385, 34 S. E. 594, Justice Lewis said: "In the administration of law there is perhaps nothing that is guarded with more vigilance by the judiciary than the conduct of the jury pending the trial of a litigated case. For the sake of public policy, and for the purpose of maintaining and protecting the purity of the jury box, and to insure a fair and impartial trial to litigants, it is the policy of the law that each juror should be kept entirely and absolutely free from any influence which might tend to prejudice or bias his mind in favor of either party to the case on trial." See *Smith v. Lovejoy*, 62 Ga. 372; *Styles v. State*, 129 Ga. 425-430, 59 S. E. 249, 12 Ann. Cas. 176.

In 2 *Thompson on Trials*, § 2564, it is said: "Where a juror has been treated, fed, or entertained by the successful party, or his counsel, or at the expense of either, a new trial will, in nearly all cases, be granted. This rule is, by most courts, deemed indispensably necessary to preserve the integrity

of juries. It being, as already stated, a rule of public policy, it will be enforced without reference to the question whether or not the verdict was right." See, also, Merriam on Juries, § 372.

We can have no means of knowing whether the entertainment of the juror influenced him in arriving at his verdict. But, under the previous rulings of this court, it does not matter whether injury resulted to the plaintiff in error or not. The courts will so see to it that the jury are kept free from influences which may tend to bias or prejudice their minds for or against the cause of either party they are impaneled to try. The entertainment of jurors by parties or attorneys interested in the result of the litigation pending the trial cannot be too severely condemned. And the custom of entertaining jurors after they are impaneled to try a case, or "treating" jurors before or after the case is decided, by parties or attorneys in whose favor the verdict is rendered, is reprehensible conduct and should and will be discountenanced by the courts. The streams of justice must be kept pure, and the jury, which in theory as well as in fact is to find the truth of each issue submitted to them, must not be allowed to become corrupted. Jury trial would degenerate into a farce, become a hiss and a byword and the reproach of all good citizens, if outside influences are allowed to be brought to bear upon jurors tending to influence their verdict. We understand the embarrassment which may occasionally result from parties or attorneys being unable to invite a friend who is on the jury to accept their hospitality; but the courts and their instrumentalities must at all times and at all hazards be kept free from possible contaminating influences, to the end that verdicts will speak in reality the truth of each case, and that the conduct of jurors during the trial may be above suspicion, and they be not led into temptation. From the time of Magna Charta all English speaking peoples have rejoiced in the declaration that: "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man; we will not deny or defer to any man either justice or right." By this great charter it was solemnly promised that, whether justice is demanded from the palaces of the rich or the cottages of the poor, there is a guaranty that right and justice shall be administered without bias or prejudice to either party. It was made known for all time that jurors, like the bandaged eyes of justice, shall neither see nor know either suitor as they hold the scales with an even and impartial hand.

[2] 2. Error is assigned because the court received the verdict of the jury after the

court had ordered a recess until the next morning, and in the absence of movant's counsel, "thus denying movant the privilege of requesting that the jury be polled." Counsel for the movant had left the courtroom and was at a hotel a short distance from the courthouse when the verdict was received by the court. We deem it unnecessary to discuss this ground of the motion, as the facts stated therein will not likely occur again on the next trial.

[3] 3. Error is assigned because the court permitted a witness for the plaintiff to testify, over objection of the defendant's counsel, as follows: "I think the distance between those two marks would suit the distance between the springs of that seat found there. The width of those springs between was about the right space. If the spring hit him I think that would be about right. What the facts are I don't know. I hardly know how to intelligently answer the question how the width of the springs compare with the distance of the different marks on his arm and the distance of the springs apart, but I only answer it in this way. I think it could have been made by the spring." It is objected that this evidence should not have been admitted, because the witness should state the facts and let the jury determine the question as to what caused the injury to the plaintiff's arm, whereas the answer of the witness is a mere conclusion. Undoubtedly the general rule is that a witness should state facts and not his opinion, and a non-expert witness cannot give his opinion unless he also gives the fact or facts upon which he bases his opinion. Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Mayor, etc., of Milledgeville v. Wood, 114 Ga. 370 (2), 40 S. E. 239; Augusta R. Co. v. Dorsey, 68 Ga. 228 (11). And see 5 Mich. Dig. Ga. R. 520 et seq. The witness frankly states that he does not know what the facts are, and that he hardly knows how to answer intelligently the question as to how the width of the springs compares with the different marks of the arm of the plaintiff, and the distance of the springs apart; and his conclusion is, "I think it could have been made by the spring." This answer can be no more than the mere opinion of the witness, without giving any fact as a basis or as a reason therefor. He could state, if he knew, the distance of the springs apart, and also the distance apart of the marks on the arm of the plaintiff, and let the jury say whether the injury was caused by the springs. The jury would be as competent to draw the correct inference from the facts as the witness. The witness was not testifying as an expert. We think the court erred in not rejecting the answer of the witness.

[4] 4. Complaint is made of the following charge of the court: "Replying to this, the defendant company says that his injuries permanent are slight and that he can do

practically as much work now as before; the only injury being to his left arm, as the defendant contends." The criticism is that the defendant contended that it did not cause the injury to the plaintiff and was not responsible for it in any view of the evidence, and that the instruction complained of erroneously stated its defense. We do not think this is a good assignment of error. If the court did not set out correctly, or as fully as desired, the contentions of the defendant, a proper request for additional instructions should have been submitted.

5. The eighth and ninth grounds of the amended motion complains of the failure of the court to charge the jury in substance as therein set out. It does not appear that any request was made that the court instruct the jury as the movant insists should have been done, and there is no merit in these assignments of error.

Judgment reversed. All the Justices concur.

MOORE v. SMITH.

(Supreme Court of Georgia. Nov. 12, 1913.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 9*)—"GENERAL ELECTION"—SUBMISSION OF CONSTITUTIONAL AMENDMENT.

The election for members of Congress and presidential electors, required by law to be held on Tuesday after the first Monday in November, is a "general election" within the meaning of article 13, § 1, par. 1, of the Constitution of this state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3062, 3063; vol. 8, p. 7669.]

2. CONSTITUTIONAL LAW (§ 9*)—AMENDMENT—COUNTIES.

The constitutional provision (article 11, § 1, par. 2), limiting the number of counties, may be amended by a proposal to create an additional county, to be ratified by the people in the manner provided in the Constitution, without having previously submitted an amendment for enlarging the number of the counties.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7; Dec. Dig. § 9.*]

3. DENIAL OF DISCHARGE—HABEAS CORPUS.

There was no error in denying a discharge in this case under writ of habeas corpus.

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Application for writ of habeas corpus by Ben Moore against J. E. Smith. Application denied, and Moore brings error. Affirmed.

The writ of error complains of the ruling of the judge refusing to discharge Marshall Moore from the custody of the warden at the state penitentiary on a writ of habeas corpus. Moore was regularly convicted of murder in the superior court of Wheeler county, and sentenced to the penitentiary for

life. The ground upon which it was sought to have him discharged was that the establishment of the county of Wheeler was in violation of the Constitution of the state, and the court proceeding was without authority of law, and the conviction void. Other facts will sufficiently appear in the opinion.

M. B. Calhoun, of Mt. Vernon, and W. L. & Warren Grice, of Hawkinsville, for plaintiff in error. W. A. Wooten, of Eastman, W. S. Mann and Eschol Graham, both of McRae, and C. P. Thompson, of Atlanta, for defendant in error.

ATKINSON, J. 1. An act was approved August 14, 1912, "Acts of 1912" p. 41, proposing an amendment to article 11, section 1, paragraph 2, of the Constitution of this state, as amended in 1904, so as to create a new county, to be known by the name of Wheeler. The act described the boundaries of the proposed county, the location of the county site, and contained other provisions relative to the organization of the county.

Section 2 of the act was as follows: "Be it further enacted, that when this proposed amendment shall be agreed to by two-thirds of the members elected to each of the two houses composing the Legislature of the state of Georgia, such proposed amendment shall be entered upon the journal of each house with the yeas and nays thereon; and the Governor is hereby directed to cause the said proposed amendment to be published in one or more newspapers in each congressional district, at least two months before the time of holding the next general election to be held on Tuesday after the first Monday in November of the year 1912; and he shall also provide for a submission of the proposed amendment at said general election. And, if the people shall ratify such amendment by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment shall become a part of the Constitution of the state of Georgia."

Section 3 of the act was as follows: "Be it further enacted, that it shall become the duty of the Governor to submit such amendment to the people at said election in the following form: That those voting in favor of said proposed amendment shall have written or printed on their tickets, 'in favor of the ratification of the amendment to the Constitution creating the county of Wheeler, with the town of Alamo as the county site.' And those opposed to the ratification of said amendment shall have written or printed on their tickets, 'opposed to the ratification of the amendment of the Constitution creating the county of Wheeler with the town of Alamo as the county site,' which votes cast at said election shall be consolidated as now required by law in election for members of

the General Assembly, and returns thereon made to the Governor, and, if a majority of the electors qualified to vote for members of the General Assembly shall vote in favor of the ratification of the amendment to the Constitution creating the county of Wheeler, with the town of Alamo as county site, the Governor shall declare said amendment adopted and make proclamation of the result of said election in the manner provided by law."

The act received the requisite number of votes in both branches of the Legislature, and after approval by the Governor was duly submitted to be voted upon at the November election, 1912, which was held on the Tuesday after the first Monday in November, being the time provided by law for the holding of elections for members of Congress and the presidential electors. At such election the requisite number of votes was cast for the amendment, and the Governor declared the amendment adopted and issued his proclamation to that effect.

[1] The point is raised by the applicant for the writ of habeas corpus that the November election was not a general election within the contemplation of article 13, § 1, par. 1, of the Constitution of this state (Civil Code 1910, § 6610), and therefore the submission of the proposed amendment to the Constitution to the voters at the November election was without constitutional authority, and the effort to create the county of Wheeler in the manner stated was violative of both provisions of the Constitution above cited. That part of the Constitution contained in Civil Code 1910, § 6610, was adopted at the constitutional convention of 1877, and was as follows: "Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on the journals, with the yeas and nays taken thereon. And the General Assembly shall cause such amendment or amendments to be published in one or more of the newspapers in each congressional district, for two months previous to the time of holding the next general election, and shall also provide for a submission of such proposed amendment or amendments to the people at said next general election; and if the people shall ratify such amendment or amendments by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution. When more than one amendment is submitted at one time, they shall be so submitted as to enable the electors to vote on each amendment separately." Under this law amendments to the Constitution of the character now under consideration

are required to be submitted at the "next general election" to all of the voters of the state for ratification or rejection. The question raised is whether the November election is a "general election" within the meaning of article 13, § 1, par. 1, of the Constitution. Before the adoption of the Constitution of 1877 the Constitution of 1868 declared: "This Constitution may be amended by two-thirds vote of two successive Legislatures, and by submission of the amendment to the qualified voters for final ratification." In that instance the Constitution did not specify how a proposed amendment to the Constitution should be submitted to the people, or the kind of election at which the question should be submitted. Those matters were left open to be dealt with by the Legislature. Under that Constitution the question of the adoption of the amendment might have been submitted to the voters of the state at a special election regularly provided for that purpose, by the Legislature, or at any general election, as the Legislature might see fit to direct. When the constitutional convention of 1877 dealt with the same matter there was a material departure, in that a proposed amendment was not required to be voted for at two successive sessions of the Legislature, and additionally to be submitted to the voters of the state at any election; but the requirement was that the proposed amendment should receive a specified vote at one session of the Legislature, and that the proposed amendment should be submitted to the voters at "the next general election." In 1868, and in 1877 the conventions, upon adjournment, were to go out of existence. The necessity for possible amendments to the Constitution then being adopted was in the mind of the members of the convention, who had been elected by the people, and in each instance it was deemed proper to make provision for such amendment without another convention, but in doing so care was taken that no amendment should be made without being submitted to the voters of the state for ratification. As indicated above, in 1868 the time and manner of submitting the question was not specified in that Constitution, but in 1877 it was. In the latter Constitution it was to be submitted at the next general election. The term "general election" was not defined, but that term, as employed, evidently contemplated an election to be held at a fixed time after a specified notice, at which all the qualified voters of the state should have an opportunity to express their choice on the question of ratification of the amendment. Owing to the gravity of the question to be voted on, a full expression of the voters was desired. If submitted at a "general election," after notice to the people as provided, the tendency would be to have a fuller vote than at a special election, where the only question to be voted on was that

of the adoption of the amendment. Other consistent reasons might be suggested for providing that the question should be voted on at a general election. The designation of the "next" general election was merely to fix the time for submission to the voters, taking into consideration the existing conditions.

When the Constitution of 1877 was adopted, the act approved August 20, 1872 (Acts 1872, p. 29) was in effect. By this act it was provided that elections for members of Congress and presidential electors should be held biennially on Tuesday after the first Monday in November. Elections for county officers should be held on the first Wednesday in January of the years in which, under the Constitution and laws of the state, elections should be held to fill such offices. And, lastly, that elections for all other officers of this state should be held the first Wednesday in October. Each of the three classes of elections mentioned were required to be held the same day in each county of the state, and the qualification for voters was the same for all of them. Each election, therefore, was a general election throughout the state, and all voters qualified to vote at them were qualified to vote on the adoption of the constitutional amendment. Proper submission to the voters of the state was the object sought. That object could be accomplished in any one of the three elections above mentioned, which might happen to occur at a time when it was practicable to publish the notice required. The elections were all state elections, and no reason appears why the question of ratification should not be submitted at one class as well as another. There was no fixed date at which a proposed amendment might be submitted, and what might be the "next general election" after the adoption and approval of the act, occurring at a time when the notice could be given, would be indefinite. It could be one or the other of the three general elections. Under these circumstances, the framers of the Constitution, without attempting to specify one class of the elections rather than the other, merely provided that the question should be submitted at the "next general election," occurring at a time when the notice of the submission of the proposed amendment to the Constitution could be duly published.

Counsel for plaintiff in error insist that the election contemplated in article 13, § 1, par. 1, of the Constitution of 1877, to which the question of amendment should be submitted, was intended to apply only to the October election, rather than the November election, but we fail to see any ground for this contention. To give the Constitution this construction would also eliminate the January election; yet at the January election, as well as the November election, there would be the same facilities for expression by the voters

of the state, and probably as large vote as if it were submitted at the October election. Under these views it was proper to submit for ratification the proposed amendment to the Constitution, for the purpose of creating the county of Wheeler, at the November election.

[2] 2. It was urged that the creation of Wheeler county in the manner indicated above was violative of article 11, § 2, par. 1 of the Constitution. So far as necessary to be stated, this provision of the Constitution (Civil Code, § 8595) declares: "There shall be no more than one hundred and forty counties in this state: Provided, however, that in addition to the counties now provided for by this Constitution there shall be a new county laid out from the counties of Irwin and Wilcox," to be known as Ben Hill county. This contention of counsel for plaintiff in error is based on the fact that the creation of Wheeler county would add another county to the already existing 145 counties, limited as above, and it insists that before an amendment could be submitted to create Wheeler county, it would be necessary to change the limitation restricting the number of counties in this state. There is no basis for these contentions. The ratification of the amendment for the creation of Wheeler county makes that amendment a part of the Constitution, and places in the proviso a new county. To that extent it modifies the provisions of the Constitution limiting the number of counties to 145.

[3] 3. The grounds urged for the discharge of the prisoner upon the writ of habeas corpus were insufficient for the ground of that relief, and the judge committed no error in refusing to discharge him.

Judgment affirmed. All the Justices concur.

SEABOARD AIR LINE RY. CO. v. DIXON.
(Supreme Court of Georgia. Nov. 14, 1914.)

(Syllabus by the Court.)

1. CARRIERS (§§ 85, 86*)—FREIGHT SHIPMENT.—NOTICE TO CONSIGNEE.

Where shipments of lumber in car loads were consigned to a person at a named city, and were transported to their destination on the railroad on which they were shipped, and the consignee was given notice and afforded opportunity to receive and unload the lumber, the liability of the railroad company as a common carrier ceased. In the absence of any valid rule of the railroad commission, contract or custom raising such a duty, it was not bound at the request of the consignee, to deliver the cars to another carrier, to be transported to a different part of the same city, where the consignee desired to ship such lumber by steamship.

[Ed. Note.—For other cases, see Carriers Cent. Dig. §§ 316-322; Dec. Dig. §§ 85, 86*]

2. CARRIERS (§ 86*)—DELIVERY OF FREIGHT.—If the consignee relied on a usage or custom for the purpose of raising such a duty, it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

ould have to take such usage or custom as it existed.

[Ed. Note.—For other cases, see Carriers, *ent. Dig.* §§ 316-322; *Dec. Dig.* § 86.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by J. M. Dixon against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dixon, doing business as the Dixon Lumber Company, obtained an interlocutory injunction against the Seaboard Air Line Railway to restrain the defendant from collecting and enforcing demurrage on cars of lumber which were consigned to the plaintiff at Savannah and carried to that place, but which the plaintiff desired to have transported to steamship wharves in another part of the city, which were reached by the tracks of another railroad company. The defendant was also enjoined from "collecting or attempting to collect such demurrage by refusing to carry such cars before demurrage is paid." The defendant denied that it was a common carrier in connection with the other railroad company from its yards to the steamship wharves, and asserted that the car loads of lumber came over its road consigned to the plaintiff at Savannah, and that upon arrival at their destination, notice was given to the plaintiff, and demurrage began to run after 48 hours. It further alleged that the only practice as to the delivery of such cars to the Central of Georgia Railway Company was that the plaintiff would give orders to the last-named company to take from the defendant certain designated cars, that the agent of the Central Railway Company would then transmit to the agent of the defendant such instructions as to the cars desired, and the defendant would thereupon deliver the cars so ordered to the Central Railway Company for delivery to the Merchants' & Miners' Transportation Company, or at whatever point the plaintiff designated in his order to the Central Railway Company. To the grant of the injunction the defendant excepted. The other facts are sufficiently stated in the opinion.

Anderson, Cann & Cann and Thos. F. Walsh, all of Savannah, for plaintiff in error. Osborne & Lawrence, of Savannah, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1. If the plaintiff had cause for injunction against the defendant railroad company, it was because of some impending wrong which the latter was about to commit on the former. The alleged wrong was a violation of the duty of the railroad company as a common carrier. If there was any such duty, it must have been imposed by legislative enactment, by valid rule of the

railroad commission, by contract, or by custom. Was such a duty, arising from any of these sources shown?

In *Coles, Simkins & Co. v. Central Railroad & Banking Co.*, 86 Ga. 251, 12 S. E. 749, *State v. Wrightsville & Tennille R. Co.*, 104 Ga. 437, 30 S. E. 891, and *Central Ry. Co. v. Murphey*, 116 Ga. 866, 43 S. E. 265, 60 L. R. A. 817, it was held that there was no law which required a railroad company to make a contract to forward goods beyond its own line. The question of the power of the Legislature or the railroad commission was not determined. Under these rulings, whether or not it will adopt a custom of issuing through bills of lading, at least as to intrastate freight, is optional, not compulsory. *Central of Georgia Ry. Co. v. Augusta Brokerage Co.*, 122 Ga. 648, 50 S. E. 473, 69 L. R. A. 119. Even had it been shown that the company had, on certain occasions, transported cars from the initial point of the shipment to a terminal point beyond its line, this would not alone suffice to impose on it the duty of doing so. *Coles v. Central Railroad, etc., Co.*, *supra*.

[1] But there was no evidence that the railroad company had transported any lumber beyond its own yards except upon request or order from the Central Railway Company. When the Seaboard Air Line Railway received at various points car loads of lumber consigned to Dixon at Savannah, and transported such cars to the point of destination—that is, to the usual place of delivery of such cars on its line in Savannah—and gave the consignee due notice and opportunity to receive and carry away the lumber, its liability as a common carrier ceased, in the absence of a law, valid rule of the railroad commission, custom, or usage to deliver the cars to another company for transportation to a different part of the same city. No statute or rule of the railroad commission raising such a duty has been shown. Civil Code, § 2655, does not apply to such a case. These were not through shipments of goods which had not reached their destination, and the shipments were not consigned to any point on the Central Railroad or beyond the terminus of the Seaboard Air Line Railway; nor is this a question of delivery to be made to a consignee on a private siding on the line of the road of a connecting carrier. The defendant, having complied with its contract, was not bound to deliver the loaded cars to another railroad to be transported by its line across the city except as the case may be affected by a custom. It was alleged by the plaintiff that the Seaboard Air Line Railway and the Central of Georgia Railway Company were, as common carriers, engaged in the business of transporting goods from the yards of the former to the wharves of steamship companies, which were reached by the line of the latter. But the evidence failed to show that they jointly conducted the

business of making such transportation. There being no law requiring such delivery by the Seaboard Air Line Railway of cars which had reached their destination to another carrier for more convenient delivery to the same consignee at the steamship wharves, unless it appeared that there was a custom or usage of such generality as to become binding, the Seaboard Air Line Railway would not be liable for a failure or refusal to make such delivery to the other carrier. *Melbourne v. L. & N. R. Co.*, 88 Ala. 443, 6 South. 762; *Palmer v. Atchison, etc.*, 101 Cal. 187, 35 Pac. 630.

[2] In so far as a custom or usage is relied on by the plaintiff to impose a duty on the Seaboard Air Line Railway, he must rely on the custom as proved. This was that upon application by the Central of Georgia Railway Company, the Seaboard Air Line Railway would deliver cars of lumber to the former to be transported to the steamship company's wharf. The Seaboard Air Line Railway collected a charge for this service, and paid it to the Central of Georgia Railway Company, receiving no compensation for itself. It did not appear that either the steamship company or the Central of Georgia Railway Company had at the wharf any yards or provisions for receiving and holding quantities of lumber until they could be loaded on a ship. It has been held that a steamship company is not compelled to receive more freight than it has means of carrying. *Ocean Steamship Co. of Savannah v. Savannah Locomotive Works, etc.*, Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044. It cannot be that the lumber dealer would have the right to compel the Seaboard Air Line Railway, after carrying the freight to its destination, to send it forward to the steamship wharf regardless of the ability of the latter to receive it. If this dealer had that right, so had every other dealer in the city of Savannah. As there was no through shipment or contract to transport the lumber to the steamship wharf, but only to the city of Savannah, and as the Seaboard Air Line Railway completed its contract of transportation, and as the plaintiff must rely, not upon any contract or legislative act or rule of the railroad commission, but upon custom, as raising a duty on the part of that company to deliver the cars to another carrier for more convenient delivery to him in another part of the city, he must rely on the custom as proved. And as proved, the duty on the part of the Seaboard Air Line Railway to deliver cars of lumber to the Central of Georgia Railway Company did not arise until notice from the latter, upon application of the lumber dealer to the steamship company or to the Central of Georgia Railway Company.

It is argued that this works a great hardship on the plaintiff, as he is compelled to

pay demurrage, in order to have the cars, which arrive at Savannah loaded with lumber, remain on the tracks of the Seaboard Air Line Railway until called for. But the plaintiff is not compelled to do this. He ships the lumber to Savannah. When it arrives at its destination he can receive it, and re-ship it when he desires to do so. If, instead of unloading the lumber and keeping it in his yard, he prefers to let it remain upon the cars, it is at his desire.

It follows from what has been said that the grant of an interlocutory injunction restraining the Seaboard Air Line Railway from collecting and enforcing demurrage upon car loads of lumber which had been transported to the destination thereof, and which the consignees desired that company to have carried to the steamship wharves, and from collecting or attempting to collect such demurrage as might accrue before notice from the Central of Georgia Railway Company, was erroneous.

The ruling here made renders it unnecessary to consider whether or not the injunction granted was mandatory in character.

Judgment reversed. All the Justices concur.

PLANTERS' OIL MILL v. CARTER et al
(Supreme Court of Georgia. Nov. 17, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 468*)—FORECLOSURE—RECEIVER.

As a general rule, a receiver will not be appointed for mortgaged property upon the application of the mortgagees, in the absence of satisfactory proof of the inadequacy of the security and the insolvency of the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.*]

2. MORTGAGES (§ 468*)—FORECLOSURE—RECEIVER.

Where a mortgage provides that the mortgagor shall keep the property insured for a given amount for the benefit of the mortgagee as his interest may appear, and that upon the failure of the mortgagor so to do the mortgagee may have the property insured for a like amount, and that all sums paid by the mortgagee shall become a part of the mortgage debt and be secured by the mortgage lien, a failure to insure by the mortgagor will not ordinarily authorize the appointment of a receiver for the property.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.*]

3. MORTGAGES (§ 468*)—FORECLOSURE—INTERJUNCTION AND RECEIVER.

Under the facts of the case, the judge erred in appointing a receiver and granting an interlocutory injunction unless the mortgagor should, within a reasonable time, pay or cause to be paid the taxes, and have the property insured for a stated amount.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by J. & J. S. Carter and others against the Planters' Oil Mill. Judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for plaintiff, and defendant brings error. Reversed.

On March 6, 1913, J. & J. S. Carter, Georgia Railway & Power Company, Z. T. Castleberry, J. S. Carter, H. H. Dean, Mrs. A. M. Jaquish, and G. F. Hughes brought an equitable petition against the Planters' Oil Mill, the Gainesville Cotton Oil Company (domestic corporations), J. C. Cooper, Marshall C. McKenzie, and Harold C. McKenzie. The substance of the material allegations of the petition was as follows: On April 11, 1912, the Planters' Oil Mill, hereinafter referred to as the defendant, or mortgagor, duly executed 17 promissory notes, aggregating the sum of \$34,389.12, four of which were for \$1,000 each payable to J. & J. S. Carter, and due respectively on July 1, August 1, October 1, and November 1, 1912; four were for \$5,000 each, payable to J. & J. S. Carter, one on January 5, and the other three on April 1, 1913; two were for \$2,500 each payable to J. & J. S. Carter on April 1, 1913; one was for \$1,615, payable to J. & J. S. Carter on April 1, 1913; one was for \$719.12 payable to the Georgia Railway & Power Company on April 1, 1913; one was for \$540, and another for \$1,570 payable to H. H. Dean on April 1, 1913; one was for \$400 payable to Z. T. Castleberry on April 1, 1913; one was for \$417 payable to Mrs. A. M. Jaquish on April 1, 1913; and one was for \$78 payable to G. F. Hughes on April 1, 1913. At the time these notes were given, the defendant executed and delivered to the payees thereof, to secure the payment of the same, a mortgage upon its entire oil mill plant, including realty and personality of every description connected therewith. The mortgage contained the stipulations that, if default should be made in the payment of any one of the notes, then all should become due, at the option of the holders, with a right to then foreclose; and that the mortgagor should at all times keep the mortgaged property insured to the amount of \$27,000, the policy, in case of loss by fire, payable to the mortgagees as their several interests may appear, and, upon default of the mortgagor to keep the property so insured, that the mortgagees, or any one or more of them, should have the right to have the property insured for the amount above named, and that all money so paid for insurance should become a part of the mortgage debt and be secured by the mortgage lien. The first two notes for \$1,000 each, payable to J. & J. S. Carter, were paid. The other two notes for \$1,000 each, and the one for \$5,000 due January 5, 1913, payable to J. & J. S. Carter, have not been paid, and the defendant has been notified by petitioners that they have elected to declare all the notes due, in accordance with their option so to do contained in the mortgage. The \$5,000 note just mentioned was transferred to and belongs to the First National Bank of Gainesville,

Ga., and so does the note for \$540 payable to H. H. Dean. (The bank is not a party to the suit.)

It is alleged that the defendant "is insolvent and unable to pay its indebtedness; that said material and said machinery is depreciating in value; that the same is not worth more than the amount of your petitioners' claims; that, if the said defendant is allowed to keep and run the said mill and machinery, it will greatly depreciate in value, and will result in great loss to your petitioners." On September 19, 1912, the defendant leased its oil mill plant for the season of 1912 and 1913, terminating on July 1, 1913, to the Gainesville Cotton Oil Company, in pursuance of a contract entered into by the latter company, Marshall C. and Harold C. McKenzie, and the defendant; by the terms of which agreement the defendant, after certain named expenses in the operation of the plant were paid, was to receive one-half of the net profits. To better secure the payment of the notes held by petitioners, the lease contract was transferred and assigned to them by the defendant and the Gainesville Cotton Oil Company, on February 17, 1913. The transfer stipulated that "all profits arising from said lease contract to be prorated upon their respective claims." In reference to the lease, "your petitioners show that said profits have been made by running and operating said mill, and that they have not been ascertained or paid." The defendant insured the mortgaged property for \$30,000 or \$35,000, but has failed to pay the premiums, and the insurance companies are threatening to cancel the policies, and will do so unless the premiums be paid. Among other things, the petition prayed that a receiver be appointed for the Planters' Oil Mill, and that the Gainesville Cotton Oil Company, and the McKenzies be enjoined from paying to the Planters' Oil Mill any of the profits derived from the operation of its plant, and that the mortgage be foreclosed. In an amendment to the petition it was alleged that the defendant had failed to pay its state, county, and municipal taxes for the year 1912; that executions had been issued for such taxes, which would be enforced against the property of the defendant unless their collection was restrained; and that a number of common-law judgments had been rendered against the defendants in favor of various creditors, who would put it in bankruptcy unless a receiver was appointed by the state court to take charge of its assets.

In its answer, the defendant denied its liability on the notes to the amount set out in the petition, and averred that there was a failure of consideration to the amount of at least \$25,000 represented by the notes. It denied that it was insolvent, and averred that it was in better financial condition than at the time the mortgage was executed. It further denied that the mortgage property had depreciated in value, and averred that

the machinery in its plant had been added to and its value increased since the execution of the mortgage, and that the value of the mortgaged property was much greater than the claims of the plaintiffs. In the language of the answer: "Defendant admits that it has not paid the said insurance premiums, and unless they have already been paid this defendant is ready to cause or procure the same to be paid." The defendant "amends its answer by offering to cause the taxes or tax *à fas.* against defendant, set forth in the amendment to petition of plaintiffs, to be taken up and held so as not to be enforceable until after a final decree in this cause."

Upon the interlocutory hearing for a receivership, J. Carter, of the firm of J. & J. S. Carter, testified as follows: "All they [Planters' Oil Mill] owe is in that mortgage they gave. They didn't owe us [J. & J. S. Carter] anything individually at the time they gave the mortgage. They owed us on several notes we were indorsers on; the State National Bank of Greenville \$7,200, another for \$5,000, and another for \$2,700. The notes and the mortgage were given to secure the notes which we had indorsed for them in Carolina and here in Georgia, and were given to take the place of those notes which we had indorsed. They gave us these notes secured by the mortgage, and we were to take up the other notes we were indorser on. I haven't taken up those notes, and they are still outstanding against the Planters' Oil Mill, and those notes together with the notes we are suing on make a double liability against the Planters' Oil Mill. I haven't paid any on these notes outstanding. I have been trying to get the money from the Planters' Oil Mill to pay them with. I have paid interest on some of the outstanding notes; how much I don't remember. The Planters' Oil Mill paid this interest for a while, and when they stopped we started suit. \$14,700 of the \$27,000 I am suing on represents debts that were against the Planters' Oil Mill before I gave up its management. The consideration of the mortgage I am suing on, as I understand it, was that we should take up these outstanding notes, and that the mortgage and notes sued on were given in lieu of the notes outstanding." He further testified: "These notes which are payable to our order were taken that way for convenience, and they were to be substituted for the other outstanding indebtedness. I gave one of them to Mr. Castleberry and one to the First National Bank. I hold these notes as collateral to the South Carolina notes. I gave my individual note for one of the South Carolina notes, and I hold these notes to protect my indorsement. When these notes are paid that will settle all liability existing against the Planters' Oil Mill at the time. * * * I did agree to take up these outstanding notes when this

mortgage was given. That \$5,000 note is not still outstanding. When I turned over the new note to the bank that one was settled. I can't tell you anything about the \$5,000 note to the First National Bank. I haven't paid this new note for \$5,000. We have paid and renewed several times. I wouldn't pretend that I have or haven't paid any \$5,000 note. Since the 1st day of April, 1912, I have not paid any \$5,000 note for the Planters' Oil Mill to the First National Bank. Personally, I have not paid any debt of the Planters' Oil Mill since the date named. Neither has the firm of J. & J. S. Carter, that I know of."

It was shown that the mortgagor owed state, county, and municipal taxes, aggregating \$366.13, for the year 1912; that executions had been issued for the same; that a common-law judgment for \$300 principal had been rendered against the Planters' Oil Mill since the execution of the mortgage; and that a suit was pending against the oil mill on a promissory note for \$550 principal. As to the value of the mortgaged property the testimony of the witnesses for the mortgagees was as follows: J. Carter testified: "I can't say whether the mill is as valuable now as it was when the mortgage was made. I haven't been through the mill in a year. I don't know of any deterioration in the value of the mill from the time we took the mortgage to the present time; only I know that it depreciates in value when they are run. I can't specify any particular deterioration, except that I know of a motor that was burned out. * * * I can't say what the mill was worth when I took the mortgage. It had cost about \$40,000 up to that time. It was a good mill. * * * There was some new machinery in there. * * * I don't know that it was worth \$50,000. I guess it had cost \$50,000 in 1912. I didn't value it at \$50,000 then. * * * I don't think it could be built for \$50,000. * * * The mill would not bring \$50,000 at this season of the year. Yes, sir; it will bring the amount of this indebtedness. * * * An oil mill will depreciate 15 per cent. with a year's run; sometimes as much as 25 per cent. It is owing to the kind of management. With a good superintendent it will not depreciate more than from 10 to 20 per cent. This mill had been running for three years. * * * When I took the mortgage I knew that the mill would depreciate in value, and I took the mortgage in full faith of that information. When Cooper bought the mill [about three years prior to the hearing] it was pretty well run down, as the season was just over. It is true that under Cooper's management the mill has been materially improved, and is well worth all it cost." Castleberry, one of the mortgagees, testified: "It would be hard to tell whether the mill would bring over \$25,000. I haven't

been through the mill since the year before Mr. Carter sold it [about four years prior to the hearing]. To just guess at it, I would say the mill is worth \$25,000 or \$30,000." Dean, another mortgagee, testified: "I think that \$30,000 would be a high price for it [the mill]. I went into the mill when it was taken over by Mr. Carter and Mr. Castleberry. It never did pay any dividends, and has lost money, so far as I could see, every year. I have heard about it making some money, but I don't know about it. * * * I know this, that a mill that don't belong to the trust is a pretty bad piece of property." The testimony in behalf of the mortgagor was to the effect that the mortgaged property was worth about \$40,000, and that it was in better condition at the time of the hearing than at the date of the mortgage, as the repairs made and new machinery put in more than offset the natural wear and tear of the machinery by use.

The judge passed the following order: "That if the defendant company, Planters' Oil Mill, will within ten days from this date pay or have paid off the state and county taxes and the city fl. fas., and have issued and paid for insurance on its oil mill property in the sum of \$27,000, payable to the mortgagees as their several interests may appear, in the event of loss by fire, application for permanent receiver is hereby refused, and the temporary receiver discharged. * * * Should the requirement as to payment of taxes and procurement of insurance not be met as herein required, then Hugh Montgomery is hereby made permanent receiver for said property as prayed, on his making bond in the sum of \$5,000 for the faithful performance of his duties as permanent receiver," etc. To this judgment the mortgagor excepted.

W. A. Charters and H. H. Perry, both of Gainesville, for plaintiff in error. H. H. Dean, of Gainesville, for defendants in error.

FISH, C. J. (after stating the facts as above). [1] "Receivers are not appointed as matter of right, but to preserve rights." "The power of appointing receivers and ordering injunctions should be prudently and cautiously exercised, and except in clear and urgent cases should not be resorted to." Civ. Code, § 5477. The principal ground on which courts of equity are called upon to lend their extraordinary aid by the appointment of receivers over mortgaged property is the inadequacy of the security for the payment of the mortgage indebtedness. This inadequacy consists of two elements, viz., the insufficiency of the mortgaged premises per se as a fund for the payment of the debt, and the insolvency of the mortgagor or other person primarily liable for the indebtedness, whose duty it is to make good any deficiency in the security. Stated in general terms, the

well-established rule, deducible from the clear weight of authority, is that in all cases where the rents of the property are not specifically pledged as security for the debt, to entitle the mortgagee to a receiver for the mortgaged premises, and for the rents and profits, he must show: First, that the property itself is an inadequate security for the debt with interest and costs of suit; and, second, that the mortgagor, or other person who is personally liable for the payment, is insolvent, or beyond the jurisdiction of the court, or of such doubtful responsibility that an action against him for the deficiency would prove unavailing. High on Receivers, § 666. In the application of this rule, the courts require satisfactory proof, both as to the inadequacy of the security and the insolvency of the mortgagor or other person liable for the debt; and, unless both these conditions are shown to exist, no satisfactory cause is presented to warrant the interference of equity. Id. § 667. See, to the same effect, Beach on Receivers, § 524; Alderson on Receivers, § 417 et seq.; and the many adjudicated cases cited by these authors. In the case at bar it is manifest that the plaintiffs, according to the evidence which we have been at some pains to particularly set forth, did not show a clear and urgent case for a receivership over the mortgaged property in order to preserve their rights. According to the evidence of the plaintiffs themselves, who testified on the hearing the mortgaged property was amply sufficient for the payment of all the mortgage indebtedness, as well as the taxes due on the property and any premiums for insurance that the mortgagees might advance. Indeed, if the notes payable to J. & J. S. Carter did not, in their hands, represent a valid indebtedness against the mortgagor, because of a failure of consideration (which is seemingly true), then the value of the mortgaged property was something like at least five times as great as the valid mortgage indebtedness. Moreover, under the evidence submitted in behalf of the plaintiffs, it could not be said that the mortgagor was shown to be insolvent. Again, it appeared that the mortgagor had leased the mill plant, and had transferred the lease to the mortgagees, in order that they might be entitled to receive whatever profits might accrue from the operation of the mill by the lessees, as further security for the mortgage indebtedness, and that the term of the lease had not expired.

[2] From the nature of the order passed by the trial judge, we assume that he was of the opinion, from the evidence submitted to him, that the plaintiffs were not entitled to a receivership on the ground of the inadequacy of their security and the insolvency of the mortgagor; but, as the mortgagor had suffered taxes to remain unpaid, and had failed to keep up the insurance on the mill property, that a receiver should be appointed

unless the taxes should be paid and the insurance procured by the mortgagor. Under the facts of the case, we cannot concur in this view. There was a stipulation in the mortgage to the effect that the mortgagor should procure insurance on the mill property in a given amount, and should keep it up for the benefit of the mortgagees; and, in the event of its failure to do so, then the mortgagees might have the property insured for a like amount, and the cost of insurance should become a part of the mortgage indebtedness. In view of this agreement, we are of the opinion that the failure of the mortgagor as to the insurance was not cause for the appointment of a receiver, as the mortgagees had the right, under the contract, to protect their security in this respect; especially when the excess of the value of the property over the indebtedness is considered. The exact point was before the Supreme Court of Idaho in the case of Eureka Mining, etc., Co. v. Lewiston Navigation Co., 12 Idaho, 472, 86 Pac. 49, and it was held: "Where a mortgage provides that the mortgagor shall keep the property insured, and that in case he fails to do so the mortgagee may insure, and that all sums paid by the mortgagee for insurance shall become a part of the mortgage debt and be secured by the mortgage lien, a failure to insure by the mortgagor will not amount to such waste of the security as to authorize the appointment of a receiver to take charge of the property." In *Ray v. Carlisle*, 125 Ga. 316, 54 S. E. 119, it was held: "Even if the claims of the plaintiff were of such character that the property in controversy was either legally or equitably charged with their payment, the fact that the building is uninsured, and in the event of its destruction by fire the land could not be sold for a sum sufficient to pay the amount claimed by the plaintiff, does not constitute such a 'manifest danger of loss or destruction' of the property * * * to take charge of the same and impound the rents therefrom."

[3] In view of the evidence showing the value of the mortgaged property so largely in excess of the valid indebtedness secured by the mortgage, the mere fact that the mortgagor suffered the state, county, and municipal taxes to the amount of \$366.13 to accumulate and remain unpaid did not authorize the appointment of a receiver. It was not made to appear that the security of the mortgagees would manifestly be impaired, even if a sale of a portion of the mortgaged property should be sold for taxes. It was not shown that the property was of such character that the executions could not be levied upon some separable part thereof which could be sold without interrupting the operation of the mill.

Judgment reversed. All the Justices concur.

PERKINS v. STATE.

(Supreme Court of Georgia. Nov. 11, 1913.)

(Syllabus by the Court.)

REVIEW OF CONVICTION.

No complaint was made that any error was committed on the trial. There was evidence sufficient to authorize a verdict. The court did not abuse its discretion in refusing a new trial.

Error from Superior Court, Jenkins County; B. T. Rawlings, Judge.

Dwelle Perkins was convicted of crime, and brings error. Affirmed.

Frank G. Rabb, of Millen, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

ANDERSON v. ANDERSON.

(Supreme Court of Georgia. Nov. 14, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 60*)—DISQUALIFICATION.

The common-law disqualification of a party to testify as a witness on the ground of interest has been expressly preserved by Civil Code 1910, § 5861, in cases where the action is instituted in consequence of adultery.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 167-173; Dec. Dig. § 60.*]

2. WITNESSES (§ 60*)—COMPETENCY—DIVORCE.

Where a wife sues her husband for a divorce on the grounds of cruel treatment and habitual intoxication, she is a competent witness in her own behalf. And where to her suit the husband files a cross-libel on the ground of adultery, the wife is competent to testify concerning the grounds of her libel, but is incompetent to testify to any fact pertaining to the charge of adultery made in the cross-libel.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 167-173; Dec. Dig. § 60.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by L. O. Anderson against W. A. Anderson, for divorce. Judgment for defendant, and plaintiff brings error. Reversed.

Robt. L. Colding, of Savannah, for plaintiff in error. Shelby Myrick, of Savannah, for defendant in error.

EVANS, P. J. The action was for divorce by Mrs. Lillie O. Anderson against her husband, Walter A. Anderson, on the grounds of cruel treatment and habitual intoxication. The defendant filed a cross-libel, praying that he be granted a divorce on the ground of the wife's adultery. The court refused to allow the wife to testify to any fact tending to support her petition, on the ground that the defendant's cross-libel, being based on a charge of adultery, rendered her an incompetent witness; and for the same reason refused to allow her to testify denying the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

charges of adultery set out in the cross-libel. A verdict was rendered for the defendant.

The wife's libel was based on the grounds of cruel treatment and habitual intoxication. The husband denied all allegations of cruel treatment, and by way of cross-libel charged the libellant with having committed the offense of adultery, and prayed a divorce on that ground. Our Code provides that: "When a libel for divorce is instituted, the respondent may, in his or her plea and answer, recriminate, and ask a divorce in his or her favor; and if on the trial the jury believe such party is entitled to divorce instead of the libellant, they may so find upon legal proof, so as to avoid the necessity of a cross-action." Civil Code 1910, § 2952. To a libel for divorce on the grounds of cruelty and habitual intoxication the defendant may recriminate the adultery of the plaintiff. *Johns v. Johns*, 29 Ga. 718. When the defendant recriminates on the ground of the plaintiff's adultery, does such recrimination absolutely disqualify the plaintiff from testifying?

[1, 2] At common law a party to a suit was incompetent to testify as witness on the ground of interest. Our evidence act declares every person offered as witness shall be competent to testify, except in specified instances, provided that nothing therein contained shall apply to any action, suit, or proceeding in any court in consequence of adultery. Civil Code 1910, §§ 5858-5861. If the plaintiff's action had been based on the ground of adultery, she would have been an incompetent witness. *Cook v. Cook*, 46 Ga. 308. The defendant would likewise be disqualified as a witness. Such a case would come within the statute. But where a wife sues for divorce on the ground of cruel treatment and habitual intoxication, her action is not a proceeding instituted in consequence of adultery, and the husband's recrimination does not make it such. It, therefore, follows that the wife is a competent witness in her own behalf to prove the husband's cruelty and habitual intoxication. But neither spouse is competent as a witness to prove or deny the recrimination of adultery; for that is in the nature of a cross-action instituted in consequence of adultery. This principle was recognized in *Woolfolk v. Woolfolk*, 53 Ga. 661. In that case a wife sued her husband on the ground of habitual intoxication, cruelty, and adultery. The wife testified to facts tending to support her petition; and this court said that "the evidence of the plaintiff, so far as that evidence went to prove adultery on the part of the defendant, was incompetent and illegal." The implication is that she was a competent witness as to the other grounds of her suit.

We think the court erred in rejecting the plaintiff's testimony tending to support her grounds of cruel treatment and habitual intoxication, but properly excluded so much of

her testimony as related to the ground of adultery alleged in the defendant's recrimination.

Judgment reversed. All the Justices concur.

HUTCHINSON v. COLUMBUS POWER CO. et al.

(Supreme Court of Georgia. October Term, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1009*)—REVIEW—REFUSAL OF INJUNCTION—VENUE.

The defendants having pleaded that they were residents of counties of this state other than that of the venue of suit, and the evidence authorizing a finding that the pleaded facts were true, this court will not reverse the judge for refusing to grant an injunction against the defendants as ancillary to any equitable relief prayed against them. *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by P. H. Hutchinson against the Columbus Power Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

M. W. Mooty, of La Grange, for plaintiff in error. F. W. Garrard, of Columbus, and A. H. Thompson, of La Grange, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

GAULDEN v. WRIGHT, Comptroller General, et al.

(Supreme Court of Georgia. Nov. 14, 1913.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW (§ 306*)—TAXATION (§§ 545, 569*)—DUE PROCESS OF LAW—EXECUTION AGAINST TAX COLLECTOR.

The provisions of the Civil Code 1910, § 1187, relating to the power of the Comptroller General to issue execution against tax collectors and the sureties on their bonds where there is a failure to settle their accounts in terms of the law, is violative of the "due process" clause of the Constitution (Const. art. 1, § 1, par. 3; Civ. Code 1910, § 6359).

(a) It was erroneous to refuse to enjoin the enforcement of such an execution where the unconstitutionality of the law was urged as a basis for the injunction.

(b) It is unnecessary to deal with other questions presented in the record.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 928, 936, 939, 942-946, 948, 949; Dec. Dig. § 306;* Taxation, Cent. Dig. §§ 1018, 1119-1121; Dec. Dig. §§ 545, 569.*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by S. S. Gaulden against W. A.

Wright, Comptroller General, and others. Judgment for defendants, and plaintiff brings error. Reversed.

Branch & Snow, of Quitman, for plaintiff in error. T. S. Felder, Atty. Gen., and J. A. Wilkes, Sol. Gen., of Moultrie, for defendants in error.

ATKINSON, J. On the 11th day of November, 1911, the Comptroller General issued an execution, in favor of the state of Georgia, against the tax collector of Brooks county and the sureties on his bond for an amount due for taxes collected, for which no settlement had been made. One of the sureties filed a suit to enjoin enforcement of the execution. The judge refused to grant an ad interim injunction, and the plaintiff excepted. One ground relied on for injunction was the invalidity of the execution. It was charged that the execution was void because the statute in pursuance of which the Comptroller General issued the execution was violative of the due process clause of the Constitution. Under the view we take of the case it is unnecessary to deal with any other question. The statute to which reference is made is to be found in the Civil Code, § 1187, which declares: "If any collector shall fail to settle his accounts with the Comptroller General in terms of the law, he shall issue execution against him and his sureties for the principal amount, with interest at the rate of twenty per cent. per annum on said amount: Provided, that if upon a final settlement it should appear that said collector was entitled to credits at the time he is required by law to settle, the Comptroller General may allow the same, and charge such interest only on the amount for which the collector is in default, together with all the costs and attorney's fees incurred by reason of the issuance of said execution."

There is no provision of law for notice to a delinquent tax collector or surety on his bond, or hearing, before the Comptroller General issues an execution. When such an execution is issued, it is final process and authorizes a levy and sale of the property of the defendant, and no provision is made by which the execution can be converted into mesne process by making an affidavit of illegality or otherwise. That an illegality would not lie to such an execution was expressly ruled in the case of *Webb v. Newsom*, 138 Ga. 342, 75 S. E. 106. There is no other provision for tax collectors or the sureties on their bonds to have a hearing before the property is finally sold.

Where an execution issues, and there is no provision of law for the defendant to have a hearing before he is finally deprived of his property, he is not afforded due process of law, and the enforcement of the execution will be enjoined. *Shippen Bros. Lumber Co. v. Elliott*, 134 Ga. 699, 68 S. E. 509; *Cent. Ga. R. R. v. Wright*, 207 U. S. 127, 28 Sup.

Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463. After the rendition of the decision in the case last cited, the Legislature of this state passed an act, Acts 1910, page 22, by the fourth section of which it was declared: "Should the taxpayer desire to contest the taxability of said property under this section, he may do so by petition in equity in the superior court of the county where said property is assessed." This was intended to afford taxpayers an opportunity to be heard on the question of the taxability of their property, where it was attempted to enforce an execution issued by the Comptroller General for taxes, and was evidently enacted to meet the defect in the law pointed out in the decision last mentioned. The scope of the act, however, was not sufficiently broad to comprehend tax collectors and sureties on their bonds so as to afford them a hearing where the Comptroller General has issued his final judgment against them for the failure of the tax collector to make returns and pay over money collected from the taxpayers. There is no provision of law for a hearing for the tax collectors and their sureties in such cases, and it was erroneous for the judge to refuse to grant the injunction.

Judgment reversed. All the Justices concur.

WEBB v. STATE.

(Supreme Court of Georgia. Nov. 11, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 785, 1038*)—INSTRUCTIONS—IMPEACHMENT.

If the trial judge undertakes to instruct the jury as to the methods by which a witness may be impeached, he should instruct them as to the methods of impeachment, so far as the instructions are authorized by the evidence; and it has been held by this court that his failure to do so will not require the grant of a new trial, where no written request was made to charge the jury as to the mode of impeachment suggested from his instructions upon the subject of impeachment of witnesses. *Millen & Co. v. Allen*, 130 Ga. 656 (5), 657, 61 S. E. 541.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1889-1894, 2646; Dec. Dig. §§ 785, 1038.*]

2. CRIMINAL LAW (§ 781*)—INSTRUCTIONS—EVIDENCE.

Where, on the trial of one indicted for murder, the evidence on behalf of the state shows that the decedent was shot by the accused just outside of a house, and a witness testified that just after the shooting the accused had a pistol in his hand, that his wife and the witness, hearing shooting, were going out of the door of the house, and that the accused told them to go back out of the door, as they were liable to be shot, and that he had got one man (applying a vile epithet to him) "falling on his knees now" and did not know who it was, such evidence authorized a charge to the effect that all confessions of guilt should be received with great caution, and that a confession uncorroborated would not be sufficient to warrant a conviction. *Joe v. State*, 130 Ga. 274 (4), 277, 60 S. E. 840.

(a) The statement mentioned in the preceding head note was not merely an admission.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Index.

f some minor or subordinate fact, or series of acts, which could be true, whether the main act existed or not; but, in the light of the other evidence, it amounted to a statement that the accused had shot the decedent, with no exculpatory addition, or at least the jury could have found.

(b) The charge was not erroneous in itself, and a request for a further charge on the subject was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1864-1871, 1898; Dec. Dig. 781.*]

VERDICT AND DENIAL OF NEW TRIAL SUSTAINED.

The evidence authorized the verdict, and there was no error in overruling the motion for new trial.

Error from Superior Court, Early County; 7. C. Worrill, Judge.

Shadrach Webb was convicted of crime, and brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. B. T. Castellow, Sol. Gen., of Cuthbert, R. R. Arnold, of Atlanta, and T. S. elder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

DALE v. CHRISTIAN.

Supreme Court of Georgia. Nov. 12, 1913.)

(Syllabus by the Court.)

EVIDENCE (§§ 165, 423*)—BEST AND SECONDARY—ADMISSIBILITY.

The court erred in permitting the plaintiff to testify that he signed a note at the Bank of Quitman, for the amount for which the attachment was issued, as security for the defendant; this evidence having been admitted over mere objection upon the ground that the note as the best evidence to show the amount for which it was given and who signed it. However, upon the production of the note it does not appear on the face of it whether the plaintiff signed as surety or not, it would be competent to establish that fact by his testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 548-555, 1957-1965; Dec. Dig. §§ 45, 423.*]

EVIDENCE (§§ 165, 423*)—BEST AND SECONDARY—ADMISSIBILITY.

The ruling of the court admitting other evidence of the same character as above, over substantially the same objection, is open to the same criticism.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 548-555, 1957-1965; Dec. Dig. §§ 45, 423.*]

EVIDENCE (§ 129*)—RELEVANCY.

The fact that other creditors of the defendant had sued out attachments against him was relevant to the issue in this case, and should have been excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-393, 395-398; Dec. Dig. § 9.*]

ATTACHMENT (§ 47*)—EVIDENCE—PLEADINGS.

The affidavit upon which the attachment is issued in this case and the attachment issued thereon had no evidentiary value relative-

ly to the issues involved. They would be before the jury as pleadings, but should not have been introduced as evidence.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 120, 861-876; Dec. Dig. § 47.*]

5. TRIAL (§ 83*)—WITNESSES (§ 367*)—INTEREST—OBJECTION TO EVIDENCE—SUFFICIENCY.

Where an attorney at law had testified in favor of the defendant, it was not irrelevant to show by the same witness that he represented other creditors of the defendant, who would gain an advantage in case the traverse was sustained. Objection to the testimony on the ground that it was incompetent is too general, where it does not state for what reasons it was incompetent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193-210; Dec. Dig. § 83.* Witnesses, Cent. Dig. §§ 1184, 1185; Dec. Dig. § 367.*]

6. SUFFICIENCY OF EVIDENCE.

No opinion is expressed as to the sufficiency of the evidence, as the case is remanded for a new trial.

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by G. R. Christian against W. D. Dale. Judgment for plaintiff, and defendant brings error. Reversed.

Christian sued out an attachment against Dale upon the grounds that he was absconding and that he was actually removing without the limits of Brooks county. The defendant traversed the grounds of the attachment, and upon the trial of the issue thus made the jury found for the plaintiff. A motion for a new trial was overruled, and the defendant excepted.

Baum & Johnson, of Quitman, for plaintiff in error. Branch & Snow, of Quitman, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

SMITH v. STATE.

(Supreme Court of Georgia. Nov. 12, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—EVIDENCE—HARMLESS ERROR.

The fact that the presiding judge, in addition to charging the jury that the defendant must be proved guilty beyond a reasonable doubt, added the rule, applicable to cases of circumstantial evidence, that the guilt of the defendant must be proved to the exclusion of every other reasonable hypothesis, was not injurious to the defendant, on the assignment of error that there was no legal evidence to authorize such charge. If the case was one involving the rule as to circumstantial evidence, the charge was right. If not, it was not injurious to the accused, as it gave a rule more favorable than he could claim.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

2. HOMICIDE (§ 11*)—"LEGAL MALICE."

There was no error in charging as follows: "Legal malice" is an intent unlawfully to take away the life of a fellow creature in a case where the law would neither justify, nor to any degree excuse, the intention, should the killing

take place as intended. Legal malice is not necessarily ill will or hatred. It is an unlawful intention to kill, without justification or mitigation, which must exist at the time of the killing; but it is not necessary for that intention to exist for any length of time before the killing. A man may form the intention to kill, do the killing instantly, and regret the deed as soon as done."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4298-4804; vol. 8, pp. 7712, 7713.]

8. HOMICIDE (§§ 167, 338*)—EVIDENCE—HARMLESS ERROR.

The court should have excluded, on objection, certain testimony that a witness owned a gun, which was stolen from his house about the time when the homicide occurred, and that after the homicide he identified it in the possession of another witness, to whom it had been delivered by a third person; there being no legal evidence to show that the gun so stolen was that which was used by the accused in the commission of the homicide, or was in his possession, or was connected with the crime in any way. But, under the uncontradicted evidence, this error will not require a reversal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 332-340, 709-713; Dec. Dig. §§ 167, 338.*]

4. VERDICT AND DENIAL OF NEW TRIAL SUSTAINED.

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

George Smith was convicted of crime, and brings error. Affirmed.

Patterson & Copeland, of Valdosta, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

MCCONNELL v. GREGORY.

(Supreme Court of Georgia. Nov. 15, 1913.)

(Syllabus by the Court.)

USURY (§ 98*)—INVALID CONVEYANCE—HOMESTEAD.

A conveyance of land executed by a borrower to secure a debt infected with usury is void and ineffectual to pass title. Civ. Code 1910, § 3442. Therefore the maker of such a conveyance may, subsequently to its execution, have a valid homestead set apart in the property sought to be so conveyed, which homestead will not be subject to a judgment recovered on the debt notwithstanding the usury was eliminated when the judgment was taken. Applying these rulings to the evidence in this case, the court erred in directing a verdict finding the property subject.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 205-213; Dec. Dig. § 98.*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by J. M. Gregory against D. A. McConnell, head of a family. Judgment for

plaintiff, and defendant brings error. Reversed.

Hendricks & Christian, of Nashville, for plaintiff in error. Alexander & Gary, of Nashville, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

RELIFORD v. STATE.

(Supreme Court of Georgia. Nov. 11, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 641*)—CONTINUANCE—DISCRETION—"BENEFIT OF COUNSEL."

Counsel, appointed by the court to represent the accused on trial for his life, were allowed only ten minutes to confer before entering upon the trial and after such conference announced to the court that they "had not had the proper time to prepare the defense," and for this reason they moved for a continuance to a subsequent adjourned term, which motion was overruled. The trial proceeded and terminated in a verdict of guilty, and the accused was sentenced to be hung. *Held*, that it was not a sound exercise of the discretion of the court to deny the continuance without at least offering in lieu of it to postpone the trial for a reasonable time to afford counsel opportunity to prepare the defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496-1505; Dec. Dig. § 641.*]

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"BENEFIT OF COUNSEL."

The guaranty of "benefit of counsel" to accused, given in the Bill of Rights of Const. art. 1, § 1, par. 5 (Civ. Code 1910, § 6361), means more than the mere appointment by the court of counsel to represent the accused and implies also that such counsel be given a reasonable time for preparation to properly represent the accused at the trial.

Error from Superior Court, Liberty County; Frank Park, Judge.

Dorsey Reliford was convicted of murder, and brings error. Reversed.

Ben A. Way, S. B. Brewton, and O. C. Darsey, all of Hinesville, and H. H. Elders, of Reidsville, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. On Tuesday, February 18, 1913, during the regular February term of the superior court of Liberty county, an indictment was found against Dorsey Reliford, charging him with the offense of murder, alleged to have been committed on October 30, 1912. The case was called for trial on Friday, February 21, 1913, at that term of the court. Upon the call of the case for trial Mr. Darsey, an attorney, stated to the court: That on the next preceding Friday "he was spoken to by defendant and agreed to represent him, provided the defendant would employ James R. Thomas to assist

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

him; that he [Darsey] had been recently admitted to the bar; that, this being his first appearance as an attorney, he did not feel authorized to take a case of that importance alone; that the defendant had failed to employ Mr. Thomas, not being able to arrange his fee; and that Mr. Thomas had returned to his home in another county." The court then appointed attorneys B. A. Way, S. B. Brewton, and H. H. Elders to assist Mr. Darsey and gave them ten minutes in which to confer. After the consultation Mr. Way asked the court to continue the case until the May adjourned term upon the ground "that [such counsel] had not had proper time to prepare the defense in a case where the person's life was at stake." The solicitor general stated to the court "that the defendant had been in jail about 3½ months before the court convened, and that it was not a bonded case and ought to be disposed of." The motion for a continuance was overruled. The trial was immediately entered upon, and a verdict of guilty was returned. One of the grounds of the motion made for new trial by the accused was that the court erred in refusing to continue the case upon the showing above set forth. A new trial was refused, and the accused excepted.

It is declared in our Bill of Rights (Civil Code 1910, § 6361) that, "every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel." This constitutional guaranty of "benefit of counsel" means something more than the mere appointment by the court of counsel to represent the accused. He is entitled to a reasonable time for preparation by such counsel to properly represent him on the trial. As was stated in *Blackman v. State*, 76 Ga. 288: "This constitutional privilege would amount to nothing if the counsel for the accused are not allowed sufficient time to prepare his defense." To the same effect see *Jones v. State*, 65 Ga. 506; *Jackson v. State*, 88 Ga. 784, 15 S. E. 677; *McArver v. State*, 114 Ga. 514, 40 S. E. 779; *Nick v. State*, 128 Ga. 573, 58 S. E. 48; *Harris v. State*, 119 Ga. 114, 45 S. E. 973. As was said in the case last cited: "Undue haste in the administration of the criminal law is as much to be condemned as unnecessary delay. The true course lies between these two extremes. The law vests the determination of questions relating to the time of trial in the discretion of the trial judges; and this court will not interfere with their rulings on the subject, unless it is manifest that there has been an abuse of discretion." In the case at bar the accused had endeavored to employ counsel on Friday before the court convened on the following Monday but, on account of inability to arrange fees, had not succeeded. The indictment was found on Tuesday; the case was called for trial on the following Friday. The accused had no counsel, as Mr.

Darsey was unwilling to represent him without the aid of more experienced counsel. The court appointed three other attorneys to assist Mr. Darsey in representing the accused, announcing that he would give them ten minutes in which to confer. After consultation within this brief period allowed by the court, counsel announced that they had not been able to prepare the defense within the time allowed and asked for a continuance until an adjourned term. We know of no case where so short a time for preparation of the trial of a case of any description was allowed by the court; and, without considering the merits of this case, we have no hesitancy in ruling that it was not a sound exercise of the discretion of the court to deny the continuance without, in lieu of it, at least offering to postpone the trial for a reasonable time to afford opportunity to counsel for preparation for the trial. We are constrained, therefore, to reverse the judgment on the ground that the court erred in refusing a new trial.

Judgment reversed. All the Justices concur.

BERRIEN COUNTY v. ALLEN. (No. 5,050.)
(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

1. SUFFICIENCY OF PETITION.

The petition stated a cause of action, and the court did not err in overruling the demurrers.

2. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to authorize the verdict.

3. HUSBAND AND WIFE (§ 209*)—NEW TRIAL (§ 39*) — PERSONAL INJURIES TO WIFE — RIGHT OF ACTION — ERRONEOUS INSTRUCTIONS.

The court erred in giving the following charge, complained of in the motion for a new trial: "If you believe, from the evidence that she is entitled to recover, the elements that you would be authorized to consider in determining the amount of damages would be how far, if any, her capacity to discharge her ordinary daily duties has been diminished, and, if so diminished, allow compensation for that diminution." This instruction was erroneous, because the evidence shows that the plaintiff was a married woman, and her husband would be entitled, if any one, to recover for the loss of the wife's services. *Wrightsville & Tennille R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691; *Roberts v. Haines*, 112 Ga. 842, 38 S. E. 109; *Georgia R. Co. v. Tice*, 124 Ga. 460, 52 S. E. 916, 4 Ann. Cas. 200. The wife and the husband both could not recover for the diminished capacity to discharge her duties. It being impossible to determine what damages, if any, the jury allowed for diminution of the plaintiff's capacity to discharge such duties, the case must be sent back for a new trial.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 766-772; Dec. Dig. § 209; * *New Trial*, Cent. Dig. §§ 57-61; Dec. Dig. § 39.*]

Error from City Court of Nashville; J. G. Cranford, Judge.

Action by Mrs. N. M. Allen against Berrien County. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. G. Harrison, of Nashville, for plaintiff in error. Lovett & Murray and R. A. Hendricks, all of Nashville, for defendant in error.

ROAN, J. Judgment reversed.

COLLIER v. STATE. (No. 5,230.)
(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

NO ERROR APPEARING.

No error of law is alleged to have been committed by the court on the trial, the evidence authorized the verdict, and the motion for a new trial was properly overruled.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Wade Collier was convicted of crime, and brings error. Affirmed.

T. H. Parker, Jas. L. Dowling, and Jas. Humphreys, all of Moultrie, for plaintiff in error. J. A. Wilkes, Sol. Gen., and W. A. Covington, both of Moultrie, for the State.

ROAN, J. Judgment affirmed.

PEEPLS & TYGART v. CITIZENS' NAT. LIFE INS. CO. (No. 5,123.)
(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The liability of the defendants depended wholly upon the stipulation in an application for a loan, in which the applicants agreed to pay the plaintiff a compensation for the examination of the property offered to secure the loan. By the terms of the contract the ultimate right of determining whether the security offered was satisfactory was reserved to the plaintiff. The ruling of this court upon the demurrers when this case was previously here (11 Ga. App. 177, 74 S. E. 1034) practically disposed of all the contentions of the defendants, save the single defense that the inspection made by the plaintiff was colorable only, and not made in good faith, and that the application was arbitrarily rejected, for the sole purpose of creating a liability against the defendants for the sum which they had agreed to pay. Upon the trial now under review there was no evidence which indicated that the inspection made by the plaintiff was not made in good faith, or that the application was rejected otherwise than in the exercise of the plaintiff's right to be satisfied with the security offered; there is no evidence which compels the conclusion that the contract was entered into by the plaintiff for the sole purpose of creating a liability upon the part of the defendants; and consequently a verdict in favor of the plaintiff was demanded, and the assignments of error upon the charge of the court are immaterial.

Error from City Court of Tifton; R. Eve, Judge.

Action by the Citizens' National Life Insurance Company against Peebles & Tygart. Judgment for plaintiff, and defendants bring error. Affirmed.

Fulwood & Skeen, of Tifton, for plaintiffs in error. H. S. Murray, of Tifton, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

CITY OF BAINBRIDGE v. SMITH.
(No. 5,070.)
(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

1. SALES (§ 161*)—DELIVERY TO CARRIER—NECESSITY OF BILL OF LADING.

The execution of a bill of lading is not an indispensable prerequisite to a valid contract of affreightment, nor necessary to evidence such a delivery to a common carrier as will be the equivalent in the contemplation of law to delivery to the consignee. Especially is this true when delivery is made by a shipper at a point upon the line of a carrier where there is no agency or shipping agent of the carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-390; Dec. Dig. § 161.*]

2. APPEAL AND ERROR (§ 1005*)—VERDICT—EVIDENCE.

There is evidence which authorized the inference that the defendant had constituted the carrier its agent to receive and deliver the wood which was in controversy, and other evidence which authorized the conclusion that the plaintiff had corrected all errors in the delivery of the wood which had been brought to his attention by the defendant. Consequently the evidence authorized the verdict, and the discretion of the trial judge in refusing a new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3878, 3948-3950; Dec. Dig. § 1005.*]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by G. O. Smith against the City of Bainbridge. From a judgment for plaintiff. The City brings error. Affirmed.

Albert H. Russell, of Bainbridge, for plaintiff in error. John R. Wilson, of Bainbridge, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

VAUGHAN v. BANK OF COBBTOWN.
(No. 5,128.)
(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

GARNISHMENT (§ 158*)—TRAVERSE OF ANSWER OF GARNISHEE—NOTICE TO GARNISHEE.

Merely exhibiting to a party or his counsel a traverse to an answer of garnishment at the time it is filed is not such notice to the garnishee as is contemplated by the statute.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 288-297; Dec. Dig. § 158.*]

Error from City Court of Reidsville; A. S. Way, Judge pro hac.

Action by the Bank of Cobbtown against Dassey Vaughan, and garnishment summons was served upon J. N. Collins. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error. H. C. Beasley, of Reidsville, for defendant in error.

ROAN, J. The Bank of Cobbtown sued W. B. Vaughan in the city court, and had summons of garnishment served upon J. N. Collins. The garnishee answered that he had \$50 in his hands belonging to the defendant. Dassey Vaughan traversed this answer, and denied that this \$50 belonged to W. B. Vaughan, and claimed it as her property. The claim and traverse came on for trial, and counsel for the plaintiff moved the court to dismiss the traverse, on the ground that no written notice of it had been given to the garnishee as required by law. The claimant replied by showing that at the March term, 1913, of the court—the first term at which the garnishee could have answered—the claimant traversed the answer, “and the written traverse was read to and shown to the party that made said answer, and to the counsel for the plaintiff, and that both of them read said traverse, and fully understood the same, and that said case was continued by consent of all parties at the March term, 1913.” The court granted the motion to dismiss the said traverse on the ground urged, and the claimant excepted.

We hold that there was no error in the judgment excepted to. Section 5287 of the Civil Code of 1910 reads thus: “The service of notice of traverse shall be perfected by the plaintiff, his agent, or attorney of record, or by the proper officer of said court, either by serving the garnishee, his agent, or attorney of record in person or by leaving a copy of such notice of traverse at the most notorious place of abode of such garnishee, his agent, or attorney, or by acknowledgment of service.” And service of notice not having been perfected, as required by this section of the Code, there was no service in contemplation of law.

Judgment affirmed.

JOHNSON v. GEORGIA FERTILIZER & OIL CO. (No. 5,055.)

(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

EXCEPTIONS, BILL OF (§ 43*)—DISMISSAL—TENDER OF BILL OF EXCEPTIONS.

The bill of exceptions not having been tendered until after the expiration of 30 days from the judgment complained of, and it not appearing that the court remained in session more

than 30 days, the writ of error must be dismissed.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

Error from City Court of Baxley; A. V. Sellers, Judge.

Action between John Johnson and the Georgia Fertilizer & Oil Company. Judgment for the latter, and the former brings error. Dismissed.

W. W. Bennett and W. H. Watson, both of Baxley, for plaintiff in error. O'Steen & Wallace, of Douglas, for defendant in error.

ROAN, J. Writ of error dismissed.

J. W. SCARBOROUGH & CO. v. YARBOROUGH. (No. 5,073.)

(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 628*)—RES JUDICATA—JOINT CONTRACT.

The suit was upon a promissory note, of which the defendants were joint makers. At the appearance term one of the defendants filed a plea, and the other suffered judgment against him by default. The defendant who filed the plea was present at the rendition of the judgment against his joint obligor, but no further proceedings were had at that term of the court. At the succeeding term he orally moved to dismiss the petition as to himself, and this motion was granted. The court did not err in sustaining the motion. The subject of the suit was a joint contract, and the rendition of the judgment against one of the joint obligors merged the entire cause of action, and bars any subsequent suit on the same contract against the other debtor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1144; Dec. Dig. § 628.*]

2. CASE DISTINGUISHED.

This case is distinguished by its facts from that of *Merritt v. Bagwell*, 70 Ga. 578, and the decision is properly controlled by the ruling in *Almand v. Hathcock*, 140 Ga. —, 79 S. E. 345.

Error from City Court of Fitzgerald; Philip Newbern, Judge.

Action by J. W. Scarborough & Co. against John Yarbrough. Judgment for defendant, and plaintiffs bring error. Affirmed.

Jas. A. Griffin and O. H. Elkins, both of Fitzgerald, for plaintiffs in error. McDonald & Grantham and Lewis A. Mills, Jr., all of Fitzgerald, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

ROME RY. & LIGHT CO. v. LANSDELL (No. 5,084.)

(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

STREET RAILROADS (§ 113*)—WRONGFUL DEATH—EVIDENCE.

In the trial of an action against a street railway company for damages for the homicide

of the plaintiff's husband, alleged to have been caused by the negligence of the defendant's motorman in running a car at excessive speed, it was error, requiring the grant of a new trial, to admit evidence tending to show that other motormen, in charge of other cars of the defendant, had operated those cars at the place where the plaintiff's husband was killed at an excessive rate of speed, and on a former occasion came very near running over some children at that place.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 229-238; Dec. Dig. § 113.*]

Error from City Court, Floyd County; J. H. Reece, Judge.

Action by Mrs. W. S. Lansdell against the Rome Railway & Light Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. M. Hunt and Dean & Dean, all of Rome, for plaintiff in error. Seaborn & Barry Wright and Graham Wright, all of Rome, for defendant in error.

ROAN, J. Mrs. W. S. Lansdell sued the Rome Railway & Light Company for damages for the killing of her husband, who was killed by being struck by one of defendant company's cars while crossing the track of the company at a public crossing in the city of Rome. The petition alleged that he was in the exercise of all ordinary and reasonable care and caution, and that his death resulted through the negligence of the defendant's motorman in running the car recklessly and at excessive speed, and at a rate of speed greater than that allowed by ordinances of the city of Rome. The defendant, in its answer, denied all the material allegations of the plaintiff, and in addition thereto pleaded that the ordinances of the city of Rome, alleged to have been violated in the running of the defendant's cars at the time of the homicide, were unreasonable and invalid, in so far as they applied to the running of its cars at the place of the homicide. The trial of the case resulted in a verdict in favor of the plaintiff.

The defendant excepts to the overruling of its motion for a new trial. The motion was based on the usual general grounds, and on several additional grounds, one of which was as follows: "Because the following evidence of witness A. P. McGinnis was illegally admitted by the court over the objection of movant, to wit: Q. What was the usual way the cars ran at that place? A. Sometimes they ran pretty slow, and sometimes pretty fast. Q. Did you ever make any protest to Mr. Arnold, the superintendent of the car line here, as to the rapidity with which that car was run along there? A. Yes, sir. Q. Was that before Mr. Lansdell was killed? A. About six weeks before he was killed. Q. What did you say to him? A. The reason I said anything to him was they came near getting some children there one day, came in a hair's breadth of it, coming from the store south.

Q. The same direction they were running that night? A. Yes, sir. Q. What did you say to him? A. I told him I saw a narrow escape with some children, that they were running too fast, and he says, 'Make a case against the motorman and conductor,' and I says, 'I will not do it; it is your business to instruct your men.' Q. What did he say to you then? A. He never said anything; he treated me with indifference, and walked off." Defendant objected to the admission of this testimony, on the grounds that it was irrelevant, immaterial, and incompetent, and that there were no pleadings to authorize it.

Unless this evidence could illustrate the reasonableness or unreasonableness of the city ordinance in question, it was clearly inadmissible. It is impossible in looking through this record for us to arrive at the conclusion that this evidence could have been of any material value to the jury in reaching a conclusion on the issues involved. It will be noted that the answer to the first question was that "sometimes they ran pretty slow, and sometimes pretty fast." Whether he made any protest to Mr. Arnold, the superintendent of the car company, as to the rapidity with which cars were run along there, throws no light on the question as to whether the company should or should not have run rapidly. As to coming in a hair's breadth of running down some children there one day, running in the same direction they were running that night, this furnishes no light on the question. The only possible effect that this evidence could have produced on the minds of the jury was a prejudicial one against the defendant company, as it was calculated to create the impression that the agents of the defendant were habitually reckless and careless in the operation of the cars, without regard to human safety. Therefore the admission of this evidence to the jury was more than likely harmful to the defendant. As justifying the court in admitting this evidence, we are cited by the defendant in error to the case of *Savannah, Florida & Western R. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183. An examination of that case will show that Judge Bleckley, in rendering the opinion of the Supreme Court, expressed doubt as to the admissibility of the evidence there objected to. This evidence showed the high speed with which the same engine was habitually run by the same engineer at the same place. Judge Bleckley said: "This evidence was of doubtful admissibility. The authorities on the question are in conflict, and upon so doubtful a question we think the court did not err in admitting the evidence." But in the case at bar the evidence objected to fails to show that it was the same motorman or the same car and the same place, or that the company habitually ran its cars in a certain way. The testimony is by no means so strong or pertinent as that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

excepted to in the Flannagan Case. So upon the whole we conclude there was harmful error in admitting it. See, also, *Atlantic & West Point R. Co. v. Newton*, 85 Ga. 517, 11 S. E. 776, and *Central R. Co. v. Kent*, 87 Ga. 402, 408, 13 S. E. 502. There being evidence in this case which would have justified the verdict, the relative diligence and care of plaintiff's husband and the defendant company being a question for the jury, we would let it stand, but for the error in admitting this testimony, which may have played an important part in affecting the decision of the jury. See *Town of Pelham v. Pelham Telephone Co.*, 131 Ga. 325, 62 S. E. 186; *Ga. R. & Banking Co. v. Walker*, 87 Ga. 204, 13 S. E. 511; *Southern Ry. Co. v. O'Bryan*, 112 Ga. 127, 37 S. E. 161; *Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407.

Other than as above indicated, there was no material error in the trial.

Judgment reversed.

BROWN v. STATE. (No. 5,256.)

(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

VAGRANCY (§ 1*)—EVIDENCE.

A married woman, whose husband is not shown to be able to support her, cannot be convicted of vagrancy upon proof alone that she is able to work and does not work; and this is true, though she and her husband may be living in a state of separation.

[Ed. Note.—For other cases, see *Vagrancy*, Cent. Dig. § 1; Dec. Dig. § 1.*]

Error from City Court of Camilla; R. D. Bush, Judge.

Ethel Brown was convicted of vagrancy, and brings error. Reversed.

E. E. Cox, R. L. Cox, and J. M. Mayo, Jr., all of Camilla, for plaintiff in error. W. H. Haggard, Sol., of Camilla, for the State.

POTTLE, J. It is unfortunately true that some husbands do not comply with the legal and highly moral obligation imposed upon them to support their wives. It is punishment enough for a woman to espouse a man unwilling to support her. If he can and won't, the law will compel him, and will excuse the woman for not doing that which the husband is bound to perform for her. Certainly she is not to be classed as a vagrant merely because she relies upon compliance by her husband with the obligation imposed upon him by law. Married women are often compelled to supplement the income which the ostensible head of the family can earn; but they do this from stern necessity, and not because the law compels them to do it. Sometimes married women support worthless or helpless husbands; but to hold that they were legally bound to do so would put an unwarrantable burden upon the holy es-

tate of matrimony and make undesirable for the woman a relation into which the law encourages her to enter. In the present state of the law the burden of supporting the family falls upon the husband, in return for which the law crowns him with the proud, but sometimes meaningless, title of "head of the family." If he would wear the crown, he must bear the burden. Some day all this may be changed; but we are dealing with present-day law, and "sufficient unto the day is the evil thereof."

The undisputed evidence shows that the accused was a married woman, and that she lived with her husband about half the time. The evidence is silent in reference to the husband's ability to work, or as to whether he actually contributed to his wife's support. At any rate, this is not the proper proceeding in which to determine the respective obligations of husband and wife, or to fix the blame for the separation. It is enough that the woman is married and the husband is in duty bound to support her. He represents the "visible means of support" to which the statute refers.

Judgment reversed.

SIMS v. STATE. (No. 5,261.)

(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 535*)—EVIDENCE—CONFESSION—SUFFICIENCY.

In order to authorize a conviction of arson, the corpus delicti must be established, independently of the confession of the accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1225, 1226; Dec. Dig. § 535.*]

2. ARSON (§ 37*)—EVIDENCE—CORPUS DELICTI.

The evidence was insufficient to establish the corpus delicti.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. §§ 71-73; Dec. Dig. § 37.*]

Error from Superior Court, Madison County; D. W. Meadow, Judge.

Willie Sims was convicted of arson, and brings error. Reversed.

See, also, 12 Ga. App. 551, 77 S. E. 891.

Jno. E. Gordon, of Danielsville, and Geo. C. Thomas, of Athens, for plaintiff in error. Thos. J. Brown, Sol. Gen., of Elberton, for the State.

ROAN, J. The accused was convicted of arson, and excepts to the overruling of his motion for a new trial.

[1] The principal ground insisted on is that there was no proof of the corpus delicti. In a case of this kind it takes more than proof of the burning to constitute a crime: it must appear from evidence, either direct or circumstantial, to a reasonable and moral certainty, that the house was burned by some criminal agency. *West v. State*, 6 Ga.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

App. 105, 64 S. E. 130. There was proof in this case of a confession, but it is well settled that the corpus delicti must be proved aliunde the confession.

[2] The presumption in a case of arson is that the burning was the result of accident or providential cause, rather than by criminal design. In this particular case the same defendant was convicted in the same court once before for the same offense, made a motion for a new trial, which was overruled, and it was brought to this court for review. The court then held that "the circumstances relied on in this case are entirely too inconclusive. There is no evidence sufficient to overcome the presumption that the burning was accidental. This being so, the evidence was not sufficient to authorize the conviction." Now, it appears, upon a comparison of the former record with the present one, that the evidence is practically the same in both cases, and not any stronger in this case than in the previous one. It not being sufficient then to authorize a verdict of guilty, it is for the same reasons insufficient now. See *Simms v. State*, 12 Ga. App. 551, 77 S. E. 891; *Moon v. State*, 12 Ga. App. 614, 77 S. E. 1088.

Judgment reversed.

DOUGLAS v. STATE. (No. 5,225.)

(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 786*)—INSTRUCTIONS—CREDIBILITY OF STATEMENT OF ACCUSED.

The following charge to the jury was not erroneous as tending to deny their right to believe a part of the prisoner's statement and reject the remainder: "The prisoner's statement is made under oath, and it shall have such weight and effect as the jury sees fit to give it. The jury may believe it in preference to the sworn testimony in the case."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. § 786.*]

2. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—FACTS AND EVIDENCE.

The following excerpt from the charge of the court is complained of: "Is there any other reasonable hypothesis or explanation of the existence of all the facts that is consistent with the innocence of the accused? Can all these things be true and yet can we reasonably say he is innocent?" Error was assigned upon the ground that if some of the circumstances relied on by the state were untrue, there might have been an acquittal. This excerpt was not erroneous for the reason assigned.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

3. CRIMINAL LAW (§ 552*)—EVIDENCE—CIRCUMSTANTIAL.

The evidence, though circumstantial, was sufficient to authorize the verdict.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Geo. Douglas was convicted of crime, and brings error. Affirmed.

Robt. W. Barnes, of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

POTTLE, J. Judgment affirmed.

CLARK v. GEORGIA FERTILIZER WORKS. (No. 5,066.)

(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

NEW TRIAL (§ 68*)—JUDGMENT NOT SUPPORTED BY EVIDENCE.

The description in the mortgage *fi. fa.* did not follow the mortgage, nor did the levy follow the *fi. fa.* It appears, from the evidence, that the mortgagor had two farms in the Atlanta district in which the mortgaged crops were located. There was no parol evidence locating the property described in the mortgage as the "Clark place," nor any testimony identifying the property described in the levy with the property which had been mortgaged. Consequently the court erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 135-140; Dec. Dig. § 68.*]

Error from City Court of Dublin; J. F. Hicks, Judge.

Action between A. L. Clark and the Georgia Fertilizer Works. Judgment for the latter, and Clark brings error. Reversed.

Davis & Sturgis, of Dublin, for plaintiff in error. Evans & Barrett, of Dublin, for defendant in error.

RUSSELL, C. J. Judgment reversed.

SMALL v. STATE. (No. 5,231.)

(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 67*)—FRAUDULENT BREACH OF CONTRACT—CRIMINAL PROSECUTION.

A writing containing a promise to labor which does not describe the work to be performed, is too indefinite to be the basis of a prosecution for cheating and swindling, under section 715 of the Penal Code. *Adams v. State*, 10 Ga. App. 801, 74 S. E. 95, and citations.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. § 67.*]

2. MASTER AND SERVANT (§ 67*)—FRAUDULENT BREACH OF CONTRACT—CRIMINAL RESPONSIBILITY.

The rule above stated is applicable to a writing in the following language: "In consideration of the sum of (\$12.00) twelve dollars paid me to-day, I hereby agree to work C. W. Skinner seven months at \$12.00 per month on any place of the said C. W. Skinner commencing January 1st, 1913, and ending August 1st, 1913."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. § 67.*]

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Sim Small was convicted of cheating and swindling, and brings error. Reversed.

C. B. Garlick, of Waynesboro, for plaintiff in error. F. S. Burney, Sol., of Waynesboro, for the State.

PER CURIAM. Judgment reversed.

AMBROSE v. BARBER. (No. 5,068.)
(Court of Appeals of Georgia. Nov. 25, 1913.)

(Syllabus by the Court.)

1. PROCESS (§ 149*)—TRAVERSE OF RETURN — PROOF.

On the trial of a traverse to a return of personal service, proof of service by leaving a copy at the residence of the defendant will not avail the plaintiff.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 202-205; Dec. Dig. § 149.*]

2. PROCESS (§ 64*) — PERSONAL SERVICE — SUFFICIENCY.

The evidence demanded a finding in favor of the traverse to the return of service, and the court did not err in directing the jury so to find.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 55, 56, 76-82; Dec. Dig. § 64.*]

Error from City Court of Baxley; A. V. Sellers, Judge.

Action by Beverly Ambrose against K. M. Barber. Judgment for defendant, and plaintiff brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error. Parker & Highsmith, of Baxley, for defendant in error.

POTTLE, J. The only question in this case is whether service of process had been made upon the defendant, so as to authorize the rendition of a judgment against her in the absence of an appearance and pleading. The officer made a return of personal service. The affidavit of illegality traversed the return at the first term after the defendant was apprised of its existence, and denied that she was ever served.

[1] It is settled law that where there is a return of personal service, a traverse thereof will be sustained upon proof of no personal service, even though another lawful mode of service may be shown. Wood v. Callaway, 119 Ga. 801, 47 S. E. 178.

[2] The defendant, who was a married

woman, living with her husband, testified that she was never served, and the correctness of the court's judgment in directing a verdict in favor of the traverse depends upon the testimony of the officer who made the return of service. From his testimony it appears that the husband and the wife were served jointly. The officer went with copies of the suit and process to the defendant's house, and stopped outside the front yard, at the gate, and did not get out of his buggy. The husband was in the yard, and the defendant was scrubbing the porch, which was within three or four feet of the gate. The husband was between the officer and the defendant, and within hearing distance. The officer told the husband he had papers to serve on him and his wife, and handed two copies to the husband. The defendant was not more than ten feet away, and there was no reason why she could not hear the officer's remark to her husband. The officer never spoke to the defendant, nor did she speak. We think the court properly construed the testimony. The defendant says that she did not hear the conversation between the officer and her husband. She may have been engrossed with her work and failed to hear. The testimony of the officer is that she could have heard; hers that she did not. Besides, the husband had no right to accept service for his wife. Counsel calls our attention to the Biblical dogma that "They twain shall be one flesh," and argues that in the eyes of the law persons living together in wedlock should at least be enough one for the husband to represent the wife in such a matter as this in her very presence. We might take this view of it if the wife had heard the officer tell her husband that one of the papers was for her. In that case a jury might give some force to the natural curiosity which might be ascribed to the defendant to see what was in the papers. But the husband says that he got only one copy, and the wife claims that she heard no part of the conversation, and never knew that she was sued until she saw her property advertised in the paper for sale. The evidence does not show personal service, and, under the decision above cited, proof of no other service could avail the plaintiff in execution.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

END OF CASES IN VOL. 79

*

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and .
Prior Reporter Volume Index-Digests

ABANDONMENT.

See Criminal Law, §§ 1169, 1178; Divorce, § 37; Husband and Wife, §§ 302-313; Municipal Corporations, § 663; Parent and Child, § 5.

ABATEMENT.

See Nuisance, §§ 18, 72, 75.

ABATEMENT AND REVIVAL.

See Indictment and Information, § 15.

II. ANOTHER ACTION PENDING.

§ 5 (Ga.App.) The pendency of an attachment in which no declaration was filed at the first term will not abate a second attachment between the same parties under which the same property was seized and in which a declaration was duly filed.—*Drake v. Lewis*, 79 S. E. 167.

VI. WAIVER OF GROUNDS OF ABATEMENT AND TIME AND MANNER OF PLEADING IN GENERAL.

§ 85 (Ga.App.) All of defendant's pleadings may be filed simultaneously, and defendant does not waive a plea to the jurisdiction by filing simultaneously a plea to the merits, either upon the same or separate papers.—*Drake v. Lewis*, 9 S. E. 167.

ABUTTING OWNERS.

See Municipal Corporations, §§ 663, 669.

ACCEPTANCE.

See Bills and Notes, § 83; Gifts, § 4; Sales, §§ 176, 177; Vendor and Purchaser, §§ 18, 93.

ACCOMMODATION PAPER.

See Bills and Notes, §§ 337, 367; Principal and Surety, § 177.

ACCORD AND SATISFACTION.

See Payment; Trial, § 203.

§ 11 (Ga.App.) Where a debtor sends cotton to his creditor to sell, providing he honor the debtor's draft for a certain sum and apply the balance of the proceeds on the debt, and the creditor agrees to make the sale and apply the proceeds on the debt but declines to honor the draft, and thereupon the debtor instructs him to have a sale of the cotton by him without honoring the draft must be treated as a settlement of the debt and the creditor thereafter makes the sale without paying the draft, this constitutes complete accord and satisfaction of the debt.—*Wilcox, Ives & Co. v. Rogers*, 79 S. E. 219.

§ 11 (Ga.App.) The acceptance and collection of a check, which states that it is given in full settlement of all accounts between the parties, operates as a full satisfaction of the debt, where the amount had been in dispute.—*Elrod v. M. C. Kiser & Co.*, 79 S. E. 375.

ACCOUNT.

See Action, § 50; Appeal and Error, § 1071; Executors and Administrators, §§ 473, 474; Interest, § 18; Limitation of Actions, § 29; Partnership, §§ 303-344; Payment, § 38; Warehousemen, § 34; Witnesses, § 37.

ACCOUNT STATED.

§ 19 (W.Va.) Evidence held to sustain a judgment that defendant was not indebted to plaintiff on an account stated.—*First Nat. Bank v. Bank of Keystone*, 79 S. E. 649.

ACKNOWLEDGMENT.

See Evidence, §§ 213-256; Husband and Wife, § 187; Process, § 67.

II. TAKING AND CERTIFICATE.

§ 20 (N.C.) The probate of a deed was not invalid, because the justice of the peace before whom it was taken was the son of the grantee, and subsequently acquired an interest in the land by inheritance.—*Holmes v. Carr*, 79 S. E. 413.

III. OPERATION AND EFFECT.

§ 55 (Va.) The taking of an acknowledgment is a judicial act, and the officers' determination has the force of a judgment and cannot be collaterally impeached by the testimony of the certifying justice that one of the grantors did not execute the instrument.—*McCauley v. Grim*, 79 S. E. 1041.

ACTION.

See Abatement and Revival; Dismissal and Nonsuit; Lis Pendens.

I. GROUNDS AND CONDITIONS PRECEDENT.

§ 7 (W.Va.) That plaintiff is actuated by spite or ill will is no defense to an action by him to abate a public nuisance.—*Davis v. Spragg*, 79 S. E. 652.

§ 12 (W.Va.) That a prospective judgment against a defendant in an action at law will be worthless is no defense.—*Fleming v. Fairmont & M. R. Co.*, 79 S. E. 826.

II. NATURE AND FORM.

§ 28 (W.Va.) Where a trespass has been committed upon real estate, and property severed therefrom and sold or converted, the owner may waive the trespass and sue for the value.—*Wilson v. Shrader*, 79 S. E. 1083.

§ 32 (N.C.) Forms of action are no longer of supreme importance, and the objection that an ordinary action for damages for injury to shade trees in the street in front of plaintiff's property should not have been brought, but that an action for compensation for taking property by eminent domain, should have been brought instead, is of no weight.—*Moore v. Carolina Power & Light Co.*, 79 S. E. 596.

§ 35 (W.Va.) The remedies given to an adjacent owner by Code 1906, c. 62d, in case of damages to an oil and gas well consequent upon the failure of the owner of an abandoned well on adjacent premises to plug same, are not exclusive.—*Atkinson v. Virginia Oil & Gas Co.*, 79 S. E. 647.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 50 (Ga.) Under Civ. Code 1910, § 5515, prohibiting the joining in one action of distinct claims against different persons, a petition stating a cause of action against one defendant individually by reason of a partnership enterprise, and stating another and different cause of action against a corporation and based on plaintiff's right as a stockholder, was properly dismissed on demurrer.—*Ansley v. Davis*, 79 S. E. 464.

§ 50 (Ga.) A suit by numerous customers of a warehouseman for an accounting of the funds received by him from insurance and from the sale of damaged goods after a fire is not multifarious, nor is there a misjoinder of parties plaintiff.—*Farmers' Ginney & Mfg. Co. v. Thrasher*, 79 S. E. 474.

Equity will entertain one suit by all the customers for an accounting by a warehouseman, who holds insurance and the proceeds of sales of damaged goods for the benefit of his customers, and also for individual damages for the amounts due the several customers above the amounts apportioned to each under the accounting.—*Id.*

§ 50 (W.Va.) Two or more plaintiffs may sue for the penalty provided by Code 1906, c. 79, § 7, for the unlawful mining and removing of coal within five feet of their property line, though some are interested in the coal and others in the surface only, or any such interested person may sue alone, but there can be but one recovery for such wrong.—*Selvey v. Grafton Coal & Coke Co.*, 79 S. E. 656.

§ 53 (Ga.App.) Where the father of an illegitimate child has contracted to pay the mother a certain amount a month for its support for ten years, she may sue him monthly, or may wait until the expiration of the 10 years, and sue for the entire amount.—*Franklin v. Ford*, 79 S. E. 366.

ADEMPMENT.

See *Wills*, § 767.

ADJOINING LANDOWNERS.

See *Boundaries*.

§ 8 (Ga.) Under a deed conveying "all the rock and stone both surface and subsurface," on the described land, and granting the right to use said land in any way necessary to quarry, blast, and remove said stone and rock, the grantee was not liable to the grantor for the resulting damages to adjacent property from stones falling thereon during blasting operations.—*Spencer v. City of Gainesville*, 79 S. E. 543.

ADJUDICATION.

See *Counties*, §§ 205, 206; *Courts*, §§ 89-107.

ADMINISTRATION.

See *Executors and Administrators*.

ADMISSIONS.

See *Criminal Law*, § 424; *Evidence*, §§ 213-256.

ADULTERY.

See *Husband and Wife*, § 333; *Witnesses*, §§ 58, 60.

ADVANCES.

See *Mortgages*, § 114.

ADVERSE POSSESSION.

See *Ejectment*, § 9; *Evidence*, §§ 314, 324; *Limitation of Actions*; *Mines and Minerals*, § 49; *Nuisance*, § 11; *Tenancy in Common*, § 15; *Trial*, § 192.

I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

§ 10 (N.C.) A city may acquire title to land by adverse possession.—*City of Raleigh v. Durfey*, 79 S. E. 434.

§ 13 (N.C.) In order to prove title by adverse possession under Revisal 1905, § 380, subsec. 2, plaintiff in an action, must show open, notorious, continuous, and unequivocal adverse occupation, within visible boundaries and under claim of ownership, of the land in dispute and covered by his deeds, for 21 years prior to the alleged trespass of defendant.—*Barfield v. Hill*, 79 S. E. 677.

(F) Hostile Character of Possession.

§ 60 (N.C.) Where receiver appointed by divorce decree to apply rents to payment of alimony permitted the wife to take possession in discharge of her claim for alimony, her possession held not adverse to the husband.—*Goble v. Orrell*, 79 S. E. 957.

§ 79 (Ga.) A sheriff's deed, executed to one who purchases at a tax sale, though not accompanied by the tax *fi. fa.* under which the land was sold, is good as color of title.—*Peeples v. Wilson*, 79 S. E. 466.

§ 85 (N.C.) In an action to try the title to land where plaintiff relied on adverse possession, it was error to exclude evidence offered by defendant that a certain line was surveyed and that plaintiff and his predecessors never claimed beyond it, though plaintiff's deed covered the whole tract.—*Barfield v. Hill*, 79 S. E. 677.

II. OPERATION AND EFFECT.

(B) Title or Right Acquired.

§ 104 (Va.) Where the origin of a possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is prima facie evidence from which the jury may presume a conveyance.—*McCauley v. Grim*, 79 S. E. 1041.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 112 (N.C.) Plaintiff, in an action to try the title to land, who relies on adverse possession under color of title, has the burden of proof.—*Barfield v. Hill*, 79 S. E. 677.

§ 115 (Ga.) Where, in an action for land, the evidence would have sustained a finding that plaintiff and those under whom he claimed had actual and adverse possession of the land for more than 20 years prior to the date when defendant entered into possession, it was error to grant a nonsuit.—*Henry v. Roberts*, 79 S. E. 115.

§ 115 (N.C.) In an action to try the title to land, where the plaintiff introduced evidence tending to prove adverse possession for more than 21 years under color of title, a motion to nonsuit was properly denied.—*Barfield v. Hill*, 79 S. E. 677.

Evidence in an action to try the title to land, wherein plaintiff claimed title by adverse possession, held to be so far conflicting on the question of continuous and unequivocal possession for the period required that the case should have been submitted to the jury.—*Id.*

ADVERTISEMENT.

See *Execution*, §§ 222, 258.

AFFIDAVITS.

See *Appeal and Error*, §§ 670, 935, 1058; *Attachment*, §§ 47, 91, 106; *Chattel Mortgages*,

§ 283; Continuance, §§ 46, 47; Criminal Law, § 914; Evidence, § 441; Execution, §§ 167-177; Habeas Corpus, § 85; Justices of the Peace, § 209; Logs and Logging, § 33; Mortgages, § 458; Municipal Corporations, § 544; New Trial, §§ 108, 153; Pleading, §§ 155, 268; Taxation, § 707.

AGENCY.

See Principal and Agent.

AGREED CASE.

See Submission of Controversy.

AGREEMENT.

See Contracts.

AGRICULTURE.

§ 4 (N.C.) A county agricultural association which gives a fair cannot exonerate itself from liability for damages to one injured by its negligence, on the theory that it is a public service company.—*Smith v. Cumberland County Agr. Society*, 79 S. E. 632.

A fair association is bound to know that the remises are safe for public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, but it is not an insurer of patrons, though it must warn the public against dangers which can readily be foreseen.—*Id.*

In an action by a spectator at a fair, who was carried up by a hot-air balloon, a rope attaching around his foot, evidence of the negligence of the fair association *held* sufficient to go to the jury.—*Id.*

§ 7 (Ga.App.) A note for the price of fertilizer, executed after Act Dec. 18, 1901 (Civ. Code 1910, § 1771 et seq.), went into effect, is not void merely because the tax tags required by law were not attached to the packages.—*Wilmington Oil & Guano Co. v. Swann*, 79 S. E. 76.

Under Act Aug. 22, 1911 (Acts 1911, p. 172), where the actual value of fertilizer sold falls more than 3 per cent. below the guaranteed commercial value, the seller can recover only the actual value, and is liable in damages for 25 per cent. of the price.—*Id.*

The branding of the words "High Grade" on packages of inferior fertilizer does not render a note for the price absolutely void; but the buyer's remedy in such case is to recover the damages prescribed in Act Aug. 22, 1911 (Acts 1911, p. 172), and to reduce the amount of the seller's recovery to the actual value of the fertilizer, if it falls more than 3 per cent. below the guaranteed commercial value.—*Id.*

Where the seller of fertilizer expressly defines, in the purchase-money note, to warrant its quality, and states merely that the laws of the state have been complied with, the buyer cannot, because of inferior fertilizer, recover any damages other than those provided by Act Aug. 27, 1911 (Acts 1911, p. 172).—*Id.*

Where, in an action for the price of fertilizer, the defense was that the fertilizer was not of the guaranteed commercial value, a certificate of the official analysis was admissible in evidence, though it did not appear that the analysis was made from a sample taken from the particular lot of fertilizer for the purchase price of which recovery was sought.—*Id.*

§ 7 (Ga.App.) Where, in an action on a note given for fertilizer, the defense, relying on Civ. Code 1910, § 1774, alleged a deficiency in the fertilizer as marked and guaranteed, the burden as on defendant to prove a deficiency of 3 per cent. below the total commercial value, by comparison with the official analysis of the state chemist.—*Keaton v. Birmingham Fertilizer Co.*, 79 S. E. 754.

AIDERS AND ABETTORS.

See Criminal Law, § 67.

ALIBI.

See Criminal Law, §§ 572, 775, 922.

ALIENATION OF AFFECTIONS.

See Husband and Wife, §§ 328-334.

ALIMONY.

See Divorce, §§ 206, 256.

ALTERATION OF INSTRUMENTS.

See Guaranty, § 53.

§ 9 (Ga.App.) Under Civ. Code 1910, § 4206, providing that an alteration will not invalidate a note, where it is in an "immaterial matter," or is not made with intent to defraud, if the original contract can be discovered and enforced, an alteration in the figures written on the corner of a note did not invalidate it, where the amount of the note was written fully on its face.—*Bryant v. Georgia Fertilizer & Oil Co.*, 79 S. E. 236.

§ 22 (Va.) Where a deed granting land to a person for life with remainder to her children was altered after its execution and before its recording by striking out the grant of the remainder, a court of equity could grant relief to the remaindermen.—*Dickenson v. Ramsey*, 79 S. E. 1025.

§ 29 (Va.) Clear, cogent, and convincing evidence *held* necessary in support of allegation that deed to complainants' mother for life, with remainder to them, was altered after its execution and before its recording.—*Dickenson v. Ramsey*, 79 S. E. 1025.

Evidence *held* insufficient to show that deed, the record of which purported to convey a fee-simple title to the grantee as originally executed, conveyed only a life estate, with remainder to the grantee's children.—*Id.*

AMENDMENT.

See Attachment, § 241; Attorney and Client, § 190; Constitutional Law, § 9; Equity, §§ 271, 226; Executors and Administrators, § 444; Injunction, § 157; Pleading, §§ 95, 225, 229-268, 360; Process, §§ 163, 164.

AMOUNT IN CONTROVERSY.

See Justices of the Peace, § 141.

ANIMALS.

See Appeal and Error, § 1001; Carriers, § 228; Municipal Corporations, §§ 591, 604; Railroads, §§ 419-446; Street Railroads, § 87; Trespass, § 7; Trial, § 203.

ANSWER.

See Equity, § 181; Pleading, §§ 85-155.

APPEAL AND ERROR.

See Bridges, § 7; Certiorari; Contempt, § 66; Costs, § 238; Counties, § 205; Criminal Law, §§ 1014-1179, 1208; Divorce, § 184; Drains, § 14; Eminent Domain, § 238; Exceptions, Bill of; Execution, § 433; Habeas Corpus, § 113; Homicide, §§ 338-340; Justices of the Peace, §§ 141-175; Municipal Corporations, § 917; Partition, § 113.

I. NATURE AND FORM OF REMEDY.

§ 11 (Ga.) The losing party to a judgment on general demurrer may either sue out a direct bill of exceptions assigning error on the judgment or have exceptions pendente lite certified and filed.—*Durrence v. Waters*, 79 S. E. 841.

§ 13 (Ga.) A plaintiff cannot, while his motion for new trial is pending, bring to the Supreme Court for review any ruling by the judge during the trial or the judgment on the verdict.—*Durrence v. Waters*, 79 S. E. 841.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

§ 69 (W.Va.) A decree in partition, establishing a lost deed and settling a disputed title, is appealable.—*Wright v. Pittman*, 79 S. E. 1091.

§ 70 (Ga.) Under Civ. Code 1910, § 6138, where the losing party on a judgment on general demurrer files exceptions pendente lite, the ruling on demurrer becomes a pendente lite ruling, reviewable only after determination of the case on exceptions taken to the final judgment.—*Durrence v. Waters*, 79 S. E. 841.

§ 78 (Ga.App.) Where a petition is demurred to both generally and specially, and only part of the grounds of special demurrer are sustained, and the general demurrer is overruled and the petition left to be tried upon the allegations not stricken, a writ of error sued out to the ruling sustaining the special demurrer will be dismissed as premature; such ruling not being a final judgment within Civ. Code 1910, § 6138, prescribing the cases wherein a writ of error will lie.—*Harrell v. Southern Ry. Co.*, 79 S. E. 240.

§ 79 (N.C.) A direct appeal from the dismissal of a codefendant, from whom appellant claimed relief, is premature, and must be dismissed.—*Spruill v. Bank of Plymouth*, 79 S. E. 262.

§ 80 (Va.) A final order, within Code 1904, § 3454, authorizing writs of error to review such orders, defined as one disposing of the case, leaving nothing to be done save the execution of the order.—*Salem Loan & Trust Co. v. Kelsey*, 79 S. E. 329.

(E) Nature, Scope, and Effect of Decision.

§ 93 (Ga.App.) Where the only questions presented for review arise upon certain rulings, and it appears that neither a reversal of any of such rulings nor a setting aside of the verdict will terminate the main case, the writ of error will be dismissed as premature.—*Hall v. C. J. Roehr & Co.*, 79 S. E. 379.

§ 110 (S.C.) While an order granting or refusing a new trial is appealable under Code Civ. Proc. 1912, § 11 (d), subd. 2, the right is limited to orders which the court has jurisdiction to review.—*Miller v. Atlantic Coast Line R. Co.*, 79 S. E. 645.

§ 110 (Va.) In proceeding on three notes, an order setting aside a verdict for defendant as to two of them, and denying the motion to set aside the verdict as to the third, held not a final order, and not reviewable on error.—*Salem Loan & Trust Co. v. Kelsey*, 79 S. E. 329.

§ 117 (Ga.App.) The refusal of a trial judge to approve a certain portion of the brief of evidence is not reviewable on direct exception.—*Chandler v. Baggett*, 79 S. E. 179.

IV. RIGHT OF REVIEW.

(A) Persons Entitled.

§ 150 (Va.) One decreed secondarily liable only for the deficiency remaining after a sale of land to satisfy a vendor's lien held not entitled to appeal, under Code 1904, § 3454, giving a right of appeal from an interlocutory decree adjudicating the principles of a cause.—*C. L. Ritter Lumber Co. v. Coal Mountain Mining Co.*, 79 S. E. 322.

Under Code 1904, § 3455, a grantee of the timber on certain land, decreed only secondarily liable for a deficiency occurring on a sale of the land to satisfy a vendor's lien, could not appeal prior to such sale and a showing that a deficiency in excess of \$300 existed.—*Id.*

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

§ 170 (Ga.) Objections based upon the unconstitutionality of a statute will not be reviewed, unless urged upon the trial and passed upon by the court below.—*Georgia & F. Ry. v. Newton*, 79 S. E. 142.

§ 170 (Ga.) Questions as to the constitutionality of Civ. Code 1910, §§ 445, 447, 448, relative to the validation of bonds issued by a municipality, could not be considered on error, when not presented below at the hearing on the petition for injunction.—*Edwards v. Town of Guyton*, 79 S. E. 195.

§ 170 (Ga.App.) The constitutionality of a statute will not be reviewed, where the question was not raised below.—*Richter v. Cathy*, 79 S. E. 179.

§ 171 (N.C.) A civil action in the superior court to enjoin execution under a justice's judgment could not, even by consent, be treated by the Supreme Court as a motion in the cause in the justice's court to set aside the judgment.—*Ballard v. Lowery*, 79 S. E. 966.

§ 179 (Ga.) In an action for injuries from a crossing accident, a request for an instruction that the blow-post law (Civ. Code 1910, § 2675), was unconstitutional, where no reason was presented showing wherein it was unconstitutional, or what provision of the Constitution was violated, was not a sufficient presentation of the question.—*Georgia & F. Ry. v. Newton*, 79 S. E. 142.

(B) Objections and Motions, and Rulings Thereon.

§ 205 (Ga.App.) The correctness of a judgment excluding plaintiffs' evidence could not be reviewed, where no objection was filed to such judgment, though objection was made to a judgment awarding a nonsuit.—*Little Rock Furniture Co. v. Jones & Co.*, 79 S. E. 375.

§ 206 (N.C.) In the absence of an appropriate request as required by rule 27 (140 N. C. 642, 66 S. E. viii), an appellant cannot complain that evidence admissible solely in corroboration was not restricted.—*Cooper v. Seaboard Air Line R. Co.*, 79 S. E. 418.

§ 209 (S.C.) Where not raised below, a carrier, in an action for damages for refusal to transport freight at the regular interstate rate, cannot contend on appeal that there was no evidence of such refusal.—*Aldrich v. Southern Ry. Co.*, 79 S. E. 316.

§ 215 (S.C.) No advantage can be taken of a charge which misstated the issues where it was not made the ground of objection below.—*Hillier v. Bank of Columbia*, 79 S. E. 899.

§ 216 (W.Va.) Where the court modifies a requested instruction, but fails to inform the jury as required by Laws 1907, c. 38, §§ 4, 5 (Code Supp. 1909, c. 131, §§ 9a IV, 9a V) and gives the instruction as its own, and where no objection is made, the error will be deemed to have been waived.—*Greer v. Arrington*, 79 S. E. 720.

§ 219 (N.C.) A party cannot on appeal complain that the judge failed to find additional facts, where it does not appear that any request was made.—*Dell School v. Peirce*, 79 S. E. 687.

§ 222 (Ga.) The trial judge's failure to exercise his discretion in passing on a motion for new trial will be reviewed, though urged for the first time before the Supreme Court.—*Macon, D. & S. R. Co. v. Anchors*, 79 S. E. 153.

(C) Exceptions.

§ 260 (Ga.App.) The correctness of a judgment excluding plaintiffs' evidence could not be reviewed, where no objection or exception was filed to such judgment, though objection was made to a judgment awarding a nonsuit.—

Little Rock Furniture Co. v. Jones & Co., 79 S. E. 375.

§ 260 (W.Va.) The erroneous admission of evidence will not be reviewed, when not excepted to below.—Greer v. Arrington, 79 S. E. 720.

§ 267 (Ga.App.) To confer jurisdiction upon the Court of Appeals there must be at least a general exception to the final judgment, and a writ of error will be dismissed where the only exception is to a refusal to allow an amendment to the answer.—Carpenter v. First Nat. Bank, 79 S. E. 360.

§ 270 (Ga.) The trial judge's failure to exercise his discretion in passing on a motion for new trial will be reviewed, though not averred in the bill of exceptions or made the subject of a special exception.—Macon, D. & S. R. Co. v. Anchors, 79 S. E. 153.

(D) Motions for New Trial.

§ 299 (Ga.App.) A direct bill of exceptions will lie from the direction of a verdict.—Great Southern Accident & Fidelity Co. v. Guthrie, 79 S. E. 162.

§ 302 (Ga.) A motion for new trial, complaining of a refusal to permit a witness to answer a certain question, raises no question for review, where counsel does not state the answer expected.—Flemister v. Central Georgia Power Co., 79 S. E. 148.

§ 302 (Ga.App.) Where the grounds for new trial complaining of the admission of evidence are incomplete, they cannot be considered on error.—Kerr Glass Mfg. Co. v. Americus Grocery Co., 79 S. E. 381.

§ 302 (Ga.App.) An exception to the admission of documentary evidence cannot be considered where the document is not set forth in the motion for new trial literally or in substance.—Charleston & W. C. R. Co. v. Brown, 79 S. E. 932.

VI. PARTIES.

§ 327 (Ga.App.) Where defendant in trover gives bail bond with surety, and on the trial the surety is discharged, a writ of error, assigning error upon the judgment discharging the surety, will be dismissed, where the surety is not served with a bill of exceptions, or made a party to the writ of error.—Wyatt v. Wyatt, 79 S. E. 372.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 380 (Ga.App.) The agent of a corporation is not by reason of his agency disqualified to become its surety on an appeal bond.—Willingham v. Buckeye Cotton Oil Co., 79 S. E. 496.

(D) Writ of Error, Citation, or Notice.

§ 425 (S.C.) Under Code Civ. Proc. 1912, § 384, giving parties 10 days after service of notice of judgment entered in vacation in which to serve notice of appeal, a notice served 11 days after the filing of judgment, no notice of which was ever served upon the appellant, was in time.—Strickland v. Strickland, 79 S. E. 520.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

(A) Powers and Proceedings of Lower Court.

§ 440 (Ga.) A judgment sustaining a demurrer and dismissing the entire case, instead of allowing the case to stand as against one defendant, could not be corrected by the trial court while the case was pending in the Supreme Court.—McEwen v. Kelly, 79 S. E. 777.

§ 447 (N.C.) The denial of a motion for a restraining order for want of some material averment, or because the evidence is insufficient,

does not prevent the renewal of the motion; but the motion cannot be made on the same facts after an appeal from the first order.—Bonner v. Rodman, 79 S. E. 271.

(B) Jurisdiction Acquired by Appellate Court.

§ 456 (S.C.) Jurisdiction of a justice of the Supreme Court to order an injunction granting appellant relief pending appeal will not be exercised unless the appellant's right to relief is beyond reasonable question.—Silverthorne v. Barnwell Lumber Co., 79 S. E. 519.

Comparative injury should be considered in determining an application to a single justice of the Supreme Court for a temporary injunction restraining a corporation from removing appellant from his office of general manager pending appeal.—Id.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 499 (Va.) A bill of exceptions to the admission of a letter in evidence, stating a mere general objection without any reason therefor, is not reviewable.—Davis v. Cole Bros., 79 S. E. 1033.

§ 502 (S.C.) Where a case merely stated that a motion was made for new trial "on various grounds," exceptions to the overruling of the motion on grounds specified in the exceptions could not be reviewed.—Mullaly v. Smyth, 79 S. E. 634.

§ 503 (Va.) The burden of showing the existence of appellate jurisdiction is on the appellant, which jurisdiction must affirmatively appear from the record.—C. L. Ritter Lumber Co. v. Coal Mountain Mining Co., 79 S. E. 322.

(B) Scope and Contents of Record.

§ 518 (Ga.App.) An amendment which is rejected is no part of the record, and an assignment of error on its refusal cannot be considered, unless the amendment appears in the bill of exceptions in substance or as an exhibit.—Parker v. G. O. Loving & Co., 79 S. E. 77.

§ 522 (W.Va.) To make the evidence a part of the record, it is only necessary to use such means of identification in the bills of exception and orders as make the adoption thereof reasonably certain.—Wilson v. Shrader, 79 S. E. 1033.

An agreement that the facts in the case were, as shown by the transcript of the evidence, certified by the official stenographer, and marked for identification, *held* sufficient, when filed in the case, to make the evidence in an action for debt, dependent upon the same issues of fact as those involved in another action for assumption, a part of the record in the latter case.—Id.

§ 534 (Ga.App.) Where a bill of exceptions complaining of a refusal to sanction a petition for certiorari does not set forth the petition or have it attached as an exhibit, such petition is not part of the record; and the writ of error will be dismissed, though the petition is specified and set out as a part of the record.—Durham v. Page, 79 S. E. 361.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 548 (W.Va.) Evidence not made part of the record by bill of exceptions will not be considered.—Bashar v. Pittsburg, C., C. & St. L. Ry. Co., 79 S. E. 1009.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 627 (Ga.) Under Civ. Code 1910, §§ 6185, 6186, a bill of exceptions will be dismissed where it is filed with the clerk of the county court on October 11th, but it and the transcript are not transmitted to the Supreme Court until November 13th, because plaintiff in error, an attorney, held the papers in his office.—Lang v. Montgomery, 79 S. E. 840.

§ 627 (Ga.App.) Where the bill of exceptions is not filed in the clerk's office within 15 days from the date of the trial judge's certificate thereto, as required by Civ. Code 1910, § 6167, the writ of error will be dismissed.—*Allison v. Morgan*, 79 S. E. 368.

§ 628 (Ga.App.) Delay in the transmission of a bill of exceptions and failure to transmit a transcript of the pleadings held not ground for dismissal, where it appears from the clerk's transcript that such delay was not the fault of counsel for plaintiff in error, and from the bill of exceptions that the failure to contain the pleadings was due to the case being tried upon agreement as to the pleadings after they had been lost.—*Chitty v. Oliver*, 79 S. E. 496.

§ 631 (N.C.) An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court.—*Bradshaw v. Stansberry*, 79 S. E. 302.

(I) Defects, Objections, Amendment, and Correction.

§ 651 (W.Va.) Apparent want of service of a notice to take a deposition, read at the trial over a general objection, will not be regarded on error, where it appears from a corrected record, duly certified, that notice thereof was in fact accepted by counsel.—*McGuire v. Old Sweet Springs Co.*, 79 S. E. 350.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

§ 667 (Ga.App.) Where the bill of exceptions specifies "the defendant's answer on which the case was tried," and the clerk of the trial court transmits a paper purporting to be the answer, such paper must on appeal be treated as the answer, though counsel for plaintiff in error denies it to be such, especially where such counsel were not connected with the case below.—*Peavy v. Sangster*, 79 S. E. 215.

§ 670 (S.C.) Whether alleged misconduct of the jury had been called to the attention of the trial judge during the trial, not appearing in the "case," could not be shown by affidavit.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

(K) Questions Presented for Review.

§ 671 (Ga.App.) As the Court of Appeals has no other jurisdiction than the correction of errors in law and equity, a motion to dismiss a bill of exceptions depending on the adjudication of an issue of fact dehors the record will be overruled.—*Modlin v. Smith*, 79 S. E. 82.

§ 690 (N.C.) The exclusion of evidence cannot be reviewed where the record does not disclose what the witnesses would have testified to, or what was proposed to be proven.—*In re Smith's Will*, 79 S. E. 977.

Where the time to which proposed evidence related was material to its pertinency, exclusion of such evidence cannot be reviewed, where the record does not show the time to which it related.—*Id.*

Exclusion of a certain record from the evidence cannot be reviewed, where its contents are not sufficiently stated to permit the appellate court to pass on its admissibility.—*Id.*

XI. ASSIGNMENT OF ERRORS.

§ 722 (S.C.) Each assignment of error should be clearly and concisely stated in separate exceptions, or under proper subdivisions, and be free from repetition and argument, though the ground on which error is assigned may be stated when not otherwise apparent, but only one exception should be made for the same error, though it occur at different times.—*Simpson v. Cox*, 79 S. E. 102.

§ 728 (Ga.) An assignment of error, complaining that the court refused "to rule out all of the evidence interposed" on a certain point, without

stating the objection made or setting out the evidence referred to, was insufficient.—*Georgia & F. Ry. v. Newton*, 79 S. E. 142.

§ 728 (Ga.) An assignment of error to the exclusion of certain testimony of the defendant, contradicting the testimony of witnesses for the plaintiff, which does not set out what the testimony of the witnesses was, or what that of the defendant would have been, is not sufficient.—*Brotherton v. Stricklin*, 79 S. E. 459.

§ 728 (Ga.App.) An assignment of error complaining of the exclusion of evidence was insufficient where it did not show what the witness would have testified to.—*F. T. Hardy & Co. v. Jones Bros.*, 79 S. E. 246.

§ 753 (Ga.App.) A writ of error will be dismissed where the bill of exceptions contains no assignment of error on any ruling or judgment.—*McClendon v. Temple Cotton Oil Co.*, 79 S. E. 361.

XII. BRIEFS.

§ 757 (Ga.App.) A brief of the evidence, prepared in good faith in an attempt to comply with the rules of practice, may be considered, though not as complete as it might have been.—*Great Southern Accident & Fidelity Co. v. Guthrie*, 79 S. E. 162.

§ 764 (N.C.) An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court.—*Bradshaw v. Stansberry*, 79 S. E. 302.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (N.C.) An appeal from a judgment in an action to obtain a construction of Laws 1907, c. 24, § 3, and the act of Congress ratified March 3, 1913, concerning the transportation of intoxicating liquors where it is apparent that both parties are interested on the same side of the case, will be dismissed.—*Kistler v. Southern Ky. Co.*, 79 S. E. 676.

XV. HEARING AND REHEARING.

§ 833 (S.C.) A petition for rehearing is *ex parte*, and it is not necessary to serve notice thereof, or of the grounds, on opposing counsel.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 843 (Ga.) Where a judgment must be reversed on other ground, the appellate court will not consider the sufficiency of the instructions.—*Coffey v. Cobb*, 79 S. E. 568.

§ 866 (N.C.) On appeal from a judgment as of nonsuit, granted at the close of all the evidence, evidence for defendant in support of the defenses of independent contractor's negligence, contributory negligence of plaintiff, and negating defendant's negligence, cannot be considered.—*Smith v. Cumberland County Agr. Society*, 79 S. E. 632.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

§ 871 (W.Va.) A decree in partition, establishing a lost deed and settling a disputed title, cannot be reviewed on appeal to the Supreme Court from a final decree, where the appeal is taken more than one year after rendition of the decree.—*Wright v. Pittman*, 79 S. E. 1091.

(C) Parties Entitled to Allege Error.

§ 882 (Ga.) Where, in an action by a wife to set aside a deed made by her to her husband on the ground that the deed was a forgery, and that it was executed without the approval of the superior court, as required by Civ. Code 1910, § 3009, defendant prevailed on his motion to strike from plaintiff's petition the latter ground, he could not complain on appeal that

a part of his answer seeking to recover back the consideration named in the deed was stricken by the court.—*Echols v. Green*, 79 S. E. 557.

§ 882 (S.C.) Where the court gave the requests of defendant, he cannot complain of the error therein.—*Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

(E) Presumptions.

§ 901 (N.C.) Error in the rulings of the trial court will not be presumed, and appellant must not only show error, but he must make it appear plainly.—*In re Smith's Will*, 79 S. E. 977.

§ 914 (N.C.) Where, in an action on a forfeited recognizance, the case stated that the surety entered an appearance, without more, it would be presumed that a general appearance sufficient to waive the service of process was intended.—*State v. White*, 79 S. E. 297.

§ 927 (N.C.) On appeal from a judgment of nonsuit, the court must accept as true the facts which make for plaintiff's recovery, and construe them in the light most favorable to him.—*Pate v. Blades*, 79 S. E. 608.

§ 927 (N.C.) In reviewing a judgment of nonsuit, the appellate court must consider the evidence in the most favorable view for the plaintiff.—*Latham v. Field*, 79 S. E. 865.

§ 927 (N.C.) On appeal from a nonsuit the evidence must be taken in the light most favorable to plaintiff.—*Shepherd v. North Carolina R. Co.*, 79 S. E. 968.

§ 928 (N.C.) Where the charge is not in the record, it will be presumed that it correctly stated the law.—*Ellison v. Western Union Telegraph Co.*, 79 S. E. 277; *Harrison v. Same*, *Id.* 281.

§ 928 (N.C.) Where the whole charge was not sent to the Supreme Court and there was no exception to the charge as to the burden of proof, *held*, that it would be assumed that the court correctly charged thereon.—*Carroll v. Smith*, 79 S. E. 497.

§ 928 (N.C.) Where the instructions are not in the record, it will be presumed that the verdict was found under proper instructions on the issues.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

§ 930 (S.C.) As it must be assumed that the jury followed the charge, a judgment awarding a shipper damages for the refusal of an interstate carrier to transport goods at the rate published by the Interstate Commerce Commission cannot be reversed on the theory that notice to the carrier of the amount of the shipment was a condition precedent, where the charge limited the consideration of the jury to the damages arising from the refusal of the carrier to transport two cars which had already been ordered.—*Aldrich v. Southern Ry. Co.*, 79 S. E. 316.

§ 931 (S.C.) Where it was stipulated that the court should find the facts, it will be presumed that he disregarded all incompetent testimony.—*Bennettville & C. R. Co. v. Glens Falls Ins. Co.*, 79 S. E. 717.

§ 933 (S.C.) Where an order denying a motion for a new trial did not specify the grounds on which it was decided, it will be affirmed on appeal, if the record presented any grounds on which the motion could have been properly refused.—*Miller v. Atlantic Coast Line R. Co.*, 79 S. E. 645.

§ 935 (Ga.App.) Where none of the questions raised by an affidavit of illegality can be determined without a consideration of judgments and records brought in question by the affidavit, and no such judgment was set out in the affidavit, it must be presumed that the court correctly determined these questions, or was unable to determine them from the indefinite averments of the affidavit.—*Mobley v. Citizens' Bank of Valdosta*, 79 S. E. 77.

(F) Discretion of Lower Court.

§ 959 (N.C.) Denial of a motion to amend a complaint, in the exercise of the court's discretion, will not be reviewed.—*Cavanaugh v. Jarman*, 79 S. E. 673.

§ 962 (N.C.) The discretion of the court in the dismissal of an action as to a proper party brought in at defendant's request is not reviewable.—*Spruill v. Bank of Plymouth*, 79 S. E. 262.

§ 969 (Ga.App.) The court's discretion in refusing an instruction that the testimony of a witness is to be construed most strongly against the party offering him when it is self-contradictory, vague, or equivocal, and that he cannot recover on the testimony of such witness alone, will not be disturbed on appeal.—*Charleston & W. C. Ry. Co. v. Thompson*, 79 S. E. 242.

§ 973 (Ga.) While the trial judge may, within the restrictions prescribed by Civ. Code 1910, § 5331, direct a verdict, the Supreme Court will not reverse a judgment refusing to so do.—*Ford v. Blackshear Mfg. Co.*, 79 S. E. 576.

§ 977 (Ga.App.) Under the express provisions of Civ. Code 1910, § 6204, a judgment granting a first new trial could not be disturbed on appeal, where the verdict was not demanded by the law and the evidence.—*Wolverine Soap Co. v. Sellers*, 79 S. E. 246.

§ 977 (Ga.App.) The first grant of a new trial will not be disturbed on error, where the verdict was not demanded by the law and evidence, though the motion was based on a single ground; nor will the appellate court determine whether the trial court was right in granting the motion.—*Helmly v. Savannah Office Bldg. Co.*, 79 S. E. 364.

§ 979 (Ga.) Where no error of law is complained of, and the evidence is sufficient to support the verdict, the discretion of the trial judge in refusing a new trial will not be disturbed.—*Robinson v. Furr*, 79 S. E. 455.

§ 979 (Ga.App.) Where the verdict is based on conflicting evidence, the discretion of the trial court in refusing a new trial cannot be controlled.—*Dean v. Reynolds Home Mixture Guano Co.*, 79 S. E. 86.

§ 979 (Ga.App.) Where conflicting evidence would authorize a verdict for either party, the discretion of the trial court in overruling a motion for new trial will not be controlled on writ of error.—*Franklin v. Fields & Chance*, 79 S. E. 366.

§ 979 (N.C.) The Supreme Court will not review the ruling of the trial judge on a motion to set aside the verdict as against the weight of the evidence unless it clearly appears that there has been a gross abuse of his discretion.—*Pender v. North State Life Ins. Co.*, 79 S. E. 293.

§ 979 (S.C.) The Supreme Court cannot review orders granting or refusing new trials when involving the decision of questions of fact, unless the finding is wholly unsupported by the evidence, or the conclusion reached has been controlled by error of law.—*Miller v. Atlantic Coast Line R. Co.*, 79 S. E. 645.

§ 979 (S.C.) Where there is sufficient testimony to support the verdict, the allowance of a new trial is discretionary with the trial court.—*Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

(G) Questions of Fact, Verdicts, and Findings.

§ 994 (N.C.) The jury is the sole judge of the credibility of the evidence.—*Fidelity Trust Co. v. Ellen*, 79 S. E. 263.

§ 999 (Ga.App.) Assignments of error, addressed solely to the finding of the jury on issue of the facts, cannot be reviewed.—*Brown v. Hawkins*, 79 S. E. 76.

§ 1001 (Ga.App.) A verdict supported by evidence will not be disturbed on appeal merely because the evidence would have sustained a different verdict.—*Peavy v. Sangster*, 79 S. E. 215.

§ 1001 (Ga.App.) Where, in a stock-killing case, the evidence is insufficient to demand a finding that the presumption of the railroad company's negligence has been rebutted, the overruling of a certiorari sued out by defendant will not be disturbed on error.—*Southern Ry. Co. v. Johnson*, 79 S. E. 363.

§ 1002 (Ga.App.) A verdict supported by evidence will not be disturbed on writ of error, though the evidence is in sharp conflict, where no error of law was committed below.—*Moore v. Rosser*, 79 S. E. 246.

§ 1002 (S.C.) A verdict, on conflicting evidence, is conclusive on appeal.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

§ 1002 (Va.) Where an action for injuries was properly submitted to the jury on conflicting evidence, a verdict in favor of plaintiff would not be set aside on appeal.—*Nesbit v. Webb*, 79 S. E. 330.

§ 1002 (Va.) In ejectment involving the location of a disputed boundary, the jury's finding on conflicting evidence as to its correct location was conclusive, unless some other valid objection could be shown thereto.—*Honaker v. Shrader*, 79 S. E. 391.

§ 1002 (W.Va.) A verdict on conflicting evidence of experts, where there are no controlling inconsistent facts or circumstances, will not be disturbed.—*Guerin v. Pittsburg, C. & St. L. Ry. Co.*, 79 S. E. 739.

§ 1003 (Ga.App.) The Court of Appeals is bound by the verdict of the jury, supported by the testimony of the plaintiff himself, even though that testimony is against the weight of the evidence and is contradicted by some of the plaintiff's own witnesses.—*Seaboard Air Line Ry. Co. v. Lindsey*, 79 S. E. 361.

§ 1003 (Ga.App.) A verdict supported by evidence will not be disturbed though against the great preponderance of the evidence.—*John Flannery Co. v. James*, 79 S. E. 912.

§ 1003 (N.C.) Where the evidence is sufficient to support the verdict but it is claimed that the verdict is against the weight of the evidence, the only remedy is by an application to the trial judge to set it aside, as under Const. art. 4, § 8, the Supreme Court cannot review findings of fact in jury trials.—*Pender v. North State Life Ins. Co.*, 79 S. E. 293.

§ 1003 (W.Va.) Where the evidence makes out a prima facie case calling for a certain verdict, in the absence of opposing evidence, a verdict ignoring such evidence will be set aside on error.—*Indiana & Ohio Live Stock Ins. Co. v. Bowman*, 79 S. E. 651.

§ 1004 (N.C.) Under Const. art. 4, § 8, the court cannot review the action of the trial court in affirming a verdict for damages for personal injuries where they were claimed to be excessive.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

§ 1004 (S. C.) The Supreme Court has power to set aside a verdict as excessive only when it is so excessive as to warrant a conclusion that the trial judge abused his discretion in refusing to grant relief against it.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

§ 1005 (Ga.App.) A verdict supported by competent evidence and approved by the trial judge will not be disturbed on appeal.—*Kerr Glass Mfg. Co. v. Americus Grocery Co.*, 79 S. E. 381.

§ 1005 (Ga.App.) Where the evidence authorized the verdict, the discretion of the trial judge in refusing a new trial could not be disturbed on error.—*City of Bainbridge v. Smith*, 79 S. E. 1130.

§ 1005 (N.C.) The appellate court has not the power to review the action of the trial court

in refusing to set aside a verdict because against the weight of the evidence.—*Fidelity Trust Co. v. Ellen*, 79 S. E. 263.

§ 1005 (W.Va.) The rule that it takes a stronger case in an appellate court to reverse an order granting than one refusing a new trial must be confined to cases where the evidence is not only conflicting, but also against the weight of the evidence, and the evidence is wholly insufficient to support the verdict.—*Wilson v. Johnson*, 79 S. E. 734.

§ 1009 (Ga.) Where the evidence authorized a finding sustaining defendants' plea that they were residents of another county, a judgment refusing an injunction ancillary to relief prayed against defendants will not be disturbed.—*Hutchinson v. Columbus Power Co.*, 79 S. E. 1125.

§ 1009 (N.C.) While findings of fact in injunction orders are not binding upon the appellate court, they will be given due weight and consideration.—*Davenport v. Commissioners of Pitt County*, 79 S. E. 423.

§ 1009 (W.Va.) A decree based on conflicting evidence will not be disturbed on appeal, unless apparently erroneous.—*Cumberland v. Cumberland*, 79 S. E. 1010.

§ 1022 (N.C.) A referee's findings of fact, approved by the trial judge, will not be reviewed when there is some evidence to support them.—*McCullers v. Cheatham*, 79 S. E. 306.

§ 1022 (S.C.) Appellant must satisfy the Supreme Court by a preponderance of the evidence that the trial judge erred in his finding of fact, made in approving the findings of a referee.—*Farmers' Bank & Trust Co. v. Southern Granite Co.*, 79 S. E. 985.

§ 1024 (N.C.) On a motion under Revisal 1905, § 513, the trial judge's findings of fact are conclusive, and the Supreme Court can review only the question whether the facts so found constitute such mistake, etc., as authorize setting aside the judgment or verdict.—*Mann v. Hall*, 79 S. E. 437.

(H) Harmless Error.

§ 1031 (W.Va.) Where, in a suit under the civil damage act, the trial court has erroneously given a peremptory instruction to find exemplary damages, the appellate court will not assume, from the size of the verdict, that defendant was not prejudiced thereby.—*Greer v. Arrington*, 79 S. E. 720.

§ 1033 (N.C.) In an action for damages to a mule during shipment, where it was undisputed that the mule had its foot through a crack in the side of a car, testimony that there was no other crack in the side of the car large enough for the mule's foot to go through was favorable to the carrier.—*Smith v. Atlantic Coast Line R. Co.*, 79 S. E. 433.

§ 1033 (S.C.) Appellant may not allege error in instructions favorable to him.—*Bethea v. Allen*, 79 S. E. 639.

§ 1039 (Ga.App.) Error, if any, in allowing a plea of suretyship in a mortgage foreclosure, is immaterial, where the jury find against such plea.—*Benton-Shingler Co. v. Mills*, 79 S. E. 755.

§ 1040 (Ga.App.) The overruling of a demurrer to the first count of plaintiff's petition, if error, was harmless, where plaintiff elected to proceed on the second count.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

§ 1040 (Ga.App.) Error in sustaining a demurrer to certain paragraphs of defendant's answer was harmless where the jury has found rightly in spite of the error.—*Birmingham Fertilizer Co. v. Dozier*, 79 S. E. 927.

§ 1041 (Ga.) Allowance of an amendment in a suit to quiet title, praying that defendant be required to bring his title deeds under which he claims into court to be canceled, was not prejudicial, where the jury did not find in favor of such cancellation, and the court did not decree such relief.—*Peebles v. Wilson*, 79 S. E. 466.

§ 1042 (Ga.App.) Refusal to strike certain defenses was harmless, where the verdict could not have been based upon any of such defenses.—*Arlington Oil & Guano Co. v. Swann*, 79 S. E. 476.

§ 1043 (W.Va.) In a case proper for a receiver, this court will not reverse a decree appointing him, after he has performed his duties, for failure to give the notice required by statute.—*Wright v. Pittman*, 79 S. E. 1091.

§ 1050 (Ga.App.) The erroneous admission of defendant's evidence which was outside the issues presented by his answer was harmless where such evidence was within the issues presented by certain clauses of his answer which were erroneously stricken.—*Birmingham Fertilizer Co. v. Dozier*, 79 S. E. 927.

§ 1050 (N.C.) In an action on life policies, where the only defense was suicide, held, that the erroneous admission of irrelevant evidence, hearsay evidence and self-serving declarations as to why deceased bought the pistol by which he was killed was injurious and prejudicial.—*Barker v. Massachusetts Mut. Life Ins. Co.*, 79 S. E. 424.

§ 1050 (N.C.) The defendant cannot except to the admission of evidence covered by another part of the examination of the same witness without objection.—*Smith v. Atlantic Coast Line R. Co.*, 79 S. E. 433.

§ 1050 (N.C.) In an action by a buyer for breach of a contract of sale, the admission of evidence that an agent of the seller asked to be notified if the buyer ever wanted any cotton, if incompetent, was harmless, as the conversation was only preliminary or preparatory to the negotiations.—*Holt v. Wellons*, 79 S. E. 450.

§ 1050 (S.C.) In an action against an interstate carrier for damages for refusal to transport a shipment at the regular interstate rate, the admission of letters of the general freight agent to plaintiff, quoting an incorrect rate, was harmless where the correct rate was proven by undisputed evidence.—*Aldrich v. Southern Ry. Co.*, 79 S. E. 316.

§ 1050 (S.C.) In an action by a depositor for the balance of an account kept by her individually, where it appeared that she had another account in her name as administratrix, although all the money belonged to her as an individual, the improper admission of her husband's will on the theory that the latter account did not belong to her absolutely, and hence the bank could not set off as against the individual account the payment of checks signed as administratrix, is prejudicial to the bank.—*Hiller v. Bank of Columbia*, 79 S. E. 899.

§ 1050 (Va.) Defendant was not prejudiced by the answer to a question where he himself testified to the same fact.—*Davis v. Cole Bros.*, 79 S. E. 1033.

§ 1050 (W.Va.) Where, in a suit under the civil damage act, there is evidence that defendant sold intoxicating liquors to plaintiff's husband, contributing to his habits of inebriety, admission of other evidence that he was intoxicated in defendant's saloon on a particular day from liquor not proven to have been sold by defendant was not reversible error, though such evidence was not very material.—*Greer v. Arlington*, 79 S. E. 720.

§ 1051 (W.Va.) The erroneous admission in evidence of an excerpt from a deed was harmless where the deed itself was in evidence.—*Selvey v. Grafton Coal & Coke Co.*, 79 S. E. 656.

§ 1052 (Ga.) Admission of the original record to show the contents of an alleged lost deed, instead of a certified copy of the record, as provided by Civ. Code 1910, § 4212, is without prejudice, where a certified copy was subsequently introduced.—*Peebles v. Wilson*, 79 S. E. 466.

§ 1052 (Ga.) The erroneous admission of certain evidence on a defendant's application un-

der Civ. Code 1910, § 5154, to be discharged from imprisonment under bail process, was harmless, where the order discharging defendant on his own recognizance was authorized by competent uncontradicted evidence.—*Tennessee Valley Fertilizer Co. v. Stevens*, 79 S. E. 840.

§ 1052 (Ga.App.) After an amendment of the pleadings to conform to the evidence, the court may properly refuse to rule out testimony, though it was originally irrelevant or incompetent.—*Hyer v. C. E. Holmes & Co.*, 79 S. E. 58.

§ 1052 (N.C.) Error, if any, in the admission of certain testimony tending to show contributory negligence of plaintiff was harmless, where the jury found that defendant was not negligent.—*Bird v. Bell Lumber Co.*, 79 S. E. 448.

§ 1053 (N.C.) Where evidence which was erroneously admitted was fully eliminated by the court in its charge, the error was cured.—*Ellison v. Western Union Telegraph Co.*, 79 S. E. 277; *Harrison v. Same*, Id. 281.

§ 1053 (N.C.) Where evidence improperly admitted was withdrawn from the jury, in the absence of a showing that the admission of the evidence prejudiced the losing party, the error is harmless.—*Cooper v. Seaboard Air Line R. Co.*, 79 S. E. 418.

§ 1053 (S.C.) The error in the admission of evidence held not cured by the charge, where it was doubtful whether the jury understood that court's remarks were directed to them.—*Hiller v. Bank of Columbia*, 79 S. E. 899.

§ 1057 (Ga.) The exclusion from evidence of the corporate stockbook, if error, was harmless, where defendant admitted the existence and contents thereof.—*Hardee v. Tietjen*, 79 S. E. 117.

§ 1057 (Va.) In ejectment involving a disputed boundary, the admission of an old survey, if error, was not prejudicial to plaintiff, where the land described therein was clearly identified and located by other evidence.—*Honaker v. Shrader*, 79 S. E. 391.

§ 1058 (N.C.) Error, if any, in excluding testimony of an electrician as to how much voltage the wires carried to a certain arc light and what voltage it would take to operate it was cured by the subsequent admission of testimony of the same witness that in his opinion it would take 1,100 volts.—*Monds v. Town of Dunn*, 79 S. E. 303.

§ 1058 (Va.) Where a physician testified as a witness for insurer concerning what he meant by a statement in an affidavit as to the special cause of insured's death, defendant was not prejudiced by the exclusion of the affidavit.—*South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 79 S. E. 401.

§ 1062 (S.C.) Where, in an action for injuries to a servant, there was evidence justifying a recovery of punitive damages, defendants were not prejudiced by plaintiff's withdrawal of his claim for punitive damages at the conclusion of the arguments.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

§ 1062 (S.C.) In an action against a carrier for refusal to accept plaintiff's ticket for transportation, he being entitled to a peremptory charge that the ticket was good, the carrier was not prejudiced by an instruction that defendant's agents could waive a limitation stipulation in the contract and submitting to the jury whether they had done so.—*Eberle v. Southern Ry. Co.*, 79 S. E. 793.

§ 1066 (Ga.App.) In a claim case on a levy on a stock of goods, an instruction that, if a husband had sold the stock in bulk to his wife, the sale was void unless the bulk act was complied with, if not applicable to the evidence, was harmless to claimant.—*Smith v. D. Rothschild & Co.*, 79 S. E. 88.

§ 1066 (Ga.App.) Where there was a conflict in the evidence as to whether an automobile was

on a public crossing at the time it was struck by a train, errors in instructions as to the railroad's liability in case the automobile was not on a crossing are prejudicial.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

§ 1066 (N.C.) An instruction stating that the degree of care required of a town operating an electric light plant was merely reasonable care, if error, was without prejudice, where there was no evidence whatever showing any negligence of the town which would have brought the electric light wire, from which deceased was alleged to have received a fatal shock, to the ground or within reach or so low as to be unsafe.—*Monds v. Town of Dunn*, 79 S. E. 303.

§ 1066 (N.C.) An instruction that, "if the jury believed the evidence," they should answer a certain issue in the affirmative, was harmless error, where the evidence was all one way and practically undisputed.—*Holt v. Wellons*, 79 S. E. 450.

§ 1066 (N.C.) Any error, in mechanics' lien proceedings in which defendant claimed as a purchaser without notice of the lien, in charging on the burden of proof as to notice of the lien, was harmless where notice was shown by the evidence without dispute.—*Raeferd Lumber Co. v. Rockfish Trading Co.*, 79 S. E. 627.

§ 1068 (Ga.App.) In a street car passenger's action for damages, refusal to instruct as to the "worldly circumstances" of defendant was harmless where the verdict was for defendant and the measure of damages, therefore, not considered by the jury.—*Binder v. Georgia Ry. & Electric Co.*, 79 S. E. 216.

§ 1068 (Ga.App.) Where the record on writ of error by the plaintiff shows that the promise upon which he relied was without consideration, so that a verdict for the defendant was demanded, errors in the charge are harmless.—*Brooke v. Georgia Peruvian Ochre Co.*, 79 S. E. 362.

§ 1068 (W.Va.) Erroneous instructions are harmless, where the judgment could only be that which was entered.—*Hartmyer v. Everly*, 79 S. E. 1093.

§ 1071 (Ga.) Failure of the auditor's report to properly specify the items of an account was harmless, where recovery of the amount of the open account was waived.—*Cowart v. Singletary*, 79 S. E. 196.

§ 1073 (W.Va.) Where, in a joint action by several plaintiffs for a penalty provided by Code 1906, c. 79, § 7, for unlawful mining and removing of coal, one plaintiff testified that he did not consent in writing to such removal, it was not error of which defendant could complain that judgment was rendered for all the plaintiffs, though there was no evidence that defendant did not have the other plaintiffs' written consent to the removal of the coal.—*Selvey v. Grafton Coal & Coke Co.*, 79 S. E. 656.

§ 1073 (W.Va.) Error in taking a bill in partition for confessed as to a nonresident defendant who was personally served with process out of the state was harmless, where no substantial injustice was done to him by the decree which determined title and partitioned the land.—*Wright v. Pittman*, 79 S. E. 1091.

§ 1074 (Ga.App.) While, after filing a claim and after return of papers, the sheriff has no right without permission of court to amend his return, if he does so, and on objection the return is treated as if the addition had not been made, the error is harmless.—*Smith v. D. Rothschild & Co.*, 79 S. E. 85.

(I) Error Waived in Appellate Court.

§ 1078 (Ga.) Assignments of error which are not referred to in the briefs will be regarded as waived.—*Bank of Lavonia v. Bush*, 79 S. E. 459.

§ 1078 (Ga.) An assignment of error will be deemed abandoned, when not argued in the brief of counsel for plaintiffs in error.—*Strickland v. Lowry Nat. Bank*, 79 S. E. 539.

§ 1078 (Ga.App.) Where an exception in a motion for a new trial is not referred to in the brief of counsel for plaintiff in error, it will be deemed abandoned.—*Western Union Telegraph Co. v. Calhoun*, 79 S. E. 370.

§ 1078 (Ga.App.) Questions raised by demurrer were abandoned on appeal, when not argued in the briefs.—*Atlantic Coast Line Ry. Co. v. Collins*, 79 S. E. 946.

§ 1078 (N.C.) Errors which are assigned but not considered in the brief will be deemed to be abandoned.—*Smith v. Atlantic Coast Line R. Co.*, 79 S. E. 433.

(K) Subsequent Appeals.

§ 1097 (Ga.) Where petition was dismissed on demurrer, and judgment reversed on a decision that the petition set forth a cause of action, and after such decision by the Court of Appeals the Supreme Court renders a decision in another case showing that the decision of the Court of Appeals is erroneous, and the first-mentioned case comes before the Court of Appeals on writ of error, such court is bound by its own decision.—*Southern Bell Telephone & Telegraph Co. v. Glawson*, 79 S. E. 136.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

§ 1138 (Ga.App.) A judgment will not be reversed merely in order that the same result may be more technically reached by regular procedure.—*Cox v. Manning*, 79 S. E. 484.

(C) Modification.

§ 1149 (W.Va.) A judgment against an administrator personally instead of against him in his representative capacity, may be corrected on appeal.—*Selvey's Ex'rs v. Armstrong's Adm'r*, 79 S. E. 1019.

(D) Reversal.

§ 1170 (N.C.) Technical errors will be considered harmless where a reversal could not result in a different verdict.—*McKeel v. Holloman*, 79 S. E. 445.

§ 1175 (W.Va.) Submission of an action of assumpsit to the court in lieu of a jury, upon evidence brought into the case by an agreement, is equivalent to a joinder in a demurrer to evidence, and calls for a judgment on appeal, which the trial court should have rendered.—*Wilson v. Shrader*, 79 S. E. 1083.

§ 1178 (Ga.) Where the court erred in sustaining a demurrer to the petition in partition on all the grounds alleged and dismissed the case, the judgment will be reversed, though there be a defect of parties, and plaintiff will be given a reasonable opportunity to remedy the defect and thus prevent a dismissal.—*Wright v. Hill*, 79 S. E. 546.

§ 1178 (Ga.) Where the judgment for claimant on the trial of a claim case involving town lots and farm property was not erroneous as to the town lots, held that in reversing same directions should be given that on another trial the issues be restricted to the farm property.—*Ford v. Blackshear Mfg. Co.*, 79 S. E. 576.

§ 1178 (N.C.) Where the only error in the trial of an action for personal injuries was in the instructions as to the measure of damages, a new trial will be granted only upon the question of damages.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

§ 1178 (W.Va.) Where, in a suit by creditors to set aside a fraudulent conveyance, the evidence establishes fraud but the bill is deficient, a decree subjecting the property to sale will be reversed, and the cause remanded, with leave to amend the bill.—*Bland v. Rigby*, 79 S. E. 1013.

§ 1180 (S.C.) Reversal of order granting temporary injunction restraining both grantor and grantee of standing timber from cutting it pend-

a suit *held* to be without prejudice to the rights of either where both had misconceived his rights as well as his opponent's rights.—*Marion Lumber Co. v. Hodges*, 79 S. E. 1096.

Mandate and Proceedings in Lower Court.

1194 (S.C.) Where the evidence on the second trial was the same as that on the first, the reversal of a judgment of nonsuit establishes the law of the case against defendant's right to directed verdict.—*Smith v. Southern Ry. Co.*, S. E. 1099.

1195 (Ga.App.) Where the court on appeal held that a verdict for claimant was demanded by the evidence, the decision was the law of the case; and where on a second trial the evidence did not differ, and the jury returned a verdict plaintiff in attachment, it was error to overrule claimant's motion for a new trial.—*Ison v. Clark*, 79 S. E. 86.

1195 (Ga.App.) A judgment of the Court of Appeals affirming a judgment overruling a demurrer to the petition is the law of the case, though before final judgment the Supreme Court in another case renders a decision which conflicts with that of the Court of Appeals.—*Northern Bell Telephone & Telegraph Co. v. Lawson*, 79 S. E. 488.

APPEARANCE.

See Appeal and Error, § 914.

9 (N.C.) In proceedings to forfeit a recognizance, an alleged special appearance by the party, praying a dismissal of the proceedings and a return of the deposit on the merits, *held*, legal effect, a general one.—*State v. White*, S. E. 297.

9 (N.C.) An appearance will not be considered special simply because so called; hence a party seeking to set aside a default waives defects in the summons by asking leave to file an answer and cannot move to set aside the judgment on the ground of the want of jurisdiction.—*Dell School v. Peirce*, 79 S. E. 687.

17 (Ga.App.) Appearance and pleading to merits are a waiver of want of jurisdiction; but, as defenses in attachment may be made at any time before judgment, a motion to dismiss a declaration for failure to allege jurisdiction may be filed simultaneously with a plea to the merits.—*Drake v. Lewis*, 79 S. E. 107.

19 (Ga.App.) The giving of a replevy bond does not preclude a defendant in attachment from objecting to jurisdiction over his person.—*Ake v. Lewis*, 79 S. E. 167.

25 (W.Va.) Irregularities in making a successor of the defendant administrator a party to a surety's proceeding under Code 1906, c. 101, do not, for a judgment of contribution, *held* waive, where such successor entered a general appearance.—*Selvey's Ex'rs v. Armstrong's Adm'r*, S. E. 1018.

APPLIANCES.

See Master and Servant, §§ 101, 102.

APPLICATION.

See Insurance, § 132; Payment, § 38.

APPOINTMENT.

See Executors and Administrators, §§ 17, 29.

ARBITRATION AND AWARD.

See Eminent Domain, § 167; Submission of Controversy.

ARGUMENT OF COUNSEL.

See Criminal Law, §§ 723, 730; Trial, § 123.

ARRAIGNMENT.

See Criminal Law, § 269.

ARREST.

See Execution, §§ 425, 433; False Imprisonment, § 39; Habeas Corpus, § 110; Obstructing Justice.

I. IN CIVIL ACTIONS.

§ 49 (Ga.) On an application by a defendant, imprisoned under bail process in an action to recover personalty, to be discharged under Civ. Code 1910, § 5154, evidence that guano, the subject-matter of the action, had been placed in the ground as a fertilizer, was admissible to show a statutory reason for the nonproduction.—*Tennessee Valley Fertilizer Co. v. Stevens*, 79 S. E. 840.

Where a defendant, imprisoned under bail process in an action for personalty, applies to be discharged under Civ. Code 1910, § 5154, the issues determinable are merely whether he can give security or produce the property, or give satisfactory reasons for its nonproduction, and that the action was maliciously brought by plaintiff is immaterial in such proceeding.—*Id.*

II. ON CRIMINAL CHARGES.

§ 63 (Ga.App.) Where defendant voluntarily disclosed to an officer that his valise contained three gallons of whisky in quart bottles, this authorizes his arrest without a warrant, on the ground that the offense of keeping whisky for illegal sale in violation of a municipal ordinance was being committed in the officer's presence.—*Weatherington v. State*, 79 S. E. 240.

§ 63 (N.C.) The police of Raleigh, being authorized to suppress immoral shows, *held* entitled to act immediately whenever an unlawful exhibition is given in their presence, and to arrest without a warrant all persons aiding or assisting therein.—*Brewer v. Wynne*, 79 S. E. 629.

Oral direction by the mayor of Raleigh to his chief of police to prevent the exhibition of an alleged immoral show at a theater *held* ministerial in character, and insufficient to cause the arrest of plaintiff, while in the theater before it was open, without a warrant.—*Id.*

ARSON.

See Criminal Law, § 535.

§ 37 (Ga.App.) To authorize a conviction of arson, mere proof of the burning is insufficient; but it must be shown to a reasonable certainty that the house was burned by some criminal agency.—*Sims v. State*, 79 S. E. 1133.

ART.

See Evidence, § 363.

ASSAULT AND BATTERY.

See Criminal Law, § 528; Homicide, §§ 89, 100; Indictment and Information, § 189.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 63 (Ga.App.) In a prosecution for shooting at another, it is no defense that accused did not know the identity of the person at whom he shot.—*Beddingfield v. State*, 79 S. E. 581.

(B) Prosecution and Punishment.

§ 91 (Ga.App.) Evidence *held* to authorize rejection of defendant's theory that the shooting was accidental and to sustain a conviction of shooting at another.—*Beddingfield v. State*, 79 S. E. 581.

§ 95 (Ga.App.) Where a trespasser is rightfully ordered to leave a building by one having

the premises in charge, he is entitled to such a period of time as is necessary to make his exit, and the amount of reasonable time is a question of fact for the jury.—*Hollis v. State*, 79 S. E. 85.

ASSESSMENT.

See Insurance, § 195; Municipal Corporations, § 544; Taxation, §§ 319, 466.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 722-753; Certiorari, § 70; Criminal Law, § 1129.

ASSIGNMENTS.

See Covenants, §§ 57, 69; Execution, § 2; Mortgages, § 255; Taxation, § 742; Waters and Water Courses, § 190.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

§ 3 (Ga.) The common-law rule that choses in action are not assignable, so as to convey title, but only an equitable interest, is changed by the express provisions of Civ. Code 1910, § 3653.—*Cowart v. Singletary*, 79 S. E. 196.

§ 23 (Ga.App.) Under Civ. Code 1910, § 3655, providing that a right of action not involving directly or indirectly a right of property is not assignable, and section 3653, providing that all choses in action arising under contract may be assigned, a cause of action against a carrier for injury to goods awaiting delivery, arising from its negligence as a warehouseman, is assignable.—*Benjamin-Ozburn Co. v. Morrow Transfer & Storage Co.*, 79 S. E. 753.

§ 26 (W.Va.) A right of action for a penalty, given by Code 1906, c. 79, § 7, for the unlawful mining of coal within five feet of an adjacent owner's line, is not assignable.—*Wilson v. Shrader*, 79 S. E. 1083.

(B) Mode and Sufficiency of Assignment.

§ 34 (Ga.App.) While all choses in an action are assignable under Civ. Code 1910, § 3653, the assignment must not rest in parol, but must be in writing.—*Herring v. First Nat. Bank*, 79 S. E. 359.

§ 50 (Ga.) A written order by a tie company on a railroad company for the price of cross-ties furnished to the tie company and by it sold to the railroad company held to constitute an equitable assignment of such fund, though not an assignment of the legal title thereto.—*Brown v. Southern Ry. Co.*, 79 S. E. 152.

In an equitable proceeding instituted by the last purchaser of railroad ties against several persons, including the original sellers in whose favor an order had been issued on plaintiff for the price by the intermediate seller, in which proceeding the defendants were required to interplead, held that the order was enforceable as an equitable assignment.—*Id.*

§ 58 (Ga.) When rights under contract are coupled with obligations to be performed by the contractor and involve a relation of personal confidence, the contract cannot be assigned without the consent of the other contracting party.—*Cowart v. Singletary*, 79 S. E. 196.

II. OPERATION AND EFFECT.

§ 76 (Ga.App.) An indorsement on a note, containing a reservation of title to property therein described, "for value received we hereby transfer and assign all the right, title, and interest we have in the within note together with the security mentioned in said note to," etc., and dated and signed, was sufficient to pass title to both note and property.—*Blakely Artesian Ice Co. v. Clarke*, 79 S. E. 526.

IV. ACTIONS.

§ 120 (W.Va.) Where an attempted assignment is made of the penalty provided by Code

1906, c. 79, § 7, for the unlawful mining of coal within five feet of an adjacent owner's line, the alleged assignee cannot sue for the penalty in the name of his assignor.—*Wilson v. Shrader*, 79 S. E. 1083.

§ 131 (W.Va.) The objection of nonassignability of the claim sued on is available on demurrer to the declaration.—*Wilson v. Shrader*, 79 S. E. 1083.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

ASSOCIATIONS.

See Agriculture; Building and Loan Associations; Intoxicating Liquors, § 146.

ASSUMPSIT, ACTION OF.

See Appeal and Error, § 1175; Livery Stable Keepers, § 7; Money Received.

§ 8 (W.Va.) Assumpsit is not the proper form of action for the recovery of damages for a mere wrong. It lies only to recover from the defendant that which is in his hands and belongs to the plaintiff.—*Wilson v. Shrader*, 79 S. E. 1083.

§ 19 (W.Va.) A declaration in assumpsit, based on a carrier's undertaking to safely transport goods, need not aver a promise to pay money.—*Bashar v. Pittsburgh, C., C. & St. L. Ry. Co.*, 79 S. E. 1009.

ASSUMPTION.

Of risk, see Master and Servant, §§ 204, 206; Negligence, § 1.

ATTACHMENT.

See Abatement and Revival, § 5; Equity, § 26; Evidence, §§ 129, 165; Execution; False Imprisonment, § 7; Landlord and Tenant, § 229; Witnesses, § 367.

I. NATURE AND GROUNDS.

(A) Nature of Remedy, Causes of Action, and Parties.

§ 2 (Ga.App.) The procedure on attachments for purchase money does not differ from attachments based on other grounds enumerated in Civ. Code 1910, § 5055.—*Avery & Co. v. Pope*, 79 S. E. 946.

(B) Grounds of Attachment.

§ 47 (Ga.) In attachment, the affidavit upon which the attachment was issued and the attachment issued thereon held inadmissible as evidence, though competent to go before the jury as pleadings.—*Dale v. Christian*, 79 S. E. 1127.

III. PROCEEDINGS TO PROCURE.

(B) Affidavits.

§ 91 (Va.) That an attachment affidavit was written on a printed form containing the name "Corporation Court," instead of "Court of Law and Chancery," at the top of the paper did not invalidate the affidavit, where such mistake was not repeated elsewhere in the paper and the clerk certified that the affidavit was filed in the court of law and chancery.—*Bernard v. McClanahan*, 79 S. E. 1059.

§ 106 (Ga.App.) A statement, in an attachment affidavit, that defendant is indebted, is equivalent to the word "due," as used in Civ. Code 1910, § 5056.—*Avery & Co. v. Pope*, 79 S. E. 946.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 192 (Ga.App.) Where attached property has been replevied, the attachment is dissolved, the bond substituted for the property, and the case

stands as if founded on ordinary principles.—*Watters v. Southern Fixture & Cabinet Co.*, 79 S. E. 360.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§ 241 (Ga.App.) In attachment, failure of the petition to show jurisdiction of the person may be taken advantage of by a motion at the trial term, and unless cured by amendment the declaration should be dismissed.—*Drake v. Lewis*, 79 S. E. 187.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 339 (Ga.App.) Under Civ. Code 1910, § 5113, providing that after attached property has been replevied by the defendant it shall be allowable for the plaintiff to take judgment against the defendant and his securities for the amount he may recover, such judgment may be rendered upon a general verdict in favor of the plaintiff.—*Watters v. Southern Fixture & Cabinet Co.*, 79 S. E. 360.

ATTORNEY AND CLIENT.

See Bills and Notes, §§ 471, 485, 534; Corporations, § 557; Costs, § 41; Criminal Law, §§ 636, 641, 723, 730; Garnishment, § 42; Injunction, § 239; New Trial, § 29; Partition, § 114; Trial, § 123; Witnesses, §§ 5, 367.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(B) Lien.

§ 189 (Ga.App.) The lien of an attorney at law upon the subject-matter of a suit which he has been employed to prosecute or defend, under Civ. Code 1910, § 3364, par. 2, cannot be rendered ineffective by a contract of his client with the opposite party.—*Payton v. Wheeler*, 79 S. E. 81.

§ 190 (Ga.App.) Where plaintiff settles her suit after it has been filed without payment of the fees due her attorney, the attorney may prosecute the suit to a termination to recover the fees due him under his employment contract.—*Franklin v. Ford*, 79 S. E. 366.

Where plaintiff has settled the suit without payment of the fees due her attorney, the attorney need not amend the pleadings, in order to entitle him to prosecute the suit to a termination for the fees due him.—*Id.*

AUTHORITY.

See Principal and Agent, §§ 92-131.

AUTOMOBILES.

See Appeal and Error, § 1066; Livery Stable Keepers; Sunday; Trial, § 251.

AWNINGS.

See Municipal Corporations, §§ 667, 697.

BAIL.

See Appeal and Error, § 327; Habeas Corpus, § 110.

II. IN CRIMINAL PROSECUTIONS.

§ 75 (N.C.) Since a recognizance binds accused not to depart without leave of court, it was no defense to a forfeiture that his departure without leave occurred after he had pleaded guilty, and while the court had the cause under advisement, deliberating as to the punishment.—*State v. White*, 79 S. E. 297.

BAILMENT.

See Carriers, §§ 44-177; Livery Stable Keepers, § 11; Pledges; Sunday.

§ 18 (Ga.App.) Under the express provisions of Civ. Code 1910, § 3501, a depositary for hire has a lien upon the goods for his hire, and may retain them until paid.—*Jeems v. Lewis*, 79 S. E. 235.

That the defendant in an action for trover holds the property sued for as a depositary for hire, and has not been paid, is a valid defense at law.—*Id.*

§ 18 (Ga.App.) Failure to record a lien for repairing personal property within 10 days renders the lien unenforceable, where possession of the property is surrendered to the bailor.—*Gearreld v. Woodruff*, 79 S. E. 355.

Persons having a right to a lien on personal property for repairs thereon waived their lien, where they agreed to balance accounts from time to time with the person for whom the repairs were made.—*Id.*

§ 31 (Ga.App.) Where, in a bailor's action for goods lost, plaintiff proved delivery to the defendant bailee, a failure to redeliver on demand, and the value of the goods, the burden shifted to defendant to show ordinary diligence in caring for them.—*Moultrie Compress Co. v. Byrom Cotton Co.*, 79 S. E. 589.

§ 31 (Ga.App.) Under Civ. Code 1910, § 3469, in all cases of bailment, after proof of loss, the burden is on the bailee to show proper diligence.—*Atlantic Coast Line R. Co. v. Bunn*, 79 S. E. 947.

Evidence in a bailor's action for the loss of two freight cars from the giving way of a trestle held to show that the cause of the wreck was the defective and unsafe condition of the trestle, and not any defects in the cars.—*Id.*

BANKRUPTCY.

See Corporations, § 265; Limitation of Actions, §§ 21, 29; Venue, § 22.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 145 (Ga.) A trustee in bankruptcy of a trading corporation succeeds to any right which it may have to sue directors for loss from a breach of duty.—*McEwen v. Kelly*, 79 S. E. 777.

(E) Actions by or Against Trustee.

§ 298 (Ga.) An action by a bankrupt's trustee brought in 1911 before the estate was closed to recover against a transferee for value of goods received from the bankrupt in 1907 in payment of a pre-existing debt less than four months prior to the filing of the petition, authorized by Bankruptcy Act, § 60b, amended by Act Cong. Feb. 5, 1903, is governed by the limitation prescribed by section 11d of the act, requiring actions to be brought within two years from the closing of the estate.—*Arnold Grocery Co. v. Shackelford*, 79 S. E. 470.

§ 302 (Ga.) A petition in an action by a trustee in bankruptcy against the directors of a bankrupt corporation held insufficient to show a case for recovery except as against a director who was also secretary and treasurer.—*McEwen v. Kelly*, 79 S. E. 777.

(F) Claims Against and Distribution of Estate.

§ 363 (Ga.App.) That a claim is proved and allowed in bankruptcy does not constitute a bar to a creditor's subsequent action for the balance, where the claim is for goods obtained by the debtor by false representations.—*J. K.*

Orr Shoe Co. v. Upshaw & Powledge, 79 S. E. 362.

That a creditor, after having proved his claim in bankruptcy and having the same allowed, received a dividend, did not constitute a waiver of the debtor's fraud in purchasing the goods for which the claim was made, and hence constituted no bar to the creditor's subsequent action against the debtor for the balance of his claim.—Id.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 421 (Ga.) Under Bankruptcy Act July 1, 1898, § 17 (a) as amended by Act Feb. 5, 1903, § 5, a creditor holding a note, which he reduces to judgment after discharge of the debtor in bankruptcy, cannot enforce an execution on such judgment against the debtor's property acquired after the discharge.—Ford v. Blackshear Mfg. Co., 79 S. E. 576.

§ 426 (Ga.) While under Bankr. Act July 1, 1898, § 17(a), as amended by Act Feb. 5, 1903, § 5, it is not essential, in order to bring debts within the provision excepting liabilities for fraud, that there be a judgment for fraud, yet, where a creditor, instead of enforcing the liability based on fraud, enforces a judgment on the contract, the debtor's discharge will be effective as to after-acquired property.—Ford v. Blackshear Mfg. Co., 79 S. E. 576.

§ 426 (Ga.App.) A discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or false representations.—J. K. Orr Shoe Co. v. Upshaw & Powledge, 79 S. E. 362.

§ 428 (Ga.App.) Discharge in bankruptcy of the principal defendant would not oust the court of jurisdiction of a defendant secondarily liable.—Daniel v. Browder-Manget Co., 79 S. E. 237.

BANKS AND BANKING.

See Appeal and Error, § 1052; Bills and Notes, §§ 151, 356, 537; Bonds, § 55; Equity, § 48; Principal and Surety, § 152; Trial, §§ 145, 253; Usury, § 127.

I. CONTROL AND REGULATION IN GENERAL.

§ 2 (Ga.App.) The term "bank," in the commonly accepted sense, applies to an institution exercising the main functions of a bank, such as receiving money on deposit, discounting commercial paper in the usual course of trade, and loaning money on approved collateral.—Dunn v. State, 79 S. E. 170.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(D) Officers and Agents.

§ 61 (Ga.App.) That a trust company is incidentally empowered to perform some of the functions of a bank does not make it "a chartered bank," within Pen. Code 1910, § 204, making directors of an insolvent bank subject to prosecution.—Dunn v. State, 79 S. E. 170.

A "chartered bank," within Pen. Code 1910, § 204, making the directors of an insolvent chartered bank subject to prosecution, means a corporation having the powers and exercising as the main object of its creation all or some of those functions of a bank prescribed by Civ. Code 1910, § 2206.—Id.

A company, incorporated merely as a trust company, under Civ. Code 1910, § 2815 et seq., is not a chartered bank, though it exercises as an incident to the main object of its creation the power to receive trust funds on deposit and the power to loan money.—Id.

Under the act of 1898 (Civ. Code 1910, § 2815 et seq.), providing that incorporated trust companies may exercise the rights and be subject to the same liabilities and restrictions as apply to banks, upon compliance with the laws relating to the incorporation of banks, a trust company

may obtain a charter as a bank, and when it does so it becomes a "chartered bank," within Pen. Code 1910, § 204.—Id.

§ 62 (Ga.App.) Where an indictment, found against the director of an insolvent bank, under Pen. Code 1910, § 204, alleged that the corporation named, of which defendant was a director, was "a corporation duly incorporated and chartered under the laws of Georgia, and doing and carrying on a banking business, and was a bank," it sufficiently averred that the institution named was "a chartered bank," within such statute.—Dunn v. State, 79 S. E. 170.

In the prosecution of a director of an insolvent bank, under Pen. Code 1910, § 204, the burden was on the state to prove that the trust company named in the indictment was operating under a bank charter.—Id.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§ 112 (N.C.) That the president of a banking company misappropriated funds of a correspondent bank, of which he was cashier, did not charge such banking company with knowledge of the misappropriation so as to preclude recovery of an indebtedness from the correspondent bank, since its president, in misappropriating the funds, acted independently and adversely to its interests.—Corporation Commission v. Bank of Jonesboro, 79 S. E. 308.

(C) Deposits.

§ 154 (N.C.) In an action by a depositor against a bank to recover the amount of a check, paid by the bank after notice not to do so, the payee of the check is not a necessary party, where plaintiff claimed no relief against him, and the bank denied any notice.—Spruill v. Bank of Plymouth, 79 S. E. 262.

§ 154 (S.C.) A bank seeking to set off against deposits money paid on the depositor's debt without his authority must plead and prove that the depositor ratified such payment, and, in the absence of an appropriate pleading, evidence of such a ratification is inadmissible.—Hiller v. Bank of Columbia, 79 S. E. 899.

Where a depositor had two accounts, one in her name individually and the other as administratrix, but the money in both belonged to her as an individual, her husband's will under which she was acting is inadmissible in an action for the balance due her upon her individual account.—Id.

(D) Collections.

§ 165 (N.C.) That drafts collected by a bank for plaintiff were for shipments of liquor did not defeat plaintiff's right to recover from the bank the amount collected.—Arey Distilling Co. v. Mutual Aid Banking Co., 79 S. E. 287.

BAR.

See Bankruptcy, § 363.

BASTARDS.

See Action, § 53.

I. ILLEGITIMACY IN GENERAL.

§ 3 (N.C.) When a child is born in wedlock, the law conclusively presumes its legitimacy unless the circumstances show that the husband could not have begotten it, but such presumption may be rebutted by proof that the husband could not have been the father, as that he was impotent or could not have had access.—Ewell v. Ewell, 79 S. E. 509.

On an issue as to the legitimacy of a child born in wedlock, access between husband and wife is presumed until otherwise plainly proved; nothing being allowed to impugn the legitimacy of the child short of proof of facts showing it to be impossible for the husband to have been the father.—Id.

II. CUSTODY, SUPPORT, AND PROTECTION.

§ 17 (Ga.App.) An agreement by the father of an illegitimate child to pay the mother a certain amount for its support is founded on a good consideration.—*Franklin v. Ford*, 79 S. E. 368.

Where the father of an illegitimate child contracts with the mother to pay her so much a month for the child's support, the mother, and not the child, has a right to sue on the contract.—*Id.*

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations.

BENEFITS.

See Master and Servant, § 100.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, § 400; Evidence, §§ 157-187.

BETTERMENTS.

See Improvements.

BIAS.

See Witnesses, § 369.

BILL.

See Equity, § 148.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, § 228; Evidence, § 179; Sales, § 161.

BILL OF SALE.

See Chattel Mortgages, §§ 172, 176, 235; Evidence, § 370.

BILLS AND NOTES.

See Accord and Satisfaction; Agriculture, § 7; Alteration of Instruments; Assignments, § 76; Bankruptcy, § 421; Banks and Banking, §§ 154, 165; Chattel Mortgages, § 43; Corporations, §§ 404, 467; Evidence, §§ 157, 165, 271, 318, 419-423, 429, 432, 434, 441, 443; Frauds, Statute of, § 21; Husband and Wife, § 154; Judgment, § 358; Partnership, §§ 37, 146; Pleading, § 95; Principal and Surety, §§ 105, 108, 114, 177; States, § 144; Trial, §§ 191, 203, 252; Trover and Conversion, §§ 13, 40; Usury, § 127; Vendor and Purchaser, § 208; Witnesses, §§ 268, 330.

I. REQUISITES AND VALIDITY.

(D) Acceptance.

§ 83 (N.C.) Where persons accept an order upon the condition that they will pay on it, if they are indebted to the drawer, the amount of their indebtedness, and it develops that they owed him nothing at the time of the acceptance, they are not liable; but, where it develops that they owed him something, they are liable to the extent of such indebtedness not exceeding the amount of the order and accrued interest.—*Craig & Wilson v. Stewart & Jones*, 79 S. E. 1100.

(E) Consideration.

§ 93 (N.C.) The release of the drawer of an order is a sufficient consideration for an acceptance of the order.—*Craig & Wilson v. Stewart & Jones*, 79 S. E. 1100.

(F) Validity.

§ 103 (Ga.App.) A true statement by plaintiff's agent in procuring a note sued on does not constitute fraud, though such agent did not fully state the contents of the note, where defendant is able to read, and there is no reason why he should have reposed special confidence in the agent, and no exigency compelled him to haste in executing the note.—*Harrison v. Lee*, 79 S. E. 211.

II. CONSTRUCTION AND OPERATION.

§ 123 (Ga.App.) Recovery may be had against a railroad on a draft signed by one describing himself as president, on proof that both parties understood that it was the obligation of the railroad, and that it received the consideration furnished, and authorized the execution of a contract, or ratified it.—*Ocilla Southern R. Co. v. Morton*, 79 S. E. 480.

III. MODIFICATION, RENEWAL, AND RESCISSION.

§ 141 (Ga.) A second note, which recited that the makers "have pledged * * * as collateral security" the original purchase-money note and "security for the same," held not a mere agreement collateral to the original note, extending the time of payment and increasing the rate of interest, but a new note for the balance due on the first note, bearing interest at the fixed rate, the first note to be held as collateral for the second.—*Strickland v. Lowry Nat. Bank*, 79 S. E. 539.

Where a second note constituted a new note for the balance due on the first, the first note to be held as collateral, the holder could not, after maturity of the second note, bring suit on the first, and supplement its terms by applying to it the increased rate of interest specified in the second note.—*Id.*

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§ 151 (W.Va.) A certificate of deposit issued by a bank, not subject to check and payable to the depositor's order on return of the certificate properly indorsed, is negotiable under Code 1906, c. 99, § 7.—*Pomeroy Nat. Bank v. Huntington Nat. Bank*, 79 S. E. 662.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Indorsement for Transfer.

§ 301 (Va.) An indorser held to have waived the defense to a note based on the holder's surrender of collateral security, where he subsequently indorsed renewals with knowledge of the facts, and to be estopped to assert such defense.—*Lynch v. O'Brien*, 79 S. E. 389.

(D) Bona Fide Purchasers.

§ 330 (Ga.App.) Before the holder of a note payable to another can assert the rights of a bona fide purchaser for value, the payee must have formally assigned or indorsed the note to him in writing before its maturity.—*Herring v. First Nat. Bank*, 79 S. E. 359.

§ 330 (N.C.) Under Revisal 1905, § 2178, a negotiation of a note by delivery without indorsement passes only the equitable title and will not give the transferee title free from defenses good against the payee.—*Elgin City Banking Co. v. McEachern*, 79 S. E. 680.

An equitable owner of a note takes it subject to defenses good against the holder; and, where the note was procured by fraud, the transferee's want of notice of the fraud is immaterial.—*Id.*

§ 337 (Ga.App.) A purchaser of a note on which a corporation was an accommodation indorser, held not a bona fide holder where he was chargeable with notice of the character and purpose of the indorsement.—*Savannah Ice Co.*

v. Canal-Louisiana Bank & Trust Co., 79 S. E. 45.

§ 356 (N.C.) Where a bank habitually credits a depositor's accounts with negotiable instruments indorsed to it by him, but charged against the account all such instruments as were not paid, the bank was not a bona fide holder for value.—Third Nat. Bank of St. Louis v. Exum, 79 S. E. 498.

§ 367 (Ga.App.) Where a corporation having power to do so indorses commercial paper, a bona fide purchaser, without notice, will be protected, even though the indorsement was made merely for the accommodation of third persons.—Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 79 S. E. 45.

VII. PAYMENT AND DISCHARGE.

§ 426 (Ga.App.) In an action on a note, a plea of payment, without evidence to show that it was made to an authorized agent of the holder, or that the money ever reached the holder, was no defense.—Edwards v. Savannah Trust Co., 79 S. E. 35.

VIII. ACTIONS.

§ 452 (Ga.App.) Where plaintiff was not a bona fide purchaser before maturity of the notes sued on, it was error to exclude defendant's evidence that the consideration for the notes had partially failed.—Herring v. First Nat. Bank, 79 S. E. 359.

§ 454 (Ga.App.) A petition in an action on a note against A., as maker, and B., as surety, which action is brought in the county of the surety's residence is not demurrable as showing that the maker does not reside in the county where action is brought, though from the copy of the note it appears that B. apparently signed as an indorser, since an apparent indorser may be shown by parol to be in fact a surety, in which case the maker and surety may both be sued in the county where the surety resides.—Daniel v. Browder-Manget Co., 79 S. E. 237.

§ 471 (Ga.) An allegation in a petition that plaintiff had served on defendant a written notice of its intention "to bring this suit to this term of this court and to claim attorney's fees in accordance with the terms of said original note" together with a prayer for the recovery of such fees, held sufficient to show that the notice, given pursuant to Civ. Code 1910, § 4252, was a notice of intention to sue on the original note and seek to recover attorney's fees according to its terms, and not under a second note.—Strickland v. Lowry Nat. Bank, 79 S. E. 539.

§ 471 (Ga.) Where the petition in an action on a note providing for attorney's fees alleged the giving of the required 10 days' notice of intention to bring suit, it was unnecessary to attach to it a copy of such notice.—Setze v. First Nat. Bank of Pensacola, Fla., 79 S. E. 540.

§ 481 (Ga.App.) An amended plea held to sufficiently charge, in the absence of a special demurrer and as against a general attack that it presented no defense, that the note sued on was without consideration, and that plaintiff with knowledge of this fact conspired with the payer to collect same from defendant, the maker.—Daniel v. Browder-Manget Co., 79 S. E. 237.

§ 485 (Ga.App.) In a suit on a note conditioned for the payment of attorney's fees, if collected through an attorney, defendant's unsworn denial that the statutory notice has been given is sufficient; the obligation to pay attorney's fees being conditional.—Walker v. Wood, 79 S. E. 905.

§ 497 (N.C.) Where there was allegation and proof tending to show that the execution of the note was procured by fraud, the burden was on plaintiff to show that it was a holder in due course.—Fidelity Trust Co. v. Ellen, 79 S. E. 263.

§ 497 (N.C.) Under Revision 1905, § 2208, providing that, when it appears that the title of any one who negotiated an instrument was defective, the burden was upon the holder to show that he was a holder in due course, evidence that there was fraud in the execution of a note casts upon the holder the burden of proving that he was a bona fide purchaser for value.—Third Nat. Bank of St. Louis v. Exum, 79 S. E. 498.

§ 499 (Ga.App.) Where the maker of a note pays it to any other than the holder, in an action on the note, the burden is on him to show payment to one authorized to receive it, or that the money reached the holder's hands.—Edwards v. Savannah Trust Co., 79 S. E. 35.

§ 534 (Ga.App.) Where a note stipulates for attorney's fees on proof that the maker was served with 10 days' notice under Civ. Code 1910, § 4252, attorney's fees cannot be recovered, unless the answer of defendant or the testimony shows that he was notified as required by law.—Turner v. Bank of Maysville, 79 S. E. 180.

In an action on a note, where defendant is in court, it is error, without proof that defendant was notified of the claim for attorney's fees, as required by Civ. Code, § 4252, to enter judgment for attorney's fees.—Id.

§ 534 (Ga.App.) In an action on a note conditioned for the payment of attorney's fees, in case of collection through an attorney, plaintiff was not entitled to a judgment for attorney's fees as upon an unconditional contract in writing.—Walker v. Wood, 79 S. E. 905.

§ 537 (Ga.App.) Where the defense to a note was merely that it was without consideration, and such defense was supported by no evidence, the question whether plaintiff purchased the note before or after maturity was immaterial, and the court properly directed a verdict for plaintiff.—Glass v. Lowry Nat. Bank, 79 S. E. 366.

§ 537 (N.C.) In an action by a bank on notes procured by fraud and indorsed to it, evidence held sufficient to take to the jury the question whether the plaintiff was a bona fide holder for value, or merely held the notes for collection.—Third Nat. Bank of St. Louis v. Exum, 79 S. E. 498.

BLASTING.

See Adjoining Landowners.

BOARDS.

See Physicians and Surgeons.

BODY EXECUTION.

See Execution, §§ 425, 433.

BONA FIDE PURCHASERS.

See Bills and Notes, §§ 330-367, 452, 497, 537; Vendor and Purchaser, §§ 228-235.

BONDS.

See Appeal and Error, §§ 170, 327, 380; Appearance, § 19; Building and Loan Associations, § 32; Constitutional Law, §§ 63, 306; Corporations, § 479; Costs, § 238; Eminent Domain, § 238; Equity, § 48; Execution, §§ 155, 177, 204, 207, 210; Indemnity; Injunction, §§ 148, 157, 239; Judgment, §§ 167, 519; Lost Instruments; Municipal Corporations, §§ 642, 917; Principal and Surety, §§ 100, 117, 152; Recognizances; Schools and School Districts, § 97; States, §§ 115, 158, 164, 165; Statutes, § 119; Telegraphs and Telephones, § 33; Vendor and Purchaser, §§ 214, 215.

II. CONSTRUCTION AND OPERATION.

§ 55 (W.Va.) A bank cashier's bond conditioned that he shall faithfully account for all moneys coming into his hands as such cashier

held an indemnity to the bank, though its officers are named therein as obligees, "as" president, and "as" directors of the bank in its corporate name; the word "as" designating the official relation of the obligees to the real beneficiary.—*Clark v. Nickell*, 79 S. E. 1020.

BOUNDARIES.

See Appeal and Error, §§ 1002, 1057; Evidence, §§ 460, 461.

I. DESCRIPTION.

§ 3 (N.C.) Where the parties at the time of the conveyance of land actually made a corner setting up a monument, the boundaries by the monument will govern, notwithstanding errors in the description of the deed when run by courses and distances.—*Allison v. Kenion*, 79 S. E. 1110.

§ 3 (W.Va.) Where one or more monuments of a tract of land have been ascertained, the courses and distances have controlling effect in locating the others as to the identity of which the evidence is conflicting.—*Lewis v. Yates*, 79 S. E. 831.

§ 3 (W.Va.) While a call for quantity will not control other, definite description of land, yet, where all other elements of description are ambiguous, the quantity called for in an oil and gas lease may be considered, in ascertaining the land covered.—*Lovett v. West Virginia Central Gas Co.*, 79 S. E. 1007.

§ 11 (W.Va.) A call for an adjoining tract as a boundary of leased premises in a lease containing a clear description of the premises cannot be rejected.—*Reserve Gas Co. v. Carbon Black Mfg. Co.*, 79 S. E. 1002.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 35 (N.C.) Hearsay and common reputation is received in boundary disputes, provided it has its origin at a time comparatively remote, and attaches to some monument or natural object, or is fortified by evidence of occupation and acquiescence giving the land a definite location.—*Locklear v. Paul*, 79 S. E. 617.

§ 36 (Va.) In ejectment involving disputed boundary, evidence as to the execution and contents of lost title bond for land adjoining plaintiff's line held properly received when limited to throwing light on the location of the line.—*Honaker v. Shrader*, 79 S. E. 391.

§ 37 (W.Va.) A subsequent survey, calling for lines of the older one, is not a monument thereof, and the call therefor is only a circumstance, admissible under some circumstances, as evidence of the location of the lines of the older survey.—*Lewis v. Yates*, 79 S. E. 831.

§ 47 (N.C.) Where the grantee wrote the deed, measured and located the land, and planted the monument and, so long as he continued the owner, acquiesced in grantor's possession up to the monument, the grantee's grantee is estopped from claiming land of the grantor beyond the point of the monument.—*Allison v. Kenion*, 79 S. E. 1110.

BREACH.

See Contracts, §§ 324-353; Covenants, §§ 114-135.

BRIBERY.

See Witnesses, § 203.

BRIDGES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 7 (N.C.) The establishment of a county bridge rests in the discretion of the county commissioners, and, in the absence of fraud or op-

pression, their discretion cannot be reviewed by the Supreme Court.—*Davenport v. Commissioners of Pitt County*, 79 S. E. 423.

BRIEFS.

See Appeal and Error, §§ 117, 757, 764; Criminal Law, §§ 955, 1103, 1178.

BROKERS.

See Factors.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 20 (Ga.App.) The validity, form, and effect of a real estate broker's employment contract, which is made and to be performed within the state of Georgia, are controlled by the laws of Georgia.—*Hatton v. W. D. Morton & Co.*, 79 S. E. 371.

IV. COMPENSATION AND LIEN.

§ 42 (Ga.App.) A person who was not registered as a real estate dealer, as required by law, could not recover a commission for the sale of real estate.—*Hatton v. W. D. Morton & Co.*, 79 S. E. 371.

§ 54 (Ga.) A real estate broker has ordinarily earned his commission when he finds a purchaser who is ready, willing, and able to buy, and offers to buy, on the terms stipulated.—*Smith v. Tatum*, 79 S. E. 775.

§ 60 (Ga.App.) Where a broker holding an option to buy land including the timber thereon transfers same by a contract binding the transferee to pay him a certain commission for procuring the option, the fact that the owner subsequently declines to make a conveyance including the timber, and that the transferee accepts a deed excluding the timber, will not affect the broker's right to his commission.—*Witt v. Baker*, 79 S. E. 243.

§ 63 (Ga.) Where the owner refuses to sell to the purchaser procured by the broker, it is not ordinarily essential to the broker's right to his commission that the purchaser shall actually tender the price.—*Smith v. Tatum*, 79 S. E. 775.

V. ACTIONS FOR COMPENSATION.

§ 82 (Ga.) Proof of a defendant owner's contract to convey to plaintiff for a certain amount in cash, leaving him to retain any greater sum which he might receive from another purchaser, held at variance with an allegation that defendant employed plaintiff to procure a purchaser, and agreed that, if plaintiff should sell the property for more than a certain amount he should have the excess as compensation for his services and expenses.—*Smith v. Tatum*, 79 S. E. 775.

§ 86 (W.Va.) Evidence in an action on a contract for procuring a vendor to sell defendant a tract of timber land held sufficient to sustain a verdict for plaintiff.—*Wilson v. Johnson*, 79 S. E. 734.

BUILDING AND LOAN ASSOCIATIONS.

§ 32 (S.C.) In an action by a building and loan association on bonds secured by a mortgage, a bond cannot, in computing the amount due, be split into two loans, but must be treated as one loan.—*Union Building & Loan Ass'n v. McNally*, 79 S. E. 796.

BUILDING CONTRACTS.

See Principal and Surety, § 100.

BURDEN OF PROOF.

See Criminal Law, §§ 335, 561; Evidence, §§ 90, 94.

BURGLARY.

See Criminal Law, § 1159; Indictment and Information, §§ 75, 191.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 3 (N.C.) Under Revisal 1905, § 3333, relative to breaking or entering dwelling houses, buildings where personal property shall be, or uninhabited houses, with intent to commit a felony, the intent to commit a felony is an essential element of the offenses specified in all the clauses of the section, and not merely of that of breaking and entering an uninhabited house.—State v. Spear, 79 S. E. 869.

II. PROSECUTION AND PUNISHMENT.

§ 47 (N.C.) A verdict finding accused guilty of housebreaking with no intent to commit a felony amounted to a verdict of acquittal, and accused should therefore have been discharged.—State v. Spear, 79 S. E. 869.

BY-LAWS.

See Insurance, § 718.

CALLS.

See Boundaries, §§ 3, 11.

CANCELLATION OF INSTRUMENTS.

See Appeal and Error, § 882; Deeds, § 19; Equity, § 148; Husband and Wife, § 201; Pleading, § 64; Quietting Title; Taxation, § 805.

II. PROCEEDINGS AND RELIEF.

§ 34 (Ga.) An action by the heirs of a grantor, with the consent of his administrator, to cancel a deed for want of mental capacity to execute same, *held* barred by laches, where the deed was executed in 1896, and the grantor died in 1897, and defendants had been in possession since that time, and suit was not brought until 1910, and no excuse was shown for the delay.—James v. Hill, 79 S. E. 782.

Where heirs of the grantor, with consent of his administrator, sued to cancel a deed for want of mental capacity to execute same, and it appeared that the administrator, as clerk of the superior court, recorded the deed, and one plaintiff was a witness to it, and that plaintiffs knew that defendants were in possession, and the grantor's mental condition, they could not set up lack of knowledge to prevent their action, commenced nearly 14 years after the deed was recorded, being barred by laches.—Id.

§ 35 (Ga.) In a wife's action to cancel a deed to defendants as obtained by fraud and coercion of her husband, she and her husband having joined in its execution, an administrator appointed on her husband's estate pending the suit and before the appearance term was a necessary party.—Biggs v. Silvey, 79 S. E. 857.

§ 59 (N.C.) In action to set aside deeds, judgment against plaintiff for betterments under Revisal 1905, § 652, without deducting the rents and profits adjudged to plaintiff, *held* improper.—Daniel v. Dixon, 79 S. E. 425.

Under Revisal 1905, § 652, in action to set aside deeds, judgment for defendant, who was still a tenant in common with plaintiff after the deeds were set aside, for the full value of betterments, *held* erroneous.—Id.

CAPITAL.

See Taxation, § 378.

CARMACK AMENDMENT.

See Commerce, § 8.

CARNAL KNOWLEDGE.

See Rape.

CARRIERS.

See Appeal and Error, §§ 930, 1033, 1050, 1062; Assignments, § 23; Assumpsit, Action of, § 19; Commerce, §§ 8, 10, 61; Constitutional Law, §§ 247, 303; Courts, § 489; Evidence, §§ 413, 474; New Trial, § 108; Trial, § 191.

I. CONTROL AND REGULATION OF COMMON CARRIERS.**(A) In General.**

§ 2 (S.C.) Civ. Code 1912, § 2573, providing a penalty for carrier's failure to promptly adjust claims, *held* constitutional.—Varnville Furniture Co. v. Charleston & W. C. Ry. Co., 79 S. E. 700.

(B) Interstate and International Transportation.

§ 32 (S.C.) An interstate carrier can charge no more and no less than the rate filed with and approved by the Interstate Commerce Commission and published as the lawful rate, and a greater or less charge cannot be justified on the ground of mistake.—Aldrich v. Southern Ry. Co., 79 S. E. 316.

§ 36 (S.C.) In an action against a carrier for damages for refusal to carry goods at the rate filed with and published by the Interstate Commerce Commission, the question whether the carrier refused to transport the goods except at an excessive rate *held* for the jury.—Aldrich v. Southern Ry. Co., 79 S. E. 316.

Where an interstate carrier refused to transport goods at the regular interstate rate, the measure of damages was not the mere difference between the correct rate and the quoted rate where, by reason of the higher quotation, the shipper was forced to forego the shipment and sell the goods at a loss.—Id.

Under the Interstate Commerce Act, providing that the certificate of the secretary of the Interstate Commerce Commission shall be prima facie evidence of the correct rate, letters of an interstate carrier's general freight agent, quoting an incorrect rate, are admissible in an action by a shipper for damages for refusal to carry goods at the regular rate.—Id.

II. CARRIAGE OF GOODS.**(A) Delivery to Carrier.**

§ 44 (N.C.) Where piling had been placed by a shipper in the yards of a railroad company and two cars loaded, and the railroad company refused to transport that already loaded or furnish cars for that in the yard, the shipper was not required to deliver other piling for which he had also demanded cars in order to recover damages for the railroad's refusal to furnish cars.—Bell v. Norfolk Southern R. Co., 79 S. E. 421.

§ 45 (N.C.) Revisal 1908, § 2634a, making a railroad company liable to a penalty for failure to furnish cars upon written demand, does not affect the common-law duty of the railroad to receive and transport freight tendered it within a reasonable time.—Bell v. Norfolk Southern R. Co., 79 S. E. 421.

(C) Custody and Control of Goods.

§ 76 (Ga.App.) A transfer by a trustee in bankruptcy of personal property belonging to the bankrupt, in the possession of a carrier as warehouseman conferred on the transferee the right to recover damages for loss of the property owing to the negligence of the carrier.—Benjamin-Ozburn Co. v. Morrow Transfer & Storage Co., 79 S. E. 753.

§ 76 (S.C.) The consignee of freight who purchased the goods and received a bill of lading

was the real party in interest to an action against the railroad company for damages for the destruction en route, the title being in the consignee, in the absence of an intention or agreement to the contrary.—*Deaver-Jeter Co. v. Southern Ry. Co.*, 79 S. E. 709.

(D) Transportation and Delivery by Carrier.

§ 85 (Ga.) Where lumber in car load lots was transported to its destination, and the consignee was given notice to receive and unload the lumber, the liability of the railroad as a common carrier ceased.—*Seaboard Air Line Ry. Co. v. Dixon*, 79 S. E. 1118.

§ 86 (Ga.) Where a carrier delivered freight at its destination, it was not bound, at the request of the consignee, to deliver the cars to another carrier, to be transported to a different part of the same city.—*Seaboard Air Line Ry. Co. v. Dixon*, 79 S. E. 1118.

Where a consignee relied on a usage of a carrier on receiving freight in a city to deliver it to another carrier to be transported to a different part of the city, the consignee could hold the carrier to that custom only which required such a delivery on request of the other carrier.—*Id.*

(E) Delay in Transportation or Delivery.

§ 105 (Ga.App.) Where contractors for a public building were delayed by failure to deliver in a reasonable time a shipment of finishing material, due to the carrier's negligence, loss sustained for wages paid to idle workmen, while awaiting the shipment, expenses of tracing the same, forfeit which the contractors were compelled to pay from the delay, and interest on money which they were compelled to borrow for the same reason were not objectionable for remoteness.—*J. B. Carl & Co. v. Southern Ry. Co.*, 79 S. E. 41.

Where contractors suffered delay by reason of a carrier's negligence in failing to promptly transport finishing material, lost time of the members of the contracting firm could not be made the proper subject of a recovery of damages.—*Id.*

(F) Loss of or Injury to Goods.

§ 109 (S.C.) An action against a delivering railroad company for damages for the destruction of goods shipped en route is a common-law action, so that the state law and not the law as declared by the federal courts, would be applicable, though the shipment was an interstate shipment.—*Deaver-Jeter Co. v. Southern Ry. Co.*, 79 S. E. 709.

§ 132 (S.C.) In an action against a delivering carrier for damages for the destruction of goods en route, the burden was upon defendant to prove that the goods were destroyed by the act of God, and that it had exercised due care to prevent the consequences of such act.—*Deaver-Jeter Co. v. Southern Ry. Co.*, 79 S. E. 709.

§ 134 (Ga.App.) Where, in an action for loss of freight, plaintiff's evidence was based on hearsay, and persons knowing of a failure to deliver, if any, were not introduced, judgment for plaintiff was error.—*Atlantic Coast Line Ry. Co. v. Collins*, 79 S. E. 946.

(I) Connecting Carriers.

§ 177 (Ga.App.) A shipper of goods in interstate commerce over lines of several carriers can bring suit, under Civ. Code 1910, § 2752, against the last carrier who received the goods as in good order, for damages from their loss or damage thereto.—*Thomasville Live Stock Co. v. Atlantic Coast Line R. Co.*, 79 S. E. 162.

§ 177 (N.C.) Where an initial carrier, under an oral contract, agreed to transport goods to destination over the lines of connecting carriers to be selected by it, it was liable as an insurer for damages to the goods resulting on

any part of the route.—*McConnell v. New York Cent. & H. R. R. Co.*, 79 S. E. 974.

At common law, carriers are not bound to carry except on their own line, but by special contract to transport the goods to destination over the lines of connecting carriers they may subject themselves to liability over the whole course of transit.—*Id.*

III. CARRIAGE OF LIVE STOCK.

§ 228 (N.C.) No receipt or bill of lading is necessary to establish a contract for the carriage of live stock, but such a contract may be shown by the fact that the carrier received the stock for shipment and was paid therefor.—*Smith v. Atlantic Coast Line R. Co.*, 79 S. E. 433.

The classification of the Interstate Commerce Commission based upon a valuation clause in a bill of lading for a stock shipment is inadmissible in an action for damages to stock, where there was not in evidence a bill of lading containing a valuation clause.—*Id.*

In an action for damages to a mule during shipment, testimony that the plank in the side of the car where the mule's foot was caught in a crack was split off and that the break was an old one was competent.—*Id.*

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 247 (Ga.App.) One who after purchasing a ticket, takes the wrong train by mistake, is a passenger until he has safely alighted therefrom.—*Johnson v. Seaboard Air Line Ry.*, 79 S. E. 91.

(B) Fares, Tickets, and Special Contracts.

§ 253 (S.C.) Where a carrier sold a mileage contract to plaintiff under schedules imposing no limit on the use of tickets issued in exchange for coupons, it could not, by filing subsequent schedules containing such limitation, alter plaintiff's contract so as to make a ticket issued to him on his mileage coupons subject to such limitation.—*Eberle v. Southern Ry. Co.*, 79 S. E. 793.

(C) Performance of Contract of Transportation.

§ 264 (Ga.App.) Where a passenger takes the wrong train by mistake, and not by any negligence of the carrier, the latter is not bound to return him to the point where the mistake was made.—*Johnson v. Seaboard Air Line Ry.*, 79 S. E. 91.

Failure of ticket agent to inform a passenger on which of two nearby tracks his train will come is not a basis of recovery for taking the wrong train, in the absence of a request for information on that subject.—*Id.*

§ 275 (Ga.App.) In an action by a passenger for damages because of taking a wrong train at the station, where the petition shows that the mistake was due to plaintiff's failure to exercise ordinary care, and not to any negligence of defendant, a demurrer to the petition was properly sustained.—*Johnson v. Seaboard Air Line Ry.*, 79 S. E. 91.

(D) Personal Injuries.

§ 280 (Ga.App.) Under the provision of the Hepburn Act which permits a railroad company to issue free transportation to employés and their families, where the wife of an employé was injured while traveling on a free pass, she could recover, though the injury did not result from wantonness or willful negligence.—*Charleston & W. C. Ry. Co. v. Thompson*, 79 S. E. 242.

§ 280 (Ga.App.) The liability of the owner of a passenger elevator to those carried therein is that of a "common carrier," as the term is defined by Civ. Code 1910, § 2712, and the rule

of diligence which applies to common carriers of passengers under section 2714, applies to such owners.—*Helmly v. Savannah Office Bldg. Co.*, 79 S. E. 364.

§ 280 (Va.) A railway mail clerk in the discharge of his duties is entitled to the same degree of care for his protection against injury as a passenger.—*Virginian Ry. Co. v. Bell*, 79 S. E. 396.

§ 281 (Ga.App.) While under Civ. Code 1910, §§ 2717-2719, and Pen. Code 1910, § 539, it is the duty of the carrier, who accepts a sick passenger, to exercise diligence to provide for his safety and comfort, the carrier is not required to place such passenger in a baggage car, even though sick passengers have previously been placed in baggage cars by the carrier's conductors.—*Central of Georgia Ry. Co. v. Fleming*, 79 S. E. 369.

§ 283 (N.C.) A railroad company is responsible for the acts of a conductor who, while collecting tickets and acting within the scope of his authority, addressed insulting remarks to a lady passenger who had failed to purchase a ticket for her child.—*Huffman v. Southern Ry. Co.*, 79 S. E. 307.

§ 292 (N.C.) Where plaintiff, a street car passenger, had his little finger jerked off by catching a finger ring in a small screw which projected about one-sixteenth of an inch from the bottom of the handhold, at a point 36 inches from the bottom step, *held*, that the injury was an unavoidable accident, for which the street car company was not responsible.—*Pendergraft v. Durham Traction Co.*, 79 S. E. 984.

§ 303 (Ga.App.) Where a passenger takes the wrong train by mistake, and not by any negligence of the carrier, the latter is liable for injuries from requiring him to disembark at an unsafe place.—*Johnson v. Seaboard Air Line Ry.*, 79 S. E. 91.

§ 303 (W.Va.) A railroad company should stop its trains at stations a reasonable time to allow passengers to alight with safety.—*Guerin v. Pittsburg, C., C. & St. L. Ry. Co.*, 79 S. E. 739.

A railroad company is liable to a passenger who, without fault, is injured while alighting by the starting and sudden stopping of the train after it had once stopped at a station, but not long enough to allow him to get off.—*Id.*

§ 315 (Ga.App.) In a street car passenger's action for damages for defendant's negligent failure to protect plaintiff from the abusive language of its motorman, defendant's evidence, showing that the motorman's conduct was fully warranted and justifiable, was properly admitted under a plea of the general issue.—*Binder v. Georgia Ry. & Electric Co.*, 79 S. E. 216.

§ 316 (Ga.App.) An injury to a passenger on a passenger elevator raises a presumption of the negligent failure of the owner of the elevator to exercise the ordinary diligence required of him.—*Helmly v. Savannah Office Bldg. Co.*, 79 S. E. 364.

§ 317 (Ga.App.) In a street car passenger's action for damages for defendant's failure to protect him from abusive language of its motorman, evidence that whenever the motorman subsequently saw plaintiff riding on his car he would shake his fists and clench his teeth at plaintiff was properly excluded as irrelevant.—*Binder v. Georgia Ry. & Electric Co.*, 79 S. E. 216.

§ 318 (Ga.App.) In an action for injuries to a passenger in alighting from a street car, evidence *held* to sustain a verdict for plaintiff.—*Savannah Electric Co. v. Lackens*, 79 S. E. 53.

§ 319 (Ga.App.) A carrier, which requires a passenger to disembark at an unsafe place, is not liable for the mental suffering caused by the passenger's mistake in taking the wrong train.—*Johnson v. Seaboard Air Line Ry.*, 79 S. E. 91.

§ 319 (N.C.) In an action against a railroad company for insulting remarks addressed by a conductor to a lady passenger who had failed to purchase a ticket for her child, the plaintiff is entitled to punitive damages if the conductor maliciously, willfully, and wantonly insulted the plaintiff.—*Huffman v. Southern Ry. Co.*, 79 S. E. 307.

§ 320 (Ga.App.) Where a train stops short of the station after its name has been called, and a passenger gets off in the darkness and falls into a ditch, whether the railroad company was negligent in not warning the passenger that the station had not been reached, was a question for the jury.—*Atkinson v. Kennedy*, 79 S. E. 84.

(E) Contributory Negligence of Person Injured.

§ 330 (Ga.App.) Where a street car passenger without provocation uses abusive language toward the motorman and incites him to use like language in return, the company cannot be held liable in damages for failure to protect the passenger from the motorman's abuse.—*Binder v. Georgia Ry. & Electric Co.*, 79 S. E. 216.

§ 347 (Ga.App.) Where a train stops short of the station after its name has been called, and a passenger gets off in the darkness and falls into a ditch, whether the passenger was negligent, was a question for the jury.—*Atkinson v. Kennedy*, 79 S. E. 84.

§ 347 (Va.) In an action for injuries to a mail clerk by the shutting of a defective door, evidence *held* to require the submission to the jury of the question whether plaintiff would have used a hook to fasten the door open, if one had been supplied.—*Virginian Ry. Co. v. Bell*, 79 S. E. 396.

§ 348 (Ga.App.) Where the evidence showed that plaintiff's injury was due to a sudden jerk of the street car from which she was alighting, and that the accident could not have been avoided by her after it became operative, failure to instruct that she could not recover if, by ordinary care, she could have avoided the consequences of defendant's negligence was not error.—*Savannah Electric Co. v. Lackens*, 79 S. E. 53.

§ 348 (Va.) In an action for injuries to a railway mail clerk by the shutting of a defective door, evidence as to his contributory negligence *held* to require that issue to be clearly and fully submitted to the jury.—*Virginian Ry. Co. v. Bell*, 79 S. E. 396.

Instructions in such case which require the jury to find the defendant's negligence to have been the sole proximate cause of the injury, and place the burden of proving contributory negligence upon the defendant, do not sufficiently present the issue of contributory negligence.—*Id.*

(F) Ejection of Passengers and Intruders.

§ 355 (N.C.) A railroad passenger may recover damages for wrongful ejection where he was ejected for not paying his fare after the conductor had accepted and retained his ticket.—*Mott v. Atlantic Coast Line R. Co.*, 79 S. E. 867.

§ 359 (Ga.App.) Where a railroad conductor ordered a passenger to stop smoking, but allowed others to smoke in the same car, the passenger might assume that the conductor was discriminating against him on personal grounds, and might recover damages for being ejected from the train upon his refusal to obey the command.—*Seaboard Air Line Ry. Co. v. Lindsey*, 79 S. E. 361.

§ 363 (N.C.) A railroad passenger who is ejected at a place forbidden by statute, 3½ miles from a station and where no one lived on the ground of nonpayment of his fare, may recover damages for wrongful ejection.—*Mott v. Atlantic Coast Line R. Co.*, 79 S. E. 867.

§ 381 (N.C.) Evidence, in a railroad's action for damages for his wrongful ejection, *held* to show that plaintiff was ejected at a place forbidden by statute, and after the conductor had accepted and retained his ticket.—*Mott v. Atlantic Coast Line R. Co.*, 79 S. E. 867.

CATTLE.

See Municipal Corporations, §§ 591, 604.

CATTLE GUARDS.

See Railroads, § 103.

CERTAINTY.

See Indictment and Information, § 71.

CERTIFICATE.

See Chattel Mortgages, § 271; Evidence, § 342.

CERTIFICATES OF DEPOSIT.

See Bills and Notes, § 151.

CERTIORARI.

See Appeal and Error, § 1001; Criminal Law, § 1179; Justices of the Peace, §§ 194-209; Municipal Corporations, § 642.

II. PROCEEDINGS AND DETERMINATION.

§ 42 (Ga.App.) Where a petition for certiorari set out the overruling of a motion to dismiss for want of prosecution and of a motion that the case be tried on the merits and a ruling that the case had been settled and an entry made to that effect, *held* error to dismiss the petition on the ground that it "does not set out any clear and specific assignment of error upon any specific and judicial act of justice, judicial decision, or judgment."—*Union Mut. Ass'n v. Cooper*, 79 S. E. 220.

§ 54 (Ga.App.) Where both exceptions to the answer to a petition for certiorari and a traverse of the answer are filed in the same case, the court should act on the exceptions before disposing of the traverse.—*Chandler v. Baggett*, 79 S. E. 179.

Under Civ. Code 1910, § 5196, exceptions to an answer in a petition for certiorari must be in writing, and notice thereof be given to the opposite party before the case is called for hearing.—*Id.*

Where no notice of the exceptions to the answer to a petition for certiorari is given the opposite party until after the trial upon a traverse of the answer, the exceptions, being too late, should be stricken.—*Id.*

§ 56 (Ga.App.) Under Civ. Code 1910, § 5200, a traverse to the answer to a petition for certiorari is sufficiently definite when it specifically refers to and denies the controverted portion of the answer, and states that a specified portion of the petition relates the truth as to the point at issue.—*Chandler v. Baggett*, 79 S. E. 179.

§ 62 (Ga.App.) A final determination of the merits of a certiorari cannot be had until the issue formed upon the traverse to the answer of the inferior tribunal has been correctly adjudicated.—*Chandler v. Baggett*, 79 S. E. 179.

§ 70 (Ga.App.) Error in striking the traverse to certain paragraphs of the answer to a petition for certiorari *held* not reviewable, where no exceptions to this ruling were preserved by filing exceptions *pendente lite*.—*Chandler v. Baggett*, 79 S. E. 179.

§ 70 (Ga.App.) While a justice of the peace has no authority to direct a verdict, where the evidence shows that the verdict directed was demanded, the judgment in the superior court in refusing to sustain certiorari on the ground

that the verdict was directed will not be reversed.—*Simmons v. Hawkins*, 79 S. E. 179.

§ 70 (Ga.App.) On a writ of error to the dismissal by the superior court of certiorari to a judgment of a justice of the peace, the assignments of error, while not aptly or clearly stated, *held* sufficient to furnish the necessary information for the Court of Appeals.—*Ballard v. Daniel*, 79 S. E. 376.

CHALLENGE.

See Jury, § 116.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Criminal Law, § 130.

CHARACTER.

See Criminal Law, §§ 376, 381, 782; Witnesses, § 355.

CHARGE.

To jury, see Criminal Law, §§ 762-847; Trial, §§ 191-296.

CHARTER.

See Municipal Corporations, §§ 623, 655, 680, 681.

CHattel Mortgages.

See Evidence, § 441; Frauds, Statute of, § 111; Pledges.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 6 (Ga.App.) A paper stipulating that the maker conveys certain personalty to secure a debt, and that upon payment of the debt the creditor will reconvey, is a bill of sale to secure a debt and not a mortgage.—*Owens v. Bridges*, 79 S. E. 225.

(B) Form and Contents of Instruments.

§ 43 (Ga.App.) A purchase price note given for fertilizer, which stipulated that crops on lands fertilized with the fertilizer should be held "in trust" for payment of the note, *held* to create a mortgage upon the crops mentioned; the words "in trust" being equivalent to the term "mortgage."—*Hillis v. E. T. Comer & Co.*, 79 S. E. 930.

§ 48 (Ga.App.) A chattel mortgage on "all cotton and corn grown during the current season on lands fertilized with the fertilizer," to secure payment for which the mortgage was given, *held* not void for uncertainty.—*Hillis v. E. T. Comer & Co.*, 79 S. E. 930.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

§ 138 (Ga.App.) Under Acts 1899, p. 78, the lien of a mortgage on a crop to secure payment for moneys or supplies furnished, to make and gather such crop, is superior to the lien of a mortgage thereon not given for that purpose, though recorded first.—*J. G. & G. W. Durden v. Aycock Bros.*, 79 S. E. 213.

The purpose of Acts 1899, p. 78, was to give a preference to the mortgage creditor to furnish supplies for making crop, so as to enable insolvents, otherwise unable to obtain credit, to pursue their ordinary vocation of farming, instead of being forced to become vagrants.—*Id.*

The word "judgment," as used in Civ. Code 1910, § 3340, providing that liens of mortgages on crops shall be superior to older judgments, so far as applicable to proceedings by rule to

distribute funds in custodia legis, includes any final process under which property was brought to sale, or could have been legally sold.—Id.

§ 138 (N.C.) Where a tenant mortgaged his cotton crop to plaintiff to secure advances, subject to the landlord's lien, the landlord's release of his lien on one bale of cotton, to enable the tenant to buy a horse from defendants, did not impair plaintiff's mortgage, which thereupon became a first lien on such bale.—*M. H. White & Co. v. Winslow & White*, 79 S. E. 261.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 172 (S.C.) In a chattel mortgagee's action to recover possession of property which he sold the mortgagors, for the purpose of foreclosing, the mortgagors could set up a counterclaim for damages from false representations by the mortgagee concerning the property, and for breach of warranty.—*Hoover v. Thames*, 79 S. E. 795.

§ 176 (Ga.App.) Where plaintiff, after taking a bill of sale to secure a debt, brought suit and elected to take a money verdict, he could not recover more than the principal and interest of his debt, less any sum paid, though the value of the property covered by the bill of sale exceeded such amount.—*Owens v. Bridges*, 79 S. E. 225.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 235 (Ga.App.) Where a bill of sale is given to secure a debt, a reconveyance can be compelled upon payment of the debt, but until this is done the instrument remains operative as a bill of sale even though the debt is paid.—*Owens v. Bridges*, 79 S. E. 225.

IX. FORECLOSURE.

§ 271 (Ga.App.) A copy of a chattel mortgage held not sufficiently verified as required by Civ. Code 1910, § 3286, where the certificate signed by the mortgagee's attorney and the attesting officer recited merely, "I hereby certify on oath that the above is a true copy of the original mortgage which is now in my possession;" it not showing that any oath was administered.—*Hillis v. E. T. Comer & Co.*, 79 S. E. 930.

§ 278 (Ga.App.) In an action to foreclose a chattel mortgage on crops upon which the fertilizer bought should be used, the burden was on plaintiff to show that the fertilizer was used upon the crops claimed to be subject to the mortgage, and in the absence of such evidence it was error to direct a verdict for plaintiff.—*Hillis v. E. T. Comer & Co.*, 79 S. E. 930.

§ 283 (Ga.) Where the affidavit of illegality interposed to the foreclosure of a chattel mortgage did not aver that no order was granted authorizing sale by the sheriff under authority of Civ. Code 1910, § 3301, and, though alleging the order to be illegal, stated no reason therefor, and was vague, indefinite, and consisted almost entirely of conclusions, it was demurrable.—*Armistead v. Weaver*, 79 S. E. 783.

§ 285 (Ga.) Under the express provisions of Civ. Code 1910, § 3301, where defendant interposes an affidavit of illegality to the statutory foreclosure of a chattel mortgage, but fails to replevin the property, such property may be sold by special order as may property which is perishable or expensive to keep.—*Armistead v. Weaver*, 79 S. E. 783.

CHILDREN.

See Infants; Parent and Child.

CHOSE IN ACTION.

See Assignments.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, §§ 427, 552, 784.

CITIES.

See Municipal Corporations.

CITIZENS.

See Constitutional Law, §§ 206, 238-249.

CIVIL RIGHTS.

See Constitutional Law, §§ 206, 238-249.

CLAIMS.

See Bankruptcy, § 363; Carriers, § 2; Constitutional Law, § 303; Counties, §§ 205, 206; Execution, §§ 194-210; Executors and Administrators, § 221; Garnishment, § 210.

CLASS LEGISLATION.

See Constitutional Law, § 206.

CLERKS OF COURTS.

See Criminal Law, § 101; Dismissal and Non-suit, § 58; False Imprisonment, § 7.

CLOUD ON TITLE.

See Quieting Title.

CLUBS.

See Intoxicating Liquors, § 146.

CODICIL.

See Wills, §§ 99, 269, 767.

COLLATERAL AGREEMENT.

See Evidence, §§ 441-445.

COLLATERAL ATTACK.

See Acknowledgment, § 55; Drains, § 13; Executors and Administrators, § 29; Judgment, §§ 478-519.

COLLECTION.

See Banks and Banking, § 165; Taxation, § 545.

COLOR OF TITLE.

See Adverse Possession, § 79.

COMITY.

See Courts, § 489.

COMMERCE.

See Appeal and Error, §§ 930, 1050; Death, §§ 31, 75; Evidence, § 474.

I. POWER TO REGULATE IN GENERAL.

§ 3 (S.C.) The authority of Congress to regulate interstate and foreign commerce is supreme and unlimited, except by the federal Constitution, and when Congress legislates upon any particular subject of such commerce, all conflicting state laws, whether statute or common law, affecting the same subject are thereby superseded; but, in the absence of such legislation, the police power of the state remains unimpaired.—*Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700.

§ 8 (Ga.) The federal Employers' Liability Act supersedes the state legislation on the same subject.—*Louisville & N. R. Co. v. Kemp*, 79 S. E. 558.

§ 8 (S.C.) The Carmack Amendment to the Interstate Commerce Act, imposing a liability for damage to a shipment upon the initial carrier, does not deprive a shipper of his right to recover the penalty against the terminal car-

der given him by Act Feb. 15, 1910 (26 St. at Large, p. 717, Civ. Code 1912, § 2572).—*Du Pre v. Columbia, N. & L. R. Co.*, 79 S. E. 310.

§ 8 (S.C.) Penalties incurred under Civ. Code 1912, § 2573, prior to the enactment of the Carmack amendment to the interstate commerce law, are recoverable from carriers even if that action is superseded and annulled by such amendment.—*Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700.

Civ. Code 1912, § 2573, prescribing a penalty or the failure of carriers to adjust claims promptly, held not inconsistent with, or superadded by, the Carmack amendment to the interstate commerce law, and hence to be valid as applied to interstate commerce.—*Id.*

Civ. Code 1912, § 2573, and the Carmack amendment to the interstate commerce law held not inconsistent as to the carrier against which actions for loss or damage to property shall be brought, the Carmack amendment not requiring them to be brought against the initial carrier, and section 2573 not requiring them to be brought against the terminal carrier.—*Id.*

Carmack amendment to the interstate commerce law held to continue all rights and remedies for the redress of some specific wrong or injury, whether given by that act, by state statute, or by the common law, not inconsistent with the rules and regulations prescribed by that act.—*Id.*

§ 8 (S.C.) The courts of this state are not deprived of jurisdiction of an action against a delivering carrier for damages for loss of goods on the ground that the shipment was interstate, and that under the Carmack amendment to the interstate commerce act only the initial carrier is liable; it being a resident of another state and liable there for the loss.—*Deaver-Jeter Co. v. Southern Ry. Co.*, 79 S. E. 709.

§ 10 (S.C.) Civ. Code 1912, § 2573, imposing a penalty for the failure of carriers to adjust claims for overcharges of freight, or injuries to property, promptly, held valid in the absence of action by Congress covering the same subject.—*Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700.

II. SUBJECTS OF REGULATION.

§ 27 (Ga.) A section foreman of a railroad company operating a line which traversed several states, and who was injured owing to negligence in the operation of a freight train engaged in interstate commerce, was entitled to recover under the federal Employers' Liability Act of April 22, 1908.—*Louisville & N. R. Co. v. Kemp*, 79 S. E. 558.

III. MEANS AND METHODS OF REGULATION.

§ 61 (S.C.) Civ. Code 1912, § 2573, imposing a penalty for the failure of carriers to adjust claims for overcharges of freight, or injuries to property, promptly, held not to unlawfully regulate or unreasonably burden interstate commerce.—*Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

See Officers; States, § 165; Taxation, § 466.

COMMISSION AND COMMISSIONERS.

See Courts, § 489.

COMMISSIONERS.

See Drains, § 57; Insurance, § 20; Judicial Sales.

COMMISSIONS.

See Brokers, §§ 42-63, 82, 86; Factors, § 46.

COMMITTEE.

See States, §§ 34, 40.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

See Assignments, § 3; Carriers, §§ 32, 36, 45, 109, 177; Corporations, § 479; Courts, § 489; Criminal Law, § 269; Deeds, § 117; Witnesses, § 60.

COMMON SCHOOLS.

See Schools and School Districts.

COMPARATIVE NEGLIGENCE.

See Negligence, §§ 98, 101, 138.

COMPENSATION.

See Brokers, §§ 42-63, 82, 86; Contracts, § 324; Eminent Domain, §§ 69-136, 260; Master and Servant, §§ 69-83.

COMPETENCY.

See Evidence, § 543; Witnesses, §§ 37-203.

COMPLAINT.

See Pleading.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Attorney and Client, § 190; Execution, § 2; Warehousemen, § 22.

§ 2 (N.C.) Where an amount tendered by a debtor did not purport to cover the amount in controversy, but merely as a payment upon an indebtedness to be thereafter adjusted, its acceptance by the creditor was not a settlement in full.—*Bryant Lumber Co. v. Coppock-Warner Lumber Co.*, 79 S. E. 282.

CONCLUSION.

See Evidence, §§ 471-501; Indictment and Information, § 63.

CONCURRENT JURISDICTION.

See Courts, § 489.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 467-484.

CONDITIONS.

See Deeds, § 166; Vendor and Purchaser, § 344.

CONFESSION.

See Criminal Law, §§ 528, 535, 781, 814.

CONFIDENTIAL COMMUNICATIONS.

See Witnesses, § 191.

CONFLICT OF LAWS.

See Brokers, § 20; Commerce, § 3; Courts, § 489; Evidence, § 35.

CONNECTING CARRIERS.

See Carriers, § 177.

CONSENT.

See Husband and Wife, § 326.

CONSIDERATION.

See Bills and Notes, §§ 93, 123; Deeds, §§ 19, 210; Gifts, § 4.

CONSPIRACY.

See Criminal Law, §§ 427, 779.

CONSTITUTION.

See Insurance, § 718.

CONSTITUTIONAL LAW.

See Appeal and Error, §§ 1003, 1004; Carriers, § 2; Commerce, §§ 3-10; Counties, §§ 132, 139; Courts, §§ 102, 163; Criminal Law, §§ 641, 1030; Drains, §§ 2, 13; Eminent Domain, §§ 69, 76; Homestead, § 169; Indictment and Information, § 3; Insurance, § 618; Master and Servant, § 69; Officers; Schools and School Districts, §§ 41, 97, 103; States, §§ 40, 115; Statutes, §§ 76, 90, 107, 112, 119, 126; War, § 29.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ 9 (Ga.) The election for members of Congress and presidential electors, required to be held on the Tuesday after the first Monday in November, is a "general election" within Const. art. 13, § 1, par. 1, providing for the submission of a proposed amendment to the constitution at the next general election.—*Moore v. Smith*, 79 S. E. 1116.

Const. art. 11, § 1, par. 2, limiting the number of counties, may be amended by a proposal to create an additional county without an amendment for enlarging the number of counties having been previously submitted.—*Id.*

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 46 (Ga.App.) The question as to whether a statute is unconstitutional will not be certified to the Supreme Court, where the issues involved can be determined without a decision of that question.—*Cosper v. State*, 79 S. E. 94.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(A) Legislative Powers and Delegation Thereof.**

§ 60 (W.Va.) Code 1906, c. 12, § 7, authorizing either house of the Legislature or a committee thereof to enforce obedience to its process, is not an unconstitutional delegation of power.—*Sullivan v. Hill*, 79 S. E. 670.

§ 63 (S.C.) Act Feb. 19, 1913 (28 St. at Large, p. 355), amending Act Jan. 25, 1905 (21 St. at Large, p. 921), enlarging the Anderson school district, and authorizing trustees thereof to hold election on the question of issuing \$100,000 in bonds, and providing that, in the event of failure of the voters to authorize the issuance of bonds, the trustees may suspend the amendment and operate under the original act, does not confer legislative power upon the trustees.—*Burriss v. Brock*, 79 S. E. 193.

(B) Judicial Powers and Functions.

§ 70 (N.C.) The Supreme Court cannot make the law, but can only construe statutes as they are enacted.—*Powell v. Strickland*, 79 S. E. 872.

§ 70 (W.Va.) The Supreme Court of Appeals must apply legislative enactments as it finds

them, though their policy or effect may be subject to sound criticism.—*Collins v. Board of Trustees of Davis and Elkins College*, 79 S. E. 10.

VII. OBLIGATION OF CONTRACTS.**(B) Contracts of States and Municipalities.**

§ 126 (S.C.) Under Const. 1868, art. 12, § 1, Const. 1895, art. 9, §§ 2, 8, and Civ. Code 1912, § 3812, making corporations liable for a penalty of \$5 a day for failure to pay wages due a discharged laborer within 24 hours after demand, though the wages are not payable until a specified date thereafter, *held* sustainable as an alteration of corporate charter of defendant railroad company.—*Wynne v. Seaboard Air Line Ry.*, 79 S. E. 521.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 203 (S.C.) Act Feb. 17, 1912 (27 St. at Large, p. 702), changing the manner of inflicting the death penalty from hanging to electrocution, is not *ex post facto* as applied to one who committed a crime punishable by death prior to the enactment of that law.—*State v. Vaughn*, 79 S. E. 312.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 206 (Ga.) Civ. Code 1910, § 2563, allowing a suit against an insurance company to be brought in the county where the company had an office when the policy was issued, although not at the time of suit, is not unconstitutional, as abridging the privileges of citizens of the United States.—*Jefferson Fire Ins. Co. of Philadelphia v. Brackin*, 79 S. E. 467.

X. EQUAL PROTECTION OF LAWS.

§ 238 (S.C.) Civ. Code 1912, § 3812, requiring corporations to pay wages to discharged employees within 24 hours after demand, *held* a proper exercise of the police power, and hence not unconstitutional as denying them equal protection of the laws.—*Wynne v. Seaboard Air Line Ry.*, 79 S. E. 521.

§ 247 (S.C.) Civ. Code 1912, § 2573, providing a penalty for carrier's failure to promptly adjust claims, *held* not to deny carriers the equal protection of the laws.—*Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700.

§ 249 (Ga.) Civ. Code 1910, § 2563, allowing a suit against an insurance company to be brought in the county where the company had an office when the policy was issued, although not at time of suit, is not unconstitutional as denying the equal protection of the laws.—*Jefferson Fire Ins. Co. of Philadelphia v. Brackin*, 79 S. E. 467.

XI. DUE PROCESS OF LAW.

§ 251 (W.Va.) "Due process," as used in the state and federal Constitution, does not necessarily mean process of the court, but means in due course of legal proceeding according to those rules and forms established for the protection of private rights securing to every person a judicial trial before he can be deprived of life, liberty, or property.—*Carnegie Natural Gas Co. v. Swiger*, 79 S. E. 3.

§ 273 (W.Va.) Code 1906, c. 12, § 7, authorizing either house of the Legislature or a committee thereof to enforce obedience to its process, *held* not a denial of due process of law.—*Sullivan v. Hill*, 79 S. E. 670.

§ 275 (S.C.) Civ. Code 1912, § 3812, requiring corporations to pay wages to discharged employees within 24 hours after demand, *held* a proper exercise of the police power, and hence not unconstitutional as depriving corporations of their property without due process of law.—*Wynne v. Seaboard Air Line Ry.*, 79 S. E. 521.

§ 276 (S.C.) Civ. Code 1912, § 3812, requiring corporations to pay wages to discharged employees within 24 hours after demand, *held* a proper exercise of the police power, and hence not unconstitutional as depriving corporations of their property by depriving them of liberty of contract.—*Wynne v. Seaboard Air Line Ry.*, 79 S. E. 521.

§ 278 (Va.) Where real property was given to a hospital in trust to provide extra comforts for patients therein, acts of the General Assembly approved February 20, 1906 (Laws 1906, c. 48), and March 12, 1908 (Laws 1908, c. 195), providing for a sale of the land and a diversion of the proceeds to other uses, were unconstitutional and void as a deprivation of property in the trust fund without due process of law.—*General Board of State Hospitals for the Insane v. Robertson*, 79 S. E. 1064.

§ 281 (W.Va.) Acts 1907, c. 74 (Code Supp. 1909, c. 42, §§ 18, 20), amending and re-enacting Code 1906, c. 42, §§ 18, 20, and providing for an alternative method of condemning land or easements by pipe line companies, *held* not violative of the due process of law provisions of Const. art. 3, § 10 (Code 1906, p. 11), and Const. U. S. Amend. 14.—*Carnegie Natural Gas Co. v. Swiger*, 79 S. E. 3.

§ 303 (S.C.) Civ. Code 1912, § 2573, providing a penalty for carrier's failure to promptly adjust claims, *held* not to deprive carriers of their property without due process of law.—*Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700.

§ 305 (Ga.) Civ. Code 1910, § 2563, allowing a suit against an insurance company to be brought in the county where the company had an office when the policy was issued, although not at the time of suit, is not unconstitutional as depriving the company of its property without due process of law.—*Jefferson Fire Ins. Co. of Philadelphia v. Brackin*, 79 S. E. 467.

§ 306 (Ga.) Civ. Code 1910, § 1187, authorizing the Comptroller General to issue execution against tax collectors and their sureties on their bonds on a failure to settle their accounts according to law, is violative of the due process clause of the Constitution (Const. art. 1, § 1, par. 3; Civ. Code 1910, § 6359), in that there is no provision for notice or hearing to the tax collector or his surety.—*Gaulden v. Wright*, 79 S. E. 1125.

§ 309 (Ga.) Civ. Code 1910, § 2564, providing that service may be had upon an insurance company which had ceased to do business in the county where the policy was written by leaving a copy of the petition at its former office, violates the due process of law clause of the Constitution, which requires notice of procedure.—*Jefferson Fire Ins. Co. of Philadelphia v. Brackin*, 79 S. E. 467.

CONSTRUCTION.

See Bonds § 55; Contracts, §§ 147-214; Deeds, §§ 90-166; Insurance, §§ 146-179½; Landlord and Tenant, § 37; Statutes, §§ 181-246; Trial, §§ 295, 296; Trusts, § 124; Vendor and Purchaser, § 51; Wills, §§ 461-693.

CONTEMPT.

See False Imprisonment, § 7.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 29 (W.Va.) A corporation may be a contemnor, and punishable as such by fine.—*State v. Baltimore & O. R. Co.*, 79 S. E. 834.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 63 (W.Va.) Conditional judgments of imprisonment may be rendered in contempt cases.—*State v. Baltimore & O. R. Co.*, 79 S. E. 834.

§ 66 (Ga.App.) Where a person adjudged guilty of contempt pays a fine to avoid an alternative sentence of imprisonment, he waives his right to a writ of error.—*In re Hartsfield*, 79 S. E. 225.

§ 66 (W.Va.) Under Code 1906, c. 160, § 4, a writ of error will not lie to review judgments in contempt cases, where the trial court acted within its jurisdiction in entering the violated order.—*State v. Baltimore & O. R. Co.*, 79 S. E. 834.

A writ of error will lie to review a contempt judgment, where the trial court acted outside its jurisdiction in entering the violated order.—*Id.*

CONTINUANCE.

See Criminal Law, §§ 594, 603, 1151; Husband and Wife, § 25; New Trial, § 156.

§ 46 (Ga.App.) A motion for continuance for surprise is defective, unless the court is advised in the showing wherein and in what respect the movant is not prepared, and how or why he will be better prepared to meet the issue in the event that a continuance is granted.—*Hyer v. C. E. Holmes & Co.*, 79 S. E. 53.

§ 46 (Ga.App.) It was not error to overrule a motion for continuance because of defendant's absence, due to alleged sickness, where the motion was supported only by the unsworn statement of an alleged physician, and there was no evidence that the certificate was made by a physician, especially where no meritorious defense was set up.—*Franklin v. Ford*, 79 S. E. 366.

§ 47 (Ga.App.) Proof that defendant was a married woman, who was not separated from her husband, was, without more, insufficient to disprove her showing for a continuance, that she had no one by whom she could send a physician's certificate or notify her counsel that she was physically unable to attend court.—*Wright v. Bank of Southwestern Georgia*, 79 S. E. 184.

CONTRACTS.

See Accord and Satisfaction; Action, § 53; Alteration of Instruments; Appeal and Error, § 1050; Assignments; Assumpsit, Action of; Attorney and Client, § 189; Bastards, § 17; Bills and Notes, § 123; Bonds; Brokers, §§ 20, 60; Cancellation of Instruments; Carriers, §§ 177, 228; Chattel Mortgages; Compromise and Settlement; Constitutional Law, §§ 126, 276; Convicts, § 10; Corporations, §§ 228, 388, 399, 407, 426, 448-487; Covenants; Criminal Law, § 325; Deeds; Dower, § 20; Equity, § 48; Evidence, §§ 390-461; Frauds, Statute of; Gaming, §§ 12, 49; Guaranty; Highways; Indemnity; Infants, §§ 50, 99; Insurance; Interest; Judgment, §§ 594, 628; Landlord and Tenant; Limitation of Actions, §§ 21, 46; Logs and Logging; Master and Servant, §§ 6, 67; Mechanics Liens; Mines and Minerals, §§ 62-81; Money Received; Mortgages; Novation; Partnership; Pledges; Principal and Agent; Reformation of Instruments; Sales; Set-Off and Counterclaim; Specific Performance; Sunday; Telegraphs and Telephones, §§ 28, 33; Torts, § 1; Trial, §§ 252, 253, 260, 296, 330; Usury, § 98; Vendor and Purchaser; Warehousemen, § 22; Waters and Water Courses, § 190; Wills, §§ 58, 59.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§ 9 (Ga.) An oral agreement, made on the mutual rescission of a contract of sale and trade, that defendant would give plaintiff "part of the money" which he had paid, *held* too vague to be enforced.—*Burney v. Jones*, 79 S. E. 840.

§ 10 (Ga.) An oral contract between two persons to buy land whereby one was to pay therefor from a loan to be secured by him on the security of land owned by him and the purchased tract, and was to take title in his own name and convey to the other a half interest when he was reimbursed from the rents and profits of the purchased tract, *held* void for want of mutuality.—Hall v. Edwards, 79 S. E. 852.

§ 10 (Ga.App.) An agreement to purchase shares of stock one year from date at a price to be mutually agreed upon, with a provision that if the seller desires to sell he should give the purchaser 30 days' notice of his intention to sell, is unilateral; the seller not being bound to sell and making no promise whatsoever.—Martin v. Cox, 79 S. E. 39.

§ 10 (N.C.) That letters of the seller evidencing a contract of sale do not bind the purchaser to pay does not make the contract unilateral, where the letters are merely in confirmation of an agreement for the sale.—Holt v. Wellons, 79 S. E. 450.

§ 10 (W.Va.) When a proposal to perform labor is certain, definite, and unconditional, and there is a like acceptance, there is no lack of mutuality.—McGuire v. Old Sweet Springs Co., 79 S. E. 350.

(B) Validity of Assent.

§ 94 (Ga.App.) Under Civ. Code 1910, § 4254, providing that fraud voids all contracts, the law is liberal in relieving from the consequences of fraud shown.—Harrison v. Lee, 79 S. E. 211.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 147 (W.Va.) Where a contract is made for the accomplishment of one main purpose, every provision of the contract must be read in the light of such purpose, and the whole instrument considered in its entirety.—Taylor v. Buffalo Collieries Co., 79 S. E. 27.

In construing a contract, the court will regard the obvious intent of the parties and the object sought, as well as the language used.—Id.

§ 156 (W.Va.) Where a particular purpose is sought by a contract and the language pertaining thereto is clear and certain, no general terms used therein will extend the meaning beyond that definitely expressed.—Taylor v. Buffalo Collieries Co., 79 S. E. 27.

§ 170 (W.Va.) An ambiguous written contract should be construed in the light of the practical construction put upon it by the parties.—Lovett v. West Virginia Central Gas Co., 79 S. E. 1007.

(D) Place and Time.

§ 214 (W.Va.) An oral contract for continuous services will be construed to postpone the time of payment therefor until the promisor's death, or provision made therefor in his will, where the peculiar circumstances of the parties, their confidential relations, and the promisor's declarations clearly indicate that such was the understanding of the parties, though the contract does not expressly provide for such postponement.—Hotsinpiller v. Hotsinpiller, 79 S. E. 936.

VI. ACTIONS FOR BREACH.

§ 324 (W.Va.) A bill will not lie to recover compensation or damages for breach of contract.—Swarthmore Lumber Co. v. Parks, 79 S. E. 723.

§ 340 (Ga.App.) In an action on a contract providing for the transfer of an option, and containing an ambiguous provision that the transferee should pay the transferor 2½ per cent. of the purchase price of the land "for services previously rendered to this date," it was error to strike from defendant's answer a plea that no services were rendered by plain-

tiff, and that therefore the promise to pay was without consideration.—Witt v. Baker, 79 S. E. 243.

§ 353 (Ga.App.) In an action based upon an entire contract, it is not error for the court to confine the consideration of the jury to a recovery for the plaintiff of the full amount of the contract price.—Jarrard v. Hawes, 79 S. E. 373.

CONTRIBUTION.

See Principal and Surety, § 199.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 65-101, 136.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Assignments; Chattel Mortgages; Deeds; Fraudulent Conveyances; Tenancy in Common, §§ 8, 15, 45; Usury, § 98.

CONVICTS.

§ 10 (S.C.) Work of a county chain gang in laying the substructure of a street in advance of employes of contractors laying the superstructure *held* a violation of Civ. Code 1912, § 957, providing that the chain gang shall not be worked in "connection" with any road contractor or overseer.—State v. Patterson, 79 S. E. 309.

COOLING TIME.

See Homicide, § 295.

COPY.

See Wills, § 246.

CORPORATIONS.

See Appeal and Error, §§ 380, 1057; Bankruptcy, § 145; Banks and Banking; Building and Loan Associations; Carriers; Constitutional Law, §§ 126, 238, 275, 276; Contempt, § 29; Evidence, §§ 157, 164, 434; Forgery, § 12; Money Received; Municipal Corporations; Railroads; States § 87; Street Railroads; Taxation, § 378; Telegraphs and Telephones.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

§ 90 (Ga.) In a receiver's action on a stock subscription, a receipt reciting that defendant had subscribed for 20 shares, which number was less than that shown by the subscription list, *held* properly admitted in evidence.—Hardee v. Tietjen, 79 S. E. 117.

Under conflicting evidence in a receiver's action on a stock subscription, the question whether defendant knew that the subscription was for 50 shares, and not for only 20, was for the jury.—Id.

That the treasurer of a corporation knows that the subscription list shows 50 shares subscribed for by the president of the corporation, and not merely 20 shares, as he believes, is not notice to him that his stock subscription has been raised to the higher amount.—Id.

§ 90 (Ga.App.) In a corporation's action on a written stock subscription, the burden is on defendant to prove a payment relied on.—Justice v. Chattooga Oil Mill Co., 79 S. E. 223.

Where, in a corporation's action on an unconditional written stock subscription, the execution of the subscription was proved and it was introduced in evidence and no plea of payment or other defense was made, a verdict was properly directed for plaintiff.—Id.

V. MEMBERS AND STOCKHOLDERS.**(A) Rights and Liabilities as to Corporation.**

§ 180 (Ga.App.) By the acceptance of a corporation's charter, the shareholders engage not to exceed the powers conferred upon them by law, and each shareholder agrees not to divert the assets to a purpose foreign to the objects of the corporation.—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 79 S. E. 45.

(D) Liability for Corporate Debts and Acts.

§ 228 (Ga.) One who subscribes for stock in a corporation under a contract providing for special terms and conditions of payment, which constitute a legal fraud upon other stockholders or creditors, is liable to the creditors, after the insolvency of the corporation, for the unpaid balance due on his subscription, irrespective of the conditions.—*Spratling v. Westbrook*, 79 S. E. 536.

§ 265 (Ga.) Under Civ. Code 1910, § 2251, permitting suits against all or any one of the members of the corporation for debts for which they are liable, a trustee in bankruptcy of an insolvent corporation may sue in one action all the stockholders whose stock subscriptions are unpaid for the balance due on such subscriptions.—*Spratling v. Westbrook*, 79 S. E. 536.

VI. OFFICERS AND AGENTS.**(A) Election or Appointment, Qualification, and Tenure.**

§ 284 (S.C.) Where plaintiff claimed that he was entitled to the position of superintendent and general manager of defendant corporation, and that he had been unlawfully deprived of his position by the officers of the company, the burden was on him to show it.—*Silverthorne v. Barnwell Lumber Co.*, 79 S. E. 519.

§ 291 (W.Va.) Code 1906, c. 53, § 53, providing that corporate officers and agents shall hold during the pleasure of the board, does not apply to persons employed for carpenter work.—*McGuire v. Old Sweet Springs Co.*, 79 S. E. 350.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 310 (Ga.) Directors of a trading corporation must exercise ordinary care as to its affairs, and, while they may commit the active management to authorized officers, this does not relieve them from the duty of reasonable supervision.—*McEwen v. Kelly*, 79 S. E. 777.

(D) Liability for Corporate Debts and Acts.

§ 331 (Ga.) Though the directors of a solvent going concern are agents of the corporation rather than of its creditors, creditors may in some instances sue directors on account of losses occurring from their maladministration.—*McEwen v. Kelly*, 79 S. E. 777.

VII. CORPORATE POWERS AND LIABILITIES.**(A) Extent and Exercise of Powers in General.**

§ 370 (Ga.App.) Corporations have no rights or powers other than those expressly conferred by law or the charter or which arise therefrom by necessary implication.—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 79 S. E. 45.

§ 385 (Ga.App.) An "ultra vires act" of a corporation is one in excess of charter power.—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 79 S. E. 45.

§ 388 (Ga.App.) A corporation is not estopped to challenge the validity of an executory ultra vires contract where no innocent person has been misled to his injury.—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 79 S. E. 45.

(B) Representation of Corporation by Officers and Agents.

§ 399 (Ga.App.) That a person is president of a corporation does not authorize him to buy, sell, or contract for it, or to control its property, funds, or management.—*Blakely Artesian Ice Co. v. Clarke*, 79 S. E. 526.

That the agent of a corporation was specially authorized in some instances to execute a mortgage and a security deed, and in others to borrow money from named persons on specified terms, did not authorize the inference that he had general authority to contract, on behalf of the corporation, to borrow money, or for any other purpose.—*Id.*

§ 404 (Ga.App.) That the governing authorities of a corporation empower an agent to renew a note payable to a named person does not authorize such agent to pledge corporate property for payment of the note, unless the property was pledged as security in the original evidence of indebtedness.—*Blakely Artesian Ice Co. v. Clarke*, 79 S. E. 526.

§ 407 (Ga.App.) That the agent of a corporation was vice president and afterwards president of the corporation did not authorize him to appoint other agents to sell corporate stock.—*Great Southern Accident & Fidelity Co. v. Guthrie*, 79 S. E. 162.

§ 407 (W.Va.) A contract by the general manager of a corporation for carpenter work beyond the term of his own employment is not necessarily void when made with the specific direction of the president of the corporation, or when there is no abuse of the manager's authority and no fraud practiced.—*McGuire v. Old Sweet Springs Co.*, 79 S. E. 350.

A contract by the general manager of a corporation for carpenter work to be done after the term of his own employment, when definite in terms, duly accepted, and the work entered upon, was not void for want of authority.—*Id.*

§ 426 (Ga.App.) The president of a corporation has no authority by virtue of his office to contract in its behalf; but where he without authority executes a contract, and the corporation retains and uses the consideration, it cannot repudiate the contract.—*Ocilla Southern R. Co. v. Morton*, 79 S. E. 480.

§ 432 (Ga.) Where a deed purporting on its face to convey land from one corporation to another is signed by the president of the grantor with the corporate seal attached, it will be presumed that such officer was authorized to execute the conveyance.—*Augusta Land Co. v. Augusta Ry. & Electric Co.*, 79 S. E. 138.

§ 432 (Ga.App.) An instrument executed in the name of a corporation by its president under its corporate seal is presumed to be executed by its authority, but this presumption is rebuttable.—*Blakely Artesian Ice Co. v. Clarke*, 79 S. E. 526.

In an action of trover, evidence held insufficient to authorize a finding that the corporation defendant had held out as its agent the person who executed the contract upon which plaintiff relied in proof of his title, in such way as to estop it or its privies from pleading the want of the agent's authority.—*Id.*

(D) Contracts and Indebtedness.

§ 448 (W.Va.) A corporation does not succeed to the right of action of one of its promoters against his agent for breach of his contract of agency antedating the existence of the corporation, in the absence of an assignment.—*Swarthmore Lumber Co. v. Parks*, 79 S. E. 723.

§ 467 (Ga.App.) The authority of a corporation to make an accommodation indorsement of commercial paper will not be implied from the power to lend or borrow money on such paper and to generally exercise corporate powers.—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 79 S. E. 45.

§ 479 (W.Va.) The owner of past-due coupons of corporate bonds secured by mortgage may recover judgment on same where there is nothing in them restricting such right, though the mortgage provides for the trustee to take over the mortgaged property on request of one-third of the bondholders on such default.—*Fleming v. Fairmont & M. R. Co.*, 79 S. E. 826.

The common-law right to sue upon a corporate bond is not affected by the remedies provided in the mortgage given to secure same unless the mortgage expressly or by necessary implication excludes such right.—*Id.*

Where the mortgage securing corporate bonds provides for a trustee to take over the mortgaged property after default, an execution issued on a judgment obtained on coupons forming part of the bonds is not leviable on property covered by the mortgage.—*Id.*

§ 480 (S.C.) Where a mortgage executed to one who was secretary of a corporation was on record when the corporation issued bonds secured by mortgage on the same property, such person was not estopped from asserting the validity of the prior mortgage as against the purchasers of the bonds merely because they were executed by him as secretary, and were headed "First Mortgage Bonds" and "Second Mortgage Bonds."—*Farmers' Bank & Trust Co. v. Southern Granite Co.*, 79 S. E. 985.

§ 484 (Ga.App.) A corporation cannot, in the absence of express charter authority, lend its credit for the mere accommodation of third parties.—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 79 S. E. 45.

§ 487 (Ga.App.) To be entitled to repudiate an executed ultra vires contract, a corporation must restore the benefit received.—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 79 S. E. 45.

A corporation cannot ratify a contract which it has no legal power to make.—*Id.*

An executory contract of a corporation wholly beyond its power cannot be enforced by a person who, at the time of contracting, had notice of its illegality, even though ratified by all the stockholders.—*Id.*

§ 487 (N.C.) Where standing timber was conveyed to a corporation at a reduced price in consideration of its covenant to build a railroad, which it repudiated on the ground that it was ultra vires, the grantor could recover the difference between the contract price and the actual value of the timber.—*Herring v. Wallace Lumber Co.*, 79 S. E. 876.

VIII. INSOLVENCY AND RECEIVERS.

§ 556 (Ga.) Three general creditors, holding small claims against an electric railway company, without lien therefor, held to have no right to a receivership, upon an allegation of the company's insolvency and inability to complete its railway.—*Atlanta & C. Ry. Co. v. Carolina Portland Cement Co.*, 79 S. E. 555.

§ 557 (Ga.) An intervention filed by attorneys, claiming attorney's fees from the defendant railway company, to be paid from proceeds of the sale of bonds issued by the company, or from other property or funds, without any allegation that there were such funds arising from the sale of the bonds, or showing that they had any interest therein, held demurrable, and not to save the original petition from being demurrable.—*Atlanta & C. Ry. Co. v. Carolina Portland Cement Co.*, 79 S. E. 555.

An intervention filed by several individual bondholders in a suit by creditors against an electric railway company for a receiver held demurrable, and not to save the original petition from demurrer, where it showed no reason why they had a right to proceed otherwise than through the trustees, to whom mortgages had been given to secure the bonds in which they claimed an interest.—*Id.*

In an action by creditors against an electric railway company for a receiver, an answer filed by trustees of the bondholders, who were made

parties defendant, held to furnish no reason against the sustaining of a demurrer filed by the corporation to the original petition and interventions.—*Id.*

§ 557 (W.Va.) Where a bill is filed to wind up corporate affairs and unsecured creditors have not by proper pleading attacked for fraud a lien on the corporate property, they cannot make such an attack before a commissioner to whom the case has been referred to ascertain and report the debts and their priorities.—*McDonald v. McDonald Planing Mill Co.*, 79 S. E. 1081.

§ 559 (W.Va.) Where creditors of an insolvent corporation suffered to be taken for confessed a bill which was filed against them and the corporation by its stockholders which averred that a deed of trust upon the corporate property created a lien thereon in favor of a certain creditor, they thereby admitted the validity of such lien.—*McDonald v. McDonald Planing Mill Co.*, 79 S. E. 1081.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 603 (Ga.App.) Though one corporation may own all the stock in another, the two do not become merged but remain distinct legal entities.—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 79 S. E. 45.

CORPUS DELICTI.

See Criminal Law, § 535.

CORRECTION.

See Taxation, § 466.

COSTS.

See Criminal Law, § 982; Judgment, § 167; Partition, § 114.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 41 (Ga.App.) A letter stating that plaintiff would institute suit in a certain court, if the claim was not paid by a certain day, held sufficient notice to bind defendant for attorney's fees, when timely received by defendant.—*Cook v. Hightower & Co.*, 79 S. E. 165.

§ 42 (N.C.) A plea of tender was insufficient to stop costs where the tender was not kept good and defendant did not produce the money and pay it into court.—*Dr. Shoop Family Medicine Co. v. Davenport*, 79 S. E. 602.

Revisal 1905, § 860, authorizing a written offer to allow judgment, held inapplicable to an attempted tender by check which was not kept good by a continued readiness to pay and payment of the money into court.—*Id.*

III. PERSONS, PROPERTY, AND FUNDS LIABLE.

§ 96 (Va.) The trustees of a state hospital and the general board of the state hospital for the insane, who are public officers of the state represented by the Attorney General, having no personal interest in a suit to protect the beneficial rights of a patient in a trust fund held by the hospital held not liable to costs where an adverse judgment was rendered against them.—*General Board of State Hospitals for the Insane v. Robertson*, 79 S. E. 1064.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 238 (Ga.App.) Where, in an action against the principal and sureties on a bond, all defendants prosecuted one writ of error, the costs of a second and unnecessary writ, which was a mere duplicate, were taxable against the plaintiffs in error, though they prevailed in part.—*Blackburn v. Morel*, 79 S. E. 492.

COUNCIL

See Municipal Corporations, § 185.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Bridges, § 7; Constitutional Law, § 9; Evidence, § 441; Highways; Mandamus, § 111; Taxation, §§ 730, 742; Trial, §§ 252, 253.

II. GOVERNMENT AND OFFICERS.

(A) Organisation and Powers of Government in General.

§ 21½ (N.C.) Counties have only such powers and capacities as have been conferred upon them by law.—Board of Com'rs of Vance County v. Town of Henderson, 79 S. E. 442.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(C) County Expenses and Charges and Statutory Liabilities.

§ 132 (N.C.) Revisal 1905, § 3152, imposing on counties expenses of post mortem examinations in homicide cases, *held* a valid exercise of the state's police power.—Withers v. Board of Com'rs of Columbus County, 79 S. E. 615.

§ 139 (N.C.) Expense of chemical analysis of stomach of a person believed to have been poisoned *held* a necessary county expense, within Const. art. 7, § 7, and hence the judge of the superior court could order its payment by the county, especially in view of Revisal 1905, § 3152.—Withers v. Board of Com'rs of Columbus County, 79 S. E. 615.

An order in a homicide case, requiring the county to pay expense of a chemical analysis of deceased's stomach, *held* not void because the Board of Commissioners were not parties to the action, and were not given notice before the order was made.—*Id.*

V. CLAIMS AGAINST COUNTY.

§ 205 (Va.) While under Code 1904, §§ 838, 843, and 844, the manner of suing a county is by "appeal" from the action of the board of supervisors upon presentation of the claim, the determination of the board is not an adjudication of the case, and the court to which the "appeal" is taken is not an appellate court in the sense that a plea of offset cannot be filed therein.—Luck Const. Co. v. Russell County, 79 S. E. 393.

§ 206 (Va.) The allowance of a claim against a county by the board of supervisors is not an adjudication of the claim, and does not estop the county from setting up a defense to the claim when subsequently sued upon it.—Luck Const. Co. v. Russell County, 79 S. E. 393.

COURSES AND DISTANCES.

See Boundaries, § 3.

COURTS.

See Appeal and Error, §§ 456, 671, 1003, 1004; Appearance; Bankruptcy, § 428; Commerce, § 8; Constitutional Law, § 70; Contempt; Criminal Law, §§ 88-101, 1014; Dismissal and Nonsuit, § 58; Divorce, § 79; Exceptions, Bill of, § 43; Justices of the Peace; Partition, § 113; Prohibition; States, § 165; Venue, § 22.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 89 (Ga.) Decisions which have stood for a long time will not be overruled.—Echols v. Green, 79 S. E. 557.

§ 90 (Ga.) Where, under Civ. Code 1910, § 6207, decisions were concurred in by the entire bench, concurrence of all the judges is necessary to reverse them.—Southern Bell Telephone & Telegraph Co. v. Glawson, 79 S. E. 136.

§ 97 (N.C.) In construing a federal statute the state Supreme Court is bound by any construction placed thereon by the Supreme Court of the United States.—Dooley v. Seaboard Air Line Ry. Co., 79 S. E. 970.

§ 102 (S.C.) Under Const. 1895, art. 5, §§ 2, 6, 12, the Supreme Court has power to decide a case, though there is a vacancy thereon, though its decision can be only an affirmance; there being but two judges for reversal.—McAulay v. McAulay, 79 S. E. 785.

§ 107 (S.C.) In construing a judicial opinion the language must always be read and considered in the light of the facts in the case under consideration.—City of Anderson v. Fant, 79 S. E. 641.

§ 116 (Va.) Process to commence a suit is part of the record for the purpose of amendment, and the court will look to the return thereon when necessary, not only to show the date of the return, but also the date of its execution.—House v. Universal Crusher Corporation, 79 S. E. 1049.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 163 (Ga.App.) Under the constitutional provision (Civ. Code 1910, § 6510) vesting exclusive jurisdiction in superior courts to try cases respecting title to land, any other court should hesitate to entertain jurisdiction to abate a nuisance, where the only substantial issue is one respecting title to realty.—Adair v. Spellman Seminary, 79 S. E. 589.

Cases where the title to land is only incidentally involved are not "cases respecting title to land," within the constitutional provision (Civ. Code 1910, § 6510).—*Id.*

§ 188 (Ga.App.) Under Civ. Code 1910, § 5521, a city court cannot entertain a plea attempting to set off a claim arising *ex delicto* against a suit arising *ex contractu*.—Drake v. Lewis, 79 S. E. 167.

§ 188 (Ga.App.) An equitable set-off is cognizable only in a court of equity, and hence city courts have no jurisdiction to allow equitable set-offs.—McArthur v. Wilson, 79 S. E. 374.

§ 188 (Ga.App.) While a city court is without jurisdiction to afford a plaintiff affirmative equitable relief, it may entertain an equitable defense which will prevent plaintiff from recovering.—Birmingham Fertilizer Co. v. Dozier, 79 S. E. 927.

§ 189 (Ga.App.) In an action of trover in the city court of Nashville, an amendment changing the action to one seeking equitable relief is not permissible, since such court is without equitable jurisdiction.—Gaskins v. Gaskins, 79 S. E. 483.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) State Courts and United States Courts.

§ 489 (N.C.) In view of Act March 3, 1887, § 3, permitting actions in the state courts against receivers appointed by the federal court without obtaining the consent of the federal court, a provision in the decree confirming a sale by the receivers that the federal court re-

tains exclusive jurisdiction to enforce the liability of the grantees for debts incurred by the receivers, and which the purchasers assumed, does not deprive the state court of jurisdiction over an action for the negligence of the receivers' employes.—*Lassiter v. Norfolk Southern R. Co.*, 79 S. E. 284.

§ 489 (S.C.) As the common-law remedies are preserved by Interstate Commerce Act, § 22, the state courts have jurisdiction of an action by a shipper for damages suffered by an interstate carrier's refusal to carry goods at the rate approved by the Interstate Commerce Commission.—*Aldrich v. Southern Ry. Co.*, 79 S. E. 316.

COVENANTS.

See Deeds, § 45; Evidence, § 441; Landlord and Tenant, § 134; Logs and Logging, § 3; Railroads, § 72; Specific Performance, § 123; Telegraphs and Telephones, § 16; Vendor and Purchaser, § 197.

I. REQUISITES AND VALIDITY.

(A) Express Covenants.

§ 7 (N.C.) The grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed.—*Herring v. Wallace Lumber Co.*, 79 S. E. 876.

II. CONSTRUCTION AND OPERATION.

(A) Covenants in General.

§ 31 (Ga.App.) A "personal covenant" is one which has no relation to the land conveyed.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

(D) Covenants Running with the Land.

§ 57 (Ga.App.) To constitute a "covenant running with the land," the covenant must have a relation to the interest in the land conveyed, and the act to be done must concern such interest; but it is not necessary that privity of the estate should exist between the original grantor and a purchaser from the covenantee.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

§ 69 (Ga.App.) A grantee, by accepting a deed obligating it to construct a railroad and build a side track and warehouse, entered into a covenant to comply with such obligation, which covenant ran with the land, and became obligatory upon its assignee.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

IV. ACTIONS FOR BREACH.

§ 114 (Ga.App.) The petition in an action for breach of covenants in a deed *held* not demurrable on the ground that it set out covenants, conditions, and agreements different from those in the attached deed.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

§ 119 (Ga.App.) In a suit against a grantee and its assignee for breach of a covenant running with the land and requiring the location of a railroad station at a certain point, a deed executed by the grantee to its assignee subsequently to the filing of the suit *held* properly admitted in evidence, where, before the commencement of the suit, the assignee was in possession and control of the property.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

§ 134 (Ga.App.) Under conflicting evidence in an action for breach of a railroad company's covenant to construct a side track and erect a warehouse, the questions whether a spur track was a side track, and whether the placing of a box car near the spur track after the commencement of the suit was the construction of a warehouse within the covenant, *held* for the jury.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

§ 135 (Ga.App.) Under the evidence in an action for breach of a railroad company's covenant to construct a side track and erect a ware-

house at a certain point, an instruction on the liability of a defendant company, which had taken over the property pursuant to a contract of consolidation with the defendant covenantor, *held* not erroneous.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

CREDIBILITY.

See Witnesses, §§ 311, 330.

CREDIT.

See Corporations, § 484.

CREDITORS.

See Fraudulent Conveyances.

CREDITORS' SUIT.

See Appeal and Error, § 1178; Corporations, § 557.

CRIMINAL LAW.

See Arrest, § 63; Arson; Assault and Battery; Bail, § 75; Banks and Banking, §§ 61, 62; Bastards; Burglary; Constitutional Law, § 203; Contempt; Convicts; Disorderly House; Embezzlement; Extradition; False Pretenses; Forgery; Fornication; Fraud, § 68; Gaming, §§ 71, 75; Grand Jury; Incest; Indictment and Information; Intoxicating Liquors, § 132; Jury; Larceny; Licenses; Master and Servant, § 67; Municipal Corporations, §§ 592, 640, 642; Obstructing Justice; Perjury; Rape; Receiving Stolen Goods; Sales, § 484; Statutes, § 241; Trespass, §§ 76-88; Vagrancy; Weapons.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 13 (N.C.) The Constitution not having defined petty misdemeanors, it was competent for the Legislature to define the offenses which should be so classified, provided the punishment prescribed therefor was not that prescribed for felonies.—*State v. Hyman*, 79 S. E. 284.

§ 20 (Ga.App.) A criminal intent is an essential ingredient of a crime.—*Cosper v. State*, 79 S. E. 94.

§ 27 (N.C.) That the Legislature calls an offense a petty misdemeanor does not make it so, when the punishment prescribed makes it a felony.—*State v. Hyman*, 79 S. E. 284.

III. PARTIES TO OFFENSES.

§ 59 (Ga.App.) Where two or more parties, either with or without a common cause or quarrel, act with a common intent, and jointly commit an unlawful act, each is chargeable with criminal responsibility for the acts of all the others.—*Pope v. State*, 79 S. E. 909.

§ 67 (Ga.App.) A "principal in the second degree" is a person who is present, aiding and abetting the act to be done.—*Pope v. State*, 79 S. E. 909.

IV. JURISDICTION.

§ 88 (Ga.App.) A defendant, charged with violating Acts 1907, p. 121 (codified in Civ. Code 1910, §§ 1661, 1662; Pen. Code 1910, § 459), as to the sale of narcotic drugs, can be prosecuted in a city court having jurisdiction of misdemeanors, by accusation filed therein, as well as by indictment transferred thereto from the superior court.—*Cooper v. State*, 79 S. E. 908.

§ 90 (N.C.) Perjury, being punishable by imprisonment in the state's prison under Revisal 1905, § 3615, is a felony, and therefore not within the jurisdiction of the Edgecombe recorder's court, under Pub. Loc. Laws 1911, c. 472, giving it jurisdiction of offenses below the grade of felony, declared petty misdemeanors.—*State v. Hyman*, 79 S. E. 284.

§ 101 (W.Va.) That the clerk of the criminal court prematurely certified a murder case to the circuit court did not deprive the circuit court of jurisdiction, where Acts 1911, c. 12, § 2, abolishing such criminal court, had operated to effect such transfer and give the circuit court jurisdiction at the time of trial.—State v. Edwards, 79 S. E. 1005.

V. VENUE.

(B) Change of Venue.

§ 130 (Ga.) A petition for a change of venue held to be based solely upon the ground that an impartial jury could not be obtained in the county in which the crime was alleged to have been committed.—Coleman v. George, 79 S. E. 543.

VII. FORMER JEOPARDY.

§ 178 (Ga.App.) Until the jurors have been impeached and sworn, a case is not "submitted" to the jury, within Pen. Code 1910, § 982, authorizing the entry of a nolle prosequi at any time before submission.—Fortson v. State, 79 S. E. 746.

A nolle prosequi may be entered under Pen. Code, § 982, where the jurors have not been sworn, though they have been stricken and have taken their seats in the jury box.—Id.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 269 (Ga.App.) At common law a personal plea was necessary on arraignment in a criminal case, but under Pen. Code 1910, § 971, the plea of defendant may be made by his attorney, and where accused interposes no objection to such plea he is bound thereby.—Bearden v. State, 79 S. E. 79.

§ 274 (Ga.App.) A plea of guilty may be withdrawn as a matter of right before sentence, and after sentence on meritorious grounds in the discretion of the trial court.—Bearden v. State, 79 S. E. 79.

§ 278 (Ga.App.) All objections affecting the incompetency of a grand juror, other than such as disqualify him to serve in any case, must be taken by challenge, and not by plea in abatement.—Barlow v. State, 79 S. E. 93.

It is not good ground for plea in abatement to an indictment for murder that a member of the grand jury was a nephew of the deceased.—Id.

§ 281 (Va.) Where a plea in abatement is filed to an indictment, the commonwealth may demur or reply, but it cannot do both.—Mullins v. Commonwealth, 79 S. E. 324.

§ 382 (Va.) The commonwealth may demur or reply to a plea in abatement, but it cannot do both.—Mullins v. Commonwealth, 79 S. E. 324.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

§ 304 (Ga.App.) The Court of Appeals will take judicial notice that the Georgia Southern & Florida Railway Company is a corporation chartered under the laws of Georgia.—Trueheart v. State, 79 S. E. 755.

§ 308 (Ga.App.) The term "presumption of innocence" is not synonymous with that of "reasonable doubt"; the presumption referring to a substantive right in the nature of evidence, and the phrase "reasonable doubt" applying to the degree of proof necessary to produce mental conviction.—Butts v. State, 79 S. E. 87.

§ 308 (Ga.App.) Where an act is equally subject to two constructions, the one indicative of guilt, the other consistent with innocence, the latter must be adopted.—Johnson v. State, 79 S. E. 524.

§ 317 (N.C.) Failure of accused to testify in a criminal case should not be used against

him, and should not be considered to his prejudice.—State v. Smith, 79 S. E. 979.

§ 325 (Ga.App.) The presumption that every man knows the law will be subordinated to the presumption of innocence in the case of one prosecuted for an offense growing out of matters of civil contract, such as a trespass on land, and the question of intent and knowledge will be left to the consideration of the jury.—Hayes v. State, 79 S. E. 761.

§ 335 (Ga.App.) Where accused was charged with defrauding a certain corporation, and the offense was committed more than two years before the accusation, and it was alleged that it was unknown to the corporation until within the two years, the burden was on the state to show such fact.—Williams v. State, 79 S. E. 207.

Where, to relieve an accusation from the bar of limitations, an exception to the statute is alleged, the burden is on the state to prove it.—Id.

(C) Other Offenses, and Character of Accused.

§ 369 (Ga.App.) Testimony of the justice of the peace, who issued the warrant upon which an accusation was based, that he had information that accused had been convicted before, was inadmissible as evidence of another offense.—Cooper v. State, 79 S. E. 908.

§ 376 (Ga.App.) Testimony of the justice of the peace, who issued the warrant upon which an accusation was based, that he had information that accused had been convicted before, was improperly admitted, since it put the character of accused in issue.—Cooper v. State, 79 S. E. 908.

(D) Materiality and Competency in General.

§ 381 (Ga.App.) Evidence of good character may of itself be sufficient to create a reasonable doubt and produce an acquittal.—Taylor v. State, 79 S. E. 924.

Proof of good character may of itself annihilate a plain case of guilt by discrediting and impeaching the testimony upon which the conclusion of guilt is necessarily based.—Id.

§ 393 (Ga.App.) In a prosecution for keeping whisky for illegal sale in violation of a municipal ordinance, evidence that defendant's valise contained whisky was properly admitted, where he voluntarily disclosed the contents of the valise.—Weatherington v. State, 79 S. E. 240.

(E) Best and Secondary and Demonstrative Evidence.

§ 400 (Ga.App.) Parol evidence of the contents of a plea in a civil case, and of the judgment rendered therein, was improperly admitted, where it did not appear that the records had been lost or destroyed, or were otherwise inaccessible.—Duke v. State, 79 S. E. 861.

(F) Admissions, Declarations, and Hearsay.

§§ 419, 420 (Ga.App.) Testimony of the justice of the peace, who issued the warrant upon which an accusation was based, that he had information that accused had been convicted before, was improperly admitted, since it was hearsay.—Cooper v. State, 79 S. E. 908.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 422 (Ga.) On a joint trial of a husband and wife for murder, the wife's statement, not under oath, that she killed deceased could not be taken as evidence in favor of her husband.—Lynn v. State, 79 S. E. 29.

§ 422 (N.C.) One of two defendants jointly on trial for murder cannot object that declarations of his codefendant were made while in custody and under duress.—State v. Cobb, 79 S. E. 419.

§ 424 (S.C.) On the trial of a man and a woman for fornication, the woman's admissions to the deputy sheriff when arrested could not be considered as evidence against the man.—*State v. Wade*, 79 S. E. 106.

§ 427 (Ga.) A conspiracy between two defendants to commit the murder charged may be shown by circumstantial evidence, as well as by direct testimony.—*Lynn v. State*, 79 S. E. 29.

Where, in the joint trial of two persons for murder, the state relied on circumstantial evidence and the existence of a conspiracy, a letter admitted to have been written jointly by the defendants to the deceased *held* admissible, as tending to show a conspiracy between them.—*Id.*

(I) Opinion Evidence.

§ 448 (Ga.App.) In a prosecution for violation of Pen. Code 1910, § 715, a witness' testimony merely that defendant "took an affidavit" should have been excluded as opinionative.—*Johnson v. State*, 79 S. E. 524.

§ 493 (Ga.App.) Testimony of a deputy sheriff that he saw defendants playing and betting for money *held* sufficient to sustain a conviction, where the witness was not cross-examined, as against an objection that it was a mere conclusion of the witness.—*Curry v. State*, 79 S. E. 771.

(K) Confessions.

§ 528 (Ga.App.) Under Pen. Code 1910, § 1037, providing that the confession of one joint offender made after the enterprise is ended is admissible only against himself, it was error to admit in evidence the pleas of guilty of defendants jointly indicted with accused on trial for assault and battery.—*Gray v. State*, 79 S. E. 223.

§ 535 (Ga.App.) To authorize a conviction of arson, the corpus delicti must be established, independently of the confession of the accused.—*Sims v. State*, 79 S. E. 1133.

(M) Weight and Sufficiency.

§ 552 (Ga.App.) To warrant conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but inconsistent with every other reasonable hypothesis.—*Flannigan v. State*, 79 S. E. 745.

§ 552 (Ga.App.) Circumstantial evidence may support a conviction.—*Douglas v. State*, 79 S. E. 1134.

§ 552 (S.C.) Where the circumstantial evidence was not inconsistent with accused's innocence, it does not warrant a conviction, as they must exclude every other reasonable hypothesis except that of guilt.—*State v. Wade*, 79 S. E. 106.

§ 553 (Ga.App.) The jury may believe the testimony of a single witness, though it is contradicted by the testimony of several witnesses, and though testimony is introduced sufficient to impeach him, if believed.—*Cook v. State*, 79 S. E. 87.

§ 561 (Ga.App.) The presumption of innocence is affirmative proof in behalf of one accused of crime, and places on the prosecution the burden of rebutting it by proof of guilt beyond any reasonable doubt.—*Butts v. State*, 79 S. E. 87.

§ 562 (Ga.App.) A bare suspicion of guilt is not sufficient to support a conviction.—*Williams v. State*, 79 S. E. 763.

§ 572 (Ga.App.) To establish an alibi, the evidence must exclude the possibility of defendant's presence but need not establish the impossibility of his presence beyond a reasonable doubt.—*Evans v. State*, 79 S. E. 916.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 594 (Ga.App.) Where the showing for a continuance in a criminal case was in all respects regular, and the testimony of the absent

witness was vitally material to the defense, refusal to grant a continuance was error.—*Morgan v. State*, 79 S. E. 247.

§ 594 (Ga.App.) A motion for a continuance for an absent witness for defendant should not be overruled, though there be other witnesses on the same issue, where testimony of the absent witness is vitally important to the disproof of defendant's guilt, and due diligence is shown.—*Britt v. State*, 79 S. E. 859.

§ 594 (N.C.) Refusal of a continuance for absence of a witness who was a fugitive from justice, by whom accused expected to prove that he was under the influence of cocaine at the time of the homicide, was not error, where he claimed that he could prove the fact by other witnesses, whom he did not call.—*State v. Daniels*, 79 S. E. 953.

§ 603 (Ga.) A motion for continuance for an absent witness was properly denied, there being no showing that he resided in the county in which the case was pending, or even in the state.—*Allen v. State*, 79 S. E. 29.

XII. TRIAL.

(A) Preliminary Proceedings.

§ 622 (S.C.) The nature of the offense does not prevent a severance in the trial of the parties to a single act of fornication.—*State v. Wade*, 79 S. E. 106.

(B) Course and Conduct of Trial in General.

§ 633 (N.C.) The mode of conducting the trial is in the discretion of the trial judge.—*State v. Cobb*, 79 S. E. 419.

§ 636 (Ga.App.) An accused has a right to be present in person and to be represented by his attorney during every stage of his trial from arraignment to verdict.—*Miller v. State*, 79 S. E. 252.

§ 641 (Ga.) Refusal to permit counsel, appointed to represent accused on a trial for murder, more than ten minutes to confer with him before entering upon the trial *held* violative of the constitutional guaranty of "benefit of counsel" (Const. art. 1, § 1, par. 5 [Civ. Code 1910, § 6361]).—*Reliford v. State*, 79 S. E. 1128.

§ 655 (Ga.App.) A trial judge's intimation of an opinion on the existence of a material fact, when made in a question propounded by him, is ground for reversal, under Pen. Code 1910, § 1058, and Civ. Code 1910, § 4863.—*Cox v. State*, 79 S. E. 909.

§ 656 (Ga.App.) The presiding judge may properly question a witness as to a transaction under investigation in a criminal case, but for him to intimate an opinion by such questions is repugnant to Pen. Code 1910, § 1058, as a direct statement of opinion.—*Murphy v. State*, 79 S. E. 228.

(C) Reception of Evidence.

§ 665 (Ga.App.) The manner of the enforcement of a right accorded by Pen. Code 1910, § 1043, to either party to require the sequestration of witnesses rests largely within the trial court's discretion.—*Hudgins v. State*, 79 S. E. 367.

In enforcing the right accorded by Pen. Code 1910, § 1043, to either party to require sequestration of witnesses, it was not error to permit the prosecutor to remain in the courtroom throughout the trial.—*Id.*

§ 673 (N.C.) While the declarations of two defendants jointly on trial for murder were admissible only as against the party making them, it was not error to admit them where the jury were instructed that they were incompetent as to the other defendant.—*State v. Cobb*, 79 S. E. 419.

§ 683 (Ga.App.) It is error to refuse to permit accused to make a supplemental statement strictly in rebuttal of an alleged confession not shown upon the state's case in chief but re-

served and introduced as new matter after accused had made his statement.—*Timmons v. State*, 79 S. E. 216.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 695½ [New, vol. 17 Key-No. Series] (Ga.) Failure of the court to rule upon an objection to the evidence is equivalent to overruling the objection.—*Lynn v. State*, 79 S. E. 29.

(E) Arguments and Conduct of Counsel.

§ 723 (Ga.App.) Where the language of the solicitor general in his argument was highly inflammable, and calculated to prejudice the jury against defendant, and not warranted by the evidence, the court should have declared a mistrial, or admonished the jury to disregard such language.—*Manning v. State*, 79 S. E. 905.

§ 730 (N.C.) The remark of the judge that defendant could deny it in reply to the unsound argument of defendant's counsel that in analogy to Revisal 1905, § 1631, a conversation between defendant and one, with whose murder he was charged, was incompetent, and no one could deny the truth of witness' statement, was not improper.—*State v. Shelton*, 79 S. E. 883.

(F) Province of Court and Jury in General.

§ 738 (Ga.App.) The question of intent rests ultimately with the jury.—*Cosper v. State*, 79 S. E. 94.

§ 762 (Ga.) An instruction that the fact that the woman alleged to have been raped made complaints is evidence, but the particulars of the complaint cannot be shown, is not an expression of opinion on the facts.—*Allen v. State*, 79 S. E. 20.

§ 762 (Ga.App.) Where the evidence shows that accused was drunk when he committed the crime, an instruction that voluntary drunkenness was no excuse is not objectionable as an expression of opinion.—*Brown v. State*, 79 S. E. 177.

§ 762 (Ga.App.) In a prosecution for voluntary manslaughter by the unlawful administering of morphine, an instruction that the offense was complete if accused intended to administer the morphine and death resulted was not objectionable as an expression of opinion of accused's guilt.—*Silver v. State*, 79 S. E. 919.

§ 763, 764 (Ga.) An instruction that the testimony of a detective or person interested or prejudiced should be scanned with care was properly refused; the weight of testimony and credibility of witnesses being exclusively for the jury.—*Lynn v. State*, 79 S. E. 29.

§ 763, 764 (Ga.App.) In a prosecution for voluntary manslaughter by the unlawful administering of morphine, an instruction that the offense was complete if accused intended to administer the morphine and death resulted was not objectionable as invading the province of the jury.—*Silver v. State*, 79 S. E. 919.

§ 763, 764 (N.C.) Part of a charge, considered with what preceded and followed, *held* not a reference to the testimony of defendant's parents but a proper warning of the jury against being influenced by sympathy for either side.—*State v. Fogleman*, 79 S. E. 879.

§ 763, 764 (S.C.) Where it was undisputed that defendant killed deceased, and also that the killing was either in self-defense or murder, a charge that the law of self-defense arises out of necessity, and "right there is the pivotal point in the case," was not erroneous as a charge upon the facts.—*State v. Spears*, 79 S. E. 315.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 775 (Ga.App.) An instruction requiring defendant to establish the defense of alibi to the

exclusion of a reasonable doubt *held* erroneous.—*Evans v. State*, 79 S. E. 916.

§ 778 (S.C.) A charge in a prosecution for homicide that, if evidence showed beyond a reasonable doubt that defendant killed deceased, then the burden shifted to defendant to explain the killing, *held* not erroneous under the facts.—*State v. Spears*, 79 S. E. 315.

§ 779 (Ga.) That no conspiracy was charged in a joint indictment of two defendants for murder did not make it error to give a correct instruction on conspiracy, where there was evidence to authorize such charge.—*Lynn v. State*, 79 S. E. 29.

§ 781 (Ga.) Evidence that accused stated, just after the shooting, that he had got one man "falling on his knees now," *held* to authorize an instruction as to the sufficiency of confessions to warrant a conviction.—*Webb v. State*, 79 S. E. 1126.

§ 782 (Ga.App.) An instruction that the object of legal investigation is not to ascertain the truth to an absolute certainty, which is not within the range of legal investigation, is not erroneous.—*Flannigan v. State*, 79 S. E. 745.

§ 782 (Ga.App.) It was error to instruct that evidence touching the good character of accused could warrant an acquittal only in connection with other evidence.—*Taylor v. State*, 79 S. E. 924.

§ 782 (N.C.) Under Pub. Laws 1913, c. 44, making possession of more than one gallon of spirituous liquors *prima facie* evidence of a violation thereof, the jury is not required to convict on such evidence, nor does the statute change the burden of proof, and it was therefore error to charge that, possession having been shown, it was accused's duty to show by the greater weight of the evidence that he did not have the liquor for purposes of sale.—*State v. Wilkerson*, 79 S. E. 888.

§ 784 (Ga.App.) Where the guilt of defendant is wholly dependent on circumstantial evidence, the jury should be instructed that, if the proved facts are consistent with innocence, defendant is entitled to an acquittal.—*Allen v. State*, 79 S. E. 769.

§ 784 (Ga.App.) Where the guilt of accused rests entirely upon circumstantial evidence, failure to charge on the law relating to such character of evidence is erroneous.—*Kincaid v. State*, 79 S. E. 770.

§ 784 (Ga.App.) A charge containing the interrogation, "Is there any other reasonable hypothesis or explanation of the existence of all the facts that is consistent with the innocence of the accused?" was not erroneous as excluding the possibility that if some of the circumstances relied on by the state were untrue, an acquittal might follow.—*Douglas v. State*, 79 S. E. 1134.

§ 785 (Ga.) An instruction on impeachment in a criminal case should embrace all the methods of impeachment so far as authorized by the evidence.—*Webb v. State*, 79 S. E. 1126.

§ 785 (N.C.) A charge as to the duty of the jury in considering the testimony of defendant's parents, relative to the question of bias and weight to be given their testimony, *held* proper.—*State v. Fogleman*, 79 S. E. 879.

§ 786 (Ga.App.) A charge in the language of the statute in reference to accused's statement at the trial, that the jury might believe the statement in preference to the sworn testimony "provided you believe it to be true," was not objectionable on account of the use of the quoted words.—*Smith v. State*, 79 S. E. 764.

§ 786 (Ga.App.) A charge that the prisoner's statement under oath should have such weight and effect as the jury sees fit to give it, and the jury may believe it in preference to the sworn testimony in the case, was not erroneous.—*Douglas v. State*, 79 S. E. 1134.

§ 786 (N.C.) A charge as to the duty of scrutinizing the testimony of defendant and the weight to be given his testimony *held correct*.—*State v. Fogleman*, 79 S. E. 879.

§ 809 (Ga.App.) An instruction that, when the jury "have reached a conviction under the evidence" and the law, they must write it in their verdict, and the use of the word "conviction," taken in connection with the context, could not have misled the jury to believe that the court had reference to the conviction of accused, rather than to the conviction in their own minds.—*Flannigan v. State*, 79 S. E. 745.

§ 814 (Ga.App.) Where it was not disputed that the crime, if committed, was committed within two years, failure to instruct that, to sustain a conviction, the crime must have been committed within the limitation period, was not error.—*Cook v. State*, 79 S. E. 87.

§ 814 (Ga.App.) In a prosecution for the sale of narcotic drugs, in violation of Acts 1907, p. 121, as codified in Civ. Code 1910, §§ 1651, 1652, and Pen. Code 1910, § 459, it was error to instruct the jury to find defendant guilty if he sold the drugs to the person named in the accusation or to any one else" within the last two years.—*Cooper v. State*, 79 S. E. 908.

§ 814 (Ga.App.) Where there was no evidence that accused confessed, the judge was not required to instruct upon the subject of admissions and confessions.—*Cox v. State*, 79 S. E. 909.

§ 822 (Ga.App.) In a prosecution for uttering a forged certificate of stock with intent to defraud a bank, an instruction to convict if the paper was uttered "with intent to defraud any person" was not erroneous, where the charge as a whole predicated conviction on an intent to defraud the bank.—*Smith v. State*, 79 S. E. 764.

§ 823 (Ga.) An instruction which stated the law of accidental killing in the language of Pen. Code 1910, § 40, and told the jury not to find defendant guilty if they were satisfied from the evidence that the killing was accidental, *held* not erroneous, as destroying the effect of a prior charge on reasonable doubt, when followed by an instruction to acquit defendant if not satisfied of his guilt beyond a reasonable doubt.—*Jones v. State*, 79 S. E. 114.

§ 823 (Ga.App.) An instruction, that when the guilt of accused is made to appear "to the satisfaction of the jury" they may convict regardless of evidence of good character, was not erroneous in excluding the reasonable doubt doctrine, where such doctrine was fully presented in other instructions.—*Smith v. State*, 79 S. E. 764.

§ 823 (N.C.) Error in charging that burden was on accused to show that possession of liquor was not for purpose of sale *held* not cured by a further instruction directing an acquittal if the jury had a reasonable doubt.—*State v. Wilkerson*, 79 S. E. 888.

(H) Requests for Instructions.

§ 824 (Ga.App.) Failure to define "felony," in an instruction on the right to kill to prevent the commission of a felony, is not error, in the absence of a request for such definition.—*Faison v. State*, 79 S. E. 39.

§ 824 (Ga.App.) An instruction that the guilt of accused must be proved beyond a reasonable doubt, and that the testimony to remove the presumption of innocence must be such as to remove any reasonable doubt, is sufficient, in the absence of request that the term "reasonable doubt" be defined.—*Cook v. State*, 79 S. E. 87.

§ 824 (Ga.App.) The court should have instructed a verdict of not guilty, if the intent to steal was formed after the killing of the cow taken, where such instruction, though not requested, was warranted by the evidence.—*Hunter v. State*, 79 S. E. 752.

§ 824 (Ga.App.) Where, in a prosecution for assault with intent to murder, one defense is

that defendant was attempting to prevent an illegal arrest, but there is no evidence thereof outside defendant's statement, the court need not, in the absence of request, instruct on the law relative to resistance of illegal arrest.—*Taylor v. State*, 79 S. E. 924.

§ 825 (Ga.App.) In the absence of a request for more definite instructions, an instruction that the grand jury had returned an indictment charging defendant with murder, and that defendant had pleaded not guilty, sufficiently presented the issue.—*Faison v. State*, 79 S. E. 39.

§ 825 (Ga.App.) Where the instructions were correct in the abstract and applicable to the evidence, if any additional instructions were desired, they should have been requested.—*Hollis v. State*, 79 S. E. 85.

§ 829 (Ga.App.) Where the judge submitted the contentions of accused, embraced in a written request, in his instructions given, the denial of such request was not error.—*Cameron v. State*, 79 S. E. 745.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

§ 847 (S.C.) A defendant, who through his attorneys pleaded guilty during trial and made no objection to the charge submitting his plea and statement to the jury to determine whether they would recommend mercy, thereby waived his right to object that he did not enter the plea in person, that his statement was not a confession, and that the court failed to advise him of the consequences of his plea.—*State v. Vaughn*, 79 S. E. 312.

(J) Custody, Conduct, and Deliberations of Jury.

§ 850 (Ga.App.) A deputy sheriff, who is also the prosecutor, is disqualified to have charge of the jury pending the trial.—*Cooper v. State*, 79 S. E. 908.

§ 864 (Ga.App.) Where the trial judge, upon going to the jury room with the sheriff to inquire if the jury desired to be put to bed, was asked by a juror as to what he had charged with reference to the jury's right to recommend punishment as for a misdemeanor, and the judge stated the substance of such charge, this did not amount to a recharge, but was equivalent to an instruction merely on the form of verdict returnable.—*Miller v. State*, 79 S. E. 232.

§ 865 (Ga.App.) Where a jury after deliberating 18 to 20 hours requested the sheriff to ask the court to recharge them or order a mistrial, his statement that the judge was conscientiously opposed to mistrial, and that it would be embarrassing to ask him, as a result of which the jury shortly thereafter returned a verdict of guilty, amounted to coercion.—*Renfroe v. State*, 79 S. E. 758.

(K) Verdict.

§ 877 (S.C.) On the trial of a man and a woman for fornication with each other, one may be acquitted and the other convicted.—*State v. Wade*, 79 S. E. 106.

§ 878 (Ga.App.) Where the evidence demanded a conviction on both counts of the indictment, a general verdict of guilty was proper.—*Cronin v. State*, 79 S. E. 747.

(L) Waiver and Correction of Irregularities and Errors.

§ 895 (S.C.) A defendant in a criminal case may waive a constitutional as well as a statutory provision intended for his benefit.—*State v. Vaughn*, 79 S. E. 312.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 909 (Ga.App.) One who has filed a plea of guilty cannot move for a new trial.—*Bearden v. State*, 79 S. E. 79.

§ 914 (Ga.App.) That the affidavit on which an accusation was based was not properly at-

tested by the magistrate is matter for demurrer or motion to quash, and comes too late when raised for the first time in a motion for a new trial.—*Cooper v. State*, 79 S. E. 764.

§ 918 (Ga.App.) Failure of the court to require strict sequestration of witnesses is not ground for a new trial, where it is not manifest that the trial judge abused his discretion.—*Hudgins v. State*, 79 S. E. 367.

§ 918 (Ga.App.) Refusal of the trial judge to allow counsel additional time, under superior court rule 5 (Civ. Code 1910, § 6264), to argue a misdemeanor case will not be cause for new trial, when the evidence demands a conviction.—*Quinlan v. State*, 79 S. E. 768.

§ 918 (Ga.App.) Under Pen. Code 1910, § 1058, an intimation of an opinion by the court unfavorable to the accused in the examination of witnesses is ground for a new trial.—*Nobles v. State*, 79 S. E. 861.

§ 921 (Ga.App.) In a prosecution for selling "near beer," a substitute for intoxicating liquors, without a license, it was not ground for new trial that the court admitted in evidence copies of a letter from the Governor to the attorney assisting in the prosecution, designating him as special agent to collect the unpaid taxes due by "near beer" dealers, and a letter from the attorney to accused demanding payment of the tax.—*Quinlan v. State*, 79 S. E. 768.

§ 922 (Ga.App.) The failure of the court to charge that the defendant enters upon his trial with a presumption of innocence, which remains with him in the nature of evidence until rebutted to the exclusion of reasonable doubt, requires a new trial.—*Butts v. State*, 79 S. E. 87.

§ 922 (Ga.App.) The evidence as to alibi not being such as to exclude the possibility of defendant's presence, and there being no request for an instruction, the failure to charge on the defense of alibi was not ground for a new trial.—*Gadlin v. State*, 79 S. E. 751.

§ 922 (Ga.App.) An instruction that the jury might recommend defendant to mercy, although they found him guilty of a felony, held not to require a new trial, especially where the jury were told that, if they returned a verdict of guilty of voluntary manslaughter with a recommendation of mercy, such recommendation could not reduce the crime from a felony to a misdemeanor.—*Odum v. State*, 79 S. E. 558.

§ 923 (Ga.App.) The relationship within the prohibited degrees of a juror to defendant, if unknown to the latter until after verdict, is not ground for new trial.—*Dawson v. State*, 79 S. E. 745.

§ 925½ (Ga.App.) The refusal of the trial court on request to conceal from the jury, by pasting over it, a verdict of a previous jury entered on the bill of indictment against one jointly indicted with accused is not ground for new trial, being a matter within the discretion of the trial judge.—*Kincaid v. State*, 79 S. E. 770.

§ 929 (Ga.App.) Where the jury in a criminal case requested the sheriff to ask the court either to recharge them or order a mistrial, the act of the sheriff in stating that the judge was conscientiously opposed to mistrials was ground for a new trial, where shortly after the making of such statement to the sheriff the jury returned a verdict of guilty.—*Renfroe v. State*, 79 S. E. 758.

§ 935 (Ga.App.) Where the evidence, though conflicting, authorizes a verdict of guilty, a new trial will not be granted on the ground that the verdict is contrary to the evidence.—*Hudgins v. State*, 79 S. E. 367.

§ 938 (Ga.App.) Where defendant was convicted on the testimony of one witness that the offense was committed in the presence of a third person, a motion for new trial, with affidavits that such third person could not have been procured at the trial, but could be pro-

cured on a new trial, and would testify that the offense was not committed as claimed, should have been granted.—*Meeks v. State*, 79 S. E. 744.

§ 942 (Ga.App.) Where newly discovered evidence was merely impeaching, there was no abuse of discretion in overruling such ground of motion for new trial.—*Brown v. State*, 79 S. E. 177.

§ 942 (Ga.App.) Newly discovered evidence, merely impeaching in character, is not ground for new trial.—*Williams v. State*, 79 S. E. 767.

§ 945 (Ga.) A new trial was properly denied, where the alleged newly discovered evidence was not such as would be likely to produce a different result.—*Jones v. State*, 79 S. E. 114.

§ 945 (Ga.App.) Newly discovered evidence is not ground for a new trial where it does not plainly appear that it will probably change the result.—*Taylor v. State*, 79 S. E. 862.

§ 955 (Ga.App.) A party moving for a new trial need not make up a brief of evidence from the official stenographer's report.—*Bugg v. State*, 79 S. E. 748.

Where counsel for defendant moving for new trial presents brief of evidence, it is for the judge to approve or reject it, and it is immaterial whether counsel for opposite party agrees to the brief or approves it.—*Id.*

On presentation of an incorrect brief of evidence, the trial judge may require it to be corrected, and on failure so to do the judge may refuse to approve it after calling attention to the corrections necessary.—*Id.*

The trial judge may require the notes of the official stenographer to be written out at the public expense, to be compared with the brief of evidence presented on motion for new trial, but cannot require accused to make up a brief from such report.—*Id.*

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 982 (Ga.) A trial judge cannot indefinitely suspend the imposition of the punishment prescribed by law upon a defendant who has been convicted or has pleaded guilty.—*Hancock v. Rogers*, 79 S. E. 558.

That the city judge erroneously suspended the sentence prescribed by law did not deprive him of authority to subsequently impose the sentence.—*Id.*

§ 982 (N.C.) A court has power to suspend sentence upon one convicted or pleading guilty to a crime, upon reasonable terms and conditions imposed at the time the sentence is suspended.—*State v. Everett*, 79 S. E. 274.

Where a defendant is present in court when an order suspending sentence upon certain conditions is made, and does not object thereto, his assent to the order will be implied.—*Id.*

The payment of the costs by one against whom sentence had been suspended on condition that he pay the costs and satisfy the court of his good behavior is not such performance of the conditions as to deprive the court of power thereafter to impose sentence upon ascertaining that the defendant is again violating the law.—*Id.*

A condition in an order suspending sentence that the defendant appear at each term and show that he had demeaned himself as a law abiding citizen does not render the judgment uncertain as an alternative judgment.—*Id.*

Where sentence had been suspended during good behavior, and was thereafter imposed by the court, after a hearing at which testimony on both sides was heard as to subsequent violations of the law by the defendant, the sentence was for the original offense and not for the subsequent conduct.—*Id.*

The suspension of sentence upon one who had pleaded guilty to unlawfully selling intoxi-

cating liquors, upon condition that he pay the costs and show good behavior at each term of the court for two years, was not an abuse of the court's discretion as to the terms upon which sentence might be suspended.—*Id.*

§ 989 (Ga.) Where the city court judge erroneously suspended the sentence prescribed by law, it was not a prerequisite to a subsequent imposition of the sentence by him that he call upon the defendant to show cause why the sentence should not be imposed.—*Hancock v. Rogers*, 79 S. E. 558.

§ 1001 (Ga.) The judge of a city court cannot suspend execution of a sentence imposed by him, except as incidental to a review of the judgment.—*Hancock v. Rogers*, 79 S. E. 558.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1014 (Va.) The Court of Appeals is without jurisdiction to entertain an amended petition for a writ of error, where the original petition was denied on the ground that the judgment was clearly right, since Code 1904, § 3406, provides that the Court of Appeals shall not entertain another petition for a writ of error after rejection on that ground.—*Morgan v. Commonwealth*, 79 S. E. 388.

§ 1023 (Ga.) Act Aug. 21, 1911 (Laws 1911, p. 74), relating to change of venue in criminal cases, and providing for a direct bill of exceptions, which "shall operate as a supersedeas," is inapplicable, in case of the denial of a petition for a change of venue, based solely on the ground that an impartial jury cannot be obtained in the county; and hence the denial of a motion on such ground was a proper matter of exceptions pendente lite, and not of a direct bill of exceptions to the Supreme Court.—*Coleman v. George*, 79 S. E. 543.

§ 1023 (Ga.App.) An order overruling a demurrer to an indictment is reviewable under Civ. Code 1910, § 6138, authorizing a bill of exceptions either to a final judgment or to a judgment which would have been final if rendered as claimed by the excepting party.—*Leary v. State*, 79 S. E. 584.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1030 (Ga.App.) A reviewing court will not pass on the constitutionality of a statute unless the question was raised in the court below.—*Cosper v. State*, 79 S. E. 94.

§ 1038 (Ga.) Failure to instruct fully on impeachment in a criminal case is not reviewable, where no written request is made therefor.—*Webb v. State*, 79 S. E. 1126.

§ 1038 (N.C.) That complaint may be made on appeal of the trial judge having incorrectly stated a contention of defendant's counsel, counsel must, at the time, have called it to the court's attention.—*State v. Fogleman*, 79 S. E. 879.

§ 1058 (Ga.App.) To entitle accused to bring error from the overruling of a demurrer to the indictment, it is not essential that he except to the final judgment of conviction.—*Leary v. State*, 79 S. E. 584.

Where an exception is made to an interlocutory order which is neither final nor would have been final if it had been rendered as requested by accused, he must except to the final judgment of conviction before the order is reviewable.—*Id.*

§ 1059 (Ga.App.) A general exception, that a statute "is illegal and void and contains subject-matter not expressed in the caption of said act," is too indefinite to raise any question for review.—*Myrick v. State*, 79 S. E. 580, 756.

§ 1063 (Ga.App.) To entitle accused to bring error from the overruling of a demurrer to the indictment, it is not essential that he move for a new trial.—*Leary v. State*, 79 S. E. 584.

(D) Record and Proceedings Not in Record.

§ 1092 (Ga.App.) Since there is no statute authorizing the service of a bill of exceptions by mail, a writ of error in a criminal case will be dismissed, where the bill of exceptions is certified to as having been merely served by mail.—*Jackson v. State*, 79 S. E. 377.

Since the mere certification of counsel is not proper evidence of service of a bill of exceptions pursuant to Civ. Code 1910, § 6160, the writ of error in a criminal case will be dismissed where the only evidence of service of a bill of exceptions is a certificate of counsel.—*Id.*

§ 1092 (Ga.App.) Where no bill of exceptions is filed with the clerk of the trial court within 15 days from the certification of the judge, as required by Civ. Code 1910, § 6167, the writ of error must be dismissed.—*Haddon v. State*, 79 S. E. 583.

§ 1103 (Ga.App.) A document containing 34 typewritten pages, 11 of which contained evidence in extenso and narrative form, and 23 of which were made up of questions and answers transcribed from the reporter's notes, held insufficient as a brief of the evidence.—*Trueheart v. State*, 79 S. E. 755.

Where no sufficient brief of the evidence, as required by Civ. Code 1910, § 6093, was filed, matters raised in the motion for new trial and depending on the evidence could not be reviewed.—*Id.*

§ 1105 (Ga.App.) The recitals in the grounds of the amendment to the motion for a new trial, not being approved as true by the trial judge, cannot be considered.—*Williams v. State*, 79 S. E. 767.

§ 1120 (N.C.) Error, in a criminal case in receiving as evidence a complaint in a civil suit, would not be reviewed where its contents were not set out so as to show prejudice.—*State v. Smith*, 79 S. E. 979.

§ 1122 (Ga.App.) Where only fragments of the charge, in themselves abstractly correct, were presented for review by the record, the reviewing court could not determine that the instruction on mutual combat and the defense which could arise under Pen. Code 1910, § 73, in case of urgent danger, was so given as to confuse the jury and injure defendant.—*Faison v. State*, 79 S. E. 39.

§ 1122 (Ga.App.) An exception complaining that the judge erred in failing to charge as to insanity of accused at the time of the perjury, without alleging any reason why the failure to charge was error or how accused was prejudiced, held insufficient to present anything for review.—*Cox v. State*, 79 S. E. 909.

(E) Assignment of Errors and Briefs.

§ 1129 (Ga.App.) The validity of an assignment of error depends on verification by the trial judge.—*Vernon v. State*, 79 S. E. 85.

§ 1129 (Ga.App.) Objections to the form of a criminal accusation cannot be considered upon assignments of error presented as grounds of a motion for a new trial.—*Duke v. State*, 79 S. E. 861.

(G) Review.

§ 1134 (Ga.App.) Where a conviction must be reversed for a particular error, other errors assigned will not be considered, where they will probably not occur on another trial.—*Dunn v. State*, 79 S. E. 764.

§ 1134 (Ga.App.) Where the evidence demands a conviction, assignments of error as to the charge of the court will not be considered.—*Quinlan v. State*, 79 S. E. 763.

§ 1134 (N.C.) Where a court suspended sentence on condition that the defendant appear at each term for two years and show good behavior on his part, the question of the power of the court to suspend sentence indefinitely need not be considered.—*State v. Everett*, 79 S. E. 274.

§ 1144 (Ga.App.) The striking of a plea in abatement is not ground for a reversal, where it does not affirmatively appear that the plea was filed before arraignment.—*Barlow v. State*, 79 S. E. 93.

§ 1144 (Va.) Where, after demurrer to a plea in abatement had been sustained, the commonwealth offered to reply and over objection was permitted to do so, and accused joined in the replication which was tried to the court, it will be presumed that the demurrer was withdrawn or waived, though the record does not show it.—*Mullins v. Commonwealth*, 79 S. E. 324.

§ 1151 (Ga.App.) The Court of Appeals will not interfere with the judge's discretion in overruling a motion for a continuance because of an absent witness, where the state has made a countershowning as to such witness' testimony.—*Hester v. State*, 79 S. E. 746.

§ 1151 (N.C.) An order denying a continuance is not reviewable, unless there has been an abuse of discretion.—*State v. Daniels*, 79 S. E. 953.

§ 1152 (Ga.App.) A finding on a motion for a new trial that a juror complained of because of prejudice and the expression of an opinion before the trial, was competent will not be disturbed in the absence of a clear abuse of discretion.—*Taylor v. State*, 79 S. E. 862.

§ 1152 (N.C.) The mode of conducting the trial, being within the discretion of the trial judge, is not reviewable unless in case of abuse of discretion.—*State v. Cobb*, 79 S. E. 419.

§ 1152 (S.C.) Exceptions to the rejection or acceptance of jurors in the trial of a criminal case cannot be sustained where the defendant fails to show an abuse of the trial court's discretion in making such rulings.—*State v. Vaughn*, 79 S. E. 312.

§ 1153 (N.C.) The mode of the examination of witnesses is not reviewable except for very gross abuse of discretion.—*State v. Cobb*, 79 S. E. 419.

§ 1153 (W.Va.) Refusal of the trial court to admit character evidence at a certain stage of the trial was not ground for reversal, in the absence of an abuse of discretion to the prejudice of the complaining party.—*State v. Edwards*, 79 S. E. 1005.

§ 1156 (Ga.) The discretionary refusal of a new trial will not be disturbed on error, where the evidence authorized the verdict.—*Jones v. State*, 79 S. E. 114.

§ 1158 (Ga.App.) Where there was some evidence to support the findings of the recorder of a city in a prosecution for violation of an ordinance, the appellate court will not disturb the judgment of the superior court in refusing to sanction the petition for certiorari.—*Davis v. City of Atlanta*, 79 S. E. 747.

§ 1159 (Ga.App.) A conviction of burglary will not be set aside on appeal merely because the evidence is wholly circumstantial, where the facts proved are not only consistent with the hypothesis of guilt, but exclude every other reasonable hypothesis within the requirements of Pen. Code 1910, § 1010.—*Miller v. State*, 79 S. E. 232.

§ 1159 (Ga.App.) A conviction will not be reversed, as against the weight of the evidence, when there is sufficient to sustain it.—*Myrick v. State*, 79 S. E. 550, 756.

§ 1159 (Ga.App.) Where the evidence was conflicting as to whether accused, while justifiably shooting at another person, accidentally shot the person named in the indictment, or whether he shot recklessly into a crowd, and thus inflicted such injury, a verdict finding accused guilty of shooting at another will not be disturbed.—*Wilson v. State*, 79 S. E. 767.

§ 1160 (Ga.App.) Where the evidence authorized a conviction, and there is no complaint of

any error of law, a verdict approved by the trial judge will not be set aside.—*Smith v. State*, 79 S. E. 51.

§ 1160 (Ga.App.) Where there is some evidence to support the verdict, though not entirely satisfactory, the trial judge having approved the verdict, the same will not be disturbed on appeal.—*Ross v. State*, 79 S. E. 746.

§ 1160 (Ga.App.) The verdict of the jury, approved by the trial judge, will not be disturbed on appeal.—*Gadlin v. State*, 79 S. E. 751.

§ 1163 (Ga.App.) The right of defendant to make such statement as he may deem proper in defense, given by Pen. Code 1910, § 1036, cannot be abridged; but where the matter omitted therefrom by the rulings of the court was trivial, its omission cannot be presumed harmful to accused.—*Skinner v. State*, 79 S. E. 181.

§ 1166½ (Ga.App.) Questions asked of a state's witness by the trial judge, which tended to impress, unfavorably to accused, those circumstances indicating guilt, and to convey an impression that the court believed more could be proven against him if the witness could be induced to make the disclosure, held prejudicial.—*Nobles v. State*, 79 S. E. 861.

§ 1169 (Ga.) In a prosecution for murder, error in allowing the state to introduce evidence of specific acts of defendant tending to show his violent character was harmless, where the evidence was of such a weak nature that the jury could not well have believed that a threat was made by defendant, and the evidence of his guilt was conclusive.—*Lynn v. State*, 79 S. E. 29.

§ 1169 (Ga.App.) Error in admitting in evidence a certified copy of an application by accused to sell "near beer" was harmless where it was admitted that accused had engaged in such sale without a license.—*Quinlan v. State*, 79 S. E. 768.

§ 1169 (N.C.) In a prosecution for wife abandonment, accused was not prejudiced by evidence of the sheriff that he could not find him in his county when he attempted to serve the process; there being no dispute that defendant had actually abandoned his wife and left her without adequate support.—*State v. Smith*, 79 S. E. 979.

In a prosecution for wife abandonment, error in admitting a part of defendant's answer in a divorce suit instituted by the wife, but not tried, was not prejudicial.—*Id.*

§ 1170 (W.Va.) Any error in the exclusion of evidence held harmless, where it was subsequently admitted.—*State v. Edwards*, 79 S. E. 1005.

§ 1171 (Ga.App.) In a prosecution for voluntary manslaughter, by the unlawful administering of morphine, any error in permitting the solicitor general to read from medical books extracts relating to the properties of virburnum held harmless, where the evidence showed that death was caused by morphine, and there was no claim that it was caused or contributed to by virburnum.—*Silver v. State*, 79 S. E. 919.

§ 1172 (Ga.) An instruction as to circumstantial evidence, that the guilt of defendant must be proved to the exclusion of every other reasonable hypothesis, is harmless, even though no such evidence was involved.—*Smith v. State*, 79 S. E. 1127.

§ 1172 (Ga.App.) Failure to instruct that accused was not guilty of assault with intent to murder unless actuated by malice and intent to kill, if error, was harmless where he was convicted only of shooting at another.—*Beddingfield v. State*, 79 S. E. 581.

§ 1172 (N.C.) Complaint may not be made of the trial judge having stated one of the contentions of defendant's counsel; it not appearing that it was an incorrect statement or that it prejudiced defendant.—*State v. Fogleman*, 79 S. E. 879.

§ 1173 (Ga.) In the joint trial of two persons for murder, failure to charge as to the effect of an admission was not prejudicial to the defendant convicted, where such instruction, if given, could have applied only to the other defendant.—*Lynn v. State*, 79 S. E. 29.

§ 1174 (Ga.App.) That the trial judge, upon going to the jury room with the sheriff to inquire whether the jurors desired to be put to bed, stated, in reply to a question by a juror, that he had instructed that the jury could recommend that defendant be punished as for a misdemeanor, if error, was harmless, where the verdict of guilty was strongly supported by the evidence, though such verdict recommended that a misdemeanor sentence be imposed.—*Miller v. State*, 79 S. E. 232.

§ 1178 (Ga.App.) Assignments of error complaining of the erroneous admission of evidence of defendant's conviction of another offense, and of an instruction on impeachment, will be deemed abandoned, when not referred to in the brief or argument of defendant's counsel.—*Hudgins v. State*, 79 S. E. 367.

§ 1178 (N.C.) An alleged error not argued in the brief will be deemed waived as expressly provided by Supreme Court rule 34 (140 N. C. 666, 53 S. E. ix).—*State v. Smith*, 79 S. E. 979.

§ 1179 (Ga.App.) The Court of Appeals cannot disturb a superior court judge's refusal to set aside on certiorari a sentence imposed within statutory limits by a city court in a criminal case.—*Myrick v. State*, 79 S. E. 580, 756.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1205 (Ga.App.) A defendant, convicted of larceny in violation of Pen. Code 1910, § 175, cannot be sentenced, since such section prescribes no punishment.—*Jenkins v. State*, 79 S. E. 861.

§ 1206 (S.C.) Act Feb. 17, 1912 (27 St. at Large, p. 702), changing the manner of inflicting the death penalty from hanging to electrocution, is not unconstitutional as applied to one who committed a crime punishable by death prior to the enactment of that law.—*State v. Vaughn*, 79 S. E. 312.

§ 1208 (Ga.App.) The trial court's exercise of discretion in fixing the quantum of punishment to be imposed within the statutory limits cannot be disturbed on review.—*Beddingfield v. State*, 79 S. E. 581.

CROPS.

See Chattel Mortgages, §§ 48, 138, 278; Frauds, Statute of, § 111.

CROSS-BILL.

See Equity, § 196.

CROSS-EXAMINATION.

See Witnesses, §§ 268-287.

CROSSINGS.

See Railroads, §§ 301-350.

CRUELTY.

See Divorce, § 133.

CURTESY.

§ 9 (N.C.) Where a remainder to heirs was contingent on their being alive when the life estate should terminate, the husband of an heir who died before the life tenants could not claim as tenant by the curtesy, as the wife never had the seisin requisite to such a claim.—*Jones v. Whichard*, 79 S. E. 503.

CUSTODY.

See Carriers, § 76; Divorce, § 289; Execution, §§ 129, 155.

CUSTOMS AND USAGES.

See Carriers, § 86; Warehousemen, § 22.

§ 10 (Ga.App.) A buyer is bound by a universal and general custom applicable to the trade or business, unless the contract stipulates to the contrary, or he notifies the seller that he is buying without regard to the custom.—*Louisiana Red Cypress Co. v. George Gilmore & Co.*, 79 S. E. 379.

§ 15 (Ga.App.) A warehouse receipt, providing that cotton was held subject to presentation of the receipt only, the paying of expenses and advances, "acts of fire and Providence excepted," held subject to explanation so far as related to the quoted phrase, and to proof that by a recognized local custom, defendant undertook to insure all cotton in its warehouse.—*Rochelle Gin & Cotton Co. v. Fisher*, 79 S. E. 534.

§ 21 (Ga.App.) In an action for the balance of the price of shingles, evidence held sufficient to take to the jury the questions whether a certain custom as to counting shingles existed in the market where they were bought, whether the defendant knew of such custom, and whether the contract was made irrespective of the custom.—*Louisiana Red Cypress Co. v. George Gilmore & Co.*, 79 S. E. 379.

DAMAGES.

See Appeal and Error, §§ 1081, 1062, 1178; Assumpsit, Action of, § 8; Carriers, §§ 36, 105, 319; Contracts, § 324; Corporations, § 487; Death, §§ 86, 95; Drains, § 57; Eminent Domain, §§ 69-136, 206; Execution, § 199; Executors and Administrators, § 122; False Imprisonment, § 7; Husband and Wife, §§ 209, 334; Negligence, §§ 39, 101; Nuisance, § 72; Parent and Child, § 6; Railroads, § 72; Sales, §§ 370, 392; Waters and Water Courses, § 126.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 20 (Ga.App.) Where a petition sets forth an action ex delicto, plaintiffs are not restricted to the damages reasonably within the contemplation of the parties, but may recover all damages directly traceable to defendant's neglect.—*J. B. Carr & Co. v. Southern Ry. Co.*, 79 S. E. 41.

§ 53 (N.C.) In an action for injuries to a servant, mental suffering, consisting of worry concerning the welfare of his wife and child during the period when he was unable to work, is too remote to constitute a proper element of damage.—*Ferebee v. Norfolk Southern R. Co.*, 79 S. E. 685.

V. EXEMPLARY DAMAGES.

§ 91 (S.C.) If a tort is committed under such circumstances that a person of ordinary reason and prudence would have been conscious of it as such, punitive damages may be inflicted though there is no willful intent.—*Eberle v. Southern Ry. Co.*, 79 S. E. 793.

VI. MEASURE OF DAMAGES.

(A) Injuries to the Person.

§ 97 (Ga.App.) In estimating damages for personal injuries, the loss of ability to labor may be considered as pain and suffering.—*City of Rome v. Ford*, 79 S. E. 243.

§ 100 (N.C.) In an action for personal injuries resulting in diminished earning capacity, the measure of damages is not the difference between the probable earnings of the plaintiff before and after the injury, but the reasonable

resent value of the diminution in his earning capacity.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

II. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132 (S.C.) In an action for injuries to a railroad engineer, a verdict awarding plaintiff 40,000 *held* not excessive.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

§ 159 (W.Va.) A smaller amount of damages may be proven than that laid in the declaration.—*McLain v. West Virginia Automobile Co.*, 9 S. E. 731.

(B) Evidence.

§ 178 (Ga.App.) Where, in a personal injury case, it was alleged and proved that plaintiff was rendered unable to do his accustomed work and suffered great mental anguish and physical pain, plaintiff's testimony that the fact that he was unable to work and carry on his duties as before worried him was properly admitted.—*City of Rome v. Ford*, 79 S. E. 243.

(C) Proceedings for Assessment.

§ 208 (S.C.) In an action for injuries to an engineer by the alleged incompetency of his fireman, evidence *held* to warrant submission of plaintiff's right to recover punitive damages on the theory that defendant's foreman had recklessly disregarded plaintiff's right to the assistance of a competent fireman.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

§ 215 (W.Va.) In a suit under the civil damage act, authorizing recovery of damages from the sale of intoxicants, it is error to peremptorily charge that the jury "shall" or "should" find exemplary damages; such damages being wholly within the jury's discretion.—*Greer v. Arington*, 79 S. E. 720.

§ 216 (Ga.) Where, in an action against an employer for injuries to a boy, plaintiff testified that he lost about one-half of his hand, and could do little work with the remainder, and was confined to the house for more than a week, and could not work for two or three months, and that his injuries still caused him pain at night, it authorized an instruction on pain, past and future.—*Elk Cotton Mills v. Grant*, 79 S. E. 836.

§ 216 (Ga.App.) Where the petition in a personal injury action against a municipality claimed actual damages for loss of ability to labor and physician's bills, but there was proof only of mental anguish and physical pain, it was not error to instruct that there was no particular rule for determining the damages recoverable for the mental pain and suffering out that such damages were left to the enlightened consciences of intelligent jurors.—*City of Rome v. Ford*, 79 S. E. 243.

DEATH.

See Appeal and Error, §§ 1050, 1058; Constitutional Law, §§ 203, 249, 305, 309; Criminal Law, § 1206; Evidence, § 576; Master and Servant, §§ 270, 274, 289; Municipal Corporations, § 818; Railroads, §§ 282, 400; Street Railroads, §§ 113, 117; Trial, §§ 156, 295, 296.

I. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 31 (N.C.) Under federal Employers' Liability Act, § 1, as amended in 1910 by adding section 9, making interstate railroad companies liable to the personal representative of an employé killed by the company's negligence, for

the benefit of the employé's parents, and, if none, then of the next of kin dependent upon such employé, a parent of an adult son could recover for his wrongful death by showing a reasonable expectation of pecuniary benefit without showing actual dependency.—*Dooley v. Seaboard Air Line Ry. Co.*, 79 S. E. 970.

(D) Pleading and Evidence.

§ 47 (Ga.) A petition in an action for damages for the tortious killing of plaintiff's husband, who took poison, causing his death, which alleged that defendants wrote a letter to deceased requesting him to resign a certain position and advising him to make no inquiry as to the reasons for the demand, and that defendants "knew" such letter would bring about decedent's death, *held* demurrable, in the absence of any allegation that the letter advised or suggested that decedent kill himself.—*Stevens v. Steadman*, 79 S. E. 564.

§ 75 (N.C.) In an action by a father under the federal Employers' Liability Act for damages for the negligent death of his son while employed on an interstate railroad, evidence *held* to sustain a finding that plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life of his son.—*Dooley v. Seaboard Air Line Ry. Co.*, 79 S. E. 970.

(E) Damages, Forfeiture, or Fine.

§ 86 (N.C.) The damages recoverable by a parent for the negligent death of a son under the federal Employers' Liability Act are limited to such loss as results to the parent because of being deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the employé.—*Dooley v. Seaboard Air Line Ry. Co.*, 79 S. E. 970.

§ 95 (S.C.) The recovery under federal Employers' Liability Act for the wrongful death of a servant is limited to compensation for pecuniary loss.—*Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

The measure of damages allowed in actions for wrongful death *held* limited to the actual loss suffered, which, in case the deceased is a husband or father or wife or mother, may include loss of services or counsel and training, but not loss of companionship.—*Id.*

DEBTOR AND CREDITOR.

See Fraudulent Conveyances.

DECEDENTS.

See Evidence, §§ 271-273.

DECEIT.

See Fraud.

DECLARATION.

See Pleading.

DECLARATIONS.

See Criminal Law, § 422; Evidence, §§ 271-294.

DECREE.

See Appeal and Error, § 69; Equity, § 427; Partnership, § 344.

DEEDS.

See Acknowledgment; Adjoining Landowners; Alteration of Instruments; Appeal and Error, §§ 871, 882, 1051; Boundaries, §§ 3, 47; Cancellation of Instruments, §§ 34, 35, 59; Corporations, § 432; Covenants; Ejectment, §§ 12, 110; Estoppel, §§ 22-38; Evidence, §§ 121, 273, 390-461; Frauds, Statute of, § 18; Fraudulent Conveyances, § 172; Home-

stead, § 169; Mortgages; Pleading, § 64; Quieting Title; Railroads, § 68; Reformation of Instruments; Tenancy in Common, §§ 15, 44; Trover and Conversion, § 13; Trusts, §§ 21, 124, 366; Vendor and Purchaser, §§ 120, 197, 208, 233; Witnesses, §§ 149, 159.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 19 (Va.) Where a grantee under a conveyance in consideration of the grantor's support failed to support the grantor, and denied that she was under any legal obligation to do so, the consideration failed, and the conveyance would be rescinded in a court of equity.—*Martin v. Hall*, 79 S. E. 320.

(B) Form and Contents of Instruments.

§ 36 (Ga.) It is essential to a valid deed that there be words showing an intention to grant a present estate; Civ. Code 1910, § 4182, providing that no prescribed form is essential, not dispensing with the necessity of such words.—*Caldwell v. Caldwell*, 79 S. E. 853.

(C) Execution.

§ 45 (N.C.) A grantee who receives and accepts a deed is liable on its covenants to be performed by him, as the consideration of the grant or a part thereof, whether he signed it or not.—*Henry v. Heggie*, 79 S. E. 982.

(D) Delivery.

§ 54 (Va.) Delivery of a deed is essential to its validity.—*Leftwich v. Early*, 79 S. E. 384.

§ 56 (Va.) The fact of delivery of a deed depends on the intention which must be manifested by some express act of the grantor or by acts, words, or conduct, and the grantor must lose control or dominion over the deed, and it must be his intention to pass title at the time and lose control over it.—*Leftwich v. Early*, 79 S. E. 384.

§ 58 (Va.) Where a wife, who had not delivered a deed to her husband, intrusted it to a third person for use by him in connection with an election, *held*, that this did not constitute a delivery which passed title to the husband.—*Leftwich v. Early*, 79 S. E. 384.

§ 66 (N.C.) Delivery to and acceptance by grantee of a deed so as to bind him by its covenants and stipulations *held* to be a mixed question of fact and law; and the jury should find the facts and the judge declare the law arising thereon.—*Henry v. Heggie*, 79 S. E. 982.

§ 66 (Va.) Whether there has been such a complete and perfect delivery of a deed to the grantee as to vest in him a perfect and indefeasible title to land, or an interest therein, is a question of fact to be determined by the circumstances of the case, and cannot in the majority of instances be declared as a matter of law.—*Leftwich v. Early*, 79 S. E. 384.

(E) Validity.

§ 68 (N.C.) A deed by a grantor who did not have sufficient mental capacity to execute it was void, and was not rendered valid by its registration prior to the registration of an earlier deed.—*Thompson v. Thomas*, 79 S. E. 896.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 90 (N.C.) A deed should be construed most favorably to the grantee.—*Outlaw v. Gray*, 79 S. E. 676.

§ 94 (Ga.) Where a written agreement was entered into whereby a deed was to be executed upon certain conditions, and subsequently a deed in fee simple was executed, which referred in the preamble to the agreement, and recited that

its conditions had been complied with, but contained no such conditions in the habendum clause, the conditions were merged in the deed, and the grantee held the land free therefrom.—*Augusta Land Co. v. Augusta Ry. & Electric Co.*, 79 S. E. 138.

§ 97 (N.C.) It is the usual province of the habendum of a deed to define and determine the quantity of the estate, or to explain or qualify the premises, but it cannot be allowed to create an estate entirely repugnant to the interest conveyed in the premises.—*Jones v. Whichard*, 79 S. E. 503.

Where the premises of a deed, standing alone, conveyed the fee, but the habendum limited the estate to a life estate, they are not to be construed as entirely repugnant, but each is to be used in explanation of the other; and, it being clear that it was only intended to create a life estate, it will be construed accordingly.—*Id.*

(B) Property Conveyed.

§ 117 (N.C.) Between the vendor and purchaser the common-law rule that whatever is affixed to the freehold becomes a part of it and passes with it is observed in full vigor.—*Basnight v. Small*, 79 S. E. 269.

(C) Estates and Interests Created.

§ 128 (N.C.) Where land was conveyed to J. and wife for life, "then to their legal bodily heirs provided they leave any, and if not, to be equally divided among my nearest of kin," the word "heirs" not being used in its technical sense, but as meaning children and grandchildren, the fee did not pass to J. and wife under the rule in *Shelley's Case*.—*Jones v. Whichard*, 79 S. E. 503.

§ 129 (Ga.) Where a deed conveying land to grantor's daughter, "trustee for her children," gave her the use of the land, but denied her power to sell or incur same, and provided that, if she should have no children living at her death, she could bequeath same as she might desire, and the daughter died leaving a husband and child surviving her, *held*, that the child took a fee-simple estate in the land to the exclusion of the husband.—*Heyward-Williams Co. v. McCall*, 79 S. E. 133.

§ 132 (N.C.) Where a husband conveyed land to his wife for life, and at her death to their surviving children, their heirs and assigns forever, the term "surviving children" meant children living at the death of the life tenant and not grandchildren.—*Bradshaw v. Stansberry*, 79 S. E. 302.

§ 133 (N.C.) Where land was deeded to J. and wife for life, "then to their legal bodily heirs provided they leave any, and if not, to be equally divided among my nearest of kin," the remainder to the heirs was contingent on their being alive when the life estate terminated, and no title could be claimed through heirs who died before the life tenants.—*Jones v. Whichard*, 79 S. E. 503.

(D) Exceptions and Reservations.

§ 138 (S.C.) While there is a well-defined and established difference between an exception and a reservation in a deed, the use of the word "exception" or "reservation" will not control the manifest intention, as they are often used interchangeably and synonymously.—*Marion County Lumber Co. v. Hodges*, 79 S. E. 1096.

§ 143 (N.C.) A logging railroad which is a fixture upon the land is not excluded from a conveyance thereof by the fact that the grantor reserved for himself the pine timber upon the tract; it appearing that there was timber of other varieties large enough to cut.—*Basnight v. Small*, 79 S. E. 269.

(E) Conditions and Restrictions.

§ 166 (Ga.) Where plaintiff, in an action to recover land, relied on a breach of conditions

in an agreement made prior to the execution of a deed, which contract was merged in the deed, so that the grantee held the land free from such conditions, the action was properly dismissed on demurrer to the petition.—*Augusta Land Co. v. Augusta Ry. & Electric Co.*, 79 S. E. 138.

IV. PLEADING AND EVIDENCE.

§ 196 (W.Va.) Circumstances of the execution of a deed by a man 88 years old, and feeble in body and mind, *held* to create a presumption of undue influence on the part of his sons, which presumption could be rebutted only by clear evidence of fair dealing on their part.—*Turner v. Hinchman*, 79 S. E. 18.

§ 208 (N.C.) On the question of whether a deed was delivered to and accepted by a grantee, the fact that it was produced by the grantee under a notice to him or a rule of the court requiring him to do so might have an important bearing.—*Henry v. Heggie*, 79 S. E. 982.

§ 208 (Va.) In suit by a husband's heirs against wife to partition land originally owned by the wife, evidence *held* insufficient to show that a deed by the wife to the husband was ever delivered.—*Leftwich v. Early*, 79 S. E. 384.

§ 210 (W.Va.) Where the grantee verbally agrees to maintain the grantors and such agreement is properly pleaded and sufficiently proved, it will be deemed the actual consideration, though the deed of grant recites as consideration therefor "one dollar in hand paid."—*Cumberledge v. Cumberledge*, 79 S. E. 1010.

§ 211 (N. C.) Evidence *held* to sustain a finding that a deed from defendant to plaintiff for a one-fifth interest in the land was procured by fraud.—*Turner v. Davis*, 79 S. E. 257.

§ 211 (W.Va.) Evidence *held* to show that a deed was procured by undue influence exercised upon the grantor by his sons, the grantees.—*Turner v. Hinchman*, 79 S. E. 18.

DEFAULT.

See Judgment, §§ 106-167.

DELAY.

See Carriers, § 105; Telegraphs and Telephones, §§ 38, 66, 73.

DELEGATION OF POWER.

See Constitutional Law, § 60.

DELIVERY.

See Bills and Notes, § 330; Carriers, §§ 44, 45, 85, 86; Deeds, §§ 54-66, 208; Evidence, §§ 354, 431; Gifts, § 4; Sales, § 161; Telegraphs and Telephones, §§ 38, 66, 73, 78.

DEMAND.

See Telegraphs and Telephones, § 54.

DEMURRER.

See Pleading, §§ 199-225.

To evidence, see Trial, § 156.

DEPOSITARIES.

See Bailment, § 18.

DEPOSITIONS.

See Holidays; Justices of the Peace, § 175; Time, § 9.

§ 7 (W.Va.) Depositions taken on an application, under Code 1906, c. 64, § 13, for an absolute divorce, after a decree of divorce a mensa et thoro, before a bill or other plead-

ing is filed, and before process or appearance, cannot be read on final hearing of the cause.—*Dixon v. Dixon*, 79 S. E. 1016.

§ 64 (Ga.App.) That one set of interrogatories was propounded to two witnesses, each of whom made separate answers, was not ground for rejecting the answers.—*Macon, D. & S. R. Co. v. Yesbik*, 79 S. E. 243.

§ 107 (W.Va.) After trial begins, it is too late to object to the reading of depositions on any ground that can be cured by a retaking.—*Cable Co. v. Mathers*, 79 S. E. 1079.

DEPOSITS.

See Banks and Banking, § 154.

DESCENT AND DISTRIBUTION.

See Cancellation of Instruments, § 34; Executors and Administrators; Wills.

DESCRIPTION.

See Boundaries, §§ 3, 11; Vendor and Purchaser, § 22; Wills, § 564.

DESERTION.

See Divorce, §§ 37, 133; Husband and Wife, §§ 302-313.

DILIGENCE.

See Bailment, § 31; Criminal Law, § 594.

DIRECTING VERDICT.

See Trial, §§ 139, 141, 168.

DIRECTORS.

See Banks and Banking, § 61.

DISCHARGE.

See Bankruptcy, §§ 421, 426, 428; Garnishment, § 210; Guaranty, § 53; Principal and Surety, §§ 97-117.

DISCRETION OF COURT.

See Appeal and Error, §§ 959-979; Criminal Law, §§ 274, 633, 665, 918, 925½, 1151-1156, 1208; Divorce, § 289; Habeas Corpus, § 110; New Trial, § 11; Parties, § 51; Reference, § 101; Witnesses, §§ 226, 240, 262.

DISCRIMINATION.

See Telegraphs and Telephones, § 28.

DISMISSAL AND NONSUIT.

See Adverse Possession, § 115; Appeal and Error, §§ 79, 93, 631, 753, 764, 781, 927, 962; Attachment, § 241; Certiorari, § 42; Criminal Law, § 1092; Deeds, § 166; Divorce, § 184; Drains, § 14; Eminent Domain, § 238; Landlord and Tenant, § 315; Master and Servant, § 235; Negligence, § 136; New Trial, §§ 114, 117, 154; Partition, § 64; Sales, § 445; Trial, §§ 139, 165.

II. INVOLUNTARY.

§ 58 (Va.) The December rules in the Richmond county circuit court occurring on the 25th of November, process having been returned executed on November 4th, a month did not elapse between the day of the return and the rules, so that the clerk had no power, under Code 1904, §§ 3236, 3241, to dismiss the suit for failure to file the declaration at such rules.—*House v. Universal Crusher Corporation*, 79 S. E. 1049.

DISORDERLY HOUSE.

§ 17 (Ga.App.) In order to convict in a prosecution for keeping a disorderly house, evidence

of its general reputation is insufficient; but the jury must be satisfied that the house was maintained for purposes of lewdness, and its reputation may be considered in corroboration of the circumstances.—*Smith v. State*, 79 S. E. 51.

DISQUALIFICATION.

See Witnesses, § 60.

DISSOLUTION.

See Attachment, § 192; Corporations, § 603; Garnishment, § 210; Partnership, § 279.

DISTRESS.

See Landlord and Tenant, § 270.

DISTRICTS.

See Drains, §§ 13, 14; Schools and School Districts, §§ 19, 41.

DIVORCE.

See Adverse Possession, § 60; Depositions, § 7; Witnesses, § 60.

I. NATURE AND FORM OF REMEDY.

§ 11 (Va.) It is against public policy to encourage divorce litigation.—*Devers v. Devers*, 79 S. E. 1048.

II. GROUNDS.

§ 37 (Va.) Where complainant allowed his wife to visit her relations and had himself broken off the correspondence between them, he is not entitled to divorce on the ground of desertion merely because it appeared she stated she would not live with him at the place he had chosen as their home.—*Devers v. Devers*, 79 S. E. 1048.

§ 37 (W.Va.) The conduct which will justify one spouse in abandoning the other must be inconsistent with their matrimonial relations or render cohabitation unsafe.—*Dawkins v. Dawkins*, 79 S. E. 822.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(B) Parties, Process, and Incidental Proceedings.

§ 79 (Va.) In view of Code 1904, § 2259, fixing the jurisdiction of courts for divorce, a complainant husband held not to have made a showing entitling the court to jurisdiction.—*Yates v. Yates*, 79 S. E. 1040.

(D) Evidence.

§ 133 (W.Va.) Divorce for desertion and cruelty denied; the grounds therefor not being established by clear and convincing evidence.—*Dawkins v. Dawkins*, 79 S. E. 822.

(F) Judgment or Decree.

§ 157 (W.Va.) An application, under Code 1906, c. 64, § 13, for absolute divorce, subsequent to a decree of divorce a mensa et thoro, must be by petition or bill averring grounds for relief, and upon the usual process and proceedings at rules for equity practice.—*Dixon v. Dixon*, 79 S. E. 1016.

(G) Appeal.

§ 184 (Va.) Unless the record on appeal shows that proper constructive service has been had on a nonresident defendant in divorce proceedings, the action of the trial court in dismissing the case for want of jurisdiction will not be disturbed.—*Yates v. Yates*, 79 S. E. 1040.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 206 (N.C.) Where, pending divorce suit, husband was enjoined from selling land, and by final decree receiver was appointed to apply

rent to the payment of alimony, mortgage by husband and sale by the mortgagee under a power of sale held not in violation of the injunction.—*Gobble v. Orrell*, 79 S. E. 957.

§ 256 (Va.) Lien of decree for alimony, granted to a wife, on the lands of the husband, held not to be affected by decree of absolute divorce granted to the husband in another state, even though the foreign court had jurisdiction of the parties.—*Isaacs v. Isaacs*, 79 S. E. 1072.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 289 (Ga.) In determining the custody of children on a motion made under Civ. Code 1910, § 2980, pending an action for divorce, the judge is not bound by a previous judgment in habeas corpus between the same parties, and may award such custody in the exercise of his sound discretion; Civ. Code 1910, §§ 2971, 2980, both of which relate to the custody of children and control on this question, being in pari materia and properly construed together.—*Zachry v. Zachry*, 79 S. E. 115.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Evidence, §§ 342-370.

DORMANT JUDGMENTS.

See Judgment, § 853.

DOWER.

See Wills, § 506.

I. NATURE AND REQUISITES.

§ 20 (S.C.) A decree which, while giving the widow dower in the real estate of her deceased husband, which he on the day of but prior to the marriage deeded to his daughter, refused to set aside, as in fraud of the wife, his will to his daughter of all his other property, made a few days after the marriage, there having been no valid antenuptial contract, affirmed per an equally divided court.—*McAulay v. McAulay*, 79 S. E. 785.

DRAFTS.

See Bills and Notes, § 123.

DRAINS.

See Eminent Domain, §§ 31, 136, 238; Municipal Corporations, §§ 839, 845.

I. ESTABLISHMENT AND MAINTENANCE.

§ 2 (N.C.) The drainage act of 1909 (Pub. Laws 1909, c. 442) is not obnoxious to either the state or federal Constitution.—*Newby & White v. Board of Drainage Com'rs of Bear Swamp Drainage Dist.*, 79 S. E. 266.

§ 13 (N.C.) A drainage district organized under Pub. Laws 1909, c. 442, is a quasi municipal corporation, and neither its existence nor the irregularity of its proceedings may be collaterally attacked.—*Newby & White v. Board of Drainage Com'rs of Bear Swamp Drainage Dist.*, 79 S. E. 266.

§ 13 (N.C.) The establishment of levee and drainage districts is a valid exercise of legislative power, based upon the police power, the right of eminent domain, and the taxing power.—*Shelton v. White*, 79 S. E. 427.

§ 14 (N.C.) Under Laws 1909, c. 442, §§ 16, 17, relating to the formation of drainage districts, any landowner included therein may appeal from the decision of the clerk to the superior court upon the issue as to whether his land will be benefited, and have such issue pass-

ed upon by a jury.—*Shelton v. White*, 79 S. E. 427.

Where, upon hearing of final report of viewers, under Act 1909, c. 442, § 9, relating to formation of drainage districts, a majority of landowners and owners of three-fifths of the land within the proposed district objected, the proceeding should have been dismissed, although some of the objectors signed the original petition for the formation of the district.—Id.

§ 14 (N.C.) Under Laws 1909, c. 442, relating to the formation of drainage districts, and providing for an appeal by any landowner to the superior court upon the issue as to whether his land will be benefited, such issue was by the superior court properly submitted to a jury.—*Parker v. Johnson*, 79 S. E. 430.

§ 57 (N.C.) Remedies provided by Pub. Laws 1909, c. 442, by which a landowner may recover damages resulting from the construction of drains under the act, are exclusive of all other remedies.—*Newby & White v. Board of Drainage Com'rs of Bear Swamp Drainage Dist.*, 79 S. E. 286.

Plaintiff's predecessors in title having made no claim for damages to land by the construction of a drainage ditch, as they might have done under Pub. Laws 1909, c. 442, § 11, plaintiffs were estopped to maintain an action against drainage commissioners to recover such damage.—Id.

DRAMSHOPS.

See Intoxicating Liquors.

DRUGGISTS.

See Criminal Law, § 814.

DRUGS.

See Poisons.

DRUNKARDS.

§ 10 (Ga.App.) Under Pen. Code 1910, § 442, it is only unlawful for any person to appear in an intoxicated condition on the street, when the intoxication is made manifest by boisterous and indecent conduct, or profane language, and intoxication is not manifested by reckless driving.—*Peterson v. State*, 79 S. E. 927.

Reckless driving is not within that indecent conduct and action which Pen. Code 1910, § 442, requires as one of the evidences of public intoxication punishable by law.—Id.

§ 11 (Ga.App.) Evidence merely that defendant had whisky in his possession was insufficient to sustain his conviction of drunkenness on church grounds.—*Carswell v. State*, 79 S. E. 589.

DRUNKENNESS.

See Criminal Law, § 762.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 251-309.

DUPLICITY.

See Indictment and Information, § 125.

DYING DECLARATIONS.

See Homicide, §§ 207-218.

EASEMENTS.

See Constitutional Law, § 281; Fences, § 1; Municipal Corporations, § 663.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 17 (Ga.App.) Where lots are bought and sold with reference to a plat showing certain streets, a person who purchases with reference

to the plat acquires such a right in all the streets designated thereon as entitles him to enjoin the obstruction of one such street, even though his lots do not abut upon it.—*Adair v. Spellman Seminary*, 79 S. E. 589.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 44 (W.Va.) A testator's reservation of a right of way for an outlet over land given one devisee confers no right to the exclusive use of the soil, but creates only an easement, and the way cannot be fenced against the servient tenant's wishes.—*Wiley v. Ball*, 79 S. E. 659.

The servient tenant cannot be burdened with the occupancy of a greater width than is reasonably necessary for the uses for which the right of way is reserved as an easement, where no width is defined in the reservation.—Id.

§ 61 (Ga.App.) The stopping or impeding of a private way which has been opened and is in use is a private nuisance.—*Adair v. Spellman Seminary*, 79 S. E. 589.

The summary proceeding provided for by Civ. Code 1910, § 5329 et seq., is not available to remove an obstruction in a private way which exists only on a plat, and has never been opened or used.—Id.

EJECTION.

See Carriers, §§ 355-381.

EJECTMENT.

See Appeal and Error, §§ 1002, 1057; Boundaries, § 36; Improvements; New Trial, § 161;

I. RIGHT OF ACTION AND DEFENSES.

§ 9 (Ga.) Plaintiff in an action for land must recover on the strength of his own title.—*Henry v. Roberts*, 79 S. E. 115.

§ 9 (N.C.) Plaintiff, in an action to try the title to land, who relies on adverse possession under color of title, must recover upon the strength of his own title, and not merely rely on the weakness of his adversary's title.—*Barfield v. Hill*, 79 S. E. 677.

§ 12 (W.Va.) Plaintiff in ejectment cannot extend the description in his deed by a reference to a patent or other paper not referred to or adopted in the deed.—*Hartmyer v. Everly*, 79 S. E. 1093.

§ 15 (S.C.) The rule that plaintiff in ejectment must show a complete and perfect title in himself, going back to a grant either actual or presumed, is subject to the exception that, where both parties claim from a common source, plaintiff need go back no further than such source.—*Bethea v. Allen*, 79 S. E. 639.

§ 16 (W.Va.) The doctrine that a plaintiff in ejectment may recover merely on the strength of prior possession does not apply, where defendant has acquired possession peaceably and in good faith under claim of title.—*Lovett v. West Virginia Central Gas Co.*, 79 S. E. 1007.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 110 (N.C.) In an action involving the delivery of an unregistered deed, where the court properly charged as to the burden of proof, his refusal to charge that the grantor's possession of the deed was presumptive evidence that it had not been delivered was not error.—*Carroll v. Smith*, 79 S. E. 497.

In an action involving the delivery of an unregistered deed, where there was evidence of delivery, the court properly charged that possession of the deed by the grantor was a circumstance which the jury might consider.—Id.

ELECTION.

See Wills, § 781.

ELECTIONS.

See Constitutional Law, §§ 9, 63; Schools and School Districts, §§ 97, 103; States, § 115.

V. REGISTRATION OF VOTERS.

§ 106 (N.C.) The fact that the registrar of elections did not administer an oath to any of the electors whose names were registered in the register book would not invalidate an election to determine whether a school tax should be levied, in absence of fraud or improper motive.—Gibson v. Board of Com'rs of Scotland County, 79 S. E. 976.

ELECTRICITY.

See Appeal and Error, §§ 1058, 1066; Eminent Domain, § 69; Evidence, § 474; Municipal Corporations, §§ 763, 818, 822, 852.

§ 15 (Va.) Where a child went on the tracks of a motor road, along the poles of which was strung an electric light wire, which had become broken, took hold of the wire, and brought it in contact with the rail, causing a flash which set fire to her clothes, *held*, that the owner of the road and wire was not liable; the child being a trespasser, or at most a bare licensee.—Kiser v. Colonial Coal & Coke Co., 79 S. E. 348.

§ 19 (Ga.) A petition alleging that plaintiff's son, while moving a house for another, and lifting one of defendant's light wires over the chimney of the house was struck by the rebound of the wire and received a shock, from failure to provide proper insulation, from which he died, and that decedent was in the exercise of ordinary care, *held* not demurrable.—Sedlmeyer v. City of Fitzgerald, 79 S. E. 469.

ELEVATORS.

See Carriers, §§ 280, 316.

EMBEZZLEMENT.

See Indictment and Information, § 71.

§ 4 (Ga.App.) Where A. is charged with the duty of collecting for B. accounts from C. and D., he cannot be convicted of embezzlement if he pays the entire amount collected from D. to B., though he directs that the amount be applied to the credit of C., though in fact he has not collected anything from C.—Gibson v. State, 79 S. E. 354.

§ 11 (Ga.App.) One cannot be convicted of embezzlement of public funds collected by him in his fiduciary capacity, where they were paid over to the department of the government to which the funds should have been paid, although the payments were made on the wrong account.—Gibson v. State, 79 S. E. 354.

§ 36 (Ga.App.) The state need not prove that accused used any of the appropriated money to buy any particular article.—Trueheart v. State, 79 S. E. 755.

§ 39 (Ga.App.) In a prosecution for embezzlement, evidence that accused falsified his account was competent upon the question of criminal intent.—Trueheart v. State, 79 S. E. 755.

EMINENT DOMAIN.

See Constitutional Law, § 281; Drains, § 13; Evidence, §§ 142, 543, 558; Executors and Administrators, § 129; Statutes, §§ 76, 112.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (S.C.) Where a municipal corporation emptied sewage into a stream flowing through plaintiff's land, thus injuring her property, there was a taking of private property for pub-

lic use within the purview of the Constitution, guaranteeing that private property shall not be taken for public use without just compensation.—Parrish v. Town of Yorkville, 79 S. E. 635.

§ 31 (N.C.) Under Laws 1909, c. 442, §§ 16, 17, relating to the formation of drainage districts, if, on appeal to the superior court by a landowner upon the issue as to whether his lands will be benefited, the jury finds that his lands will not be benefited, they can, nevertheless, be included, if necessary for construction purposes, under the right of eminent domain upon an allowance for damages.—Shelton v. White, 79 S. E. 427.

§ 34 (W.Va.) The rights of the public in the services to be performed by a pipe line company are sufficiently definite and fixed by general law to warrant the taking of a right of way by the company in eminent domain proceedings.—Carnegie Natural Gas Co. v. Swiger, 79 S. E. 3.

Where a pipe line company is authorized by general law to take a right of way or easement for its public service, the general law sufficiently protects the rights of the public in respect to the services to be rendered and reasonableness of the charges to be made therefor to warrant the taking thereof for such public use.—Id.

That only a few persons are being served at the time a right of way or easement for a pipe line is proposed to be taken will not defeat the right of the pipe line company to take same, if the real object is to serve the public.—Id.

§ 66 (W.Va.) Where a public service corporation has a public duty to perform, the question of what is necessary in the way of easements and other means of performing the services is generally a matter within its discretion, not controllable by the courts.—Carnegie Natural Gas Co. v. Swiger, 79 S. E. 3.

The question of the public need or benefit of a proposed right of way or easement for a pipe line is generally a question for the court, and not one of fact for the jury.—Id.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

§ 69 (N.C.) A quasi public corporation, such as an electric light company, authorized to place poles and wires along the streets of a city cannot invade the rights of a property owner in respect to trees in the street in front of his property, without paying compensation therefor.—Moore v. Carolina Power & Light Co., 79 S. E. 596.

§ 69 (S.C.) As the Constitution prohibits the taking of private property for a public use without just compensation, the granting by the Legislature of the right to condemn private property imposes upon the condemning corporation the correlative duty of making just compensation.—Parrish v. Town of Yorkville, 79 S. E. 635.

§ 76 (W.Va.) Acts 1907, c. 74 (Code Supp. 1909, c. 42, §§ 18, 20), amending and re-enacting Code 1906, c. 42, §§ 18, 20, and providing for an alternative method of condemning land or easements by pipe line companies, *held* not violative of Const. art. 3, § 9 (Code 1906, p. 1), prohibiting the taking of private property for public use without just compensation paid or secured to be paid, such requirement being satisfied by a provision for the giving of a bond.—Carnegie Natural Gas Co. v. Swiger, 79 S. E. 3.

§ 79, 80 (Ga.) Where a landowner petitions for a new road, and agrees to give the right of way for same without cost, she cannot subsequently recover damages from the county for the running of the road through her property.—Murray County v. Wilson, 79 S. E. 783.

§ 79, 80 (Ga.App.) As a waiver is a relinquishment of a known right, plaintiff, an abutting owner, would have to be in possession of all the facts as to how a change of grade would leave his property before his consent to the im-

rovement would be a waiver of any resulting damage.—*City of Americus v. Phillips*, 79 S. E. 36.

B) Taking or Injuring Property as Ground for Compensation.

§ 95 (Ga.) The damages recoverable for injuries to land not taken may include any injury caused by the legitimate use of the property taken for the purpose for which condemnation is made.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

§ 96 (Ga.) That the taking of proposed land will destroy the general unity of the condemnor's farm, and depreciate the market value of the land not taken, affords an element of the damages recoverable in proceedings to condemn land for a reservoir.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

§ 98 (Ga.) Where, in proceedings to condemn land for a reservoir, it appears that the proposed raise of the water in the river will prevent the drainage of a part of the condemnor's and not taken, this furnishes an element of the damages recoverable by the condemnor.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

§ 101 (Ga.App.) A city is liable to a property owner for damages from altering the grade of a street or sidewalk in front of his property, whereby his means of ingress and egress are impaired.—*City of Americus v. Phillips*, 79 S. E. 36.

(C) Measure and Amount.

§ 136 (Ga.) Where it is sought to condemn an easement for a sewer, the landowner can recover damages for the property actually taken, and such damages to the remainder as flow from the construction of the sewer.—*Potts v. City of Atlanta*, 79 S. E. 110.

II. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 167 (S.C.) As condemnation of land by a municipality is statutory in origin, the method prescribed by Civ. Code 1912, § 3023, by which the amount of compensation is to be determined by arbitrators appointed by the corporation and the landowner, is exclusive; there being no common-law action.—*Parrish v. Town of Yorkville*, 79 S. E. 635.

§ 167 (W.Va.) Acts 1907, c. 74 (Code Supp. 1909, c. 42, §§ 18, 20), amending and re-enacting Code 1906, c. 42, §§ 18, 20, and providing for an alternative method of condemning land or easements by pipe line companies, *held* valid.—*Carnegie Natural Gas Co. v. Swiger*, 79 S. E. 3.

§ 191 (W.Va.) Petitioner for a right of way or easement taken for a pipe line under authority of Acts 1907, c. 74 (Code Supp. 1909, c. 42, §§ 18, 20), amending and re-enacting Code 1906, §§ 18, 20, need not, when less than the fee is taken, describe a definite width or depth, but must pursue a definite line with courses and distances given, and have a definite and fixed termini.—*Carnegie Natural Gas Co. v. Swiger*, 79 S. E. 3.

§ 202 (Ga.) In condemnation proceedings it was not error to reject the testimony of a witness that under a certain assumption the water owner on the land sought to be condemned ought to pay interest on a certain valuation.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

Where the condemnor's notice included the right to back water on land on which there was a shoal, and he introduced evidence generally as to the value of the land, without referring specifically to whether the shoal had any value for furnishing water power, and where the condemnor introduced evidence of

the general value, and also of the value of the shoal, the condemnor was properly permitted to introduce depositions previously taken tending to prove that the shoal had no value.—*Id.*

§ 203 (Ga.App.) That plaintiff had put down a brick sidewalk in front of his property and had been required to pay for the curbing thereof was admissible to show damages by change in the grade of the street.—*City of Americus v. Phillips*, 79 S. E. 36.

§ 222 (Ga.) Where, in proceedings to condemn land, the instructions given referred only in general terms to the consequential damages to land not taken, it was error to refuse to instruct on specific damages caused to such land.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

An instruction which repeated several times that the consequential damages recoverable were only such as were proximately caused by the taking *held* too restricted.—*Id.*

Where there was no evidence that the use of the condemned land as a part of a pond would render the remainder unhealthy and decrease its market value, a precautionary instruction on this point was improper.—*Id.*

§ 224 (Ga.) It was not ground for new trial to give instructions which in effect were the same as instructions requested by the condemnor.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

§ 238 (Ga.) Where a municipality seeks to condemn an easement for a sewer, and to appeal from the assessor's award, under Civ. Code 1910, § 5228, the appeal is duly entered on the city's filing in the superior court within the statutory time a bond for the condemnation money, with a recital of the proceedings and of a desire to appeal.—*Potts v. City of Atlanta*, 79 S. E. 110.

Corporate municipal action is not necessary to authorize such appeal.—*Id.*

A bond on appeal, under Civ. Code 1910, § 5228, may be executed and an appeal entered by the attorney at law.—*Id.*

§ 238 (Ga.) Under Civ. Code 1910, § 5228, requiring that an appeal from an award of assessors in a condemnation case be filed within 10 days after the award, an appeal entered after the 10 days was properly dismissed.—*Edwards v. Savannah & S. Ry. Co.*, 79 S. E. 841.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 266 (S.C.) Where a municipality has taken private property for public use, but denies the right to compensation, the owner may bring an action in equity to ascertain his right to compensation because Civ. Code 1912, § 3023, which provides for the computation of the amount of compensation, does not provide any method for determining the right to compensation when it is contested.—*Parrish v. Town of Yorkville*, 79 S. E. 635.

§ 269 (S.C.) As the remedy of condemnation is for the benefit both of the condemning corporation and the owner, a landowner whose property is taken by a municipality as a dumping place for sewage, may, if the right to some compensation is not denied, institute proceedings to compel the assessment of his damage.—*Parrish v. Town of Yorkville*, 79 S. E. 635.

§ 274 (W.Va.) The taking of private personal property for public use without payment of just compensation therefor may be enjoined.—*State v. Baltimore & O. R. Co.*, 79 S. E. 834.

§ 275 (Ga.) Evidence, in an action to enjoin a railway company from trespassing by constructing its railway through a tract of land, *held* to authorize the granting of an interlocutory injunction.—*Chattanooga & C. I. Ry. Co. v. Morrison*, 79 S. E. 903.

EMPLOYERS' LIABILITY ACTS.

See Commerce, §§ 8, 27; Death, §§ 31, 75, 86, 95; Limitation of Actions, § 182; Master and Servant, §§ 87, 100, 250½, 278, 291; Negligence, § 101; Trial, § 255.

EMPLOYÉS.

See Master and Servant.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, §§ 238-249.

EQUITABLE ASSIGNMENTS.

See Assignments, § 50.

EQUITY.

See Cancellation of Instruments; Courts, § 188; Deeds, § 19; Divorce, § 157; Eminent Domain, § 266; Estoppel, §§ 54-98; Injunction; Lost Instruments; Partition; Quietening Title; Reformation of Instruments; Specific Performance; Trial, § 874; Trover and Conversion, § 18; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.**(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.**

§ 11 (W.Va.) A court of equity will not take cognizance of a fraud, working injury as a mere tort.—*Swarthmore Lumber Co. v. Parks*, 79 S. E. 723.

§ 26 (W.Va.) Code 1906, c. 106, authorizing attachments in equity, confers on courts of equity no jurisdiction as to causes of action ex delicto.—*Swarthmore Lumber Co. v. Parks*, 79 S. E. 723.

(B) Remedy at Law and Multiplicity of Suits.

§ 48 (Va.) Where an infant servant after leaving the master's service returned at the request of the master, who promised to pay him \$400 a year, any wages due the complainant for such services were recoverable by action at law, so that he could not file a bill asking that a court of equity award him such amount.—*Starke v. Storm's Ex'r*, 79 S. E. 1057.

§ 48 (W.Va.) Equity alone has jurisdiction to enforce the bond of a defaulting cashier according to its real intent and purpose, where the bond names a bank's officers as obligees instead of the bank.—*Clark v. Nickell*, 79 S. E. 1020.

(C) Principles and Maxims of Equity.

§ 60 (N.C.) He has the better right who was first in point of time.—*Dell School v. Peirce*, 79 S. E. 687.

§ 64 (N.C.) The law will assist those who are diligent and will not take from them the advantage they have thus acquired and turn it over to those who have been inactive.—*Dell School v. Peirce*, 79 S. E. 687.

§ 66 (Ga.) Under Civ. Code 1910, § 4521, a person seeking equity must do equity, and give effect to all equitable rights of other parties respecting the subject-matter of the suit.—*Echols v. Green*, 79 S. E. 557.

III. PARTIES AND PROCESS.

§ 114 (W.Va.) A petition filed by a stranger to a cause in equity, asking relief against a defendant therein on new matter contained in such petition, must be filed by leave of court, and must make such defendant a party to it by proper allegation and process, unless waived by appearance or otherwise.—*Freeman v. Egnor*, 79 S. E. 824.

Where a person files his petition, asking to be admitted as a party defendant in a pending suit in equity, in which no allegation is made naming or referring to him in any way, and

in which no relief is prayed against him, and he is admitted as a party defendant, he does not in fact become a party to the cause until he has been made a party by some allegation in the bill as amended.—*Id.*

IV. PLEADING.**(A) Original Bill.**

§ 148 (Va.) "Multifariousness" in a bill means the improper joining therein of distinct and independent matters, as the union of several unconnected matters against one defendant or the demand of several distinct and independent matters against several defendants.—*Dennis v. Justus*, 79 S. E. 1077.

A bill seeking to set aside a tax deed to one defendant as invalid and to restrain proceedings by another defendant under an ex parte petition before a commissioner under the statute providing for proving recorded papers, to set up title in himself, was bad as being multifarious.—*Id.*

(B) Plea, Answer, and Disclaimer.

§ 181 (W.Va.) An answer tendered after a final decree has been rendered upon a bill taken for confessed is properly rejected under authority of Code 1906, c. 125, § 53, when not accompanied by affidavits showing good cause for delay.—*McDonald v. McDonald Planing Mill Co.*, 79 S. E. 1081.

§ 181 (W.Va.) An answer in partition, filed after the term has ended at which an appealable decree was rendered, could not raise an issue upon questions determined by the decree.—*Wright v. Pittman*, 79 S. E. 1091.

(C) Cross-Bill and Plea and Answer Thereto.

§ 196 (W.Va.) While relief against plaintiff may, in certain cases, be given to the defendant on an ordinary answer to a bill in equity, no such relief can be given against a codefendant.—*Freeman v. Egnor*, 79 S. E. 824.

In order for the defendant, in an action in equity for partition, to obtain relief against a codefendant, resort must be had to a cross-bill, or an answer, under Code 1906, c. 125, § 35, in lieu of a cross-bill.—*Id.*

(D) Replication.

§ 208 (W.Va.) No special reply to an ordinary answer to a bill in equity, outside the answers under Code 1906, c. 125, § 35, is necessary, and its matter is not taken as true under general replication.—*Freeman v. Egnor*, 79 S. E. 824.

(E) Amended and Supplemental Pleadings and Revivor.

§ 226 (Va.) The court should dismiss a bill for multifariousness on its own motion though not objected to on that ground by defendant, so that it was immaterial that the demurrer for multifariousness was made by only one of defendants.—*Dennis v. Justus*, 79 S. E. 1077.

§ 271 (Va.) Where the matter of amendment is similar to that in a bill and was known or might well have been known to complainant, but was not brought forward until after argument, and the demurrer was sustained, the court properly refused to allow it.—*Starke v. Storm's Ex'r*, 79 S. E. 1057.

X. DECREE AND ENFORCEMENT THEREOF.

§ 427 (W.Va.) To authorize granting one defendant relief against a codefendant, it is not enough that the latter be named as defendant in the bill; but the bill and the answer seeking relief, considered together, must sufficiently raise the issue between such defendants.—*Freeman v. Egnor*, 79 S. E. 824.

ERROR, WRIT OF.

See Appeal and Error; Contempt, § 66; Costs, § 238; Exceptions, Bill of, § 43.

ESTABLISHMENT.

See Trusts, § 366.

ESTATES.

See Curtesy; Dower; Executors and Administrators; Life Estates; Mines and Minerals, § 55; Perpetuities; Remainders; Tenancy in Common; Wills.

§ 8 (N.C.) Under the rule in *Shelley's Case*, when a person takes an estate of freehold, and in the same instrument there is a limitation by way of remainder of an interest of the same quality to his heirs, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.—*Jones v. Whichard*, 79 S. E. 503.

To make the rule in *Shelley's Case* apply, the word "heirs" or "heirs of the body" must be used in a technical sense carrying the estate to such heirs as a class from generation to generation, and where they are simply intended as a descriptio personarum, or if the estate is conveyed in any other manner than it would descend, the rule does not apply.—*Id.*

ESTATES TAIL.

See Vendor and Purchaser, § 129.

ESTOPPEL.

See Bills and Notes, § 301; Boundaries, § 47; Corporations, §§ 388, 432, 480; Counties, § 206; Drains, § 57; Executors and Administrators, § 221; Husband and Wife, §§ 129, 198, 201; Judgment, §§ 585-743, 956; Mortgages, § 183; Municipal Corporations, § 697; Partnership, § 37; Sales, § 176; States, § 144; Trial, §§ 203, 253.

II. BY DEED.**(A) Creation and Operation in General.**

§ 22 (S.C.) A general recital will not ordinarily furnish the basis for an estoppel.—*Farmers' Bank & Trust Co. v. Southern Granite Co.*, 79 S. E. 985.

§ 25 (S.C.) An estoppel can be invoked only by a party who shows that he was misled to his injury.—*Farmers' Bank & Trust Co. v. Southern Granite Co.*, 79 S. E. 985.

(B) Estates and Rights Subsequently Acquired.

§ 35 (N.C.) Where decedent's widow and daughter partitioned his land, the daughter conveyed her part, and the widow died intestate, the daughter's grantee *held* to have title by estoppel, whether partition was valid or not.—*Holmes v. Carr*, 79 S. E. 413.

§ 38 (Ga.) Whatever title the maker of a warranty deed subsequently acquires by payment of purchase money due her grantor will pass to her grantee.—*Cowart v. Singletary*, 79 S. E. 196.

III. EQUITABLE ESTOPPEL.**(A) Nature and Essentials in General.**

§ 54 (Va.) The doctrine of estoppel in pais is an equitable one, and it cannot be taken advantage of by one claiming to have been influenced by the conduct of another to his injury, who acted with knowledge of the facts relied on as constituting an estoppel.—*Luck Const. Co. v. Russell County*, 79 S. E. 393.

§ 59 (Va.) One whose own acts or fraud induced conduct on the part of another cannot urge such conduct by way of estoppel.—*Luck Const. Co. v. Russell County*, 79 S. E. 393.

(B) Grounds of Estoppel.

§ 67 (N.C.) Where a landlord contracted to buy the tenant's share of a crop of tobacco, the landlord *held* estopped to insist that the bringing of an action for the tobacco by the tenant and his mortgagee was a rescission of the contract where it was not treated by him as a rescission.—*McCullers v. Cheatham*, 79 S. E. 306.

(C) Persons Affected.

§ 98 (S.C.) Where property was granted in trust for a woman and her heirs, with power to her of appointment by will, the heirs of one of her children cannot attack a conveyance of a part of the land where their parent was given the proceeds as his share of the property; the remainder being distributed by the beneficiary to other children.—*Huggins v. Price*, 79 S. E. 798.

EVIDENCE.

See Account Stated; Adverse Possession, §§ 13, 85, 104, 112; Agriculture, § 7; Alteration of Instruments, § 29; Appeal and Error, §§ 205, 206, 209, 280, 503, 522, 548, 690, 728, 866, 901-935, 979, 994-1024, 1033, 1050-1053, 1057-1062, 1066, 1178; Arrest, § 49; Arson, § 37; Assault and Battery, § 91; Attachment, § 47; Bailment, § 31; Banks and Banking, §§ 62, 154; Bastards, § 3; Bills and Notes, §§ 426, 452, 497, 499, 537; Boundaries, §§ 3, 35-37; Brokers, § 86; Carriers, §§ 36, 132, 134, 228, 315-318, 381; Chattel Mortgages, § 273; Continuance, § 47; Corporations, §§ 90, 284, 432; Covenants, § 119; Criminal Law, §§ 304-572, 779, 781, 782, 935, 1120, 1158-1160, 1169, 1170; Customs and Usages, § 21; Damages, §§ 178, 208; Deeds, §§ 196, 208, 210, 211; Depositions; Disorderly House, § 17; Divorce, § 133; Drunkards, § 11; Ejectment, § 110; Embezzlement, §§ 36, 39; Eminent Domain, §§ 202, 275; Execution, §§ 177, 194; Executors and Administrators, § 130; Extradition, § 39; Factors, § 46; False Pretenses, § 49; Fornication, § 9; Fraud, §§ 41, 58; Fraudulent Conveyances, §§ 277, 300; Gaming, § 49; Gifts, § 48; Habeas Corpus, § 85; Homicide, §§ 144-238, 319, 338, 339; Husband and Wife, §§ 133, 313, 333; Incest; Infants, § 99; Injunction, § 147; Insurance, §§ 646, 665; Intoxicating Liquors, §§ 196, 223, 224, 236, 309; Judgment, §§ 162, 951, 956; Justices of the Peace, §§ 175, 194; Landlord and Tenant, §§ 231, 270, 285, 308; Larceny, §§ 55, 63; Lost Instruments, § 23; Master and Servant, §§ 6, 67, 250½, 264, 265, 267, 270, 274, 276, 278, 279, 281; Municipal Corporations, §§ 640, 697, 790, 818, 819; Negligence, § 121; New Trial, §§ 108, 124, 132, 168; Obstructing Justice, § 16; Partition, § 63; Partnership, §§ 48, 54; Payment, § 89; Perjury, § 31; Possessory Warrant, § 3; Principal and Agent, §§ 21, 78, 103; Principal and Surety, § 199; Process, §§ 148, 149; Property; Railroads, §§ 232, 347, 396, 441, 480; Rape, §§ 43, 53; Reformation of Instruments, § 45; Sales, §§ 347, 358, 381; Specific Performance, § 121; Street Railroads, § 113; Taxation, § 788; Telegraphs and Telephones, §§ 16, 54, 66, 73, 78; Trespass, § 88; Trial, §§ 139, 141, 165, 234, 235, 252, 253, 256, 295, 296; Trover and Conversion, §§ 16, 35, 40; Wills, §§ 52, 292-302, 324, 424, 487; Witnesses.

Reception of, see Criminal Law, §§ 665-683; Trial, §§ 48-89.

I. JUDICIAL NOTICE.

§ 35 (S.C.) Where the law of another state is germane to the issue, it must be proved as a fact.—*Bethea v. Allen*, 79 S. E. 639.

§ 41 (Va.) The time for the commencement of the terms of the several courts is fixed by gen-

eral law of which the court takes judicial notice.—*House v. Universal Crusher Corporation*, 79 S. E. 1049.

II. PRESUMPTIONS.

§ 63 (Va.) All men are presumed to be sane until the contrary is shown.—*South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 79 S. E. 401.

§ 75 (Ga.App.) Where the means of proving a negative are not within the power of one of the parties, but all the proof on the subject is within the control of the other, who, if the negative is not true, can disprove it at once, the truth of the negative can be presumed from the fact that the opposite party withholds proof to the contrary.—*Hyer v. C. E. Holmes & Co.*, 79 S. E. 58.

III. BURDEN OF PROOF.

§ 90 (Ga.App.) The meaning of the term "onus probandi" is that, if the party who has the burden of proof does not offer any evidence in the case, the issue must be found against him.—*Hyer v. C. E. Holmes & Co.*, 79 S. E. 58.

§ 94 (Ga.App.) One who assumes the burden of proof is only required to carry it until his contention has been prima facie established, the term "burden of proof" being coextensive with the legal proposition sought to be proved, applying to every fact essential to or necessarily involved in the proposition, but not to facts relied on in defense. The burden of establishing a case (citing 1 Words & Phrases, 905).—*Hyer v. C. E. Holmes & Co.*, 79 S. E. 58.

The position of the burden of proof is determined by the pleadings and is unchanging, while the burden of testimony may be shifted and alternate between the parties according to the contingencies and crises of the trial.—*Id.*

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(B) Res Gestae.

§ 121 (N.C.) In an action for relief against a deed to a second wife on the ground that it was obtained by her fraud and undue influence, facts and circumstances in the association of the husband and wife tending to show her influence over him and the means by which it was obtained held admissible as res gestae.—*Lamm v. Lamm*, 79 S. E. 290.

§ 122 (N.C.) Where the only defense was suicide, statements of insured as to his need of a pistol, made to his wife 8 or 10 months before he was killed, held no part of the res gestae.—*Barker v. Massachusetts Mut. Life Ins. Co.*, 79 S. E. 424.

(C) Similar Facts and Transactions.

§ 129 (Ga.) In attachment, evidence that other creditors of defendant had sued out attachments against him was irrelevant.—*Dale v. Christian*, 79 S. E. 1127.

§ 142 (Ga.) Evidence of sales of property similar to that in question, made at or near the time of the taking, is competent on the question of the value of the land sought to be condemned.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

V. BEST AND SECONDARY EVIDENCE.

§ 157 (Ga.) Parol evidence is admissible to prove the unrecorded acts and transactions of corporations or of their officers and directors.—*Caudell v. Athens Savings Bank*, 79 S. E. 776.

§ 157 (Ga.App.) In a suit upon a note given as commission for the sale of real estate, testimony of the plaintiff as to the listing of the property held admissible over objection that it did not appear whether the listing was written or oral.—*Franklin v. Fields & Chance*, 79 S. E. 366.

§ 164 (Ga.) Parol evidence of the formal actions of the directors and stockholders of a corporation is ordinarily inadmissible, where the minutes of the corporation have not been pro-

duced or accounted for.—*Caudell v. Athens Savings Bank*, 79 S. E. 776.

§ 165 (Ga.) Admission of plaintiff's testimony that he signed a note for the amount for which attachment was issued, as security for defendant, held error, since the note itself was the best evidence.—*Dale v. Christian*, 79 S. E. 1127.

§ 165 (Ga.App.) In an action against a surety, testimony that another note was given in renewal of the note sued on was inadmissible under the express provisions of Civ. Code 1910, § 5828, because not the best evidence, where the new note was not produced, and no foundation was laid for the introduction of secondary evidence.—*E. Matthews & Son v. Richards*, 79 S. E. 227.

§ 178 (Ga.App.) A constable can testify that he posted the advertisement of sale under a justice court *fi. fa.* as required by Civ. Code 1910, § 4765, and on proof of the loss of such advertisement may testify as to its contents.—*Bowman v. Kidd*, 79 S. E. 167.

§ 179 (Ga.App.) A duplicate bill of lading was properly admitted in evidence, where it appeared that the original bill was beyond the court's jurisdiction and not accessible.—*Rogers-McRorie Co. v. Robeson Cutlery Co.*, 79 S. E. 374.

§ 187 (Va.) Evidence held to show that an instrument offered in evidence was an original and not a copy and therefore was not objectionable on the ground that the original had not been sufficiently accounted for.—*Davis v. Cole Bros.*, 79 S. E. 1033.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 213 (W.Va.) A plain concession, made in an offer of compromise, and not stated merely hypothetically to buy peace, is admissible in evidence as an admission.—*Lovett v. West Virginia Central Gas Co.*, 79 S. E. 1007.

(B) By Parties or Others Interested in Event.

§ 222 (N.C.) Evidence that there had been a parol partition of land between defendant and plaintiff's father, since deceased, which had descended to them as heirs of E., held admissible, in a subsequent suit for partition, to show that defendant had recognized plaintiff's father as the legitimate heir of E.—*Ewell v. Ewell*, 79 S. E. 509.

(C) By Grantors, Former Owners, or Privies.

§ 236 (Ga.) Admissions made by defendant's deceased husband as to the existence of the resulting trust sought to be established held binding on defendant if made while the property stood in his name, but not if made after he had disposed of any part of it by gift or otherwise.—*Banks v. Bradwell*, 79 S. E. 572.

(E) Proof and Effect.

§ 256 (Ga.) Where, in an action to establish a resulting trust, it was sought to bind defendant by admissions made by her deceased husband as to the existence of the trust, the burden was on plaintiff to prove that such admissions were made before title to the property had passed out of defendant's husband.—*Banks v. Bradwell*, 79 S. E. 572.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 271 (Ga.) In an action to establish a resulting trust in land, certain paid and canceled notes and mortgages, and testimony that they were given for improving the property while it was occupied by defendants, held admissible to explain the character of defendants' possession, and rebut plaintiff's theory of the case, though

in the nature of self-serving declarations.—*Banks v. Bradwell*, 79 S. E. 572.

§ 271 (Ga.App.) In a street car passenger's action for damages for defendant's failure to protect him from abusive language of its motor-man, evidence of an extract from a letter written by plaintiff's attorney, when offered by plaintiff, was properly excluded as self-serving.—*Binder v. Georgia Ry. & Electric Co.*, 79 S. E. 216.

§ 271 (N.C.) Where the only defense was suicide, statements of insured to his wife 8 or 10 months before his death that he needed a pistol as deputy sheriff *held* incompetent as self-serving, where they were not in corroboration of competent statements.—*Barker v. Massachusetts Mut. Life Ins. Co.*, 79 S. E. 424.

§ 272 (N.C.) Declarations against a party's interest are competent.—*Barker v. Massachusetts Mut. Life Ins. Co.*, 79 S. E. 424.

§ 272 (N.C.) A writing by deceased, addressed to his wife, directing her as to certain business matters, and not intended to come into her hands until after deceased's death, *held* admissible to show suicide as declarations against interest.—*Whitford v. North State Life Ins. Co.*, 79 S. E. 501.

§ 273 (N.C.) Testimony of uninterested witness, in an action involving delivery of a deed, that he heard alleged grantor, since deceased, admit the making of the deed *held* properly admitted.—*Carroll v. Smith*, 79 S. E. 497.

(C) As to Pedigree, Birth, and Relationship.

§ 287 (N.C.) Entry in the family Bible by a person since deceased, showing his own birth and its date, *held* admissible to prove the fact.—*Ewell v. Ewell*, 79 S. E. 509.

§ 294 (S.C.) Any person, whether a stranger or a relative, who is acquainted with a family and reputation in the family, can testify as to the pedigree and relationship of members of the family, and as to common rumor in the community as to this pedigree and relationship, and as to the declarations of the family as to pedigree, kinship, relationship, marriages, etc.—*McLain v. Allen*, 79 S. E. 1.

IX. HEARSAY.

§ 314 (S.C.) Where, in an action by an administrator to sell a lot to pay debts of decedent, defendant claimed title by adverse possession, testimony of a witness that a real estate agent, a collector of rent, had collected rent for the house for the decedent prior to his death was not hearsay.—*McLain v. Allen*, 79 S. E. 1.

§ 317 (N.C.) Where the only defense was suicide, testimony of the insured's wife and beneficiary that some 8 or 10 months before his death insured stated to her that he needed a pistol as deputy sheriff and was thinking of getting one, and a later conversation as to the need of a pistol to protect her in his absence, offered to rebut the theory of suicide, were incompetent as hearsay.—*Barker v. Massachusetts Mut. Life Ins. Co.*, 79 S. E. 424.

§ 318 (N.C.) In an action upon a note, where the plaintiff was an equitable holder, a letter from one not a party to the note, which referred to the question of plaintiff's good faith, is inadmissible as hearsay.—*Elgin City Banking Co. v. McEachern*, 79 S. E. 680.

§ 320 (Ga.App.) Testimony on direct examination relative to the loss of sacks of fertilizer was properly excluded, where it was shown on cross-examination that the witness testified merely from hearsay.—*Atlantic Coast Line Ry. Co. v. Collins*, 79 S. E. 946.

§ 324 (N.C.) On an issue as to whether L. had occupied a tract of land in controversy adversely and under known and visible boundaries for

a sufficient time to mature his title, evidence that the land was reputed to belong to L. *held* hearsay and inadmissible.—*Locklear v. Paul*, 79 S. E. 617.

X. DOCUMENTARY EVIDENCE.

(B) Exemplifications, Transcripts, and Certified Copies.

§ 342 (W.Va.) A copy of a Virginia grant, certified by the auditor of West Virginia or the register of the Virginia land office, is admissible as evidence of title, though it does not indicate that the grant bore a seal; a presumption that the original was under seal arising from the recordation thereof and the recital that the Governor had affixed the seal.—*William James' Sons Co. v. Crouch*, 79 S. E. 815.

(C) Private Writings and Publications.

§ 354 (Ga.App.) That a book is kept in ledger form is not a valid objection to its admission as a book of original entries, under Civ. Code 1910, § 5769.—*Harper v. V. Hammond & Sons*, 79 S. E. 44.

If a book offered in evidence was not a book of original entries, it was properly admitted in corroboration of admission by defendant that he was indebted to plaintiff in an amount proximately the same as that shown by the book.—*Id.*

Civ. Code 1910, § 5769, permits admission of books and original entries as direct primary evidence in cases where the fact of delivery of specific items of an account or particular service cannot be otherwise definitely proven.—*Id.*

§ 355 (N.C.) Where an original entry of the birth of a person and its date in the family Bible is proved to have been lost or destroyed, an authentic copy thereof is admissible.—*Ewell v. Ewell*, 79 S. E. 509.

§ 363 (Ga.) Books on science and art are inadmissible in evidence to prove opinions of experts announced in them.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

(D) Production, Authentication, and Effect.

§ 370 (Ga.App.) A recorded bill of sale is admissible in evidence without other proof.—*Owens v. Bridges*, 79 S. E. 225.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 390 (W.Va.) An unambiguous description in a deed cannot be varied by parol.—*Hartmyer v. Everly*, 79 S. E. 1093.

§ 397 (Ga.) Where a written contract apparently contains the entire agreement, and there is no allegation that additional terms have been omitted by fraud or mistake, it may not be enlarged by parol evidence.—*Bank of Lavinia v. Bush*, 79 S. E. 459.

§ 405 (N.C.) An insurer may show that the manual delivery of a policy was conditional, or it may prove fraud or other equitable matter to show that such policy never took effect; but, when it is once delivered, statements therein which, if falsified, would affect its continued validity cannot be contradicted to avoid the insurance.—*Gardner v. North State Mut. Life Ins. Co.*, 79 S. E. 806.

§ 413 (S.C.) In an action by a railroad company on an insurance policy covering loss by fire of cotton for which it was liable as a common carrier, evidence of an agreement between the carrier and the shippers, whereby the carrier became liable as a common carrier for cotton, is admissible, not tending to modify the contract of insurance.—*Bennettsville & C. R. Co. v. Glens Falls Ins. Co.*, 79 S. E. 717.

§ 413 (W.Va.) On a grantee's bill to rescind a deed to coal in place, parol evidence was in-

admissible to prove his expectancy of a particular vein or a representation of the presence thereof.—*Light v. E. M. Grant & Co.*, 79 S. E. 1011.

§ 417 (Va.) Contract for the completion of a church tower *held* incomplete as to the thickness of the walls, so that parol evidence of the prior oral agreement of the parties on that question was admissible.—*Marsteller v. Ward*, 79 S. E. 332.

§ 419 (Ga.App.) In a suit upon a note given as commission for the sale of real estate, testimony of plaintiff as to the listing of the property *held* admissible as against the objection that it permitted inquiry into the consideration for the note.—*Franklin v. Fields & Chance*, 79 S. E. 366.

§ 419 (Va.) Recitals of a deed as to consideration, although prima facie evidence, *held* rebuttable by parol evidence as to the actual consideration, provided such evidence does not alter or contradict the legal import of the deed.—*Martin v. Hall*, 79 S. E. 320.

Where a deed recited a money consideration, *held*, that it could be shown by parol that, although money was passed as a matter of form, the real consideration was the support and maintenance of the grantor.—*Id.*

§ 420 (Va.) A showing aliunde that joint payees of a note jointly indorsed it on an agreement of one of them to indemnify the others in case of default of the maker *held* not prevented by the last sentence of Negotiable Instruments Law, § 68.—*Alphin v. Lowman*, 79 S. E. 1029.

§ 423 (Ga.) Where a note does not show on its face whether a person signed as surety, such person's testimony is competent to prove that he so signed.—*Dale v. Christian*, 79 S. E. 1127.

(B) Invalidating Written Instrument.

§ 429 (Ga.App.) Parol evidence of a verbal promise, alleged to have been part of the consideration of a note, is properly excluded, where the effect of such promise would completely defeat the note, and there is no contention that the promise was omitted from the note through fraud, accident, or mistake.—*Thomson v. McLaughlin*, 79 S. E. 182.

§ 431 (N.C.) In an action on a written contract ordering goods, oral evidence is admissible to prove that the contract was left with the salesman on condition that he should not send it in until he had further instructions from the buyer.—*Blackstad Mercantile Co. v. Parker & Glover*, 79 S. E. 606.

§ 431 (Va.) While parol evidence is inadmissible to prove that a deed perfect on its face was delivered to the grantee on condition, this rule does not control where the question is whether there was such a complete and perfect delivery as to vest in the grantee a perfect and indefeasible title.—*Leftwich v. Early*, 79 S. E. 384.

§ 432 (Ga.App.) Parol evidence is admissible to show want of consideration for a note.—*Herring v. First Nat. Bank*, 79 S. E. 359.

§ 434 (Ga.) In an action on a note given for stock of a corporation, evidence that defendant was induced to sign the note by false statements of the agents of the payee as to the finances of the corporation and the personnel of its directors was not objectionable on the theory that the evidence failed to shew fraud, and tended to vary the terms of a written contract.—*Bank of Lavonia v. Bush*, 79 S. E. 459.

§ 434 (Ga.App.) A promise to do certain acts or perform certain services, made to induce the execution of a promissory note, though made with no intention of performance, is not such a fraud as will authorize the admission of parol evidence thereof to vary the terms of a note which contains no such stipulation.—*Thomson v. McLaughlin*, 79 S. E. 182.

* An independent promise to do certain acts, or

perform certain services, made to the maker of an unconditional note to induce him to sign it, though made with no intention of performance, is not such a fraud as authorizes the admission of parol evidence to vary the terms of the note.—*Id.*

(C) Separate or Subsequent Oral Agreement.

§ 441 (Ga.) In a landowner's action against a county for damages for the running of a road through her property, plaintiff's oral testimony that she signed an agreement to give the right of way for the road because she was told the road would run on a different route from that alleged was inadmissible.—*Murray County v. Wilson*, 79 S. E. 783.

§ 441 (Ga.) An affidavit of illegality interposed to the foreclosure of a chattel mortgage *held* demurrable, where it set up parol agreements between the parties at or before the giving of the mortgage.—*Armistead v. Weaver*, 79 S. E. 783.

§ 441 (Ga.App.) In an action for breach of a railroad company's covenant to construct a side track and erect a warehouse, testimony of the covenantee's widow as to a conversation between her husband and defendant's superintendent, who was engaged in locating stations along its line, *held* properly admitted, where it was to the effect that the superintendent admitted the existence of the covenant; such testimony not being objectionable as tending to vary the terms of a written contract.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

§ 441 (Ga.App.) Where, in an action on a note given for the price of mules, it appeared that the written contract of sale contained no express warranty, and the answer did not state that its execution was procured by fraud, a plea contradicting the terms of the written contract, by setting up an oral warranty as to the age of the mules, was properly stricken.—*Harrison v. Lee*, 79 S. E. 211.

§ 441 (Ga. App.) Under the express provisions of Civ. Code 1910, § 4279, parol evidence is inadmissible to show that a blank indorsement on a promissory note was intended as an indorsement without recourse.—*E. Matthews & Son v. Richards*, 79 S. E. 227.

§ 441 (N.C.) Where defendant purchased medicines from plaintiff under a written contract, parol evidence of an agreement between defendant and plaintiff's agent that the goods might be returned if unsatisfactory *held* inadmissible.—*Dr. Shoop Family Medicine Co. v. Davenport*, 79 S. E. 602.

§ 441 (N.C.) In a suit on a contract for the sale of timber, parol evidence to prove an additional agreement binding plaintiff to deposit a specified sum or give a note as security for the faithful performance of such contract *held* inadmissible.—*Wilson v. Scarboro*, 79 S. E. 811.

§ 441 (Va.) An indorsement of a renewal note could not be varied or contradicted by proof of a contemporaneous parol agreement that the indorser should not be liable thereon, because of the holder's surrender of collateral security pledged for the payment of the original note.—*Lynch v. O'Brien*, 79 S. E. 369.

§ 441 (Va.) In an action on a fire policy, parol evidence that the written application did not contain some of the terms found therein at the time the insured's agent signed it is inadmissible, being an attempt to vary a written instrument by parol evidence.—*Mutual Fire Ins. Co. v. Turner*, 79 S. E. 1067.

§ 441 (W. Va.) Evidence that it was verbally agreed that the lessee was not to have a portion of the land included in a written lease is inadmissible.—*Reserve Gas Co. v. Carbon Black Mfg. Co.*, 79 S. E. 1002.

§ 442 (N.C.) Where a contract is not required to be in writing, it may rest partly in parol, and proof of the parol part may be made,

provided it does not materially vary or contradict that which is written.—*Wilson v. Scarborough*, 79 S. E. 811.

§ 443 (Ga.App.) Where, in a suit on a note, defendant pleaded that it was the note of a firm from which he had retired, and that he had sold his interest to plaintiff and another under a contract binding them to pay the debts of the firm of which the note was a part, evidence that plaintiffs contracted to pay \$35,000 of the debts of the old firm on purchase of defendant's interest, and that all the books of the firm had been turned over to plaintiffs, was not objectionable as parol evidence to show the terms of a written contract.—*Hyer v. C. E. Holmes & Co.*, 79 S. E. 58.

§ 445 (Ga.App.) The parol evidence rule will not exclude evidence of the waiver of a stipulation of a contract, where such waiver is subsequent to execution of the contract.—*Elyea-Austell Co. v. Jackson Garage*, 79 S. E. 88.

Under Civ. Code 1910, § 5794, parol evidence is admissible to prove the subsequent partial modification or the entire discharge of a contract.—*Id.*

(D) Construction or Application of Language of Written Instrument.

§ 448 (Ga.App.) Warehouse receipts are ordinarily subject to explanation by parol.—*Rochelle Gin & Cotton Co. v. Fisber*, 79 S. E. 584.

§ 450 (Ga.App.) Parol evidence was inadmissible to explain the terms of an unambiguous insurance policy.—*Blalock v. Empire Life Ins. Co.*, 79 S. E. 374.

§ 460 (N.C.) Where a corner referred to in a deed was established by the parties at the time it was executed, parol evidence is admissible to show at what particular place the corner was established; such evidence being always admissible when there is latent ambiguity in boundaries.—*Allison v. Kenion*, 79 S. E. 1110.

§ 461 (Ga.App.) The parol evidence rule is not violated by the introduction of extraneous circumstances illustrating the mutual intention of both parties to the covenant in a deed, where the language employed in the covenant leaves such intention in doubt.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

§ 461 (W.Va.) Where a call for an adjoining tract as a boundary of leased premises contains a clear description of the premises, an intent of the lessor not to lease part of the land included therein cannot be shown by parol.—*Reserve Gas Co. v. Carbon Black Mfg. Co.*, 79 S. E. 1002.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Ga.) A nonexpert witness must ordinarily state facts and not give his opinion unless accompanied by the facts upon which it is based.—*Alabama Great Southern R. Co. v. Brown*, 79 S. E. 1113.

§ 471 (N.C.) It was error to refuse to permit a witness, who had operated railroad engines and had much experience in observing how far sparks would fly from them, to testify how far sparks would be thrown, since this was not opinion evidence but a statement of a fact by a person qualified to so testify.—*Watkins v. Seaboard Air Line Ry.*, 79 S. E. 273.

§ 474 (N.C.) The superintendent of a city's light department during a period of two or three years, though disclaiming to be an expert, could testify that he had received a 110-volt electric shock and it was not deadly, and that he had examined a certain transformer and it was all right, as these were matters of personal experience and observation.—*Monds v. Town of Dunn*, 79 S. E. 303.

§ 474 (S.C.) In an action by a shipper for damages for the refusal of an interstate carrier to transport goods at the rate fixed by the Interstate Commerce Commission, the shipper, who knew the market value of the goods at the point of destination, both by reason of his own visits there and communications, may testify as to their market value.—*Aldrich v. Southern Ry. Co.*, 79 S. E. 316.

§ 501 (Ga.App.) A witness may give his opinion upon facts which he details.—*Reidsville & S. E. R. Co. v. Baxter*, 79 S. E. 187.

(C) Competency of Experts.

§ 543 (Ga.) A witness, who testified that he was in the electric light business and acquainted with the operation of an electric plant and the value of waterworks, that he had been general manager of an electric light business for seven years, and that he was familiar with water powers on the river in question and had seen the land sought to be condemned, held competent to testify as to value in proceedings to condemn land for a reservoir in connection with the furnishing of electricity to the public.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

A witness, who testified that he had charge of a city light and water plant, but was unfamiliar with the use of water power for electric purposes, and had never bought or sold water power, or constructed a power plant or dam, did not qualify himself to testify as an expert to the value of a water power sought to be condemned.—*Id.*

(D) Examination of Experts.

§ 548 (N.C.) In a personal injury action, evidence by a medical expert that the muscles in the region of the stomach were rigid is competent as substantive evidence, being the result of a physical examination and the statement of a fact.—*Cooper v. Seaboard Air Line R. Co.*, 79 S. E. 418.

The opinion of a medical expert based upon an examination and statements of the party injured was competent when the examination was made in order to become a witness.—*Id.*

§ 558 (Ga.) Where a witness testified that the land sought to be condemned was of a certain value, it was too general a question on cross-examination to ask him, "You know where this [designated] place is that sold at \$4 an acre, right down there next to you?"—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

§ 576 (Ga.) Under Civ. Code 1910, § 5858 (pars. 1, 4), and section 5867, relative to the competency of witnesses, where plaintiff was incompetent to testify as to conversations with a person since deceased, and another person testified as to the same, and plaintiff died, leaving such witness as an heir, and later the witness died, the evidence of such witness at the former trial was admissible at a new trial, where plaintiff's administrator was substituted as plaintiff.—*Banks v. Bradwell*, 79 S. E. 572.

XIV. WEIGHT AND SUFFICIENCY.

§ 590 (N.C.) While the testimony of an interested witness who is not biased by his interest is entitled to the same weight as if he was not interested, such evidence is not necessarily entitled to the same weight as that of any other witness, as there may be other circumstances affecting the relative credibility of the witnesses.—*In re Smith's Will*, 79 S. E. 977.

§ 596 (Ga.) Trover is a civil action, so that plaintiff is only required to establish her cause of action by preponderance of the evidence, and not beyond a reasonable doubt, as provided

by Civ. Code 1910, § 5730, though defendant acquired possession by a crime.—*Brothers v. Horne*, 79 S. E. 468.

EXAMINATION.

See Evidence, §§ 548, 558; Witnesses, §§ 226-297.

EXCEPTIONS.

See Appeal and Error, §§ 260-270, 502; Certiorari, §§ 54, 70; Criminal Law, §§ 1058, 1059; Deeds, §§ 138, 143; New Trial, § 81.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 299, 490, 518, 522, 534, 548, 627, 628, 753; Criminal Law, §§ 1023, 1092; Municipal Corporations, § 917.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 23 (W.Va.) A skeleton bill of exceptions, including the stenographer's transcript by any designation making its identification reasonably certain, is sufficient.—*Cable Co. v. Mathers*, 79 S. E. 1079.

II. SETTLEMENT, SIGNING, AND FILING.

§ 36 (Ga.) Errors in interlocutory orders, not excepted to pendente lite, cannot be assigned for review by a bill of exceptions to the overruling of a motion for new trial, where such bill is certified more than 30 days after the adjournment of the court in which such interlocutory orders were passed and rulings made.—*Hurt v. Barnes*, 79 S. E. 775.

§ 43 (Ga.App.) The Court of Appeals is without jurisdiction over a writ of error in a case where the bill of exceptions was not filed in the lower court within 15 days from the date of the certificate of the judge, as required by Civ. Code 1910, § 6167.—*Houston v. Strachan & Co.*, 79 S. E. 495, following *Foote & Davies Co. v. Evans Furniture Co.*, 72 S. E. 1098.

§ 43 (Ga.App.) Where the bill of exceptions was not tendered until after the expiration of 30 days from the judgment, and it did not appear that the court remained in session more than 30 days, the writ of error will be dismissed.—*Johnson v. Georgia Fertilizer & Oil Co.*, 79 S. E. 1131.

EXECUTION.

See Bankruptcy, § 421; Constitutional Law, § 306; Corporations, § 479; Deeds, §§ 45, 196; Taxation, §§ 545, 569, 746; Wills, §§ 120, 123.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 2 (Ga.) While, under Civ. Code 1910, § 5969, the party causing an execution to be issued may assign the same, a sheriff cannot transfer an execution to a third person, from whom he has received the amount of same, to enable him to claim proceeds of a sale under a prior execution.—*C. L. Hardwick & Co. v. Cash*, 79 S. E. 532.

Where a sheriff had in his hands money from a sale of personality under an attachment, and a rule was brought against him by a third person, claiming the money as transferee under a prior execution, transferred to him in consideration of his paying the amount thereof and the transfer was made by the sheriff without authority from the plaintiff in execution, *held*, that this was a settlement of the execution, and that the transferee had no rights thereunder.—*Id.*

II. PROPERTY SUBJECT TO EXECUTION.

§ 31 (Ga.) Every legal interest in real and personal property can be seized and sold under

execution.—*James G. Willson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co.*, 79 S. E. 465.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

§ 129 (Ga.App.) It is essential to a valid levy upon personality that there be an actual or constructive seizure.—*Russell v. State*, 79 S. E. 495.

The mere posting of a notice on a mound of dirt supposed to contain potatoes *held* insufficient to constitute a valid levy upon the potatoes, where the officer did not see them, or reduce them to possession, and merely estimated their quantity; it being essential to a valid levy that there be an actual or constructive seizure.—*Id.*

§ 155 (Ga.App.) Where the value of property levied on does not exceed the amount of the judgment, plaintiff in execution has such an interest in a forthcoming bond as authorizes suit on the bond to be brought in his name, under Civ. Code 1910, § 3729.—*Bowman v. Kidd*, 79 S. E. 167.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 167 (Ga.) An affidavit of illegality, attacking an execution for the cost of repaving a sidewalk, *held* not a sufficiently direct and affirmative allegation that the city council took fraudulent action in the matter, and hence it was insufficient to raise an issue which the court was bound to submit to the jury.—*Wallace v. City of Atlanta*, 79 S. E. 554.

§ 168 (Ga.) An order dismissing an affidavit of illegality of a judgment, which order was entered in vacation without the notice required by Civ. Code 1910, § 4853, or pursuant to an order entered in term time, under section 4854, is void.—*Kelly v. Whitley*, 79 S. E. 472.

§ 177 (Ga.App.) Where an execution against two persons was levied on personality in the possession of one who filed an affidavit of illegality, and gave a forthcoming bond, it was a good defense to an action on the bond that the issue made by the affidavit was adjudicated in claimant's favor.—*Brown Guano Co. v. Coker*, 79 S. E. 532.

In an action on a bond for the forthcoming of property levied on under execution, plaintiff must prove a breach of the bond, and that such breach has damaged him.—*Id.*

VI. CLAIMS BY THIRD PERSONS.

§ 194 (Ga.App.) In a claim case, evidence *held* to authorize a finding that title to the property levied on was in defendant in execution at the date of the levy.—*Smith v. D. Rothschild & Co.*, 79 S. E. 88.

§ 195 (Ga.App.) Where claimant denies that defendant in execution was in possession at the time of levy, plaintiff in *fi. fa.* is entitled to the opening and close.—*Smith v. D. Rothschild & Co.*, 79 S. E. 88.

§ 199 (Ga.App.) Where property levied on as that of a husband is claimed by the wife, and the main issue is whether the wife's claim is collusive, and the jury find that it is, they can assess damages under Civ. Code 1910, § 5169, on the ground that the claim was filed for delay.—*Smith v. D. Rothschild & Co.*, 79 S. E. 88.

§ 204 (Ga.) Where a claimant disposes of property secured by giving a forthcoming bond, he is not entitled to file a second claim thereto, upon the original claim being withdrawn or dismissed, though the property has not been re-advertised; and the prosecution of an action on the bond will not be enjoined.—*Reynolds Banking Co. v. Southern Pacific Guano Co.*, 79 S. E. 132.

§ 207 (Ga.) Where a claimant gives a forthcoming bond, his failure to deliver the property to the sheriff at the time and place of sale is a breach of the bond.—*Reynolds Banking Co. v. Southern Pacific Guano Co.*, 79 S. E. 132.

§ 210 (Ga.) Where a claimant gives a forthcoming bond, and takes possession and disposes of the property, the sheriff is not required to readvertise as a condition precedent to suing upon the bond.—*Reynolds Banking Co. v. Southern Pacific Guano Co.*, 79 S. E. 132.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

§ 219 (N.C.) The sheriff in selling property under execution acts as the agent of both parties, charged with the duty, on one hand, of producing a satisfaction of the writ, and on the other, of causing no needless injury or sacrifice, and is therefore given a discretion with respect to the mode of sale.—*Williams v. Chas. F. Dunn & Sons Co.*, 79 S. E. 512.

§ 221 (N.C.) The sheriff in selling property under execution acts as the agent of both parties charged with the duty, on one hand, of producing a satisfaction of the writ, and on the other, of causing no needless injury or sacrifice, and is therefore given a discretion with respect to the time.—*Williams v. Chas. F. Dunn & Sons Co.*, 79 S. E. 512.

§ 222 (Ga.App.) The advertisement of sale under execution *held* to sufficiently comply with Civ. Code 1910, § 6062, as against objections that it named no defendant, and stated that the property would be sold by sample and subsequently delivered where located as stated in the advertisement.—*Brown Guano Co. v. Coker*, 79 S. E. 582.

§ 249 (N.C.) Sale of three lots under execution en masse, with attendant circumstances of fraud and irregularity on the part of the judgment creditor, *held* to render the sale void, and hence it was properly set aside on motion.—*Williams v. Chas. F. Dunn & Sons Co.*, 79 S. E. 512.

§ 251 (N.C.) Where property is sold under execution en masse or in bulk, when it could reasonably be sold in parcels without prejudice to the parties, and there is any fraud or oppression, or even unfairness whereby it is sold at a disadvantage to the debtor, the sale may be avoided by him in a direct proceeding.—*Williams v. Chas. F. Dunn & Sons Co.*, 79 S. E. 512.

§ 253 (N.C.) A motion to set aside an execution sale is not a new proceeding, but a motion in the original cause and the title of the original action should be retained instead of entitling it as though the moving party was plaintiff, and the purchaser a defendant.—*Williams v. Chas. F. Dunn & Sons Co.*, 79 S. E. 512.

§ 258 (N.C.) Failure to advertise a sale under execution and serve a copy of the advertisement, as required by Revisal 1905, §§ 641, 642, does not render the sale void or open to collateral attack as against an innocent purchaser.—*Williams v. Chas. F. Dunn & Sons Co.*, 79 S. E. 512.

XI. EXECUTION AGAINST THE PERSON.

§ 425 (N.C.) Where complaint alleged a cause for arrest, and the jury found the facts as alleged, judgment *held* to have made the findings a part thereof, with sufficient certainty and formality for the issuance of an execution against the person.—*Turlington v. Aman*, 79 S. E. 1102.

Under Revisal 1908, § 625 (Code, § 447, as amended by Acts 1891, c. 541), to justify a body execution, there must be a finding by the jury of the cause for arrest relied on.—*Id.*

§ 433 (N.C.) Under Revisal 1908, § 625, a motion to insert in a judgment an order that plaintiff was entitled to a body execution *held* properly denied as premature; his remedy being by motion before the clerk upon return un-

satisfied of a property execution.—*Turlington v. Aman*, 79 S. E. 1102.

Where upon the return of an execution against property unsatisfied, the clerk refuses a body execution in a proper case, the judgment creditor may appeal and have the clerk's decision reviewed.—*Id.*

EXECUTORS AND ADMINISTRATORS.

See Appearance, § 25; Cancellation of Instruments, §§ 34, 35; Evidence, § 314; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 17 (S.C.) Under Civ. Code 1912, § 3605, first entitling the husband or wife of decedent to be appointed as administrator, and secondly, if there be no husband or wife or if they do not apply, then the children or their legal representative, and fourth the brother of decedent, the guardian of minor children was properly appointed administrator over decedent's brother, where the widow withdrew her application for letters and asked that the guardian be appointed.—*In re Brown's Estate*, 79 S. E. 791.

§ 29 (S.C.) Where the probate court has jurisdiction to appoint an administrator, the appointment cannot be collaterally attacked.—*In re Brown's Estate*, 79 S. E. 791.

§ 35 (Ga.) Under Civ. Code 1910, § 4010, counsel fees and expenses, incurred by an administrator with the will annexed in defending a proceeding by certain legatees to revoke his letters for mismanagement, which proceedings are voluntarily discontinued, are chargeable against the general estate.—*Armstrong v. Boyd*, 79 S. E. 780.

Where the conduct of an administrator causes an heir to sue to revoke the letters of administration, the administrator is not entitled to charge counsel fees, but where he is merely charged with misconduct, and not guilty thereof, he should, under Civ. Code 1910, § 4010, be allowed a reasonable amount to retain counsel in defending the suit.—*Id.*

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§ 111 (Ga.) Where an executor under a will probated in common form is called upon by heirs to probate it in solemn form, he is entitled to an allowance from the estate for reasonable attorney's fees, though the will may be refused probate.—*Davison v. Sibley*, 79 S. E. 855.

Where an executor in bad faith and in fraud of the rights of the heirs attempts to probate a will, he is not entitled to reimbursement from the estate for expenses thereby incurred, though the counsel employed act in good faith and are ignorant of the executor's fraudulent intent.—*Id.*

§ 122 (Ga.) Under Civ. Code 1910, § 3935-3938, a temporary administrator may enjoin a railroad company from unlawfully seizing a portion of the estate for a right of way, though he cannot recover damages for what has already been done.—*Chattanooga & C. I. Ry. Co. v. Morrison*, 79 S. E. 903.

(B) Real Property and Interests Therein.

§ 129 (Ga.) A beneficiary's agreement that a railway company may, pending condemnation proceedings, construct its railway across the land in which she has an interest is not conclusive upon her as administratrix of the estate, where she is not the sole beneficiary.—*Chattanooga & C. I. Ry. Co. v. Morrison*, 79 S. E. 903.

§ 130 (Ga.) In trespass by an administrator with the will annexed of the estate of one who died in 1847, evidence *held* insufficient to show that the administrator was entitled to the pos-

session of the land, for the cutting of timber from which the action was brought.—Hodges v. Stuart Lumber Co., 79 S. E. 462.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

§ 221 (Ga.App.) Where an executrix pleaded a conveyance of property by her testator as a settlement of a claim against him, but there was no evidence that a deed, reciting love and affection and the payment of \$10 as the consideration, was intended as a settlement of the debt, it was error to admit in evidence the deed or the title of testator to the land.—Wardlaw v. Frederick, 79 S. E. 523.

A written agreement between an executrix and a claimant against the estate, which recited that the claimant claimed a certain sum without interest, which claim was not prejudiced by the agreement, is not admissible as an agreement not to claim interest, or as an estoppel from claiming interest.—Id.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(E) Proceeds.

§ 402 (Ga.) Under Civ. Code 1910, § 4029, plaintiff was entitled to have his mortgage paid from the proceeds derived from an administrator's sale of the mortgaged property.—Moughon v. Masterson, 79 S. E. 561.

X. ACTIONS.

§ 444 (Ga.App.) In view of Civ. Code 1910, § 5690, authorizing pleadings to be amended to show the representative capacity of a party, where the petition in an action by two individuals described plaintiffs in the first paragraph as administrators and set forth facts showing that defendant was indebted to the estate, it sufficiently showed, in the absence of a special demurrer, that plaintiffs were suing in their representative capacity.—Peavy v. Sangster, 79 S. E. 215.

§ 444 (Ga.App.) Where plaintiff sues in his individual capacity, and title in the damaged property is alleged to be in him, an amendment merely adding the words "as administrator of" A. will not entitle him to recover as administrator, where neither the petition nor the amendment alleges that the title was in the decedent named, and that such person is dead, and plaintiff his administrator.—Leathers v. Raburn, 79 S. E. 946.

§ 449 (Ga.App.) Where the answer admitted that plaintiffs were administrators as alleged in the petition, it was not necessary for them to prove such fact.—Peavy v. Sangster, 79 S. E. 215.

XI. ACCOUNTING AND SETTLEMENT.

(B) Proceedings for Accounting.

§§ 473, 474 (Ga.) In a legatee's proceeding under Civ. Code 1910, § 5417, for an accounting, the other legatees, though not necessary parties, may be permitted to intervene to contest the moving legatee's claim against the estate dependent upon the construction of the will.—Hanvy v. Moore, 79 S. E. 772.

EXECUTORY DEVICES.

See Wills, §§ 614, 634.

EXEMPLARY DAMAGES.

See Damages, § 91.

EXEMPTIONS.

See Homestead; Process, § 126.

EXPERT TESTIMONY.

See Evidence, §§ 471-558.

EX POST FACTO LAWS.

See Constitutional Law, § 203.

EXTENSION.

See Principal and Surety, § 108.

EXTRADITION.

See Habeas Corpus, §§ 85, 92, 110.

II. INTERSTATE.

§ 39 (S.C.) When extradition papers are regular on their face, every intendment is to be indulged in favor of their validity, and the burden is on the prisoner to show that the statutes have not been complied with.—Ex parte Massee, 79 S. E. 97.

FACTORS.

See Brokers.

§ 23 (Ga.App.) Where a cotton factor has advanced large sums on cotton shipments, so that his interest in the cotton equals or exceeds that of the owner, he may exercise his discretion as to the time of selling the cotton even in disregard of the owner's instructions, providing he acts with due regard both to his own interest and that of the owner.—John Flannery Co. v. James, 79 S. E. 912.

§ 46 (Ga.App.) Evidence in a cotton broker's action against the owner of cotton for commissions and charges, wherein the defense was that plaintiff negligently failed to comply with selling instructions, held sufficient to show that the factor was guilty of neglect of his duty to the owner through violation of his instructions.—John Flannery Co. v. James, 79 S. E. 912.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 7 (Ga.) A clerk of a superior court issuing an attachment for the sheriff under Civ. Code 1895, § 4774 (Civ. Code 1910, § 5346), as for contempt in failing to pay over money in his hands, the attachment being issued under an order absolute made by the judge of the superior court, was not liable to the sheriff for false imprisonment on the sheriff being discharged in habeas corpus proceedings.—Butler v. Tattnell Bank, 79 S. E. 456.

Where a sheriff was arrested under an attachment issued in pursuance of an order absolute under Civ. Code 1895, § 4774 (Civ. Code 1910, § 5346), for contempt in failing to pay over money in his hands, a bank directing the arrest to be made and a sheriff of an adjoining county making the arrest were not liable in damages as for false imprisonment after discharge of defendant in habeas corpus proceedings; no bad faith being alleged against either of them.—Id.

(B) Actions.

§ 39 (N.C.) Whether plaintiff's arrest without a warrant as an alleged aider in the production of an immoral show was justifiable held for the jury.—Brewer v. Wynne, 79 S. E. 629.

FALSE PRETENSES.

See Bankruptcy, § 426.

§ 7 (S.C.) An indictment charging that accused obtained a horse from a prosecuting witness by falsely pretending that another horse was sound in every respect, with intent to cheat and defraud the prosecuting witness, held to state facts constituting a crime, under Cr. Code 1912, § 220.—State v. Stone, 79 S. E. 108.

§ 49 (S.C.) Evidence *held* sufficient to support a conviction for obtaining goods by false pretenses in connection with a horse trade.—*State v. Stone*, 79 S. E. 108.

FALSE SWEARING.

See Perjury.

FEES.

See Attorney and Client, § 190.

FEE SIMPLE.

See Deeds, § 129; Vendor and Purchaser, §§ 129, 214; Wills, §§ 597, 600, 601.

FELLOW SERVANTS.

See Master and Servant, §§ 159-187.

FENCES.

§ 1 (W.Va.) No obligation rests upon the landowner to fence a right of way in which another has simply an easement.—*Wiley v. Ball*, 79 S. E. 659.

FERTILIZERS.

See Agriculture, § 7.

FINDING LOST GOODS.

See Weapons, § 13.

FINDINGS.

See Appeal and Error, §§ 994-1024.

FIRE INSURANCE.

See Insurance, § 165.

FIRES.

See Arson; Railroads, §§ 454-485.

FIXTURES.

See Deeds, § 143.

§ 21 (N.C.) A logging road, constructed of ties partly embedded in the soil with rails spiked thereon, built for the better enjoyment of the land by facilitating the removal of the timber thereon, is a fixture which passed by a conveyance of the land.—*Basnight v. Small*, 79 S. E. 269.

FLYING SWITCH.

See Railroads, § 312.

FOOD.

See Homicide, § 89.

FORCIBLE DEFILEMENT.

See Rape.

FORECLOSURE.

See Chattel Mortgages, §§ 271-285; Mortgages, §§ 338-468; Taxation, §§ 730, 742.

FORFEITURES.

See Bail, § 75; Corporations, § 603; Habeas Corpus, § 110; Vendor and Purchaser, § 95.

FORGERY.

See Criminal Law, § 822.

§ 12 (Ga.App.) Where a person, to whom a certificate of stock was issued, altered the same by raising the figures as to the number of shares for which it purported to be issued, and signed his name to the blank for transfer of the certificate and negotiated the same with a

bank, he was guilty of uttering a forged instrument, though the date and the name of the transferee were not inserted.—*Smith v. State*, 79 S. E. 764.

§ 16 (Ga.App.) The words "pass or tender" are synonymous with the words "utter and publish." If the accused "uttered" a forged instrument, he "published" it. If he "passed" it, he "uttered and published" it. And if it be "uttered" and "published" and "passed," it necessarily was "tendered."—*Smith v. State*, 79 S. E. 764.

§ 48 (Ga.App.) In a prosecution for forgery, an instruction that if accused "fraudulently uttered, published, passed or tendered" the paper described in the indictment, he should be convicted, was not erroneous, though the indictment did not employ the words "pass or tender"; the words used in the instruction being those employed in Pen. Code 1910, § 245.—*Smith v. State*, 79 S. E. 764.

FORMER ADJUDICATION.

See Judgment, §§ 585-743, 948, 956.

FORMER JEOPARDY.

See Criminal Law, § 178.

FORNICATION.

See Criminal Law, §§ 424, 622, 877; Incest.

§ 9 (S.C.) On the trial of a man and a woman for fornication, evidence *held* insufficient to support a conviction as to the man.—*State v. Wade*, 79 S. E. 106.

FRANCHISES.

See Corporations, § 603.

FRATERNAL INSURANCE.

See Insurance, §§ 718, 815.

FRAUD.

See Bankruptcy, §§ 363, 426; Bills and Notes, §§ 103, 330, 497, 537; Bridges, § 7; Cancellation of Instruments, § 35; Chattel Mortgages, § 172; Contracts, § 94; Corporations, §§ 228, 557; Criminal Law, § 335; Equity, § 11; Estoppel, § 59; Evidence, §§ 121, 405, 434; Execution, §§ 167, 249, 251; Executors and Administrators, § 111; Frauds, Statute of; Fraudulent Conveyances; Insurance, §§ 253-299, 377; Judgment, § 386; Sales, §§ 364, 381; Specific Performance, § 65; Trial, §§ 295, 330, 350; Vendor and Purchaser, § 334; Wills, § 355.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 11 (N.C.) When a party to a bargain knowingly makes false assertions as to the value of the property as an inducement to the trade, and these are accepted and reasonably relied on, they constitute an actionable wrong.—*Pate v. Blades*, 79 S. E. 608.

§ 13 (N.C.) One who intentionally asserts a fact to be true of his own knowledge, when he does not know whether it is true or false, is as culpable, in case another is thereby misled or injured, as one who makes an assertion which he knows to be untrue.—*Pate v. Blades*, 79 S. E. 608.

§ 20 (Ga.App.) A false statement is not fraudulent, when there is no reason why it should be believed and relied upon.—*Thomson v. McLaughlin*, 79 S. E. 182; *Harrison v. Lee*, Id. 211.

II. ACTIONS.

(B) Parties and Pleading.

§ 41 (Va.) Fraud must be clearly alleged and proved, as every presumption is in favor of innocence and not of guilt.—Dickenson v. Ramsey, 79 S. E. 1025.

(C) Evidence.

§ 58 (N.C.) Facts held to warrant a recovery for fraud in inducing plaintiff to part with a valuable tract of land for a totally inadequate consideration.—Pate v. Blades, 79 S. E. 608.

III. CRIMINAL RESPONSIBILITY.

§ 68 (Ga.App.) Where no loss is sustained by the person alleged to have been defrauded, the act alleged to be fraudulent is not punishable as a crime.—Mobley v. State, 79 S. E. 908.

FRAUDS, STATUTE OF.

See Trusts, §§ 17, 18.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARriage OF ANOTHER.

§ 18 (Ga.) The acceptance of a deed obligating the grantee to pay purchase money owing by the grantor created an agreement to pay such price, which was not within the statute of frauds.—Coward v. Singletary, 79 S. E. 196.

§ 21 (Va.) The agreement of one of several joint accommodation indorsers of a note, whereby he induced the others to join in the indorsement, that he would indemnify the others in case of default of the maker of the note, is not within the statute of frauds (Code 1904, § 2840), as an undertaking to answer for the debt or default of another.—Alphin v. Lowman, 79 S. E. 1029.

§ 32 (Ga.) A third person's agreement to pay the amount of the debt, upon the creditor's releasing the debtor and agreeing that such third person shall be substituted for the debtor, held not within the statute of frauds.—Harris v. Jones, 79 S. E. 841.

VII. SALES OF GOODS.

(C) Giving Earnest or Part Payment.

§ 95 (Ga.App.) Under the statute of frauds (Civ. Code 1910, § 3222, par. 7), the approval of a principal, when required to complete a sale made by his agent, must be in writing, where the price exceeds \$50, though the buyer pays the agent \$1 as part of purchase price.—City Drug Co. v. American Soda Fountain Co., 79 S. E. 376.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 103 (Va.) A letter signed by the vendor of land stating that she would accept the offer made by complainant is a sufficient memorandum to take the case out of the statute of frauds.—Croghan v. Worthington Hardware Co., 79 S. E. 1039.

§ 104 (N.C.) Where long subsequent to a parol contract to convey land a written agreement to the same effect was executed, this was a sufficient memorandum within the statute of frauds requiring contracts concerning land to be in writing.—Winslow v. White, 79 S. E. 258.

§ 111 (S.C.) A combined crop lien and chattel mortgage, given to secure future advances of supplies and money, which did not specify the kind, quantity, or price of the goods to be furnished was not a sufficient writing to satisfy the statute of frauds for the subsequent oral sale of supplies by the mortgagee to the mortgagor.—Rigby v. Gaymon, 79 S. E. 518.

FRAUDULENT CONVEYANCES.

See Appeal and Error, § 1178.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) Original Parties.

§ 172 (N.C.) The heirs of a grantor cannot sue to set aside a deed executed by him with intent to defraud his creditors, and as to them the grantee acquired a good title.—Pierce v. Stallings, 79 S. E. 302.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(F) Pleading.

§ 269 (W.Va.) A fraudulent conveyance will not be set aside on proof alone without an attack by proper pleading.—McDonald v. McDonald Planing Mill Co., 79 S. E. 1081.

(G) Evidence.

§ 277 (W.Va.) In an action to set aside a fraudulent conveyance, payment of an adequate consideration is an affirmative defense to be established by clear proof.—Bland v. Rigby, 79 S. E. 1013.

§ 300 (W.Va.) To sustain the claim of payment of adequate consideration in an action to set aside a fraudulent conveyance, the grantee's testimony, if uncorroborated, must be clear and consistent with other testimony offered by him.—Bland v. Rigby, 79 S. E. 1013.

FUTURE ADVANCES.

See Mortgages, § 114.

FUTURES.

See Gaming, §§ 12, 49.

GAMING.

See Criminal Law, § 493.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 12 (N.C.) In an action for breach of contract for the sale of cotton for future delivery, the buyer cannot recover if the contract was entered into without any expectation of a delivery.—Holt v. Wellons, 79 S. E. 450.

(B) Rights and Remedies of Parties.

§ 49 (N.C.) In an action by the buyer for breach of a contract for the sale of cotton for future delivery, claimed by the seller to be a gambling contract, the buyer's testimony that the seller had asked to be notified if the buyer ever wanted any cotton was admissible, as it tended, if only slightly, to show that an actual delivery of the cotton was intended.—Holt v. Wellons, 79 S. E. 450.

Under the direct provisions of Revisal 1905, §§ 1689-1691, where the defendant alleges in his answer that the cause of action is founded upon a contract for the sale of cotton for future delivery, entered into without any actual delivery being intended, the burden is upon the plaintiff to show that the contract is lawful in its nature and purposes.—Id.

III. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 71 (Ga.App.) In a prosecution for gaming it is not error to charge that, if accused played and bet for money as alleged, it is immaterial whose money it was or who put up the money with which he played.—Kincaid v. State, 79 S. E. 770.

§ 75 (Ga.App.) One who permits others to assemble in a room under his control and play any game of chance at which anything of value is hazarded, is guilty of keeping a gaming house, within Pen. Code 1910, § 389, regardless of his object in permitting the game.—Alexander v. City of Atlanta, 79 S. E. 177.

GARAGES.

See Livery Stable Keepers; Master and Servant, § 302.

GARNISHMENT.

See Trial, § 253.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 42 (Ga.App.) A debt due by an attorney cannot be collected by garnishment of a debtor of one of his clients, though the attorney as a result of his services may have a contingent interest in the debt.—*Modlin v. Smith*, 79 S. E. 82.

The debtor of a client does not become the debtor of the client's attorney, because, under the terms of his employment the lawyer will be entitled to a stipulated portion of the recovery as his fee, so as to render such portion subject to garnishment.—*Id.*

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 158 (Ga.App.) Merely exhibiting to a party or his counsel a traverse of an answer of garnishment when it is filed is not such notice of traverse to the garnishee as is contemplated by Civ. Code 1910, § 5287, requiring such notice to be served in person or by leaving same at garnishee's abode.—*Vaughan v. Bank of Cobbtown*, 79 S. E. 1130.

§ 191 (W.Va.) A garnishee may, when the debtor is served with process or defends the action, disregard any irregularity, but otherwise he pays a judgment against him at his peril, and therefore is allowed to charge the funds in his hands to the extent necessary to test the validity of the proceedings.—*Bank of Union v. Baird*, 79 S. E. 738.

VIII. CLAIMS BY THIRD PERSONS.

§ 210 (Ga.) The dissolution of a garnishment by a person not a party to the proceeding, authorized by Civ. Code 1910, § 5282, discharges the garnishee from further liability upon the filing of a dissolution bond.—*First Nat. Bank v. Case Threshing Mach. Co.*, 79 S. E. 781.

Since the Garnishment Statutes (Civ. Code 1910, §§ 5282, 5283, 5289) do not authorize a partial dissolution of a garnishment, the privilege given under section 5282 to a stranger to the suit to dissolve the garnishment by bond does not entitle a claimant to only a portion of the indebtedness admitted by the garnishee to dissolve the garnishment to the extent of the indebtedness claimed.—*Id.*

GIFTS.

See Trial, § 252; Trover and Conversion, § 23; Wills, § 194.

I. INTER VIVOS.

§ 4 (Ga.App.) A gift of a chattel, made in contemplation of immediate marriage and ratified after marriage, was founded upon a good consideration, and was binding between the parties.—*Hartz v. Hartz*, 79 S. E. 230.

The three things essential to consummate a gift of a chattel are: Intention of the donor; acceptance by the donee; and delivery of the chattel, or something which the law will accept in lieu thereof. No writing is necessary.—*Id.*

§ 48 (Ga.App.) Where, in trover by a wife to recover from her husband a chattel given her by him, he denied making the gift, evidence that at the time of the alleged gift title to a half interest in the chattel was in defendant's brother was admissible to corroborate his testimony that he made no gift, but not to defeat plaintiff's claim if a gift was in fact made.—*Hartz v. Hartz*, 79 S. E. 230.

GRAND JURY.

See Criminal Law, § 278.

§ 7 (Ga.) Under Acts 1911, p. 81, creating the Dublin judicial circuit and four terms of court for Laurens county, and providing that grand juries shall not be convened except for the spring and fall terms, unless the presiding judge deems it expedient, and under Pen. Code 1910, § 823, which provides for a grand jury at each term, a grand jury was not illegal because the presiding judge at the close of the October term drew the names of grand jurors to serve thereon at the January term.—*Lynn v. State*, 79 S. E. 29.

§ 34 (Va.) An indictment against accused held not affected by the fact that the commonwealth's attorney, at the request of the grand jury, entered their room to consult with them during their deliberations on other matters in violation of Code 1904, § 3988.—*Mullins v. Commonwealth*, 79 S. E. 324.

GUARANTY.

See Constitutional Law, § 303; Principal and Surety.

III. DISCHARGE OF GUARANTOR.

§ 53 (Ga.App.) A material alteration in the original contract, without the knowledge and consent of the guarantor, relieved him from the guaranty.—*Little Rock Furniture Co. v. Jones & Co.*, 79 S. E. 375.

GUARDIAN AND WARD.

See Trespass, § 76.

I. GUARDIANSHIP IN GENERAL.

§ 6 (Va.) The relation of master and servant, whereby the master, who did not come into possession of any property of the infant servant or agree to pay him any wages, was to furnish him with food, clothing, and lodging, did not make the master a "guardian de facto or de son tort."—*Starke v. Storm's Ex'r*, 79 S. E. 1057.

HABEAS CORPUS.

See Divorce, § 289; False Imprisonment, § 7.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 85 (S.C.) It was error to admit as evidence in a habeas corpus proceeding an affidavit of a private individual stating that the Governor of the demanding state had told him that an extradition requisition bearing his official signature and the great seal of the state had not been signed by him.—*Ex parte Massee*, 79 S. E. 97.

Telegrams in relation to extradition proceedings between the Governors of the two states, indicating withdrawal of the requisition, which were considered on the preliminary hearing in habeas corpus without objection, were properly considered on the final hearing.—*Id.*

§ 92 (S.C.) Legislation as to extradition being within the power of Congress, its statutes are paramount to state Constitutions and Statutes, and all that a state court can do under habeas corpus proceedings is to determine whether the conditions of the federal Constitution and statutes have been complied with.—*Ex parte Massee*, 79 S. E. 97.

In habeas corpus the court may determine whether the prisoner is subject to extradition, as whether he is the person charged, whether he is a fugitive from justice, whether he was in the demanding state when the offense was committed, and whether the act charged was a crime there; but it cannot inquire into the motive of the extradition or the merits.—*Id.*

§ 110 (S.C.) Bail may be granted pending final hearing in habeas corpus; but, where the

prisoner is held for extradition, bail should not be allowed, if the federal law has been complied with, though, if not, he may be released absolutely or on bail.—*Ex parte Massee*, 79 S. E. 97.

That the prisoner held for extradition for a crime was guilty of no moral wrong, the prosecution was a hardship and instituted to collect a debt, and another state had refused extradition, did not show the statutes had not been complied with, and, the extradition papers being regular on their face, the court erred in allowing bail pending hearing in habeas corpus.—*Id.*

If, pending final hearing in habeas corpus proceedings, the prisoner is released on bail, and he fails to appear, his bail will be forfeited, and the inquiry into the legality of the arrest be deemed abandoned, unless he can give a legal excuse, the acceptance of which is in the discretion of the court.—*Id.*

§ 113 (Ga.App.) The questions involved on appeal in a habeas corpus proceeding, being moot questions after expiration of the time for which the petitioner was sentenced to serve in the city chain gang, will not be considered.—*Johnson v. Harris*, 79 S. E. 588.

HARMLESS ERROR.

See Appeal and Error, §§ 1031-1078; Criminal Law, §§ 1163-1174; Trial, § 296.

HEADLIGHTS.

See Railroads, § 362.

HEALTH.

I. BOARDS OF HEALTH AND SANITARY OFFICERS.

§ 16 (N.C.) Under Laws 1911, c. 62, § 15, 21, providing for a system of quarantine, a city held not liable for quarantine expenses unless it had appointed a quarantine officer and adopted a system of quarantine of its own.—*Board of Com'rs of Vance County v. Town of Henderson*, 79 S. E. 442.

If Revisal 1905, § 4508, imposes a liability for quarantine expenses upon a city which has no quarantine officer, it is incompatible with and repealed by Laws 1911, c. 62, § 21, providing that all expenses of quarantine shall be borne by the town employing a quarantine officer.—*Id.*

HEARSAY EVIDENCE.

See Criminal Law, §§ 419, 420; Evidence, §§ 314-324.

HIGHWAYS.

See Bridges; Convicts, § 10; Easements, § 17; Eminent Domain, §§ 79, 80, 101, 203; Evidence, § 441; Municipal Corporations, §§ 225, 544, 655-697, 759-822; Railroads, §§ 94, 95, 301-350; Trial, §§ 252, 253.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 113 (Va.) In an action against a county for the balance of the contract price for constructing a road, a plea of offset, alleging that plaintiff failed to perform its agreement, and that the county was damaged thereby in excess of the amount claimed, is sufficient to entitle the county to recover from the plaintiff.—*Luck Const. Co. v. Russell County*, 79 S. E. 393.

A provision in a contract with a county for road construction that payments should be made on the engineer's estimates does not make such estimates conclusive and prevent inquiry as to whether the work embraced therein was done according to contract, where the contract also provided that no work should be regarded as accepted until final acceptance of the whole work.—*Id.*

The estimates or other acts of the engineers

under a contract with a county for the construction of a road are not binding upon either party, where induced by fraud of the other party or the result of fraud or mistake so great as to amount to fraud on the part of the engineers.—*Id.*

HOLIDAYS.

See Sunday.

§ 5 (W.Va.) Where notice to take depositions specified that they would be taken on a legal holiday, depositions taken on that day instead of on the next ensuing secular day, which, by Code 1906, c. 15L, the notice is taken to intend, cannot be read on final hearing.—*Dixon v. Dixon*, 79 S. E. 1016.

HOLOGRAPHIC WILLS.

See Wills, § 733.

HOMESTEAD.

See Judgment, §§ 503, 506, 720; Usury, § 98.

II. TRANSFER OR INCUMBRANCE.

§ 115 (Ga.) Where a mortgage was given in 1875 on a homestead granted under the Constitution of 1868, and proceedings to foreclose were begun in 1876, and dismissed because the homestead was not subject, a foreclosure proceeding begun in 1910, two years after termination of the homestead right, held not barred by limitations.—*Moughon v. Masterson*, 79 S. E. 561.

§ 120 (Ga.App.) Under Civ. Code 1910, § 6584, real estate set apart as a homestead exemption cannot be legally sold, except on order of the superior court.—*Brooks v. Tinsley*, 79 S. E. 160.

§ 131 (Ga.App.) In an action on a purchase-money note given for a homestead exemption which had been set apart, the defendant, who had no knowledge at the time of the purchase that the property was a homestead, could defend on the ground that the note was without consideration, because the vendors had no right to convey the homestead; and hence it was error to exclude from evidence a certified copy of the homestead exemption.—*Brooks v. Tinsley*, 79 S. E. 160.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 169 (N.C.) Const. art. 10, § 8, requiring the consent of the wife to a deed conveying the homestead, applies only when the homestead has been set apart, or there is a judgment lien against the land, and prior to that time the husband may waive his exemption without the consent of the wife.—*Simmons v. McCullin*, 79 S. E. 625.

§ 172 (N.C.) A judgment defendant who consents that a judgment for a certain amount may be entered in an action against him, and may be satisfied out of the property attached in that action, waives his homestead in the attached property, and cannot thereafter claim an exemption, as he might have done had the judgment been against his consent.—*Simmons v. McCullin*, 79 S. E. 625.

A debtor can waive his homestead exemption by consenting to the entry of a judgment and its satisfaction out of the homestead, since a judgment entered by consent of the parties is at least as conclusive upon them as one rendered by the court after trial.—*Id.*

HOMICIDE.

See Assault and Battery, §§ 63, 91, 95; Counties, §§ 132, 139; Criminal Law, §§ 101, 278, 422, 427, 594, 641, 673, 762-764, 778, 779, 823-825, 922, 1169, 1171-1173; Indictment and Information, §§ 63, 84, 110; Witnesses, §§ 128, 274.

II. MURDER.

§ 11 (Ga.) "Legal malice," as related to homicide, is an intent unlawfully to take human life without justification, mitigation, or excuse; and while it must exist at the time of the killing, it need not exist for any length of time before the killing, and is not necessarily ill will or hatred.—*Smith v. State*, 79 S. E. 1127.

§ 28 (N.C.) Where the purpose to kill was deliberately and premeditatedly formed when sober, imbibing intoxicants to whatever degree or extent in order to carry out the design will not avail to reduce the murder to the second degree.—*State v. Shelton*, 79 S. E. 883.

III. MANSLAUGHTER.

§ 68 (Ga.App.) Where a person in violation of Acts 1907, p. 121, Civ. Code, 1910, § 1651, and Pen. Code 1910, § 459, administers morphine to another and causes death, he may be convicted of involuntary manslaughter as defined by Pen. Code 1910, § 67.—*Silver v. State*, 79 S. E. 919.

In a prosecution for involuntary manslaughter committed by the unlawful administering of a narcotic drug, it was no defense that intent was not to cause death, but to alleviate pain.—*Id.*

The charge of involuntary manslaughter in the commission of an unlawful act in violation of Pen. Code 1910, § 67, can be based on an act *malum prohibitum*, as well as upon an act *malum in se*.—*Id.*

§ 83 (Ga.App.) A defendant may be convicted as principal in the second degree of voluntary manslaughter.—*Pope v. State*, 79 S. E. 909.

IV. ASSAULT WITH INTENT TO KILL.

§ 89 (Ga.App.) The act of maliciously putting broken glass into food with homicidal intent does not constitute the offense of assault with intent to murder, where the food is not eaten.—*Leary v. State*, 79 S. E. 584.

§ 100 (Ga.App.) That defendant furnished the room in which the crime was committed, with knowledge that a criminal abortion was to be performed, will not render him guilty as an "accessory before the fact," as defined by Pen. Code 1910, § 45, to an assault with intent to murder, under section 81, making a person guilty of such offense who causes death in an attempted abortion.—*Snell v. State*, 79 S. E. 71.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 105 (Ga.App.) Where a person does not exceed the measure of force necessary in the resistance of an illegal arrest, he is guilty of no offense.—*Taylor v. State*, 79 S. E. 924.

§ 118 (N.C.) Where an unprovoked assault with intent to kill is made upon a person, he may stand his ground and, if necessary, kill his assailant.—*State v. Lucas*, 79 S. E. 674.

The rule requiring one to quit the fight before he can maintain self-defense applies only where the person who slays the other provoked the dispute or entered into it unlawfully.—*Id.*

VI. INDICTMENT AND INFORMATION.

§ 127 (Ga.App.) An indictment for murder need not allege that defendant was of sound mind and discretion.—*Brown v. State*, 79 S. E. 231.

§ 135 (Ga.App.) An indictment for murder, charging that accused killed deceased by shooting him with a certain pistol and rifle, giving to deceased the mortal wound of which he died, *held* not demurrable for failure to clearly designate the weapon used or the manner of loading, or that it was aimed at deceased, or that the weapon was one likely to cause death.—*Brown v. State*, 79 S. E. 231.

§ 138 (Ga.App.) An indictment for voluntary manslaughter through the unlawful administration of morphine need not state the quantity administered.—*Silver v. State*, 79 S. E. 919.

§ 142 (Ga.App.) A person indicted as an accessory before the fact to an assault with intent to murder, in violation of Pen. Code 1910, § 81, cannot be convicted, upon evidence which shows him to be a principal, either in the first or second degree.—*Snell v. State*, 79 S. E. 71.

§ 142 (Ga.App.) Under an indictment for murder, charging that accused killed deceased by shooting him with a certain pistol and rifle, the state could prove the killing with either of the weapons alleged.—*Brown v. State*, 79 S. E. 231.

VII. EVIDENCE.**(A) Presumptions and Burden of Proof.**

§ 144 (Ga.) It was not necessary for the state to prove a motive in order to support the presumption of malice, which arises from proof of an unlawful killing.—*Lynn v. State*, 79 S. E. 29.

§ 150 (N.C.) Defendant claiming that at the time of and immediately before the homicide he had been rendered, by drunkenness, incapable of forming a deliberate and premeditated purpose to kill, has the burden of proving it, not however beyond a reasonable doubt, but only to the satisfaction of the jury.—*State v. Shelton*, 79 S. E. 883.

(B) Admissibility in General.

§ 163 (Ga.App.) There being no evidence that prosecutor was attempting to make an assault on accused at the time the latter shot prosecutor, evidence tending to show that prosecutor was a man of violent and turbulent character was properly excluded.—*Wimberly v. State*, 79 S. E. 767.

§ 167 (Ga.) It was error to admit testimony that a gun owned by a witness was stolen before the homicide, and thereafter found in the possession of another witness, where there was no legal showing that the gun was used by accused, or in any way connected with the crime.—*Smith v. State*, 79 S. E. 1127.

§ 174 (Ga.App.) Evidence offered by accused that he made no effort to leave the county or escape after the commission of the homicide was properly excluded.—*Dunn v. State*, 79 S. E. 764.

§ 178 (N.C.) A charge that it is not allowable when one is charged with crime to show by circumstances or insinuations that some one else killed deceased is proper.—*State v. Fogleman*, 79 S. E. 879.

(C) Dying Declarations.

§ 207 (Ga.App.) That a dying statement, not reduced to writing, was made by one in articulo mortis previous to a statement which was thereafter reduced to writing, did not render the prior oral statement inadmissible.—*Odum v. State*, 79 S. E. 858.

§ 215 (Ga.App.) A dying declaration *held* not inadmissible because declarant said, "I know the man, but I cannot call his name," where other evidence clearly disclosed the identity of the individual referred to.—*Odum v. State*, 79 S. E. 858.

§ 218 (Ga.App.) Statements by decedent that he could not live and that O. (the accused) had promised to kill him, and if he had known he was going to kill him he would have begged him not to do so, were properly submitted to the jury to determine whether they were dying declarations, under instructions as to what would constitute the same.—*Wimbish v. State*, 79 S. E. 741.

(E) Weight and Sufficiency.

§ 232 (N.C.) Evidence that defendant armed himself with a dangerous weapon, and that he used abusive language toward deceased prior to the killing, and a statement thereafter that he wished he had shot deceased again, was sufficient to show premeditation and deliberation.—*State v. Daniels*, 79 S. E. 953.

§ 238 (N.C.) Defendant, claiming that at the time of and immediately before the homicide he had been rendered, by drunkenness, incapable of forming a deliberate and premeditated purpose to kill, need not prove it beyond a reasonable doubt, but only to the satisfaction of the jury.—*State v. Shelton*, 79 S. E. 883.

Evidence in a homicide case held insufficient to show that at the time of the killing defendant was so drunk as to render him utterly incapable of forming a deliberate and premeditated purpose to kill, but rather to show that he had for months been deliberating and premeditating the murder, and that any drinking by him on the day of the killing was to assist him to execute his purpose.—*Id.*

VIII. TRIAL.

(B) Questions for Jury.

§ 282 (N.C.) Evidence held to warrant the submission to the jury of the question of defendant's guilt of murder in the first degree.—*State v. Cobb*, 79 S. E. 419.

(C) Instructions.

§ 289 (Ga.App.) In a prosecution for voluntary manslaughter by the unlawful administering of morphine, an instruction that the offense was complete if accused intended to administer the morphine and death resulted was not objectionable for failure to state that to complete the offense death must result directly from the unlawful act.—*Silver v. State*, 79 S. E. 919.

§ 295 (Ga.App.) In view of Pen. Code 1910, § 65, it is error to charge that provocation by words, threats, menaces, or contemptuous gestures will in no case free the person killing from the crime of murder, without further charging that words, threats, or menaces may justify a killing if the circumstance be such as reasonably to arouse the fears of a reasonable man that a felony is about to be committed upon him.—*Dunn v. State*, 79 S. E. 764.

§ 295 (Ga.App.) Where, in a prosecution for assault with intent to murder, the court instructs relative to the "cooling time," he should state that the cooling time is a question solely for the jury.—*Taylor v. State*, 79 S. E. 924.

§ 300 (Ga.App.) Under evidence tending to show a mutual intent to fight, it was not error to instruct on the law of justifiable homicide, as contained in Pen. Code 1910, § 70, and on the doctrine of reasonable fear as contained in section 71.—*Faison v. State*, 79 S. E. 39.

That instructions on Pen. Code 1910, §§ 70, 71, 73, relative to justifiable homicide, and to the requirements that the fear must be reasonable and the danger urgent, follow each other in quick succession, does not necessarily render the charge confusing to the jury.—*Id.*

§ 300 (N.C.) Error, in an instruction requiring the defendant to prove that he was without fault in entering into the difficulty and also that he withdrew from the fight and retreated as far as he could with safety before he could rely upon self-defense, held not cured by another instruction which referred to the right of self-defense in general terms.—*State v. Lucas*, 79 S. E. 674.

§ 300 (W.Va.) Where there is appreciable evidence on the subject of self-defense, it is error to refuse instructions properly presenting the law of self-defense.—*State v. Edwards*, 79 S. E. 1005.

§ 301 (Ga.) Where, in a prosecution of husband and wife for murder, there was no evidence

of any assault upon the wife by deceased, or that the husband had killed deceased to prevent such an assault, and the husband denied being present at the killing, an instruction that an attempted assault would have justified the killing by the husband was properly refused.—*Lynn v. State*, 79 S. E. 29.

§ 309 (Ga.App.) Testimony tending to show a mutual intent to fight authorized an instruction upon voluntary manslaughter.—*Faison v. State*, 79 S. E. 39.

§ 309 (Ga.App.) Where the theory of voluntary manslaughter is reasonably deducible from the evidence for the accused, it is not error to charge the jury on that subject.—*Dunn v. State*, 79 S. E. 764.

§ 309 (Ga.App.) In a prosecution for assault with intent to murder, the state's evidence that accused shot a depot gatekeeper without any present provocation, when considered with defendant's evidence that he was resisting an illegal arrest and evidence of defendant's ejection from the waiting room a few minutes before the shooting, authorized an instruction on voluntary manslaughter.—*Taylor v. State*, 79 S. E. 924.

§ 310 (Ga.App.) Where there was no evidence of conspiracy between accused and the slayer, and the evidence did not demand a finding that deceased came to his death from a wound inflicted by accused, it was error to refuse to instruct on assault with intent to murder.—*Pope v. State*, 79 S. E. 909.

IX. NEW TRIAL.

§ 319 (Ga.App.) Alleged newly discovered evidence, both negative and cumulative in character, to show that decedent did not make a dying declaration, where accused admitted that he shot decedent, setting up self-defense, was no ground for new trial, because it is not probable that it would have produced a different result.—*Wimbish v. State*, 79 S. E. 744.

X. APPEAL AND ERROR.

§ 338 (Ga.) Admission of testimony that a gun was stolen from the witness before the homicide, and found in the possession of another witness after the homicide, held harmless error, where it appeared that, in view of the uncontradicted evidence in the case, the jury could not have been influenced thereby.—*Smith v. State*, 79 S. E. 1127.

§ 339 (Ga.App.) Where the evidence demanded at least a verdict of guilty of stabbing, which was returned, and a verdict of guilty of assault with intent to kill would have been authorized, errors in rulings as to defendant's statements on the trial were immaterial.—*Skinner v. State*, 79 S. E. 181.

§ 340 (Ga.App.) Erroneous instructions on the law of murder are harmless, where defendant is convicted of voluntary manslaughter.—*Faison v. State*, 79 S. E. 39.

§ 340 (Ga.App.) In a prosecution for assault with intent to murder, wherein conviction was had for shooting at another, an instruction that evidence of defendant's good character could not of itself produce an acquittal held ground for reversal where there was circumstantial evidence supporting defendant's statement as to justification and the evidence did not demand the conviction.—*Taylor v. State*, 79 S. E. 924.

In a prosecution for assault with intent to murder, the refusal of instructions relating to the offense charged was harmless where defendant was convicted only of the lesser offense of shooting at another.—*Id.*

§ 340 (N.C.) In view of the charge on burden of proof on the state and on reasonable doubt, using the words "beyond a reasonable doubt," instead of "to the satisfaction of the jury," in a charge on the showing of condition of mind from intoxication to reduce the crime

to murder in the second degree, *held* harmless.—*State v. Shelton*, 79 S. E. 883.

Where there was no sufficient evidence that at the time of the homicide defendant was in such a mental condition, brought about by excessive drinking, as to render him incapable of committing deliberate and premeditated homicide, error in instructing as to the burden on him to show such condition, is harmless.—*Id.*

§ 340 (S.C.) Where, under the undisputed evidence, a homicide was either in self-defense, or was murder, erroneous charges as to manslaughter were harmless.—*State v. Spears*, 79 S. E. 315.

HOSPITALS.

See Constitutional Law, § 278; States, § 191.

HOSTILE POSSESSION.

See Adverse Possession, §§ 60–85.

HUSBAND AND WIFE.

See Adverse Possession, § 60; Appeal and Error, §§ 882, 1066; Cancellation of Instruments, § 35; Carriers, § 280; Criminal Law, §§ 422, 1169; Curtesy; Death, § 47; Deeds, §§ 58, 132; Divorce; Dower; Evidence, §§ 121, 441; Execution, § 199; Homestead, § 169; Intoxicating Liquors, § 309; Mechanics' Liens, §§ 71, 281; New Trial, § 108; Trover and Conversion, § 23; Vagrancy, § 1; Witnesses, §§ 58, 191.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 25 (Ga.App.) It is not the duty of a woman's second husband, as the successor of the marital offices of his predecessor, to make a showing for a continuance for his wife in a suit on a note evidencing a debt of her first husband.—*Wright v. Bank of Southwestern Georgia*, 79 S. E. 184.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

§ 129 (Ga.) Under Civ. Code 1910, § 4419, relative to estoppel from fraudulent acts or silence, where a wife having an equitable title to land to which her husband has the legal title permits him to use same in obtaining credit, she is estopped, after the credit has been extended, from asserting her title as against the lien of a judgment obtained by the creditor, though before judgment her husband had conveyed the land to her.—*Ford v. Blackshear Mfg. Co.*, 79 S. E. 576.

§ 133 (Va.) Evidence *held* to require a finding that real property in controversy was purchased by decedent's widow with funds furnished by herself and her stepson, and that her husband had no interest therein which could be taken by his creditors.—*Gent's Ex'x v. Pruner's Adm'r*, 79 S. E. 1044.

(C) Liabilities and Charges.

§ 154 (Ga.App.) A wife may be held liable on a note executed by her jointly with her husband, where the husband acted as her agent and she received the consideration of the note.—*Cook v. Hightower & Co.*, 79 S. E. 165.

(D) Conveyances and Contracts to Convey.

§ 185 (Ga.) Civ. Code 1910, § 3009, providing that no contract of sale by a wife as to her separate property with her husband or trustee shall be valid, unless approved by the superior court, applies to sales by the wife to her husband while they are living in a state of separation.—*Echols v. Green*, 79 S. E. 557.

Under Civ. Code 1910, § 3009, a sale by a married woman to her husband, without being

allowed by the superior court, is not only voidable, but void.—*Id.*

A deed executed by a wife to her husband in pursuance of a sale of her separate estate, without an order of court, cannot be confirmed by a court of equity, but will be canceled.—*Id.*

§ 187 (W.Va.) Under Code 1906, c. 66, § 3, a contract by a married woman living with her husband for the sale of her real estate must not only be in writing but must be signed and acknowledged by both of them.—*Slaven v. Riley*, 79 S. E. 1024.

§ 198 (Va.) In view of the removal of the common-law disabilities of coverture, a married woman, who did not join in the conveyance of property of which she was entitled to a part as tenant in common, is estopped from later setting up the claim, where she stood by for many years and permitted the purchaser to make improvements in good faith.—*McCauley v. Grim*, 79 S. E. 1041.

§ 201 (Ga.) Where a wife continues in possession of land after making a deed thereof to her husband, in violation of Civ. Code 1910, § 3009, laches will not be imputed to her from her delay for 10 years in suing to cancel the deed.—*Echols v. Green*, 79 S. E. 557.

A wife is not estopped to deny the validity of a deed executed to her husband with reservation of a life estate to herself, though she received a consideration therefor, and executed the same while she was living separate from her husband; the deed being void under Civ. Code 1910, § 3009, prohibiting conveyances between husband and wife without order of court.—*Id.*

In a suit by a wife to cancel a deed executed by her to her husband without approval of the superior court, as required by Civ. Code 1910, § 3009, the wife is required to offer to return the consideration received by her.—*Id.*

VI. ACTIONS.

§ 209 (Ga.App.) In an action by a wife for personal injuries, an instruction as to the amount of damages recoverable by plaintiff for her diminished capacity to discharge her ordinary daily duties was erroneous, since plaintiff's husband was entitled to her services.—*Berrien County v. Allen*, 79 S. E. 1129.

IX. ABANDONMENT.

§ 302 (N.C.) In order to constitute wife abandonment, a husband's desertion must be willful, without the wife's consent, and it must also appear that he has failed to provide adequate support for her.—*State v. Smith*, 79 S. E. 979.

§ 305 (N.C.) Husband's offer to provide his wife a home in another city, not made in good faith, is no defense to a prosecution for abandonment.—*State v. Smith*, 79 S. E. 979.

§ 305 (Va.) That a wife, after separation because of her husband's fault, took service and supported herself was no defense to a prosecution for nonsupport.—*Draper v. Commonwealth*, 79 S. E. 322.

In a prosecution of a husband by the commonwealth for nonsupport of his wife, her motive in testifying against him is immaterial.—*Id.*

§ 313 (N.C.) Evidence *held* to sustain conviction of a husband for willful abandonment of his wife without providing adequate support for her and her child.—*State v. Smith*, 79 S. E. 979.

§ 313 (Va.) In a prosecution for total nonsupport of accused's wife, evidence that he had two small children by a former marriage dependent on him *held* inadmissible.—*Draper v. Commonwealth*, 79 S. E. 322.

X. ENTICING AND ALIENATING.

§ 326 (N.C.) In an action by a husband for alienation of affections alleging adultery, con-

sent of the wife is no defense.—*Powell v. Strickland*, 79 S. E. 872.

§ 333 (N.C.) Adultery need not be shown by direct proof, in an action for alienation of affections, but may be shown by circumstances from which a jury may reasonably infer it.—*Powell v. Strickland*, 79 S. E. 872.

Evidence, in an action for alienation of affections of plaintiff's wife, *held* to sustain a finding of adultery committed by defendant and plaintiff's wife.—*Id.*

§ 334 (N.C.) The jury should consider in awarding compensatory damages plaintiff's dishonor, the alienation of his wife's affections, and destruction of his domestic comfort, the suspicion cast on the offspring, humiliation, loss of consortium, etc.—*Powell v. Strickland*, 79 S. E. 872.

The jury in their sound discretion may award punitive damages, in an action for alienation of affections, if defendant's conduct be willful and wanton.—*Id.*

Facts, in an action for alienation of the affections of plaintiff's wife, *held* to sustain an award of punitive damages.—*Id.*

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, § 126.

IMPEACHMENT.

See Criminal Law, § 785.

IMPLIED CONTRACTS.

See Assumpsit, Action of; Money Received.

IMPRISONMENT.

See Arrest; Contempt, §§ 63, 66; Execution, §§ 425, 433.

IMPROVEMENTS.

See Cancellation of Instruments, § 59; Municipal Corporations, §§ 269-544; Partition, § 78; Specific Performance, § 128.

§ 4 (N.C.) Under Revisal 1905, § 652, an allowance for betterments to a defendant against whom a judgment shall be rendered for land is not restricted to actions of ejectment.—*Daniel v. Dixon*, 79 S. E. 425.

INCEST.

§ 14 (Ga.App.) Evidence *held* insufficient to authorize conviction.—*Jennings v. State*, 79 S. E. 766.

INCOMPETENT PERSONS.

See Insane Persons.

INCUMBRANCES.

See Vendor and Purchaser, § 197.

INDECENCY.

See Theaters and Shows, § 1.

INDEMNITY.

See Bonds, § 55; Frauds, Statute of, § 21; Indemnity; Principal and Surety.

§ 15 (W.Va.) Where plaintiff sues as beneficial obligee on a bond of indemnity, he must prove that he had an interest in the performance of the duty and that the duty was imposed either for his sole benefit or jointly for the benefit of himself and others.—*Clark v. Nickell*, 79 S. E. 1020.

INDICTMENT AND INFORMATION.

See Banks and Banking, § 62; Criminal Law, §§ 88, 281, 1058; False Pretenses, § 7; Grand Jury, § 34; Homicide, §§ 127-142; Larceny, §§ 32, 40; Perjury, § 25.

I. NECESSITY OF INDICTMENT OR PRESENTMENT.

§ 3 (N.C.) Under Const. art. 1, §§ 12, 13, perjury being punishable by imprisonment in the state's prison as provided by Revisal 1905, § 3615, it is a felony as defined by section 3291, triable only on indictment, and not a misdemeanor.—*State v. Hyman*, 79 S. E. 284.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 15 (Ga.App.) That another indictment is pending against defendant, charging him with the same offense, is not ground for a plea in abatement.—*Brown v. State*, 79 S. E. 231.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 63 (Ga.App.) An indictment charging voluntary manslaughter by the administering of morphine, *held* not objectionable as stating a conclusion instead of a fact.—*Silver v. State*, 79 S. E. 919.

§ 71 (Ga.App.) An indictment charging that accused, being cashier of a railway company, embezzled money in his possession as cashier, of a specified amount, *held* not demurrable on the ground that it was too indefinite, and failed to allege the funds embezzled, or from whom or on what account obtained, or how the money came into his possession.—*Trueheart v. State*, 79 S. E. 755.

§ 75 (Ga.App.) An indictment charging defendant with entering a dwelling house and stealing therefrom valuable goods is a good indictment under Pen. Code 1910, § 175, though the word "privately" is omitted.—*Jenkins v. State*, 79 S. E. 861.

§ 84 (Ga.App.) An indictment as an accessory before the fact need not state the manner of committing the offense, but may charge generally that defendant feloniously, willfully, and unlawfully did procure, counsel, and command the principal to commit it.—*Snell v. State*, 79 S. E. 71.

An indictment stating that accused "did then and there unlawfully, feloniously, and willfully procure, counsel, and command" the principal to commit an assault with intent to murder, in violation of Pen. Code 1910, § 81, *held* sufficient to charge defendant as an accessory before the fact.—*Id.*

§ 87 (Va.) An indictment charging that accused, on — day of —, in the year 19—, and within the last two years, did unlawfully sell whisky without a license, etc., sufficiently charged that the sale was within the statutory period of limitations.—*Mullins v. Commonwealth*, 79 S. E. 324.

§ 109 (Ga.App.) An accusation charging in one count the sale of liquor generally, and in a second count the furnishing of liquor to a minor without first securing the written authority of the "parent and guardian," is not subject to special demurrer as to the second count, in that the conjunctive instead of the disjunctive is used between the words "parent" and "guardian."—*Ross v. State*, 79 S. E. 746.

§ 110 (Ga.App.) Under Pen. Code 1910, § 954, an indictment charging an assault with intent to murder, under section 81, making it such offense to cause death by an attempted abortion, is sufficient as against a general demurrer when the allegations are clear and in the language of the statute, though it does not allege the character of the instruments, how and upon what part of the person they were used.—*Snell v. State*, 79 S. E. 71.

I. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 124 (S.C.) An indictment against two persons joint in form is in legal effect joint and several, and hence one of the defendants may be convicted and the other acquitted.—State v. Wade, 79 S. E. 106.

§ 125 (Ga.App.) In a prosecution for perjury, it is permissible to join in a single count a number of distinct material statements alleged to have been falsely sworn to by defendant in the same investigation.—Black v. State, 79 S. E. 173.

II. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 137 (W.Va.) An indictment cannot be quashed because found upon illegal evidence.—Holl v. Dailey, 79 S. E. 668.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 189 (Ga.App.) One accused of stabbing can be convicted of assault and battery, where there is evidence thereof independently of the stabbing.—Hollis v. State, 79 S. E. 85.

§ 191 (N.C.) A person indicted for burglary may be convicted under Revisal 1905, § 3333, relative to breaking and entering not amounting to a burglary.—State v. Spear, 79 S. E. 869.

INDORSEMENT.

See Bills and Notes, §§ 301-367.

INFANTS.

See Guardian and Ward, § 6; Master and Servant, §§ 95, 96, 204, 228, 230; Negligence, § 85; Parent and Child; Railroads, § 350; Rape.

II. PROPERTY AND CONVEYANCES.

§ 31 (Va.) Where the remaindermen conveyed and which was subject to a life estate, 15 years' adverse possession barred the life tenant's rights and the two estates in the grantees merged. Hence one of the remaindermen, who claimed he was an infant at the time of his conveyance, must disaffirm within 15 years after he life tenant's rights were barred.—McCauley v. Grim, 79 S. E. 1041.

IV. CONTRACTS.

§ 50 (Va.) Contracts by an infant servant to perform personal services in return for food, clothing, and lodging, without any express agreement or other compensation, held a contract or necessities which the infant servant had the right to make.—Starke v. Storm's Ex'r, 79 S. E. 1057.

VII. ACTIONS.

§ 99 (Va.) Where a party many years after a conveyance of land sought to set aside his contract on the ground of infancy, proof of infancy must be clear and conclusive, and the party's testimony, supplemented by an unsworn statement upon which he procured a marriage license, is not sufficient.—McCauley v. Grim, 9 S. E. 1041.

§ 112 (N.C.) That parties to a suit in which consent decree was entered were infants only renders the decree voidable and not void and hence cannot be attacked collaterally.—Rawls v. Mayo, 79 S. E. 298.

INFERIOR COURTS.

See Courts, §§ 163-189.

INFLUENCE.

See Deeds, §§ 196, 211.

INFORMATION.

See Indictment and Information.

INJUNCTION.

See Appeal and Error, §§ 447, 456, 1009, 1180; Divorce, § 206; Easements, § 17; Eminent Domain, § 274; Equity, § 148; Execution, § 204; Executors and Administrators, § 122; Nuisance, §§ 18, 72, 75; States, § 164; Taxation, § 569; Telegraphs and Telephones, § 33; Warehousemen, § 34.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

§ 26 (Ga.) The prosecution of an action at law will not be enjoined because of certain matters which are available as a defense in the action at law.—Reynolds Banking Co. v. Southern Pacific Guano Co., 79 S. E. 132.

§ 27 (Ga.) The invalidity of a void judgment could be set up as a defense in a scire facias proceeding to revive the judgment; and hence an injunction sought against the scire facias proceeding was properly denied.—Bell v. Verdel, 79 S. E. 849.

§ 32 (Ga.) An injunction to stay proceedings in courts of law is not directed against the court itself, but against the parties to the proceeding.—Stone v. King-Hodgson Co., 79 S. E. 122.

(B) Property, Conveyances, and Incumbrances.

§ 38 (S.C.) Where it was a question of fact whether defendant had begun to remove timber within a reasonable time, plaintiff claiming to own the timber by reason of defendant's failure, injunction should issue to preserve the property in statu quo, pending determination of the issue of title.—Gresham v. Atlantic Coast Lumber Corporation, 79 S. E. 799.

(E) Public Officers and Boards and Municipalities.

§ 77 (W.Va.) Equity will restrain a municipal corporation from abating a nuisance, where private rights are unlawfully encroached upon and irreparable injury will ensue.—Parker v. City of Fairmont, 79 S. E. 660.

§ 85 (W.Va.) Equity has jurisdiction to restrain a municipal corporation from proceeding under an illegal resolution to remove a fence as an alleged nuisance, where private rights are encroached upon and substantial injury would result.—Donohoe v. Fredlock, 79 S. E. 736.

III. ACTIONS FOR INJUNCTIONS.

§ 107 (Ga.) An action at law will not ordinarily be enjoined at the instance of one not a party thereto.—Stone v. King-Hodgson Co., 79 S. E. 122.

§ 111 (Ga.) Civ. Code, 1910, § 5527, providing that an injunction to restrain pending proceedings may be filed where the proceedings are pending, provided no relief is prayed as to matters not included in such proceedings, escapes violating the provision of the Constitution incorporated in Civ. Code 1910, § 6540, that "equity cases shall be tried in the county where a defendant resides, against whom substantial relief is prayed," only on the theory of waiver; and injunction will not lie under the former section at the instance of a third person to restrain the prosecution of a suit, where the petition in injunction prays relief beyond that sought in such suit.—Stone v. King-Hodgson Co., 79 S. E. 122.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 132 (S.C.) Injunction restraining grantee of timber excepting such as might be necessary for plantation use from further cutting pending a suit *held* to have improperly restrained the removal of timber already cut.—Marion County Lumber Co. v. Hodges, 79 S. E. 1096.

§ 147 (Ga.) At the hearing of an application for an interlocutory injunction, the presiding judge may, in his discretion, allow witnesses to be examined orally, though the evidence ordinarily consists only of affidavits.—Chattanooga & C. I. Ry. Co. v. Morrison, 79 S. E. 903.

§ 148 (S.C.) A bond is required, under the statute, of relators to whom a temporary injunction is granted by a judge of the Supreme Court.—State v. Pattersen, 79 S. E. 522.

§ 148 (S.C.) Granting of temporary injunction without requiring bond as required by statute *held* erroneous.—Marion County Lumber Co. v. Hodges, 79 S. E. 1096.

§ 157 (S.C.) A judge, after making an order for temporary injunction, may on motion amend it to require relators to give a bond.—State v. Pattersen, 79 S. E. 522.

VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 239 (W.Va.) Counsel fees paid for services connected with the awarding of a temporary injunction as ancillary to the main relief sought, and other expenses not incurred on account of the injunction, are not recoverable in an action on the injunction bond.—State v. Nash, 79 S. E. 829.

A temporary injunction in a suit to remove a cloud, and to enjoin defendant from trespassing, and taking steps to redeem his title from forfeiture to the state, *held* ancillary to the main purpose of the suit, and hence expenses incurred therein could not be recovered in an action on the injunction bond.—Id.

IN PAIS.

See Estoppel, §§ 54-98.

INSANE PERSONS.

See Evidence, § 63; Insurance, §§ 293, 665; States, § 191.

IX. ACTIONS.

§ 92 (Va.) In an action by the committee of an insane person confined in a state hospital to protect his beneficial interest in a trust fund held by the hospital for a certain purpose and to prevent a misappropriation thereof, brought after the will was probated and not involving its validity, *held*, that the testator's heirs at law were not necessary parties.—General Board of State Hospitals for the Insane v. Robertson, 79 S. E. 1064.

§ 93 (Va.) Under Code 1904, §§ 1697, 1702, *held*, that the committee of an insane person committed to a hospital, the lunatic being a beneficiary of a trust fund held by the hospital, might maintain an action to prevent misappropriation under acts of the General Assembly by the general board of state hospitals for the insane.—General Board of State Hospitals for the Insane v. Robertson, 79 S. E. 1064.

INSOLVENCY.

See Bankruptcy; Banks and Banking, §§ 61, 62; Corporations, §§ 228, 556-559.

INSTRUCTIONS.

To agent, see Principal and Agent, § 116.

To jury, see Criminal Law, §§ 762-847; Trial, §§ 191-296.

To servant, see Master and Servant, § 155.

INSURANCE.

See Constitutional Law, § 206; Evidence, §§ 122, 271, 405, 413, 441, 450; New Trial, § 70; Warehousemen, § 34.

I. CONTROL AND REGULATION IN GENERAL.

§ 20 (S.C.) Under Civ. Code 1912, §§ 2669, 2670, 2671, 2700, where relator sued a foreign insurance company, which removed the cause to the federal court, and on return of an order to show cause why its license should not be revoked it showed that such removal was a mistake and offered to have the cause remanded, the commissioner had discretion to refuse to revoke the license.—State v. McMaster, 79 S. E. 405.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 132 (N.C.) A binding slip issued on an application for insurance is a mere written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending investigation of the risk, and subject to all the conditions of the contemplated policy, even though it may never issue.—Gardner v. North State Mut. Life Ins. Co., 79 S. E. 806.

A binding slip protects the applicant for insurance against sickness between its date and the delivery of the policy only in case the application is accepted and the policy delivered.—Id.

§ 137 (N.C.) Where insured received the policy as an ordinary applicant having no confidential relation with the company, and not as its agent, as claimed, and the company trusted him to pay the premium, the policy was then delivered and in force.—Pender v. North State Life Ins. Co., 79 S. E. 293.

§ 138 (N.C.) Revisal 1908, § 4773a, providing that no insurance company shall sell any policy granting insurance in an amount less than \$500 until the forms have been approved by the insurance commissioner, *held* a restriction on the insurance company and not on the contract, and does not invalidate a policy for less than that amount.—Blount v. Royal Fraternal Ass'n, 79 S. E. 299.

§ 138 (N.C.) Where plaintiff contracted to take out a life policy for a quarterly premium of \$38.53, which was less than the regular premium, he could refuse to make a new contract to pay the increased rate, whether the contract as originally made was legal or illegal.—Robinson v. Security Life & Annuity Co., 79 S. E. 681.

Revisal 1905, § 4775, prohibiting discrimination in favor of individual insureds of the same class, *held* to operate on insurance companies alone, and not to invalidate a policy issued for less than the regular premium.—Id.

(B) Construction and Operation.

§ 146 (S.C.) Where there is an ambiguity in a contract of insurance, it should be construed against the insurer.—Bennettsville & C. R. Co. v. Glens Falls Ins. Co., 79 S. E. 717.

§ 165 (S.C.) Where a fire policy was issued to indemnify a railroad company on all liability as a common carrier of cotton in bales in transit in cars, or in or on depots, or platforms, on line of assured's road, the policy covered cotton which was placed on the ground, but was intended to be immediately shipped.—Bennettsville & C. R. Co. v. Glens Falls Ins. Co., 79 S. E. 717.

§ 175 (S.C.) A fire policy, issued to indemnify a railroad company for its liability as a common carrier of cotton, *held* to cover a loss of cotton for which no bill of lading was issued until it was actually burning, though the policy provided that the liability should begin at the time the bill of lading was issued and when de-

livered.—Bennettsville & C. R. Co. v. Glens Falls Ins. Co., 79 S. E. 717.

§ 179½ (Ga.App.) The provisions of a life insurance policy relating to loans, when construed in connection with an "automatically nonforfeitable" clause, held to give the policy no loan value which could be automatically applied to the payment of insured's second quarterly premium for the second year, and to render no amount available to insured as a loan until the end of the second year and the payment by him of the full annual premium for the third policy year.—Blalock v. Empire Life Ins. Co., 79 S. E. 374.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

§ 184 (Ga.App.) An agreement with an agent of the insurer that, if the insured will take the local agency of the company, the agent will write other insurance locally without the aid of insured and divide his commissions on same with insured, so as to provide for the payment of his premium notes, is a mere subterfuge, amounting to an illegal rebate.—Thomson v. McLaughlin, 79 S. E. 182.

§ 195 (Va.) Where the charter of a mutual assessment fire company which required yearly assessments, provided that notice by mail of the new assessment should be sufficient, and required the insured in case of a change of address to notify the secretary, which she did not do, the giving of notice in an unsealed letter which could not be forwarded is sufficient to charge the insured with notice, though she did not receive it for that reason.—Mutual Fire Ins. Co. v. Turner, 79 S. E. 1067.

That for the past two years the company had given notice by post card is not a waiver of its right to give notice by second-class mail which cannot be forwarded as a postal.—Id.

§ 198 (N.C.) Where an insurance company issued a policy for less than the regular premium to plaintiff, who paid the specified premiums for a number of years, when the insurance company canceled the policy as violative of Revisal 1905, § 4775, the parties were not in pari delicto, and plaintiff was entitled to recover premiums paid as money received to his use.—Robinson v. Security Life & Annuity Co., 79 S. E. 681.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) Grounds in General.

§ 253 (N.C.) Where a fact is specifically inquired about in an application for insurance, the applicant is required to make a substantial disclosure thereof.—Gardner v. North State Mut. Life Ins. Co., 79 S. E. 806.

§ 255 (N.C.) Every fact which is untrue stated or wrongfully suppressed in an application for insurance must be regarded as material, if knowledge or ignorance thereof would reasonably influence the underwriter in estimating the character of the risk, or in fixing the premium.—Gardner v. North State Mut. Life Ins. Co., 79 S. E. 806.

§ 256 (N.C.) Under Revisal 1905, § 4808, a materially false statement in an application for insurance will avoid the policy, if it is calculated to influence the insurer, where the latter had no knowledge of the falsity either in making the contract, in estimating the risk, or in fixing the premium.—Gardner v. North State Mut. Life Ins. Co., 79 S. E. 806.

(C) Matters Relating to Person Insured.

§ 293 (Va.) Fraud in obtaining life insurance was not established by untrue answers in the application failing to disclose that insured's uncle was afflicted with hereditary insanity, where the proof failed to show that insured

knew that the insanity was hereditary and that the answers were willfully false.—South Atlantic Life Ins. Co. v. Hurt's Adm'x, 79 S. E. 401.

A question in an application for life insurance as to whether any of the applicant's uncles or aunts had consumption or any hereditary disease held to relate to physical condition and not to include hereditary insanity.—Id.

§ 299 (N.C.) Where an applicant for insurance falsely represented that within a year he had not been intimately associated with any one suffering from a transmissible disease, such misrepresentation avoided the policy, unless the insurer waived the same with full knowledge of the facts.—Gardner v. North State Mut. Life Ins. Co., 79 S. E. 806.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(E) Nonpayment of Premiums or Assessments.

§ 349 (Ga.App.) Mere failure to pay a note given for an insurance premium will not forfeit the policy, where it does not provide for such forfeiture, though the note stipulates that nonpayment at maturity will avoid the policy.—Columbian Nat. Life Ins. Co. v. Mulkey, 79 S. E. 482.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 377 (N.C.) Where insured falsely represented that he had not been intimately associated with any one suffering from a transmissible disease within the past year, insurer could not be held to have waived such misrepresentation in the absence of proof or knowledge that the representation was false.—Gardner v. North State Mut. Life Ins. Co., 79 S. E. 806.

§ 378 (N.C.) Where an insurance agent delivers a policy with knowledge of a materially false representation on the part of the applicant, he acts for himself and not for the company, and participates in a fraud which avoids the policy.—Gardner v. North State Mut. Life Ins. Co., 79 S. E. 806.

Where an insurance agent wrongfully delivers a policy with knowledge that insured is then suffering from his last illness, such knowledge will not be imputed to insurer.—Id.

§ 378 (Va.) Where insurer's medical examiner had full knowledge concerning the mental condition of insured's family, his uncles and aunts, the insurer was bound by the physician's knowledge, though the contract provided that he should be the agent of the insured.—South Atlantic Life Ins. Co. v. Hurt's Adm'x, 79 S. E. 401.

§ 392 (N.C.) Where a company wrote agents calling for payment of premiums on policies or the return of policies without insisting on new physical examination, and received applicant's note for premium, and retained it, held, that it waived the requirement for a new physical examination where policies were not delivered within 60 days of their issuance.—Pender v. North State Life Ins. Co., 79 S. E. 293.

§ 392 (Va.) Where a mutual assessment fire company reinstated insured's policy after default in payment of assessments, the reinstatement which came after the insured had discharged a lien on the premises is the waiver of the original ground of forfeiture on account of the lien.—Mutual Fire Ins. Co. v. Turner, 79 S. E. 1067.

XVIII. ACTIONS ON POLICIES.

§ 618 (Ga.) Civ. Code 1910, § 2563, providing that a suit against an insurance company may

be brought in a county where an agent was located at the time of the issuance of the policy, though there was none in that county when the suit was filed, does not violate the provision of the Constitution that all, except certain specified civil cases, shall be tried in the county where the defendant resides.—*Jefferson Fire Ins. Co. of Philadelphia v. Brackin*, 79 S. E. 467.

Civ. Code 1910, § 2563, allowing suits against an insurance company to be brought in the county where the company had an office at the time the policy was issued, applies to both foreign and domestic companies doing business within the state.—*Id.*

§ 622 (Ga.) Where a policy provides that no suit shall be brought thereon after 12 months from the fire, an action after that time is barred, though purporting to be a renewal of a prior action in another court, which was dismissed and renewed after payment of all costs within 6 months from the dismissal.—*Gross v. Globe & Rutgers Fire Ins. Co.*, 79 S. E. 138.

§ 626 (Ga.) Service of process in an action against an insurance company, which has ceased to do business in the county where the policy was written, may be obtained by serving a second original process upon the company at its office in another county, where it had an agent to receive service of process.—*Jefferson Fire Ins. Co. of Philadelphia v. Brackin*, 79 S. E. 467.

§ 646 (Va.) In an action on a life policy, the burden is on the defendant to prove a defense of suicide by clear and satisfactory evidence.—*South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 79 S. E. 401.

Where the evidence in an action on a life policy as to whether insured's death was accidental or suicidal leaves the question in doubt, it will be presumed that it was accidental.—*Id.*

§ 665 (N.C.) In an action on an insurance policy where there has been an actual delivery and nothing else appears, the production of the policy by the beneficiary makes a prima facie case.—*Pender v. North State Life Ins. Co.*, 79 S. E. 293.

§ 665 (Va.) Where, in an action on a life policy, the evidence that insured committed suicide is circumstantial, the defense of suicide will fail unless the circumstances exclude with reasonable certainty any hypothesis of death by accident.—*South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 79 S. E. 401.

In the absence of evidence of any demeanor, act, or word on the part of insured indicating insanity, the fact that he had insane relatives was insufficient to show that he was insane at the time of his death.—*Id.*

§ 668 (Va.) In an action on a life policy, evidence held to require submission to the jury of the question whether insured died as a result of accident or committed suicide.—*South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 79 S. E. 401.

§ 669 (Va.) In an action against a mutual assessment fire company, where it was contended that the method of giving notice of assessment to the insured was not proper, the instructions should submit the issue in that form and not whether the notice should have been given in the manner previously followed.—*Mutual Fire Ins. Co. v. Turner*, 79 S. E. 1067.

In an action against a mutual assessment fire company, instructions on the necessity for the insurer to give notice of assessments requested by defendant held correct and improperly refused.—*Id.*

§ 670 (N.C.) Findings that a life insurance policy was delivered and took effect on December 6, 1906, and that it was delivered and took effect on May 10, 1907, held not inconsistent.—*Pender v. North State Life Ins. Co.*, 79 S. E. 293.

XX. MUTUAL BENEFIT INSURANCE.

(B) The Contract in General.

§ 718 (Ga.App.) A fraternal benefit association is exempt from the rule prescribed in Civ. Code 1910, § 2471, that the constitution or by-laws of insurance companies doing business in the state shall not be received in evidence as part of the policy unless embodied in or attached thereto.—*Supreme Ruling of Fraternal Mystic Circle v. Blackshear*, 79 S. E. 210.

(F) Actions for Benefits.

§ 815 (N.C.) Where a benefit certificate for \$500 contained a provision that in case of death not more than one-fifth of the amount otherwise due should be payable for each full year of membership, plaintiff, seeking to be relieved from such provision on the ground that the policy had not been approved by the insurance commissioner as required by Revisal 1908, § 4773a, was bound to allege and prove such fact.—*Blount v. Royal Fraternal Ass'n*, 79 S. E. 299.

INTENT.

See Burglary, § 3; Contracts, §§ 147, 156; Criminal Law, §§ 20, 59, 325, 738, 822; Damages, § 91; Deeds, §§ 36, 56, 138; Evidence, § 461; Gifts, § 4; Intoxicating Liquors, § 238; Larceny, § 3; Master and Servant, § 67; Wills, §§ 120, 461, 487.

INTEREST.

See Bills and Notes, §§ 83, 141; Evidence, § 590; Execution, §§ 31, 155; Executors and Administrators, § 221; Usury; Warehousemen, § 22; Witnesses, §§ 60, 128.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 18 (N.C.) Where a grocery account was presented to the debtor, who promised to pay it, the creditor was entitled to interest thereon.—*Scott v. Reynolds*, 79 S. E. 960.

III. TIME AND COMPUTATION.

§ 50 (N.C.) A plea of tender was insufficient to stop interest where the tender was not kept good and defendant did not produce the money and pay it into court.—*Dr. Shoop Family Medicine Co. v. Davenport*, 79 S. E. 602.

INTERLOCUTORY INJUNCTION.

See Injunction, §§ 132-157.

INTERSTATE COMMERCE.

See Carriers, §§ 32, 36; Commerce.

INTERVENTION.

See Parties.

INTER VIVOS.

See Gifts, §§ 4, 48.

INTOXICATING LIQUORS.

See Appeal and Error, § 1060; Arrest, § 63; Banks and Banking, § 165; Criminal Law, §§ 393, 782, 823, 921, 982, 1160; Damages, § 215; Indictment and Information, §§ 87, 109; Municipal Corporations, §§ 640, 642; Witnesses, § 246.

VI. OFFENSES.

§ 132 (N.C.) Laws 1913, c. 44, created two new offenses with regard to intoxicating liquors and did not go into effect until April 1, 1913; consequently a conviction in February, 1913, cannot be supported thereby.—*State v. Watkins*, 79 S. E. 619.

§ 132 (S.C.) In determining the public policy of a state with reference to guilt in questions of the sale and purchase of intoxicating liquor,

the court must accept the statutes as fixing the public policy.—*City of Anderson v. Fant*, 79 S. E. 641.

In determining the public policy of the state with reference to the sale and purchase of intoxicating liquor, the courts have no concern with the reasons of the lawmakers in failing to condemn the buyer.—*Id.*

§ 132 (Va.) Act March 25, 1902 (Acts 1901-02, c. 307), prohibiting the sale of liquors in certain counties, did not render the general revenue law and the Bryd Law, prohibiting sales without a license, inapplicable to such counties so as to preclude a prosecution for a violation thereof in the circuit court.—*Mullins v. Commonwealth*, 79 S. E. 324.

§ 134 (Va.) The term "liquor" in its limited sense and in its more common application implies spirituous fluids, whether fermented or distilled such as brandy, whisky, gin, beer, and wine.—*Mullins v. Commonwealth*, 79 S. E. 324.

§ 138 (S.C.) In view of the public policy of the state as illustrated by Cr. Code 1912, §§ 794, 825, one who purchased, as an agent for others, intoxicants from one not authorized to sell and transported it to them is not guilty of a violation of the municipal ordinance making the transporting of contraband liquors a misdemeanor.—*City of Anderson v. Fant*, 79 S. E. 641.

§ 139 (Ga.App.) Where accused received a package of whisky by express and delivered it to a hackman, with directions to take it to accused's residence and deliver it to his wife, and the hackman, finding no one at the residence, took the package to accused's restaurant, during accused's absence and without his knowledge, a conviction of accused for keeping of intoxicating liquors in his place of business was not justified.—*Johnson v. State*, 79 S. E. 758.

§ 140 (N.C.) Person who in good faith purchased liquor in another state as agent for other parties and brought it within the state *held* not to have possession for the purpose of sale within Pub. Laws 1913, c. 44.—*State v. Wilkerson*, 79 S. E. 888.

§ 146 (Ga.App.) Civ. Code 1910, § 933, permits a social club to keep on hand intoxicating liquors for its members upon payment of the required license tax, providing the liquor belongs to such club, but it does not authorize it or any individual member to sell the same.—*Cronin v. State*, 79 S. E. 747.

§ 169 (N.C.) Person purchasing liquor where it was lawful to sell it as agent of other persons and bringing it within the state for distribution to such persons *held* not to have violated Rev. 1905, § 3534, relative to unlawfully procuring and delivering intoxicating liquors.—*State v. Wilkerson*, 79 S. E. 888.

§ 169 (S.C.) One who acts in good faith solely as the agent or messenger of a purchaser of intoxicating liquors is not himself guilty of violating the law against the illegal sale of intoxicants.—*City of Anderson v. Fant*, 79 S. E. 641.

§ 176 (Ga.App.) Where accused sold substitutes for intoxicants without obtaining a license, in violation of Pen. Code 1910, § 448, it was no defense that he obtained a license some months after he began to do business.—*Quinlan v. State*, 79 S. E. 768.

VIII. CRIMINAL PROSECUTIONS.

§ 196 (N.C.) Laws 1913, c. 44, which by section 5 changed rules of evidence, did not go into effect until April 1, 1913; consequently a conviction in February, 1913, cannot be supported thereby.—*State v. Watkins*, 79 S. E. 619.

§ 216 (Va.) "Whisky" is a spirit distilled from grain, barley, maize, wheat, rye, etc., and the use of the term whisky in an indictment charging the defendant with selling intoxicating liq-

uor, to wit, one quart of whisky, is sufficient to allege a sale of fermented or distilled liquor, within the statute prohibiting the sale thereof.—*Mullins v. Commonwealth*, 79 S. E. 324.

§ 223 (N.C.) Under an indictment for selling intoxicating liquors to persons to the grand jurors unknown, the state to convict must offer evidence tending to prove an actual sale to the unknown persons.—*State v. Watkins*, 79 S. E. 619.

§ 223 (N.C.) Where a person was indicted and tried for having unlawful possession of liquor for purpose of sale under Pub. Laws 1913, c. 44, he could not be convicted of violating Pub. Laws 1911, c. 133, relative to the maintenance of a place where liquors are received for sale, distribution, etc.—*State v. Wilkerson*, 79 S. E. 888.

§ 223 (Va.) Evidence that prosecuting witness purchased "corn liquor" from accused was sufficient to sustain a conviction under an indictment charging the unlawful sale of "whisky, brandy, gin, beer, malt liquors, and mixtures thereof."—*Mullins v. Commonwealth*, 79 S. E. 324.

§ 224 (Ga.App.) Where, in a prosecution for illegal sale of liquors, the defendant claims he was acting as agent for the purchaser, the burden of proof is on him to show that he received no benefit from the sale.—*Johnson v. State*, 79 S. E. 179.

§ 236 (Ga.App.) Proof of delivery of whisky by accused, and payment of money to him by the purchaser, makes out a prima facie case of selling intoxicating liquors.—*Johnson v. State*, 79 S. E. 179.

§ 236 (Ga.App.) A witness' testimony that he went to the home of accused and got a pint of whisky "from him and his wife," and laid 75 cents on the table, *held* to sustain a conviction of violating the prohibition law.—*Greer v. State*, 79 S. E. 746.

§ 236 (Ga.App.) Evidence that accused handed another person a bottle containing whisky and received something in return, which he placed in his pocket, *held* to sustain a conviction of violating the general prohibition law.—*Spicer v. State*, 79 S. E. 747.

§ 236 (Ga.App.) In a prosecution for selling intoxicating liquors, evidence *held* insufficient to support a conviction.—*Williams v. State*, 79 S. E. 763.

§ 236 (N.C.) In a prosecution for unlawfully selling intoxicating liquors, evidence *held* insufficient to support a conviction.—*State v. Watkins*, 79 S. E. 619.

Where a local law, making the possession of more than one quart of whisky prima facie evidence that the possessor had it for the purpose of sale, did not apply to the county in which accused was charged with the crime, the mere fact that a barrel of whisky was consigned to accused will not support a conviction for the unlawful sale of intoxicating liquors.—*Id.*

§ 238 (N.C.) On trial for having possession of intoxicating liquor for the purpose of sale, evidence that accused purchased it in another state as agent for other persons *held* to make questions for the jury as to his intent and as to whether the transaction was a sale.—*State v. Wilkerson*, 79 S. E. 888.

§ 242 (Ga.App.) That accused, several months after he began to sell substitutes for intoxicants without obtaining a license, in violation of Pen. Code 1910, § 448, obtained a license and paid the tax might be considered in mitigation of punishment.—*Quinlan v. State*, 79 S. E. 768.

XI. CIVIL DAMAGE LAWS.

§ 309 (W.Va.) In a suit under the civil damage act, evidence tending to show that defendant was chargeable with knowledge that plain-

tiff's husband was in the habit of drinking intoxicating liquors to excess *held* properly admitted.—Greer v. Arrington, 79 S. E. 720.

JOINDER.

See Action, § 50.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Appeal and Error, § 456; Courts; Criminal Law, § 655; Justices of the Peace; New Trial, § 114.

JUDGMENT.

See Appeal and Error, §§ 69, 70, 267, 280, 1009, 1073, 1138-1195; Attachment, § 339; Bankruptcy, §§ 421, 426; Bills and Notes, § 534; Cancellation of Instruments, § 59; Carriers, § 134; Certiorari, § 70; Chattel Mortgages, § 138; Contempt, §§ 63, 66; Corporations, § 479; Courts, §§ 89-107; Criminal Law, §§ 982, 1058; Divorce, § 289; Equity, § 427; Execution; Garnishment, § 191; Infants, § 112; Justices of the Peace, §§ 125, 127, 128; Partnership, § 344; Pleading, § 343; Usury, § 98; Vendor and Purchaser, § 208; Wills, § 355.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 1 (N.C.) In its ordinary acceptance, a judgment is the conclusion of the law on facts admitted or in some way established.—Sedbury v. Southern Express Co., 79 S. E. 286.

§ 17 (Ga.) A judgment rendered at the ensuing September term, after an acknowledgment of service after the adjournment of the March term, which was insufficient as an acknowledgment that the petition and process had been served on defendant in time, *held* void.—Bell v. Verdel, 79 S. E. 849.

IV. BY DEFAULT.

(A) Requisites and Validity.

§ 106 (N.C.) A default judgment may be rendered, although the cause is not on the trial or motion docket.—Dell School v. Peirce, 79 S. E. 687.

§ 128 (W.Va.) An office judgment, in an action in which a writ of inquiry is necessary, does not become final on the last day of the next succeeding term of court, and the defendant may plead to the declaration at any time before execution of the writ of inquiry.—Wilson v. Shrader, 79 S. E. 1083.

(B) Opening or Setting Aside Default.

§ 138 (N.C.) A defendant seeking to set aside a default must show that he used care in protecting his rights; the standard of care required being that which an ordinarily prudent man bestows upon his important business.—Dell School v. Peirce, 79 S. E. 687.

§ 143 (N.C.) Defendant *held* not entitled to have his default judgment vacated, being guilty of inexcusable neglect because failing to request an extension of time to answer, even when he knew that he was in default.—Dell School v. Peirce, 79 S. E. 687.

To warrant a vacation of a default judgment, it must appear that the defendant's neglect was excusable.—Id.

§ 145 (N.C.) To warrant a vacation of a default judgment, it must appear that the defendant had a meritorious defense.—Dell School v. Peirce, 79 S. E. 687.

§ 150 (W.Va.) Where defendant, in an action in which the office judgment has become final but is not entered, demurs to the declaration, and the demurrer is sustained, formal judgment on the office judgment cannot be entered; but

the office judgment becomes a nullity, if the declaration be not curable and amended.—Wilson v. Shrader, 79 S. E. 1083.

§ 162 (N.C.) The burden of establishing a meritorious defense necessary to procure the setting aside of a default judgment rests upon the defendant.—Dell School v. Peirce, 79 S. E. 687.

§ 167 (N.C.) Under the direct provisions of Revisal, § 453, a defendant, in an action for the recovery of land, is required to file a cost bond before he may answer, plead, or demur; consequently the filing of such cost bond is a condition precedent to the setting aside of a default judgment.—Dell School v. Peirce, 79 S. E. 687.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

§ 199 (W.Va.) Where plaintiff claims more than defendant admits owing, and secures a verdict for the amount admitted, and the pleadings put in issue his right to have more than such amount, he is not entitled to a judgment non obstante veredicto for a sum larger than the verdict.—Indiana & Ohio Live Stock Ins. Co. v. Bowman, 79 S. E. 651.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 252 (N.C.) Where corporation repudiated agreement to build railroad in consideration of reduced price for standing timber, the difference between contract price and actual value of timber *held* recoverable, in an action in which the prayer for relief was for judgment for the stipulated penalty for failure to build the railroad.—Herring v. Wallace Lumber Co., 79 S. E. 876.

IX. OPENING OR VACATING.

§ 358 (Ga.App.) Where, in an action on a note conditioned for the payment of attorney's fees if it be collected through an attorney, defendant's unsworn answer was erroneously stricken, it was error to overrule a motion, made during the term, to vacate a judgment for plaintiff which included attorney's fees.—Walker v. Wood, 79 S. E. 905.

§ 364 (N.C.) In suit for partition of tract constituting five-sixteenths of larger tract, belief of plaintiffs' counsel that description furnished him by a third person was of the larger tract and that his clients owned five-sixteenths undivided interest therein, when in fact it was of the smaller tract, the whole of which his clients owned, *held* such a mistake of fact as justified the setting aside of a verdict and judgment awarding plaintiffs five-sixteenths of the tract described, under Revisal 1905, § 513.—Mann v. Hall, 79 S. E. 437.

§ 365 (Ga.App.) A judgment should be set aside, where a party who has filed a meritorious defense was kept away from court under such circumstances that the court should have continued the case if aware of the facts.—Wright v. Bank of Southwestern Georgia, 79 S. E. 184.

§ 382 (N.C.) Where plaintiffs in partition by mistake claimed five-sixteenths of tract, all of which they owned, *held*, that verdict and judgment awarding them five-sixteenths and defendants eleven-sixteenths were against them within Revisal 1905, § 513, authorizing the setting aside of judgments and verdicts for mistake, etc.—Mann v. Hall, 79 S. E. 437.

§ 384 (Ga.App.) Where defendant moved during the term that the judgment be set aside upon the showing made for a continuance, and showed that she was providentially prevented from attending court by illness and that she had filed a meritorious defense, denial of the motion was error, though it was denominated a motion for new trial.—Wright v. Bank of Southwestern Georgia, 79 S. E. 184.

§ 386 (N.C.) Under Revisal 1905, § 2494, the clerk of the superior court was authorized, 17 months after the rendition of a judgment in a partition suit, to set aside the judgment on motion of defendant, where defendant was prevented by fraud of plaintiff from defending.—Turner v. Davis, 79 S. E. 257.

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

§ 478 (N.C.) A judgment in which the proceeds of land were adjudicated to be real estate assets is binding upon all the parties thereto unless reversed by appeal.—Rawls v. Mayo, 79 S. E. 298.

(B) Grounds.

§ 503 (Ga.App.) A judgment of the ordinary setting aside a homestead exemption allowed under the Constitution of 1877 cannot be collaterally attacked for mere irregularities in the application for the homestead.—Brooks v. Tinsley, 79 S. E. 160.

§ 506 (Ga.App.) A wife and children, for whose benefit a homestead was set apart on the application of the husband and father, and who had enjoyed the benefit for years, could not, after his death, attack the validity of the exemption, merely because of formal defects in the application or judgment setting apart the homestead.—Brooks v. Tinsley, 79 S. E. 160.

(C) Proceedings.

§ 519 (Ga.) In an action on a forthcoming bond, conditioned to deliver the property "for sale," if the illegalities should be dismissed by the court or withdrawn, a plea alleging that the execution plaintiff, in violation of an agreement with defendant, dismissed the affidavits of illegality and refused to carry out the agreement of settlement, and praying that the agreement be enforced and the illegality cases be reinstated, was properly dismissed as a collateral attack on the judgment.—Evans v. Callaway, 79 S. E. 116.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 585 (N.C.) Judgment against defendant on notes covering all sums due at that time held not an estoppel as to a different cause of action not in issue in the former action.—J. T. McTeer Clothing Co. v. Hay, 79 S. E. 955.

§ 594 (Ga.App.) Where the contract of employment is entire, all the breaches occurring up to the commencement of the action must be included therein.—Willingham v. Buckeye Cotton Oil Co., 79 S. E. 496.

One who claims a breach of contract of employment for a year, and alleges wrongful discharge 4½ months before the conclusion of the term, and after the year brings an action for the half of the salary for the month for which he was paid half, is estopped to sue for the salary for the succeeding 4 months.—Id.

(C) Persons Who may Take Advantage of the Bar.

§ 628 (Ga.App.) In an action on a joint contract, a judgment against one joint obligor merged the entire cause of action, and barred any subsequent suit on the same contract against the other debtor.—J. W. Scarborough & Co. v. Yarborough, 79 S. E. 1131.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) Persons Concluded.

§ 668 (Ga.) In trespass against a corporation for cutting timber, an entry of service upon an individual in a former suit in which the plaintiff was adjudged an owner of the land is inadmissible to bind the corporation upon which no

service was shown, under Civ. Code 1910, § 5579, allowing the plaintiff in ejectment to make the true claimant defendant by serving a copy of the action upon him.—Hodges v. Stuart Lumber Co., 79 S. E. 462.

(C) Matters Concluded.

§ 713 (N.C.) A judgment upon the merits is a finality as to the claim or demand in controversy, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose, and constitutes an absolute bar to a subsequent action.—J. T. McTeer Clothing Co. v. Hay, 79 S. E. 955.

§ 720 (N.C.) A prior judgment, holding that plaintiff was not entitled to a homestead in certain land conveyed to his son-in-law and sold under a deficiency judgment in foreclosure, held to estop plaintiff from thereafter maintaining a suit to recover the land as a homestead.—Cavanaugh v. Jarman, 79 S. E. 673.

§ 720 (W.Va.) Where causes of action, though growing out of the same transaction or relating to the same property or fund, are not the same, the record in the former suit does not estop the parties except as to matters affirmatively appearing to have been decided therein.—Pomeroy Nat. Bank v. Huntington Nat. Bank, 79 S. E. 662.

Where a partner by an equity suit charged a bank with money deposited by the firm and successfully resisted the bank's defense of authorized payment to a partner by issuing to him, in exchange for the firm's check drawn by him, a certificate of deposit, but the record showed no actual adjudication against the indorsee of the certificate, a party to the suit, it was insufficient to sustain a plea of former adjudication in an action on the certificate by the indorsee.—Id.

§ 743 (Va.) One whose right to land had been adjudicated in a previous suit wherein she claimed that she conveyed it when an infant and so was entitled to disaffirm is concluded.—McCauley v. Grim, 79 S. E. 1041.

XV. LIEN.

§ 785 (Ga.App.) Where chattels were delivered under a conditional sale contract, and before it was recorded judgment was obtained against the buyer by a third person, the judgment lien took priority over the seller's unrecorded reservation of title, though the judgment was founded on a debt antecedent to the sale.—Phillips & Crew Co. v. Drake, 79 S. E. 952.

§ 795 (W.Va.) The lien of a judgment continues so long as the right to have execution issue or to bring an action of scire facias on it is not barred.—Lamon v. Gold, 79 S. E. 728.

Though a debtor's departure from and residence out of the state after judgment recovered against him may not obstruct the creditor in the enforcement of his lien, it suspends the running of the statute and preserves the lien.—Id.

§ 801 (W.Va.) Where a judgment is barred by limitations, it ceases to be a lien on the debtor's land and equity will not enforce it.—Lamon v. Gold, 79 S. E. 728.

The term "obstruct," as used in Code 1906, c. 104, § 18, adopted and made a part of chapter 139, § 11, authorizing deduction, from time within which proceedings to enforce judgment liens may be maintained, of periods of delay caused by act of the debtor by which he may "obstruct" the enforcement, does not mean to prevent altogether but rather to interrupt, to impede, or embarrass the creditor in the pursuit of any of his remedies.—Id.

The word "suit," as used in Code 1906, c.

139, §§ 10, 11, relating to proceedings for enforcement of judgment liens, means a suit in equity.—Id.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

§ 853 (Ga.) A dated entry on the back of the execution, and entries on the execution docket showing the date of its issuance, without anything showing the date of entry of the *fi. fa.* upon the execution docket, *held* not to constitute a sufficient compliance with Civ. Code 1910, §§ 4355, 4357, requiring that the execution docket show the date of entry of the *fi. fa.*, to prevent dormancy of the execution after seven years from rendition of the judgment.—Craven v. Martin, 79 S. E. 568.

§ 861 (Ga.) A void judgment will not be revived, under Civ. Code 1910, §§ 5973 et seq., providing for the revival of judgments.—Bell v. Verdel, 79 S. E. 849.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 948 (W.Va.) Res judicata must be pleaded or shown by the record.—Collins v. Board of Trustees of Davis and Elkins College, 79 S. E. 10.

§ 951 (W.Va.) Res judicata cannot be availed of by a mere citation to a published opinion.—Collins v. Board of Trustees of Davis and Elkins College, 79 S. E. 10.

§ 956 (N.C.) Under a claim of estoppel by judgment, extrinsic parol evidence is admissible to show the material points and the decision in the former action.—J. T. McTeer Clothing Co. v. Hay, 79 S. E. 955.

JUDICIAL NOTICE.

See Criminal Law, § 304; Evidence, § 35.

JUDICIAL POWER.

See Constitutional Law, § 70.

JUDICIAL SALES.

See Execution, §§ 219–258; Executors and Administrators, § 402; Remainders; Taxation, §§ 730, 742.

§ 7 (W.Va.) Without authority of the court appointing him, a special commissioner to sell land cannot bring suit.—Monroe v. Hurry, 79 S. E. 830.

An order substituting a special commissioner in place of a previously appointed commissioner, who has defaulted in the performance of his duties, *held* not to authorize him to bring suit against the defaulting commissioner and the sureties on his official bond.—Id.

JURISDICTION.

See Abatement and Revival, § 85; Appeal and Error, §§ 456, 671; Appearance; Commerce, § 8; Courts; Criminal Law, §§ 88–101; Equity, §§ 26, 48; Exceptions, Bill of, § 43; Justices of the Peace, § 141; Lost Instruments, § 14; New Trial, § 114; Partition, § 113.

JURY.

See Appeal and Error, § 994; Criminal Law, §§ 178, 850, 864, 865, 923; New Trial, §§ 55, 153.

II. RIGHT TO TRIAL BY JURY.

§ 21 (N.C.) Where sentence upon a defendant is suspended upon certain conditions, the defendant is not entitled to a jury trial to determine whether he has violated the conditions.—State v. Everett, 79 S. E. 274.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 66 (Ga.) Two persons tried together for murder are entitled only to a panel of 48 jurors, and not to a panel of 96; they being deprived of no right thereby, where they have declined the severance offered them under Pen. Code 1910, § 995.—Lynn v. State, 79 S. E. 29.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 83 (Ga.App.) A justice of the peace *held* incompetent as a juror in a trial wherein he had received the affidavit and issued the warrant which was the basis of the accusation.—Evans v. State, 79 S. E. 916.

§ 110 (Ga.App.) Where accused accepted a juror before his strikes were exhausted, he waived his right to object that the juror was incompetent.—Taylor v. State, 79 S. E. 924.

The examination of a juror upon his voir dire exhausts the right of accused to inquire into his competency unless he puts him upon the judge as a trier and then proves some fact tending to establish that his answers on the voir dire were not true.—Id.

§ 110 (S.C.) Error in the rulings of the court in acceptance of jurors is waived by the defendant's withdrawing his plea of not guilty and entering a plea of guilty which was submitted to the jury to determine whether they would recommend mercy.—State v. Vaughn, 79 S. E. 312.

§ 116 (Ga.App.) That jurors had previously tried a similar case against another person afforded no ground for challenge to the array; the proper remedy being by challenge to the poll.—Quinlan v. State, 79 S. E. 768.

§ 116 (Ga.App.) That the panel of jurors heard the evidence introduced upon a previous trial of one jointly indicted with accused and after the conclusion of the evidence were ordered from the courtroom by the judge is not ground for challenge to the array but to the poll.—Kincaid v. State, 79 S. E. 770.

VI. IMPANELING FOR TRIAL AND OATH.

§ 149 (Ga.) Where, after selection of the jury and introduction of a part of plaintiff's evidence, defendant discovered that one juror was the guest of plaintiff's local attorney and requested that such juror be withdrawn and the trial proceed with 11 jurors, which request was refused by plaintiff, the court erred in denying defendant's request then made to declare a mistrial.—Alabama Great Southern R. Co. v. Brown, 79 S. E. 1113.

JUSTICES OF THE PEACE.

See Certiorari, § 70; Criminal Law, §§ 369, 376, 419, 420; Jury, § 83; Landlord and Tenant, § 315; Time, § 5.

IV. PROCEDURE IN CIVIL CASES.

§ 91 (Ga.App.) Where plaintiff's pleading in a justice's court, in an action against a railroad company for killing live stock, fails to allege even in general terms that the killing was due to defendant's negligence, it is subject to a special demurrer therefor.—South Georgia Ry. Co. v. Atkins, 79 S. E. 226.

§ 92 (Ga.App.) Unless the answer in an action before a justice is a dilatory plea, or a defense to an unconditional contract in writing, it need not be filed at the first term.—Willingham v. Buckeye Cotton Oil Co., 79 S. E. 496.

§ 97 (Ga.App.) In an action before a justice, not founded on an unconditional contract in writing, the plea of defendant need not be verified.—Willingham v. Buckeye Cotton Oil Co., 79 S. E. 496.

§ 125 (Ga.App.) An announcement of a justice of the peace in open court that he will render judgment in a particular way is of no effect until the judgment is actually entered.—*Duke v. State*, 79 S. E. 861.

§ 127 (N.C.) Notice of a motion before a justice of the peace to set aside a judgment recovered by a nonresident plaintiff, for want of service of the summons, might be given by publication or by service on plaintiff's attorney of record.—*Ballard v. Lowery*, 79 S. E. 968.

Upon motion to set aside justice's judgment, docketed in the superior court, for want of service, *held* that, upon application to the clerk accompanied by the required bond, the execution would be recalled until disposition of the motion.—*Id.*

§ 128 (N.C.) Where judgment was rendered by the justice without service of process, but the record on its face showed such service, the proper remedy was by a motion to set aside the judgment, and the service could not be impeached by injunction.—*Ballard v. Lowery*, 79 S. E. 966.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 141 (Ga.App.) An appeal to the superior court, being strictly statutory, will not lie from a justice's judgment establishing copies of lost papers, though such papers are part of a record in a suit involving a claim above \$50; certiorari being the proper remedy, Civ. Code 1910, §§ 6524, 4742, 4738, 4998, not authorizing an appeal in such case.—*Humphrey v. Johnson*, 79 S. E. 530.

The question whether the amount involved is sufficient to give jurisdiction on appeal from a justice's judgment must be determined by the summons and the cause of action thereto attached.—*Id.*

§ 171 (Ga.App.) Under Civ. Code 1910, § 5014, an appeal from a justice is an investigation de novo.—*Willingham v. Buckeye Cotton Oil Co.*, 79 S. E. 496.

§ 174 (Ga.App.) Where a case is appealed from a justice to a superior court, defendant must reduce his defense to writing, though it may in effect be a mere amendment to the plea originally filed in the justice court.—*Willingham v. Buckeye Cotton Oil Co.*, 79 S. E. 496.

That defendant must on appeal from a justice reduce his defense to writing does not preclude him from the right of further amending his plea on the trial, under Civ. Code 1910, § 4739.—*Id.*

§ 175 (W.Va.) In view of Code 1906, c. 50, § 168, requiring a justice of the peace to transmit on appeal depositions within 20 days, depositions regularly taken and read as evidence on the trial before a justice may be read in the circuit court on appeal.—*Cable Co. v. Mathers*, 79 S. E. 1079.

(B) Certiorari.

§ 194 (N.C.) Where a writ of recordari is desired to compel a justice of the peace to send up the record in a case where the defendant defaulted and lost the right of appeal, defendant has the burden of showing excusable neglect as well as a reasonably meritorious defense.—*Hunter v. Atlantic Coast Line Ry. Co.*, 79 S. E. 610.

As every member of a law firm is charged with knowledge of all the business of the firm, the illness of one member of a law firm which prevented him from attending a trial in justice court, and thus caused defendant to suffer a default judgment and lose its right of appeal, is not a showing of excusable neglect which will warrant the issuance of a writ of recordari.—*Id.*

§ 196 (Ga.App.) An appeal to the superior court, being strictly statutory, will not lie from a justice's judgment establishing copies of lost papers, though such papers are part of a record in a suit involving a claim above \$50; certiorari being the proper remedy, Civ. Code, §§

6524, 4742, 4738, 4998, not authorizing an appeal in such case.—*Humphrey v. Johnson*, 79 S. E. 530.

§ 197 (Ga.App.) Where, in an action in a justice court to foreclose a mortgage, the justice's judgment found against defendant's claim that the property was exempt from the mortgage debt, and held the property subject, and the defendant failed, on certiorari brought in the superior court, to show any legal reason why this judgment was erroneous, the certiorari should have been overruled.—*Salter v. Bet-tison*, 79 S. E. 358.

§ 202 (Ga.App.) The assignments of error in a petition for a writ of certiorari to review a judgment of a justice of the peace in proceedings to foreclose a laborer's lien *held* to be sufficiently specific to prevent a dismissal of the certiorari on the ground of their uncertainty.—*Ballard v. Daniel*, 79 S. E. 376.

§ 203 (Ga.App.) Where the written notice of the sanction of a certiorari and of the time and place of hearing, required by Civ. Code 1910, § 5190, is not given at least ten days before the time fixed by law for the beginning of the term to which the writ is returnable, and failure to give such notice is not due to a providential cause, the certiorari should be dismissed.—*Watson v. American Nat. Bank*, 79 S. E. 586.

As used in Civ. Code 1910, § 5190, providing that a notice of certiorari shall be given at least ten days before "the sitting of the court," the quoted phrase refers to the day fixed when the court must begin to sit for the disposition of cases, and is equivalent to the phrase "the first day of the term."—*Id.*

§ 208 (Ga.App.) The burden of showing error in a judgment of the justice of the peace is upon the plaintiff in certiorari, and where the record shows that the other party was entitled to recover some amount, and does not show the amount of the judgment, the certiorari will be overruled.—*Ludden & Bates Southern Music House v. Hale*, 79 S. E. 495.

§ 209 (N.C.) Where a judgment, granting a writ of recordari to bring up a judgment of a justice, was reversed and remanded, the trial court might properly permit the filing of additional affidavits by the petitioner.—*Hunter v. Atlantic Coast Line Ry. Co.*, 79 S. E. 610.

JUSTIFIABLE HOMICIDE.

See Homicide, §§ 105, 118.

KNOWLEDGE.

See Banks and Banking, § 112; Cancellation of Instruments, § 34; Criminal Law, § 325; Insurance, § 378; Witnesses, § 37.

LACHES.

See Cancellation of Instruments, § 34; Husband and Wife, § 201; Wills, § 261.

LANDLORD AND TENANT.

See Boundaries, § 11; Chattel Mortgages, § 138; Estoppel, § 67; Evidence, § 413; Mechanics' Liens, § 191; Specific Performance, § 123; Telegraphs and Telephones, § 16.

II. LEASES AND AGREEMENTS IN GENERAL.

(B) Construction and Operation.

§ 37 (Va.) The language of a lease is to be construed most strongly against the lessor.—*Stonegap Colliery Co. v. Kelly & Vicars*, 79 S. E. 341.

The intention of the parties to a lease must be ascertained by reference to the entire instrument and not to disjointed parts of it.—*Id.*

IV. TERMS FOR YEARS.**(D) Termination.**

§ 112 (Ga.) Where a landlord, after suing out a warrant to summarily dispossess the tenant, under Civ. Code 1910, § 5385, for failure to pay rent, accepted rent which accrued after the summary process, he waived his right to claim a forfeiture of the lease because of the tenant's arrears prior to such process.—Guptill v. Macon Stone Supply Co., 79 S. E. 854.

VI. TENANCIES AT WILL AND AT SUFFERANCE.

§ 119 (Ga.) Where a tenant for a year continues in possession without right after expiration of his term, he is a "tenant at sufferance."—Stanley v. Stembbridge, 79 S. E. 842.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.**(B) Possession, Enjoyment, and Use.**

§ 134 (Va.) Equity will not raise by implication a covenant in restraint of a beneficial use of leased premises.—Stonewap Colliery Co. v. Kelly & Vicars, 79 S. E. 341.

A covenant that premises shall be used for a specified purpose does not impliedly forbid their use for a similar lawful purpose which is not injurious to the rights of the landlord.—Id.

(D) Repairs, Insurance, and Improvements.

§ 150 (Ga.App.) In the absence of any agreement to do so, a landlord need not repair patent defects of which the tenant knew when he rented the building.—Moore v. Rosser, 79 S. E. 246.

§ 150 (N.C.) The changing of a gate which swung outward so as to make it swing inward would be a change in the condition of the premises, and not technically a "repair," so that the duty of making it was upon the landlord.—Knight v. Foster, 79 S. E. 614.

(E) Injuries from Dangerous or Defective Condition.

§ 167 (N.C.) A landlord is only liable to third persons for injuries caused by failure to repair the premises where he contracts to repair or knowingly rents the premises in a condition which is dangerous or which amounts to a nuisance, or where he authorizes a wrongful act.—Knight v. Foster, 79 S. E. 614.

A landlord who knowingly rented premises when the gate thereto swung outward so as to be dangerous to pedestrians was liable for personal injuries resulting from the condition of the gate seven years thereafter.—Id.

VIII. RENT AND ADVANCES.**(A) Rights and Liabilities.**

§ 196 (N.C.) The landlord on breach of contract by failure to pay rent and on holding over by the tenant is not confined to the rent stipulated in the lease, but may consider the fair rental value of the property; such "rental value" being, not the probable profits that might accrue to the landlord, but the value as ascertained by proof of what the premises would rent for, or of facts from which value might be determined.—Martin v. Clegg, 79 S. E. 1105.

§ 216 (Ga.) In a proceeding under Civ. Code 1910, § 5385 et seq., to dispossess a tenant, plaintiff cannot recover double rent except after a demand for possession.—Stanley v. Stembbridge, 79 S. E. 842.

The double rent recoverable under Civ. Code 1910, § 5389, where a tenant refuses to surrender possession after expiration of his term and a demand, is double the rental value of the property and not double the contract price.—Id.

§ 216 (Ga.) Civ. Code 1910, § 5385, which authorizes the summary removal of tenants for failure to pay rent, cannot be used as a means

to collect double rent pursuant to section 5389, after the landlord has accepted rent accruing after the summary process.—Guptill v. Macon Stone Supply Co., 79 S. E. 854.

§ 216 (Ga.) Where, in a landlord's proceedings to dispossess a tenant, plaintiff testified to a demand for possession, but did not specify the date thereof, and defendant denied such demand, there could be no recovery of double rent for any time before the commencement of the proceedings.—Hindman v. Raper, 79 S. E. 945.

(B) Actions.

§ 217 (Ga.) A proceeding under Civ. Code 1910, § 5385 et seq., to dispossess a tenant is not a proper method of collecting single rent due by contract, prior to demand for possession.—Stanley v. Stembbridge, 79 S. E. 842.

§ 229 (Va.) Under Code 1904, § 2791, making an undertenant's goods liable for rent, and section 2962, rendering goods liable to be distrained liable to attachment, the goods of an undertenant may be attached for rent not due, as well as for rent past due, where he has removed same from the leased premises in violation of the latter section.—Bernard v. McClanahan, 79 S. E. 1059.

An undertenant's goods may be attached for rent under Code 1904, § 2962, authorizing the attachment, and section 2791, making an undertenant liable for rent, though an action at law brought to recover the rent never matures for hearing.—Id.

Where an order in attachment proceedings for rent under Code 1904, § 2962, was in the usual form and stated that the goods levied on were liable and ordered a sale, it was not objectionable as being a personal judgment, instead of merely in rem, in an action wherein jurisdiction was not obtained over defendant's person.—Id.

§ 231 (Ga.) Where the rental was a specified amount of cotton and the only evidence, in a proceeding under Civ. Code 1910, § 5385 et seq., to dispossess the tenant, as to the value of the place for rent after the expiration of the term, was that it was worth a stated number of pounds of cotton, a verdict finding a stated sum of money as rent for the term and another sum as rent for the time defendant held over was not supported by the evidence.—Stanley v. Stembbridge, 79 S. E. 842.

(D) Distress.

§ 270 (Ga.App.) Evidence of the annual rental value of the premises is immaterial in distress proceedings, where the tenant agreed in writing to pay a specified annual rental.—Moore v. Rosser, 79 S. E. 246.

Where in distress proceedings each party claimed damages for breach of contract by the other, it was not error to instruct that the damages on one side should be set off against those on the other, and only the net amount be allowed the tenant as a deduction from the amount of the distress warrant.—Id.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 285 (N.C.) In an action to recover possession of leased property from the tenant holding over, where the plaintiff was permitted to show that the fair rental value of the premises from November 1, 1909, to January 1, 1913, above the stipulated rental was a certain amount, it was error to exclude the defendant's evidence that the rental value since November 1, 1909, was much less than that claimed by the plaintiff.—Martin v. Clegg, 79 S. E. 1105.

§ 296 (N.C.) A summary proceeding under the landlord and tenant act, Revisal 1905, § 2001, and the following sections, to oust tenants holding over after the expiration of their term, can only be maintained where the relation of landlord and tenant exists between the parties.—

McIver v. Seaboard Air Line Ry., 79 S. E. 1107.

§ 298 (Ga.) In an action under Civ. Code 1910, § 5385 et seq., to dispossess a tenant, it was no defense that defendant had heard that his original landlord, plaintiff's grantor, had sold the property and he had thereupon given a rental note to plaintiff's agent, and that thereafter his original landlord had told him that she had not sold the place, whereupon he paid her the rent and agreed to rent from her for another year and remained in possession.—Stanley v. Stembidge, 79 S. E. 842.

§ 308 (Ga.) The rent note was admissible in evidence, in a proceeding under Civ. Code 1910, § 5385 et seq., to dispossess a tenant, to show that the rent was unpaid and that the note was held by plaintiff, though plaintiff was the assignee of the note and the payee was his agent.—Stanley v. Stembidge, 79 S. E. 842.

In a proceeding under Civ. Code 1910, § 5385 et seq., to dispossess a tenant, a deed from the defendant's original landlord to plaintiff was properly admitted in evidence, though defendant had made a new rental contract for the same term with plaintiff through an agent.—Id.

§ 308 (N.C.) Evidence in a summary proceeding under the landlord and tenant act *held* not to show that the relation of landlord and tenant existed between the parties.—McIver v. Seaboard Air Line Ry., 79 S. E. 1107.

§ 315 (N.C.) If the relation of landlord and tenant is not shown to exist, so that a summary proceeding under the landlord and tenant act, Revisal 1905, § 2001, and the following sections, could not be maintained, the proceeding should be dismissed by the superior court on appeal from a justice, and plaintiff required to bring ejectment in the superior court if he claims title.—McIver v. Seaboard Air Line Ry., 79 S. E. 1107.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, § 1205; Embezzlement; Receiving Stolen Goods; Trover and Conversion, §§ 25, 40.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 3 (Ga.App.) It is not sufficient to constitute the crime of larceny that the defendant shall have fraudulently violated the rights of the owner, but it is essential that the taking shall have been with intent to steal.—Russell v. State, 79 S. E. 495.

§ 3 (Ga.App.) In a prosecution for stealing a cow, it was error to instruct that although defendants killed the cow accidentally, yet if they thereafter formed the intent to convert the carcass to their own use, they would be guilty.—Hunter v. State, 79 S. E. 752.

§ 15 (Ga.App.) Where possession of goods is delivered under an agreement to sell the same for the owner's benefit and to return either the proceeds or the goods, and the goods are converted, the conversion is not simple larceny as defined by Civ. Code 1910, § 152, unless the defendant fraudulently induced the owner to surrender the goods, intending at the time to appropriate them to his own use.—Pittman v. State, 79 S. E. 915.

§ 15 (N.C.) Where defendant broke open a letter intrusted to him to mail and abstracted money therefrom, he was guilty of larceny.—State v. Ruffin, 79 S. E. 417.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 32 (Ga.App.) An indictment under Pen. Code 1910, § 163, charging the taking away of a paper relating to real or personal estate with intent to destroy the same, need not allege ownership of the paper taken and carried away.—Hanson v. State, 79 S. E. 176.

§ 40 (Ga.App.) Where the accusation laid the title of stolen property in the levying officer, and the undisputed evidence showed that there had been no legal levy, a conviction of larceny was unauthorized.—Russell v. State, 79 S. E. 495.

(B) Evidence.

§ 55 (Ga.App.) Circumstantial evidence *held* sufficient to sustain a conviction of larceny.—Barlow v. State, 79 S. E. 93.

§ 63 (Ga.App.) Evidence merely that defendant failed to pay for, and converted to his own use, goods received under an agreement to sell the same and return to the owner either the proceeds or the unsold goods was insufficient to sustain a finding that he fraudulently induced the plaintiff to surrender the goods, intending to appropriate them.—Pittman v. State, 79 S. E. 915.

LAW OF THE CASE.

See Appeal and Error, §§ 1097, 1194, 1195.

LEADING QUESTIONS.

See Witnesses, § 240.

LEASE.

See Landlord and Tenant; Mines and Minerals, §§ 62-81.

LEGISLATIVE POWER.

See Constitutional Law, §§ 60, 63.

LETTERS.

See Carriers, § 36; Criminal Law, § 427; Evidence, § 318; Frauds, Statute of, § 103; Larceny, § 15; Wills, § 99.

LEVY.

See Execution, §§ 129, 155.

LEWDNESS.

See Disorderly House, § 17.

LIBEL AND SLANDER.

See Carriers, §§ 283, 319.

LICENSES.

See Insurance, § 20; Intoxicating Liquors, §§ 176, 242; Negligence, § 32; Physicians and Surgeons; Railroads, §§ 276, 358; Weapons, §§ 3, 13.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 40 (Va.) A conviction for doing business without a license was proper, though the commissioner of revenue proceeded on a wrong basis in estimating the amount of defendants' sales, for the purpose of determining the amount to be paid for a license.—Armour & Co. v. Commonwealth, 79 S. E. 328.

LIENS.

See Appeal and Error, § 1066; Attorney and Client, §§ 189, 190; Bailment, § 18; Chattel Mortgages, § 138; Corporations, § 559;

Divorce, § 256; Execution, §§ 129, 155; Judgment, §§ 785-801; Logs and Logging, §§ 25, 28, 33; Mechanics' Liens.

§ 13 (N.C.) While the holder of a lien may release the same to one claiming an interest or junior lien on the property, the lien cannot be assigned without at the same time transferring the debt secured, or at least a part thereof.—*M. H. White & Co. v. Winslow & White*, 79 S. E. 261.

LIFE ESTATES.

See Deeds, § 129; Remainders; Wills, §§ 600, 601, 614, 634, 689.

§ 24 (S.C.) Where life tenants mortgaged the land and on paying the mortgage had it assigned to them, they did not become mortgagees in possession for the purpose of applying the rents and profits to the payment of the mortgage.—*Bethea v. Allen*, 79 S. E. 639.

LIFE INSURANCE.

See Insurance, § 392.

LIGHTS.

See Railroads, § 362.

LIMITATION OF ACTIONS.

See Adverse Possession; Bankruptcy, § 298; Criminal Law, § 335; Homestead, § 115; Insurance, § 622; Taxation, § 805; Wills, § 261.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

§ 21 (Ga.) Civ. Code 1910, §§ 4362, 4368, providing a limitation of four years for actions for breach of contract, express or implied, do not apply to an action by a trustee in bankruptcy, under Bankruptcy Act, § 60b, against a transferee for value of goods received from the bankrupt in payment of a pre-existing debt less than four months prior to the filing of the petition.—*Arnold Grocery Co. v. Shackelford*, 79 S. E. 470.

§ 29 (Ga.) Civ. Code 1910, §§ 4362, 4368, providing a limitation of four years for actions on open accounts, do not apply to an action by a trustee in bankruptcy, under Bankruptcy Act, § 60b, against a transferee for value of goods received from the bankrupt in payment of a pre-existing debt less than four months prior to the filing of the petition.—*Arnold Grocery Co. v. Shackelford*, 79 S. E. 470.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 46 (W.Va.) Where an oral contract for continuous services provides that payment therefor shall be postponed until the death of the promisor, or provision made therefor in his will, limitations do not begin to run until the happening of the contemplated event.—*Hotsin-piller v. Hotsin-piller*, 79 S. E. 936.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 182 (N.C.) Federal Employer's Liability Act of 1908, § 6, providing that no action shall be maintained under the act unless commenced within two years, is a statute of limitation, and not a condition inherent in the right of action, and must be pleaded by defendant.—*Burnett v. Atlantic Coast Line R. Co.*, 79 S. E. 414.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

§ 7 (N.C.) Purchasers of property pending suit to correct the deed thereto on the ground that it was obtained by fraud and undue influence held to hold it subject to the results of the suit.—*Lamm v. Lamm*, 79 S. E. 290.

LIVERY STABLE KEEPERS.

See Master and Servant, § 302.

§ 6 (W.Va.) No garage keeper, in the exercise of reasonable care, can release a car left in his custody to another than the owner without the latter's order.—*McLain v. West Virginia Automobile Co.*, 79 S. E. 731.

§ 7 (W.Va.) The keeper of a garage for hire is bound to exercise reasonable diligence to keep safely an automobile left in his custody.—*McLain v. West Virginia Automobile Co.*, 79 S. E. 731.

A count in assumpsit, charging a garage keeper with the duty to take proper care of an automobile left in his custody, and to care for it without damage or injury, does not charge a higher degree of care than the law enjoins.—*Id.*

A custom of garage keepers, contrary to the implied obligation of reasonable care in favor of an automobile owner storing his car at a public garage, does not absolve the garage keeper from observance of such care.—*Id.*

§ 11 (Ga.App.) Under Civ. Code 1910, § 3479, a bailor for hire warrants a thing bailed to be free from any secret fault affecting the purpose for which it is hired, and livery stable keepers are bound in that regard to exercise ordinary care, which is such care as cautious men are accustomed to use under similar circumstances, but not the extraordinary diligence required of carriers.—*Parker v. G. O. Loving & Co.*, 79 S. E. 77.

Where one hires a carriage, the owner owes to each member of the family using it the same degree of care as is owing to the person to whom the vehicle is let, whether the owner has knowledge that the vehicle is to be employed for carriage of any other person than he to whom it is let or not.—*Id.*

LIVE STOCK.

See Carriers, § 228; Municipal Corporations, §§ 591, 604; Railroads, §§ 419-446.

LOCAL LAWS.

See Statutes, §§ 76, 90.

LOCAL STATUTES.

See Statutes, § 246.

LOGS AND LOGGING.

See Deeds, § 143; Fixtures, § 21; Injunction, §§ 38, 132; Reformation of Instruments, § 45; Statutes, § 96; Trespass, § 30; Trial, § 252.

§ 2 (N.C.) Where a grantor conveyed timber with the right to the grantee to remove same within 10 years, with option of extension of 5 years, and afterwards conveyed the land, but expressly excepted the timber previously conveyed, making a reference to that deed, a grant of the 5 years' extension by the grantor after she had parted with title of land to the grantee was valid.—*Powell v. Fosburg Lumber Co.*, 79 S. E. 272; *Cooper v. Same*, *Id.*

§ 3 (Ga.App.) Where a written contract of sale of standing timber was entered into, and one-half the purchase money paid, the title to the timber passed immediately to the purchaser, in so far as it affected the rights of innocent persons who subsequently bought from the purchaser lumber cut from the timber, though there was a verbal agreement, of which such innocent persons had no knowledge, between the seller and the purchaser that the title to the timber

should not pass until it was cut.—*Davis v. Cox*, 79 S. E. 383.

§ 3 (N.C.) Vendee of standing timber, in order to obtain extension of time for removing it, *held* bound to comply strictly with the contract by giving notice of its intention to exercise its right to the extension, and tendering the consideration therefor within the time originally provided.—*Eureka Lumber Co. v. Whitley*, 79 S. E. 268.

Vendee of standing timber *held* not to have exercised due diligence, as a matter of law, in giving notice of its intention to exercise its option to extend the time for removing it, by placing the consideration in the hands of the sheriff, with instructions to deliver.—*Id.*

§ 3 (N.C.) Where, at the time of plaintiff's conveyance of certain timber to defendant's intestate, the latter executed a license to plaintiff to cut timber on a part of the tract, and later conveyed all the timber to C., who cut the timber from the reserved portion, intestate's personal representative was not liable therefor; C.'s authority to cut having been derived from a new deed from plaintiff.—*Warwick v. Taylor*, 79 S. E. 286.

§ 3 (N.C.) Where the owners of the timber on a certain tract of land, with a limited time in which to cut it, subsequently acquired title to the land from one whose grantor excepted from the deed the right to cut timber, which had been previously conveyed by him to another, the right to cut timber did not merge with the title, and after the expiration of the right, the holder of the subsequent right became the owner of the timber.—*W. J. Downing Lumber Co. v. Riley*, 79 S. E. 605.

§ 3 (N.C.) Contract for the sale of growing timber *held* in effect a conveyance passing a present interest therein, defeasible as to all timber not cut within the time limit prescribed, and not a mere executory agreement during such period.—*Wilson v. Scarboro*, 79 S. E. 811.

§ 3 (N.C.) An assignee of rights of a grantee under conveyance of standing timber, providing that grantee would build a railroad, or pay a specified penalty, *held* bound by the grantee's covenant.—*Herring v. Wallace Lumber Co.*, 79 S. E. 876.

§ 3 (S.C.) Where a timber deed did not fix any time for removal, it must be within a reasonable time.—*Gresham v. Atlantic Coast Lumber Corporation*, 79 S. E. 799.

An exception of the timber on land is for the benefit of the grantor, even though the grantor's predecessor had conveyed the timber under a deed which merely gave the grantee a reasonable time in which to remove it, and does not inure to the benefit of the grantee of the timber.—*Id.*

§ 3 (S.C.) Under conveyance of standing timber except such as might be necessary for plantation use, *held*, that enough timber should be left to supply the present and future needs of the plantation and that the grantor's right was not limited to a right to use timber on the plantation until such time as the grantee completed the removal thereof.—*Marion County Lumber Co. v. Hodges*, 79 S. E. 1096.

Grantor *held* not entitled to set apart a tract of timber and exclude grantee therefrom unless with all other uncut timber such tract was necessary to satisfy the exception.—*Id.*

Under such grant, *held* that only so much was reserved as was required for the needs of the plantation as it then existed, although the grantor thereafter brought additional land into cultivation.—*Id.*

Evidence on application for temporary injunction *held* to show that a tract from which the grantor had excluded the grantee was not necessary for plantation use.—*Id.*

§ 25 (Ga.App.) The lien provided for by Civ. Code 1910, § 3358, applies to timber or logs severed from the soil, but not to standing trees,

although sold to be severed and converted into lumber.—*Davis v. Cox*, 79 S. E. 383.

§ 28 (Ga.App.) The lien of a sawmill proprietor, provided for by Civ. Code 1910, § 3358, not asserted in the manner prescribed by section 3354 by recording within 10 days, is lost on possession of the property being surrendered to the debtor.—*Richardson v. Mallory*, 79 S. E. 362.

§ 33 (Ga.App.) Where an execution has been issued on foreclosure of a lien given by Civ. Code 1910, § 3358, for timber furnished for a sawmill, and a counter affidavit has been filed and a claim interposed to the levy, the claimant may attack the validity of the lien, though defendant has withdrawn his counter affidavit before trial of the claim case.—*Davis v. Cox*, 79 S. E. 383.

LOST INSTRUMENTS.

See Appeal and Error, §§ 871, 1052; Justices of the Peace, §§ 141, 196.

§ 14 (W.Va.) Equity has jurisdiction to enforce the liability of the obligors on the lost bond of a defaulting bank cashier.—*Clark v. Nickell*, 79 S. E. 1020.

§ 16 (W.Va.) Where, after diligent search for a cashier's bond, the bank brings an allowable action in equity upon the lost bond, discovery and production of the bond thereafter will not defeat its right to relief in the pending suit.—*Clark v. Nickell*, 79 S. E. 1020.

§ 23 (Va.) Where in a suit for partition plaintiff's alleged title rested on an alleged deed by defendant which had been lost, strong and convincing proof of its former existence, its loss, and its contents would be required.—*Leftwich v. Early*, 79 S. E. 384.

LUNATICS.

See Insane Persons.

MAIL.

See Carriers, § 289.

MALICE.

See Action, § 7; Homicide, §§ 11, 144.

MALICIOUS PROSECUTION.

See Trial, § 255.

IV. TERMINATION OF PROSECUTION.

§ 34 (N.C.) Before an action for malicious prosecution can be instituted, it is necessary that the proceedings on which it is based shall have terminated.—*Brinkley v. Knight*, 79 S. E. 260.

§ 35 (N.C.) A criminal prosecution *held* not terminated when plaintiff instituted suit for malicious prosecution; the discharge of plaintiff having been made by the constable on the failure of the justice to appear on the date set for trial.—*Brinkley v. Knight*, 79 S. E. 260.

V. ACTIONS.

§ 47 (Ga.App.) A petition alleging that on complaint of defendant plaintiff was arrested, and in accordance with his bond appeared at five separate terms of court when he was informed that the case had been dropped, sets forth an action for malicious prosecution within Civ. Code 1910, § 4439, defining it as a prosecution "maliciously carried on and without any probable cause where any damage ensues to the person prosecuted."—*Mimbs v. Battle*, 79 S. E. 922.

MANDAMUS.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 73 (S.C.) The institution by municipality of proceedings to ascertain the amount of compensation due in a condemnation case is a plain ministerial duty, and can be enforced by mandamus.—*Parrish v. Town of Yorkville*, 79 S. E. 635.

§ 111 (N.C.) Mandamus was a proper remedy to enforce an order of the judge of the superior court requiring a county to pay all expenses of a chemical analysis of the stomach of a person believed to have been murdered.—*Withers v. Board of Com'rs of Columbus County*, 79 S. E. 615.

MANSLAUGHTER.

See Homicide, §§ 68, 83.

MARKETS.

See Municipal Corporations, § 225.

MARRIAGE.

See Divorce; Gifts, § 4; Husband and Wife; New Trial, § 108; Vendor and Purchaser, §§ 13, 51.

MASTER AND SERVANT.

See Carriers, § 283; Damages, §§ 53, 216; Death, §§ 86, 95; Equity, § 48; Guardian and Ward, § 6; Judgment, § 594; Negligence, § 101; Parent and Child, § 6; Trial, §§ 243, 255, 295.

I. THE RELATION.

(A) Creation and Existence.

§ 1 (Va.) Where plaintiff at the age of 13 applied for the position of servant to deceased, who took him into his home and furnished him with shelter, food, and clothing in return for small personal services, but there was no contract, express or implied, to pay plaintiff any money consideration for his services, no other relation than that of master and servant existed between the parties.—*Starke v. Storm's Ex'r*, 79 S. E. 1057.

§ 6 (W.Va.) Evidence in an action by a carpenter *held* insufficient to show, as against a verdict for plaintiff, that an employment contract was a fabrication.—*McGuire v. Old Sweet Springs Co.*, 79 S. E. 350.

II. SERVICES AND COMPENSATION.

(A) Performance of Services.

§ 67 (Ga.App.) An intent to defraud, coexistent with the making of a contract, is an essential element of the offense of violating Pen. Code 1910, § 715.—*Johnson v. State*, 79 S. E. 524.

Under Pen. Code 1910, § 716, a failure without good cause to perform services contracted for and to return money advanced may be presumptive evidence of fraudulent intent in cheating and swindling in violation of section 715.—*Id.*

In a prosecution under Pen. Code 1910, § 715, either the performance of the services or the repayment of the advancement is a complete defense.—*Id.*

In a prosecution under Pen. Code 1910, § 715, the burden is on the prosecution to prove, not only that the services contracted for were not performed, but also that the advances with interest thereon had not been repaid at or before the time fixed for the commencement of the services.—*Id.*

In a prosecution under Pen. Code 1910, § 715, the burden is on the prosecution to prove that accused had no good excuse for his failure to

perform his contract or to repay the advancement.—*Id.*

In a prosecution under Pen. Code 1910, § 715, evidence that defendant made a false affidavit that he was not under any other contract of service at the time of the advancement made for him by the prosecutor, the making of which affidavit would subject him to prosecution under section 719, *held* insufficient to show fraudulent intent or to authorize his conviction.—*Id.*

§ 67 (Ga.App.) In a prosecution for violating the labor contract act, the burden is on the state to prove that the hirer sustained a loss capable of definite computation.—*Mobley v. State*, 79 S. E. 906.

The labor contract act is intended to apply only to inflict punishment for obtaining advances by fraud with intent to cheat and not to afford machinery for the collection of debts.—*Id.*

Evidence, in a prosecution for violating the labor contract act, *held* insufficient to sustain a conviction.—*Id.*

§ 67 (Ga.App.) A writing containing a promise to labor, but which does not prescribe the work to be performed, is too indefinite to afford a basis for a prosecution under Pen. Code 1910, § 715.—*Small v. State*, 79 S. E. 1134.

A writing *held* not sufficiently definite to support a prosecution under Pen. Code 1910, § 715.—*Id.*

§ 67 (N.C.) In a prosecution for obtaining supplies under a promise to labor, with intent to cheat and defraud, evidence *held* insufficient to show a fraudulent intent so as to sustain a conviction.—*State v. Isley*, 79 S. E. 1105.

(B) Wages and Other Remuneration.

§ 69 (S.C.) Civ. Code 1912, § 3812, requiring corporations to pay wages to discharged employes within 24 hours after demand, *held*, constitutional.—*Wynne v. Seaboard Air Line Ry.*, 79 S. E. 521.

§ 76 (Va.) On facts showing the creation of the relation of master and servant between an adult and the infant plaintiff, without any express agreement as to the compensation, *held* that there was an implied obligation to feed, clothe, and lodge the servant.—*Starke v. Storm's Ex'r*, 79 S. E. 1057.

Where the relation of master and servant, arose between deceased and an infant servant, whereby the master, in the absence of any agreement for wages, was to furnish food, clothing, and lodging, there was no obligation on the part of the master to educate the servant.—*Id.*

§ 80 (Va.) Where a master took a boy of 13 into his home without express agreement to pay for services, *held* not to raise a presumption that the infant plaintiff expected to be paid or the master to pay therefor.—*Starke v. Storm's Ex'r*, 79 S. E. 1057.

§ 83 (S.C.) Civ. Code 1912, § 3812, requiring corporations to pay earned wages to discharged employes within 24 hours after demand on pain of a penalty, *held* not to apply where the claim is not a just debt, or where the laborer prevents payment by his own conduct, nor does it preclude the interposition of a valid defense or counterclaim.—*Wynne v. Seaboard Air Line Ry.*, 79 S. E. 521.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 87 (N.C.) Federal Employer's Liability Act of 1908 creates no right that did not exist at common law, since the change of the law as to contributory negligence, assumption of risk, and negligence of a fellow servant only withdraws a defense, and does not affect the right.—*Burnett v. Atlantic Coast Line R. Co.*, 79 S. E. 414.

§ 92 (W.Va.) A master who employs a physician to treat employes, and collects monthly fees from their wages, which are given to the

physician as his compensation, is not liable for the physician's malpractice, unless he was negligent in selecting or retaining him.—*Guy v. Lanark Fuel Co.*, 79 S. E. 941.

Where a master selects a competent physician to treat his employes, he may rely on the presumption that his competency will continue until notice of a change.—*Id.*

To constitute constructive notice of the reputation of a physician employed by defendant to treat his employes, the reputation must be so general and notorious that ignorance shows negligence of the master.—*Id.*

Where the reasons which are relied on to charge the master with knowledge of the reputation of a physician employed to treat the employes apply with equal force to show knowledge by the servant treated, the negligence of the latter in not complaining is as great as that of the master in retaining the physician.—*Id.*

§ 95 (Ga.) The employment of a boy in a factory in violation of the child labor law of 1906 (Civ. Code 1910, § 3144) § 2, is negligence per se, and renders the employer liable for injuries proximately resulting from the employment.—*Elk Cotton Mills v. Grant*, 79 S. E. 836.

§ 96 (Ga.) Where a boy employed in violation of the child labor law of 1906 (Civ. Code 1910, § 3144) § 2, is injured from some cause wholly disconnected from his employment, there can be no recovery against the master for his injury.—*Elk Cotton Mills v. Grant*, 79 S. E. 836.

§ 97 (Va.) An employer is not bound to foresee and obviate things which prudent men would not expect to happen.—*Yellow Poplar Lumber Co. v. Goble*, 79 S. E. 1036.

§ 100 (N.C.) The acceptance of benefits from a relief department does not prevent a recovery of damages for negligence under the federal Employer's Liability Act of 1908.—*Burnett v. Atlantic Coast Line R. Co.*, 79 S. E. 414.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (N.C.) A master operating machinery must supply such appliances as are known, approved, and in general use, and a failure so to do will constitute negligence.—*Bird v. Bell Lumber Co.*, 79 S. E. 448.

§ 107 (Ga.) The duty of a master as to furnishing a safe place in which to work does not apply to such places as are constantly shifting as a result of the servant's labor, and where the work necessarily changes the character for safety of the place in which it is done.—*Thomas v. Georgia Granite Co.*, 79 S. E. 130.

§ 111 (N.C.) Where the steps of a baggage car were torn away by contact with certain boxes negligently left near the track by defendant, held, that defendant was guilty of actionable negligence, creating liability for injury to a baggage man.—*Ferebee v. Norfolk Southern R. Co.*, 79 S. E. 685.

§ 114 (N.C.) A railroad is not liable for injuries to a section hand who left the track at a place of his own selection to get a drink of water, and in going down the side of a fill fell over a snag left there when the bushes were cut from the right of way by the company.—*Williams v. Seaboard Air Line Ry.*, 79 S. E. 601.

§ 129 (N.C.) Where a railroad company negligently left a quantity of boxes near its track and they toppled over and broke the steps of a passing baggage car, resulting in injury to the baggage man, defendant was not relieved from liability because an unexpected and unusual storm contributed to the accident.—*Ferebee v. Norfolk Southern R. Co.*, 79 S. E. 685.

(D) Warning and Instructing Servant.

§ 155 (Ga.App.) Where an adult servant was injured by his clothing catching in a revolving shaft on which was a set screw, and the danger

thereof was obvious, the failure of the master to instruct in relation to the danger did not render him liable for the injury.—*Holton v. Hebard Cypress Co.*, 79 S. E. 85.

§ 155 (Ga.App.) Where the danger is obvious, and as easily known to the servant as to the master, the latter will not be liable for failing to give warning of it.—*Beck v. A. N. Tumlin Co.*, 79 S. E. 587.

(E) Fellow Servants.

§ 159 (Ga.App.) Except in the case of railroad companies, a servant cannot recover for personal injuries caused solely by a fellow servant's negligence.—*Beck v. A. N. Tumlin Co.*, 79 S. E. 587.

§ 177 (N.C.) An employer is not liable for the injuries of an employe caused by the negligence of a fellow servant.—*Page v. Sprunt*, 79 S. E. 619.

§ 187 (S.C.) The acts of a vice principal are those of a master, and, if he negligently directs the servant to work at an improper machine, the master is liable.—*Smith v. Southern Ry. Co.*, 79 S. E. 1099.

(F) Risks Assumed by Servant.

§ 204 (Ga.) Where an 11 year old boy is employed in a factory in violation of the child labor law of 1906 (Civ. Code 1910, § 3144) § 2, he does not assume the risks incident to such employment.—*Elk Cotton Mills v. Grant*, 79 S. E. 836.

§ 206 (Ga.) A servant assumes the ordinary risks of his employment.—*Thomas v. Georgia Granite Co.*, 79 S. E. 130.

(G) Contributory Negligence of Servant.

§ 228 (Ga.) Where injuries to a boy while employed in violation of the child labor law of 1906 (Civ. Code 1910, § 3144) § 2, were due to a cause wholly disconnected from his employment, the defense of contributory negligence is available.—*Elk Cotton Mills v. Grant*, 79 S. E. 836.

§ 228 (Ga.App.) In a railroad employe's action under the federal Employers' Liability Act for injuries, plaintiff need not show that he was free from fault.—*Charleston & W. C. R. Co. v. Brown*, 79 S. E. 932.

§ 229 (Ga.) A servant is bound to exercise his own diligence to protect himself.—*Thomas v. Georgia Granite Co.*, 79 S. E. 130.

§ 230 (Va.) The fact that, after the father of a minor consented to his employment on the understanding that he should not do work of a dangerous character, the master assigned him to dangerous work would not estop the master from setting up the defense of contributory negligence to defeat a recovery.—*Powhatan Lime Co. v. Affleck's Adm'r*, 79 S. E. 1054.

§ 235 (Ga.App.) Where plaintiff's injuries were due either to a fellow servant's negligence or to visible defects in the machinery, and he had equal means with the master of knowing such defects or dangers, the court properly awarded a nonsuit.—*Beck v. A. N. Tumlin Co.*, 79 S. E. 587.

§ 238 (N.C.) Where a servant who had charge of a cotton gin, and whose duty it was to attend to repairs, used a hoe handle to shift the power belt after the shifting levers were broken, and was injured, he cannot recover, as his injury was due to his failure to have the levers repaired.—*Bird v. Bell Lumber Co.*, 79 S. E. 448.

§ 240 (Va.) Where there was no chock under the wheel of a car on a siding next to an embankment on the premises of a lime company, and a servant gave a signal to move the car and walked across the track to the other side next to the embankment, where there was no necessity for his going, he was guilty of contributory negligence.—*Powhatan Lime Co. v. Affleck's Adm'r*, 79 S. E. 1054.

§ 246 (Ga.App.) Where a fireman is injured in jumping from the engine after it has been signaled to stop because of an impending wreck due to defendant's negligence, and after the engineer has jumped, acting in the belief that his life is in peril, he may recover under the federal Employers' Liability Act, though the train does not actually run off the track.—*Charleston & W. C. R. Co. v. Brown*, 79 S. E. 932.

The question whether a fireman was justified in jumping from his engine in an emergency depends upon whether he used ordinary care under the apparent circumstances, and not upon the true conditions as they may have appeared to other persons in a better position to ascertain the real facts.—*Id.*

(H) Actions.

§ 250¼ [New, vol. 15 Key-No. Series] (S.C.) The federal Employers' Liability Act being general in its terms, the rules of evidence as to the quantity of proof necessary to make out a prima facie case of negligence is that which prevails in the state where the action is brought.—*Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

§ 264 (S.C.) In an action for injuries to a railroad engineer by the alleged incompetency of his fireman, a general allegation of his fireman's unfitness and knowledge of defendant's foreman thereof held to justify the admission of evidence of prior instances of the fireman's improper meddling with the engine, and that other employes had complained to the foreman of the fireman's incompetency.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

§ 265 (Ga.) Though the federal Employers' Liability Act provides that contributory negligence on the part of an injured employé shall not defeat recovery, such employé is required to show by his evidence that his injuries resulted in whole or in part from the negligence of the employer.—*Louisville & N. R. Co. v. Kemp*, 79 S. E. 558.

§ 265 (Ga.App.) In an adult employé's action for injuries from a defective machine, the burden was on plaintiff to prove that he did not have equal means with the master of discovering the defects, and that by ordinary care he could not have known of them.—*Beck v. A. N. Tumlin Co.*, 79 S. E. 587.

§ 265 (Va.) The happening of an accident is not evidence of negligence by the master; that being an affirmative fact to be established by the injured servant.—*Yellow Poplar Lumber Co. v. Goble*, 79 S. E. 1036.

§ 267 (N.C.) In an action by a servant for injuries, there was no error in permitting the master to state when he first received notice of the servant's claim, as the time elapsed has a direct bearing on the recollection of the witnesses, and may affect the validity of the claim.—*Bird v. Bell Lumber Co.*, 79 S. E. 448.

§ 270 (Ga.) In an action for the death of a railroad employé from the derailment of a hand car, testimony to show structural defects in the car and track was admissible, though the witnesses did not see the car or track until 30 days or more after the accident.—*Macon, D. & S. R. Co. v. Anchors*, 79 S. E. 153.

§ 270 (S.C.) In an action for the wrongful death of a locomotive fireman, killed when his engine was derailed at a burning trestle, where it appeared that immediately after another engine had passed over the trestle it was discovered to be on fire, testimony of a witness that he saw places nearby where fire had been dropped is admissible as tending to show the origin of the fire.—*Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

§ 270 (W.Va.) Evidence of a physician's general reputation for drunkenness in the community is admissible as tending to prove that the master knew, or by due diligence should have

known, of it.—*Guy v. Lanark Fuel Co.*, 79 S. E. 941.

§ 274 (S.C.) In an action for the death of a locomotive fireman, who was killed when the engine was derailed at a burning trestle, evidence of the engineer's reputation for carefulness is inadmissible.—*Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

§ 276 (Va.) Evidence, in an action by an employé for injuries sustained while engaged in making a tramway by being struck by a stump which was blown out, held to show that the occurrence was an unavoidable accident.—*Yellow Poplar Lumber Co. v. Goble*, 79 S. E. 1036.

§ 278 (Ga.) In an action by a section foreman under the federal Employers' Liability Act for injuries resulting from negligence in the operation of a freight train, evidence held insufficient to establish negligence on the part of defendant.—*Louisville & N. R. Co. v. Kemp*, 79 S. E. 558.

§ 278 (Va.) The evidence must show more than a mere probability of negligence by a master.—*Yellow Poplar Lumber Co. v. Goble*, 79 S. E. 1036.

Evidence, in an action by an employé for injuries sustained while engaged in making a tramway by being struck by a stump which was blown out, held to show that defendant could not reasonably have anticipated or provided against the occurrence.—*Id.*

§ 285 (Ga.App.) In an action for injuries to a blacksmith's helper, evidence held sufficient to take to the jury the questions whether the piece of iron that struck plaintiff's eye came from the hammer, or from the anvil, or the iron upon which he was working, and also whether the accident was caused by a defect in the hammer, or by the negligence of the blacksmith, who was a fellow servant.—*Harvey v. Rome Scale & Mfg. Co.*, 79 S. E. 487.

§ 285 (N.C.) Evidence held to make question for jury as to whether the employer's failure to instruct a servant was the cause of the injury.—*Breeden v. Minneola Mfg. Co.*, 79 S. E. 960.

§ 286 (N.C.) Where there was evidence of employer's negligence as cause of employé's injuries, question held to be one for the jury, though it might well have adopted defendant's view that the injury was caused by plaintiff's disobedience of orders.—*Breeden v. Minneola Mfg. Co.*, 79 S. E. 960.

Evidence held to make questions for jury as to whether employé was directed to clean machine while in motion, and whether he was furnished a safe appliance.—*Id.*

§ 286 (Va.) Defendant's negligence in exposing deceased to risks different from those incident to his employment and for which he was unfitted because of his lack of experience held for the jury.—*Powhatan Lime Co. v. Affleck's Adm'r*, 79 S. E. 1054.

§ 289 (Ga.App.) In a fireman's action for injuries received in jumping from his engine in an emergency, the question whether the circumstances justified plaintiff in jumping for his own safety was for the jury.—*Charleston & W. C. R. Co. v. Brown*, 79 S. E. 932.

§ 289 (Va.) Where it appeared that the east side of a track where a servant was killed was a dangerous place in which to put an inexperienced minor to work, that the west side was reasonably safe, and that he had been warned not to work on the east side, the question of his contributory negligence was for the jury.—*Powhatan Lime Co. v. Affleck's Adm'r*, 79 S. E. 1054.

§ 291 (Ga.) In an action under the federal Employers' Liability Act for injuries to an employé it is error to give in charge to the jury the provisions of the state statute, raising a presumption against defendant upon proof of injuries by the running of its locomotives or cars.—*Louisville & N. R. Co. v. Kemp*, 79 S. E. 558.

§ 297 (N.C.) Where the question of whether the master had given orders which caused the accident was submitted to the jury, a finding that the master was not negligent must necessarily have determined that no order was given, and the servant cannot recover.—*Bird v. Bell Lumber Co.*, 79 S. E. 448.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 302 (W.Va.) A garage keeper cannot leave the garage solely in the hands of a servant, and claim that the latter's negligence in releasing a car to one without authority from the owner is beyond the scope of his employment.—*McLain v. West Virginia Automobile Co.*, 79 S. E. 731.

MEASURE OF DAMAGES.

See Damages, §§ 97, 100.

MECHANICS' LIENS.

See Appeal and Error, § 1066; Statutes, § 48.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

§ 71 (W.Va.) Where a husband contracts in his own name with his wife's knowledge for a building on her land, she will be presumed to have constituted him her agent, and her property is liable to a mechanic's lien.—*Milligan v. Alexander*, 79 S. E. 665.

(E) Subcontractors and Contractors' Workmen and Materialmen.

§ 100 (W.Va.) Under Code 1906, c. 75, § 5, the owner may, by recording the principal contract, limit his liabilities under the contract to the amount of the contract price, and such amount may include any payment under the contract, made when no incipient or perfected right to a lien existed for materials furnished before the payment.—*Collins v. Board of Trustees of Davis and Elkins College*, 79 S. E. 10.

When a building contract is recorded, one furnishing labor or material to the principal contractor or his subcontractor must take notice of the times of payment and the amount of the contract price, and payments made under the contract before the furnishing of labor or material must be deducted in determining the amount of the contract price available for purposes of lien.—*Id.*

§ 105 (W.Va.) A subcontractor, in the sense of one to whom a specific portion of the work is sublet by the principal contractor, is entitled to a lien under Code 1906, c. 75, § 3, providing that every materialman, laborer, mechanic, or other person performing labor or furnishing material under a contract with the principal contractor or his subcontractor shall have a lien.—*Collins v. Board of Trustees of Davis and Elkins College*, 79 S. E. 10.

§ 113 (W.Va.) The mechanic's lien law (Code 1906, c. 75) gives a direct lien to subcontractors and materialmen, and no notice to the owner in advance of the performance of labor or furnishing of material is necessary in order to prevent payment by the owner to the principal contractor.—*Collins v. Board of Trustees of Davis and Elkins College*, 79 S. E. 10.

§ 115 (W.Va.) Under the mechanic's lien law, payment by the owner to the principal contractor is no defense against a lien for labor or material furnished prior to the payment.—*Collins v. Board of Trustees of Davis and Elkins College*, 79 S. E. 10.

III. PROCEEDINGS TO PERFECT.

§ 118 (N.C.) Under Revisal 1905, §§ 2019, 2020, and 2021, where neither a contractor nor materialmen gave any notice to the owner of the materialmen's claims until after the last

payment by the owner to the contractor, such claims were not a lien on the property.—*Orinoco Supply Co. v. Masonic & Eastern Star Home*, 79 S. E. 964.

§ 132 (N.C.) Revisal 1905, § 2028, as amended by Pub. Laws 1909, c. 32, requires the filing of notice of lien within 6 months to protect the materialman against a purchaser for value without notice, though he may file it within 12 months as against purchasers with notice.—*Raeform Lumber Co. v. Rockfish Trading Co.*, 79 S. E. 627.

IV. OPERATION AND EFFECT.

(B) Property, Estates, and Rights Affected.

§ 183 (Ga.App.) Where materials are furnished for the improvement of two pieces of real estate under a single contract with the owner, and a lien therefor is filed in compliance with Civ. Code 1910, §§ 3352, 3353, the lien attaches to both pieces of property, and it is immaterial for which piece the last item of material was furnished.—*Lyon v. Cedartown Lumber Co.*, 79 S. E. 236.

§ 191 (Ga.) The words "true owner," as used in Civ. Code 1910, § 3352, providing for liens of materialmen, include the owner of a leasehold estate; and hence the liens therein provided for may attach to the interest of a lessee, who has an estate for years, subject to the conditions of the lease.—*James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co.*, 79 S. E. 465.

Where in 1910 a private corporation leased certain lots for 21 years, with the right to sublet, agreeing to pay a certain annual rental, make certain building improvements, keep the buildings insured, and to return the premises in good condition at the expiration of the lease, held, that the lessee had an estate for years, to which a materialman's lien could attach, subject to the conditions of the lease.—*Id.*

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(A) Waiver of Right to Lien.

§ 210 (N.C.) Extending the time of payment to the owner does not waive a mechanic's lien, unless the time is extended by agreement beyond that allowed for enforcing the lien.—*Raeform Lumber Co. v. Rockfish Trading Co.*, 79 S. E. 627.

VII. ENFORCEMENT.

§ 253 (Ga.) Want of title in defendant to premises on which a materialman's lien is claimed, and alleged title in a third person not a party to the suit, constitute no bar to an action to foreclose the lien.—*James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co.*, 79 S. E. 465.

§ 279 (N.C.) One claiming to have purchased land charged with a mechanic's lien without notice thereof, has the burden of proof that he is within the proviso of Revisal 1905, § 2028, as amended by Pub. Laws 1909, c. 32, requiring notice of lien to be filed within 12 months after furnishing the materials, provided that as to the rights of a purchaser without notice the notice of lien must be filed within 6 months.—*Raeform Lumber Co. v. Rockfish Trading Co.*, 79 S. E. 627.

§ 281 (W.Va.) Proof that a wife was frequently present with her husband while a building was being erected on her land under a contract with him, and made suggestions as to the building, is sufficient evidence of consent to its erection.—*Milligan v. Alexander*, 79 S. E. 665.

MEDICINES.

See Poisons.

MEMORANDA.

See Frauds, Statute of, § 104; Insurance, § 132; Witnesses, § 255.

MENTAL CAPACITY.

See Deeds, § 68.

MENTAL SUFFERING.

See Carriers, § 319.

MERGER.

See Corporations, § 603; Deeds, § 166.

MINES AND MINERALS.

See Action, §§ 35, 50; Appeal and Error, § 1073; Assignments, §§ 26, 120; Boundaries, § 3; Evidence, § 441; Prohibition; Taxation, § 466; Tenancy in Common, §§ 15, 45, 49.

II. TITLE, CONVEYANCES, AND CONTRACTS.**(A) Rights and Remedies of Owners.**

§ 49 (Va.) Where defendants and their grantors, since 1880, had held possession under a deed purporting to convey the entire fee with covenants of general warranty, which deed constituted color of title, they acquired title to the surveys and to the underlying minerals by adverse possession as against claimants under a prior deed of an undivided mineral interest in the land from the common grantor.—*Virginia Coal & Iron Co. v. Hylton*, 79 S. E. 337.

(B) Conveyances in General.

§ 55 (N.C.) A conveyance of all the marl and other fossil deposits under the grantor's land held a conveyance of the same in fee and not a mere license, revocable at the pleasure of the grantor or expiring at the grantee's death.—*Outlaw v. Gray*, 79 S. E. 676.

The minerals beneath the surface of land may be conveyed in fee separate from the surface of the land.—*Id.*

§ 55 (Va.) The general owner or owners of land may grant all the minerals in the land or any particular species of them and retain ownership of the surface, or vice versa.—*Virginia Coal & Iron Co. v. Hylton*, 79 S. E. 337.

§ 55 (W.Va.) Where there is a substantial quantity of coal in the land, the grantee of coal in place cannot rescind the sale merely because the coal area is not as large as anticipated.—*Light v. E. M. Grant & Co.*, 79 S. E. 1011.

The grantee of coal in place cannot rescind because of nonexistence of a particular coal vein or measure in the land.—*Id.*

In case of a deficiency in the quantity of coal or land sold by the acre, the grantee may have an abatement from the unpaid price or a recovery of purchase money paid.—*Id.*

A deed to coal in place conveying a certain number of acres of coal in consideration of a sum of money which is an exact multiple of the number of acres specified is ambiguous on its face as to whether it is a sale by the acre or a sale in gross.—*Id.*

A deed to coal in place construed in the light of the circumstances of its execution, and the subsequent conduct of the parties held to be a contract of sale of coal by the acre.—*Id.*

(C) Leases, Licenses, and Contracts.

§ 62 (Va.) Where certain land was leased for the purpose of mining coal and manufacturing coke thereon, the lessee could construct certain buildings for the future use of its employees and lease those buildings to another company pending such future use without accounting to the lessor for the rent.—*Stonegap Colliery Co. v. Kelly & Vicars*, 79 S. E. 341.

Where a lease of premises limits the use to coal mining, the right to use the premises in

all ways which are customary in carrying on those operations is necessarily incidental to the lease.—*Id.*

Where a company leasing premises for coal mining purposes required the lessors to purchase and include in the lease adjacent tracts upon which there was neither coal nor timber, that fact is an indication that it was not the intention of the parties to limit the use of the leased premises to strictly mining operations.—*Id.*

§ 70 (W.Va.) Under a mining lease, which specifically described the property leased and reserved to the owner an interest, a 5 per cent. interest in the "property or lease herein demised, contracted, and described," which interest should be held in paid-up and nonassessable stock in the lessee's company, evidenced by 5 per cent. of every issue of capital stock, such owner was entitled to 5 per cent. only of the stock issued under authority vested in the company at the time of contract, and not to any part of stock issued under authority subsequently acquired, after the company had acquired valuable mining property other than that covered by the lease.—*Taylor v. Buffalo Collieries Co.*, 79 S. E. 27.

§ 77 (W.Va.) An oil and gas lease binding the lessee to drill within a certain period or make periodical payments of rent, containing no clause of forfeiture, can be terminated only by surrender, abandonment, or expiration of the term.—*Reserve Gas Co. v. Carbon Black Mfg. Co.*, 79 S. E. 1002.

§ 81 (W.Va.) Where an oil and gas lease guarantees to the lessor the payment of rental and a supply of gas, he is entitled, both at common law and under the express provisions of Code 1906, c. 62d, to recover for injury to the well from the percolating of water into the gas-bearing sand from an abandoned well, which the defendant owner has failed to plug as required by such statute.—*Atkinson v. Virginia Oil & Gas Co.*, 79 S. E. 647.

Where an oil and gas well is damaged from percolating water due to the failure of the owner of an abandoned well on adjacent land to plug same, the owner of the injured well may recover damages therefor, though he has leased the well and received no rental therefor.—*Id.*

III. OPERATION OF MINES, QUARRIES, AND WELLS.**(A) Statutory Regulation.**

§ 94 (W.Va.) The declaration in an action for the penalty provided by Code 1906, c. 79, § 7, for the unlawful mining and removing of coal within five feet of complainant's property line need not be in the exact words of the statute but is sufficient where it avers the wrong in language legally the equivalent of the terms of the statute.—*Selvey v. Grafton Coal & Coke Co.*, 79 S. E. 656.

Under Code, c. 13, § 17, cl. 15, providing that the word "land" includes hereditaments and rights thereto and interests therein, except chattel interests, in an action for the penalty provided by Code 1906, c. 79, § 7, for unlawful mining, evidence that plaintiff owns coal under the land is not at material variance with an averment that he owns the "land."—*Id.*

In an action for the penalty provided by Code 1906, c. 79, § 7, for the unlawful mining and removing of coal, it is not necessary to prove damages or special injury; the amount of recovery being prescribed by the statute.—*Id.*

Declaration, in an action for the penalty provided by Code 1906, c. 79, § 7, for unlawful mining, held not defective for failure to allege the manner in which the coal was unlawfully removed.—*Id.*

MINORS.

See Infants.

MISREPRESENTATION.

See Insurance, §§ 253-299, 377.

MISTAKE.

See Appeal and Error, § 1024; Attachment, § 91; Judgment, § 304; New Trial, § 91; Payment; Reformation of Instruments; Vendor and Purchaser, § 334.

MODIFICATION.

See Appeal and Error, § 1149.

MONEY RECEIVED.

See Principal and Agent, § 184.

§ 14 (Ga.App.) One defendant corporation cannot be held liable for an aggregate amount of money received separately by several defendants, where the other defendants were not acting as its agents.—Great Southern Accident & Fidelity Co. v. Guthrie, 79 S. E. 162.

MOOT QUESTIONS.

See Habeas Corpus, § 113.

MORPHINE.

See Criminal Law, §§ 762, 763, 764, 1171.

MORTGAGES.

See Appeal and Error, §§ 1039, 1066; Building and Loan Associations, § 32; Chattel Mortgages; Corporations, §§ 479, 480; Divorce, § 206; Evidence, § 271; Executors and Administrators, § 402; Homestead, § 115; Justices of the Peace, § 197; Life Estates; New Trial, § 68; Payment, § 38; Usury, § 127; Vendor and Purchaser, § 197.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

§ 114 (Ga.App.) Under Civ. Code 1910, § 3257, requiring a mortgage to specify the debt secured, a mortgage reciting that it was given for a note and "such future advances" as may be made during a given year is valid only as security for the note.—Benton-Shingler Co. v. Mills, 79 S. E. 755.

(D) Lien and Priority.

§ 183 (Ga.) A mortgagee, who accepts a mortgage note which expressly states that the mortgage is a second mortgage, is estopped to deny the validity of the first mortgage.—Setze v. First Nat. Bank of Pensacola, Fla., 79 S. E. 540.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 235 (Ga.) Under the remedial act (Acts 1899, p. 90; Civ. Code 1910, §§ 3345-3347) relative to the transfer of mortgage notes and liens, construed in connection with Civ. Code 1910, §§ 4273, 4276, 3345, relative to transfer of notes and mortgages, the simple indorsement of the name of the payee in a mortgage note payable to order, on the back thereof, transferred the note and lien.—Setze v. First Nat. Bank of Pensacola, Fla., 79 S. E. 540.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 338 (N.C.) Where, in an action for an accounting to ascertain the amount due under a deed of trust, plaintiff admitted there was due \$436, the court could require the payment by plaintiff of the amount so admitted as a condition of enjoining a sale under the deed of trust.—Bonner v. Rodman, 79 S. E. 271.

X. FORECLOSURE BY ACTION.

(B) Right to Foreclose and Defenses.

§ 412 (Ga.) There can be but one foreclosure of a mortgage.—Strickland v. Lowry Nat. Bank, 79 S. E. 539.

§ 417 (Ga.) Where the administrator of a mortgagee's estate fully administered the same, and delivered the mortgage to plaintiff as part of his interest therein, and the only other person having an interest in the mortgage relinquished to him, *held*, that plaintiff had a perfect equitable title to the mortgage, entitling him to enforce the same, though the administrator had not assigned it to him in writing.—Moughon v. Masterson, 79 S. E. 561.

(E) Parties and Process.

§ 427 (Ga.) There could ordinarily be no foreclosure of a common-law mortgage conveying title as security, unless all the parties entitled to the mortgage money were before the court.—Strickland v. Lowry Nat. Bank, 79 S. E. 539.

§ 427 (Ga.) The petition in an action to foreclose a mortgage *held* not demurrable on the grounds that it was not brought by an administrator of the mortgagee, that a personal representative of the deceased sister of plaintiff was a necessary party, or that her husband should have been joined as a party plaintiff.—Moughon v. Masterson, 79 S. E. 561.

(F) Pleading and Evidence.

§ 458 (Ga.) In a mortgage foreclosure proceeding, special demurrers based on the ground that no copy of the mortgage or the record in a former litigation was attached to the petition *held* sufficiently met by amendment.—Moughon v. Masterson, 79 S. E. 561.

§ 458 (Ga.App.) An affidavit of illegality, filed by defendant in a mortgage foreclosure proceeding, is amendable as are ordinary pleas.—Benton-Shingler Co. v. Mills, 79 S. E. 755.

(G) Injunction and Receiver.

§ 468 (Ga.) Under Civ. Code 1910, § 5477, a receiver will not ordinarily be appointed for mortgaged property where the security is not inadequate or the mortgagor insolvent.—Planters' Oil Mill v. Carter, 79 S. E. 1120.

That a mortgage failed to keep the property insured as required by the mortgage *held* not ground for the appointment of a receiver, where the mortgage provided that the mortgagee could have the property insured and include the premiums in the mortgage debt.—Id.

Conditional granting of application for an injunction and a receiver in foreclosure *held* error, where the value of the mortgaged property was largely in excess of the mortgage debt, including taxes and insurance.—Id.

MOTIONS.

See Continuance; Execution, §§ 167-177, 433; New Trial, §§ 114-163; Pleading, §§ 343, 360.

MOTIVE.

See Habeas Corpus, § 92; Homicide, § 144.

MULTIFARIOUSNESS.

See Action, § 50; Equity, §§ 148, 226; Pleading, § 64.

MUNICIPAL CORPORATIONS.

See Adverse Possession, § 10; Appeal and Error, § 170; Arrest, § 63; Counties; Criminal Law, §§ 88, 393; Damages, § 216; Drains, § 13; Eminent Domain, §§ 2, 69, 101, 136, 167, 203, 238; Execution, § 167; Health, § 16; Injunction, §§ 77, 85; Mandamus, § 73; Nuisance, § 6; Railroads, §§ 94, 95; Schools and

School Districts; Street Railroads; Telegraphs and Telephones, § 33; Theaters and Shows, § 1; Waters and Water Courses, § 190.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 57 (N.C.) Cities and towns have only such powers and capacities as have been conferred upon them by law.—Board of Com'rs of Vance County v. Town of Henderson, 79 S. E. 442.

§ 63 (Ga.App.) A city official's exercise of the discretion conferred upon him by a city to grant or refuse an application of a citizen to keep cattle within the corporate limits will not be interfered with by the courts unless arbitrarily abused.—Thorpe v. City of Savannah, 79 S. E. 949.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§ 120 (S.C.) In construing a municipal ordinance the court must bear in mind the law and policy of the state upon the same subject and if possible construe them so that there will be no conflict.—City of Anderson v. Fant, 79 S. E. 641.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

§ 142 (Ga.App.) The solicitor of the city court of the city of Jefferson, and the clerk of the superior court were not disqualified, under Civ. Code 1910, § 258, prohibiting the holding of two civil offices under the state government, to serve as members of the city council.—Phillips v. City of Jefferson, 79 S. E. 222.

Municipal officers are not "civil officers" of the state within Civ. Code 1910, § 258, disqualifying persons holding any office of profit or trust under the government of the state from holding any other civil office therein.—Id.

(B) Municipal Departments and Officers Thereof.

§ 184 (Ga.App.) Act Aug. 11, 1908 (Acts 1908, p. 909), did not revive Act 1883 (Acts 1883, p. 443) § 77, making the term of a policeman two years, unless removed for cause, and creating a new charter for the city of Rome; the broad provisions of the amendatory act being inconsistent with the limitation of power prescribed in Acts 1883, p. 443, § 77.—Lumpkin v. City of Rome, 79 S. E. 158.

§ 185 (Ga.App.) Under Act Aug. 11, 1908 (Acts 1908, p. 909) § 11, the mayor and council have power to appoint policemen and fix their salaries and terms of office, and to remove any policeman at pleasure, and can remove a policeman appointed by the board of police commissioners for a fixed term, under authority of Act Aug. 20, 1906 (Acts 1906, p. 1014).—Lumpkin v. City of Rome, 79 S. E. 158.

VI. PROPERTY.

§ 225 (N.C.) Where a municipal corporation built a market house, and placed narrow raised runways in front of the doors of the various market stalls, against which runways the carts were backed up, the runways were not public walks, but were subject to sale by the city.—City of Raleigh v. Durey, 79 S. E. 434.

Objecting owners acquired no property in the walks, such walks not being sidewalks, although occasionally used by pedestrians for passing and repassing.—Id.

The Legislature may authorize a municipality to convey the sidewalks around a plot of land owned by the city, though such sidewalks have become public ways by prescription.—Id.

Owners of land across the street from a rectangular block, which had been used for a market house, have no pecuniary interest in sidewalks

around such market house which will prevent a conveyance of the market-house site, including the walks, which the municipality is authorized to convey.—Id.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§ 269 (Ga.) Under Code of City of Atlanta of 1910, p. 359, § 340, the city is authorized to repave sidewalks when they become so worn and defective as to be no longer useful.—Wallace v. City of Atlanta, 79 S. E. 554.

§ 271 (Ga.) Where a municipal charter conferred power to preserve the health, and good order of the community, make contracts, acquire and hold real property, etc., it authorized the city to establish and construct a waterworks system.—Hall v. City of Calhoun, 79 S. E. 533.

§ 277 (Ga.) Where a city had charter power to establish a waterworks system, and it was necessary to go beyond its corporate limits to obtain a supply, a contract to use a spring of a private property owner outside the city limits was not ultra vires.—Hall v. City of Calhoun, 79 S. E. 533.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 292 (Ga.) The written petition provided for by Code of City of Atlanta, § 340, par. 3, and required to have the approval of the chief of construction, is not a prerequisite to the exercise of power by the city to order a repavement of a sidewalk.—Wallace v. City of Atlanta, 79 S. E. 554.

§ 294 (Ga.) Code of City of Atlanta of 1910, § 347, requiring the publication of notice, applies only where a street is to be paved, and not to proceedings for the repavement of a sidewalk.—Wallace v. City of Atlanta, 79 S. E. 554.

(C) Contracts.

§ 376 (Ga.App.) That a municipality fails to take a bond from a contractor providing for his payment for materials furnished, as required by the act approved August 12, 1910 (Acts 1910, p. 86), will not render it liable for material furnished to the contractor to be used in construction of a public building.—Woodward Lumber Co. v. Town of Grantville, 79 S. E. 221.

(F) Enforcement of Assessments and Special Taxes.

§ 544 (Ga.) Where an affidavit of illegality alleged that the amount was excessive, in that certain illegal sums had been included, it necessarily admitted that some part of the amount claimed under Acts 1911, p. 1097 et seq. was due, and it was insufficient, in the absence of an allegation that the correct amounts had been paid to the levying officer.—Hardwick v. City of Dalton, 79 S. E. 553.

An allegation in an affidavit of illegality to prevent the enforcement of a street improvement assessment that part of the work was unnecessary held insufficient, in the absence of a further allegation that the order was an abuse of the discretion of the municipal authorities.—Id.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

§ 591 (Ga.App.) In the exercise of its police power a city may grant to a city officer the discretion to permit or refuse an application of a citizen to keep cattle within the corporate limits.—Thorpe v. City of Savannah, 79 S. E. 949.

§ 592 (Ga.App.) A municipal ordinance which attempts to punish for an act penalized by a

law of the state is void.—*Alexander v. City of Atlanta*, 79 S. E. 177.

§ 604 (Ga.App.) An ordinance prescribing the terms upon which citizens of the municipality shall be permitted to keep cattle in a city, is a lawful exercise of the city's police power.—*Thorpe v. City of Savannah*, 79 S. E. 949.

§ 623 (W.Va.) Under a provision of the charter of the city of Fairmont, same as Code 1906, c. 47, § 28, authorizing the council to abate a nuisance, it may abate only that as a nuisance which is recognized as such per se, or branded as such by statute or ordinance.—*Parker v. City of Fairmont*, 79 S. E. 660.

The city of Fairmont had no power under a provision of its charter, the same as Code 1906, c. 47, § 28, authorizing it to abate a nuisance, to abate the production and emission of smoke from the plant of a lawful business, where there was no valid ordinance making such production and emission unlawful.—Id.

§ 623 (W.Va.) Under a city charter giving the council power to abate by summary proceedings whatever in the opinion of the council is a nuisance, the council may abate only that as a nuisance which is recognized as such per se or branded as such by lawful statute or ordinance.—*Donohoe v. Fredlock*, 79 S. E. 736.

(B) Violations and Enforcement of Regulations.

§ 640 (Ga.App.) In a prosecution for illegally keeping intoxicating liquors for sale, the mayor may credit one witness, in preference to several who contradict such witness, regardless of any efforts to impeach him.—*Jones v. City of Carrollton*, 79 S. E. 583.

§ 642 (Ga.App.) A reviewing court will not pass upon the credibility of witnesses in a prosecution for illegally keeping intoxicating liquors for sale.—*Jones v. City of Carrollton*, 79 S. E. 583.

§ 642 (Ga.App.) Certiorari lies to review in the superior court the judgment of any municipal or mayor's court.—*Douthit v. City of Blue Ridge*, 79 S. E. 744.

Where, on certiorari to the municipal court, the answer of the magistrate shows that accused had not violated a city ordinance as alleged, conviction was unauthorized, and certiorari should have been sustained.—Id.

§ 642 (Ga.App.) Where a petition for certiorari did not have attached thereto either a certified copy of the bond required by Civ. Code 1910, § 5192, or a certificate that such bond had been filed, and it appeared from the petition that the bond was not conditioned as required by law, certiorari on behalf of one convicted in the recorder's court was properly denied.—*Carolis v. City of Atlanta*, 79 S. E. 752.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 655 (Ga.App.) A city charter, authorizing the city "to open, lay out, to widen, straighten, or otherwise change streets," authorizes the straightening of a street where the termini remain the same, and the distance between them is shortened.—*Adair v. Spellman Seminary*, 79 S. E. 589.

§ 661 (N.C.) Though the mile square upon which the city of Raleigh was originally located was purchased by the state, and lots within that district were sold with the reservation to the state of the title to the streets, the control of the city over such streets is the same as in other cities, except perhaps in exceptional cases.—*Moore v. Carolina Power & Light Co.*, 79 S. E. 596.

§ 663 (Ga.App.) Where a public street has been abandoned, the fee in the soil reverts to the

owners of the abutting lots.—*Adair v. Spellman Seminary*, 79 S. E. 589.

§ 663 (N.C.) The owner of property abutting on a street in a city has an easement or property in the shade trees standing along the sidewalk in the street, subject to the right of the city government over the same, and one which the law will protect.—*Moore v. Carolina Power & Light Co.*, 79 S. E. 596.

Where an electric light company authorized to place poles and wires along a city street invades the rights of an abutting owner in the trees on the street in front of his property, and there is wantonness, oppression, or bad motive, the abutting owner may be awarded punitive damages.—Id.

Where an abutting owner is damaged by an electric light company cutting off limbs of the trees standing in a city street in front of his property, he is entitled to damages for the deterioration, if any, in the value of his property, though the trimming was done in a skillful manner, as cutting the limbs in a negligent manner would simply have added to the damages.—Id.

§ 667 (W.Va.) A private awning erected over a public street without lawful authority is a public nuisance though it does not materially interfere with public travel.—*Davis v. Spragg*, 79 S. E. 652.

§ 669 (W.Va.) An abutting owner has a special right of access to a highway and to light, air, and view therefrom regardless of the ownership of the fee in the highway.—*Davis v. Spragg*, 79 S. E. 652.

§ 678 (N.C.) The city of Raleigh, for the purpose of its government and management, may in its discretion cut down or trim up trees bordering the streets in the district wherein title to the trees is in the state, and cannot be restrained, except in case of willfulness or oppression.—*Moore v. Carolina Power & Light Co.*, 79 S. E. 596.

§§ 680, 681 (N.C.) A city cannot transfer its right of control over shade trees standing along the edge of its streets to an individual or to quasi public corporation such as an electric light company, which is authorized to use the streets.—*Moore v. Carolina Power & Light Co.*, 79 S. E. 596.

§§ 680, 681 (W.Va.) Where the council of a city attempts to permit the permanent occupation of its public streets for private purposes without authority from its charter to so do, it acts ultra vires.—*Davis v. Spragg*, 79 S. E. 652.

§ 697 (Ga.App.) A party suing as executor was not estopped to have obstructions upon certain streets removed by the fact that his testator had closed a part of a street not involved in the suit.—*Adair v. Spellman Seminary*, 79 S. E. 589.

§ 697 (W.Va.) Evidence, in an action by property owners to enjoin as a nuisance the maintenance of a private awning erected over a public street, held insufficient to show that the obstruction of the view from the street to the front of their buildings seriously and injuriously affected the actual or rental value.—*Davis v. Spragg*, 79 S. E. 652.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

§ 723 (S.C.) An action for tort will not lie against a municipal corporation unless it is made liable by statute.—*Parrish v. Town of Yorkville*, 79 S. E. 635.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 759 (Ga.App.) Where the city of Macon for nine years exercised full jurisdiction of and authority over territory added to it, including the defective street causing plaintiff's injury, and thus accepted the street as previously laid out and named, it was liable, though it had not

formally complied with Acts 1903, p. 579, providing that such city should not be liable for failure to keep in repair any streets not selected, laid out, and named by it.—City of Macon v. Leonard, 79 S. E. 241.

§ 763 (N.C.) A town operating an electric light plant is not required to use the "latest improved method" of suspending arc lights to avoid injuring persons coming in contact with its wires, without regard to whether such methods are in general use.—Monds v. Town of Dunn, 79 S. E. 303.

§ 790 (N.C.) Evidence that the witness told a day laborer employed by a town to trim street lights and do other work that the witness had received a shock at an electric street light, near which plaintiff's intestate was subsequently found dead, was inadmissible, as notice to a day laborer is not notice to the town.—Monds v. Town of Dunn, 79 S. E. 303.

§ 818 (N.C.) Evidence that four days before plaintiff's intestate was found dead 35 feet from an electric street light, lying on the ground, the witness had reached up high to take hold of the light and received a shock was inadmissible where notice was not given the town and there was no evidence that the light was any lower the night deceased met his death.—Monds v. Town of Dunn, 79 S. E. 303.

Testimony was admissible that the witness saw deceased, alleged to have been killed by a shock from an electric light wire, before he was moved and there were no wires about his feet, that the light and pole near where deceased was found were all right two or three days before, that the transformer was all right the next day, and that the primary wire was not touching the secondary wires next day.—Id.

Evidence as to whether the voltage on an electric light wire, by which deceased was alleged to have been killed, would not have been greater than 110 volts if the insulation on the primary wire had been defective was inadmissible, where there was no evidence that the insulation was defective.—Id.

§ 819 (N.C.) Plaintiff was required to show by the greater weight of evidence that the defendant failed to exercise proper care in the performance of its legal duties to plaintiff's intestate, whose death was alleged to have been due to a shock from an electric light wire, and that such negligent breach of duty was the proximate cause.—Monds v. Town of Dunn, 79 S. E. 303.

§ 822 (N.C.) There was no error in instructing that defendant contended that plaintiff's intestate himself lowered the electric street light and wires near which he was found lying dead, and that if the intestate did, by meddling with the chain, lower the light and received a fatal shock from the wires, plaintiff could not recover.—Monds v. Town of Dunn, 79 S. E. 303.

(D) Defects or Obstructions in Sewers, Drains, and Water Courses.

§ 839 (Ga.App.) Where the overflows into plaintiff's store after a change of street grade were of such a character as to raise the inference that the city knew of the defects in the sewer causing it, the city was liable.—City of Americus v. Phillips, 79 S. E. 36.

§ 845 (Ga.App.) Where the petition alleged that a city, in raising the grade of a street, had refused to provide sufficient means to convey water flowing through a depression in the land, and by reason thereof the water flowed into plaintiff's store, any testimony to show the store subject to overflows of rainwater thereby was admissible.—City of Americus v. Phillips, 79 S. E. 36.

Where plaintiff alleged that the city's failure to provide for carrying away rainwater on a change of grade, which caused it to flow into plaintiff's store, and defendant did not demur thereto, plaintiff could show that the water en-

tered either in front, or in the rear, or upon the side, or from all directions.—Id.

Where petition alleged that failure of a city to provide for the conveyance of water which flowed into defendant's store on a change of grade, evidence that water overflowing from an inadequate manhole spread over the street and sidewalk into plaintiff's store was admissible.—Id.

(E) Condition or Use of Public Buildings and Other Property.

§ 852 (N.C.) A town operating an electric light plant must use that degree of care that a reasonably prudent man would use under like circumstances to avoid injuring persons coming in contact with electrically charged wires, and it is charged with a continuous duty of taking reasonable precaution to keep its appliances in proper condition.—Monds v. Town of Dunn, 79 S. E. 303.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(C) Bonds and Other Securities, and Sinking Funds.

§ 917 (Ga.) Where no bill of exceptions has been filed within 20 days to a judgment confirming the issuance of municipal bonds under Civ. Code 1910, §§ 445, 447, such judgment becomes conclusive under section 448, and the issuance of such bonds cannot be subsequently enjoined, at the suit of taxpayers, on the ground that the town has no authority to establish waterworks and electric lights from the proceeds of the bonds.—Edwards v. Town of Guyton, 79 S. E. 195.

MUNICIPAL COURTS.

See Courts, §§ 188, 189.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 718, 815.

MUTUALITY.

See Contracts, § 10.

NAVIGABLE WATERS.

See Vendor and Purchaser, § 343.

NECESSARIES.

See Infants, § 50.

NEGATIVE.

See Evidence, § 75.

NEGLIGENCE.

See Agriculture; Appeal and Error, §§ 1001, 1052, 1066; Assignments, § 23; Carriers, §§ 76, 105, 109-134, 177, 280-348; Courts, § 489; Damages, § 20; Death; Factors, § 46; Master and Servant, §§ 87-302; Municipal Corporations, §§ 819, 852; Railroads, §§ 256-400, 419-485; Street Railroads; Telegraphs and Telephones, § 66; Trial, §§ 191, 242, 243, 251, 255, 261, 267, 296; Vendor and Purchaser, § 334; Warehousemen, § 22.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 1 (Va.) No cause of action arises from an injury caused by the doing of a dangerous but lawful act in a lawful manner; but in such cases the doctrine of assumption of risk applies.—Steele's Adm'r v. Colonial Coal & Coke Co., 79 S. E. 346.

(C) Condition and Use of Land, Buildings, and other Structures.

§ 32 (Va.) Where an engineer, after housing his engine in a roundhouse at the end of his run, started to leave the premises along a usually traveled path, when he fell into a ditch dug by defendant under a contract to rebuild the roundhouse, and was injured, a recovery could not be defeated on the ground that he was traveling the path for his own purpose.—*Nesbit v. Webb*, 79 S. E. 330.

§ 32 (Va.) A licensee takes upon himself all the ordinary risks of the place and business, and the owner owes him no active duty of protection until he knows of his danger, or might have known of it and avoided it by the use of ordinary care.—*Kiser v. Colonial Coal & Coke Co.*, 79 S. E. 348.

§ 33 (Va.) An owner of premises owes to a trespasser the duty only of doing him no intentional or willful injury, and before any duty of protection arises there must be such notice of his danger as would put a prudent man on the alert.—*Kiser v. Colonial Coal & Coke Co.*, 79 S. E. 348.

III. CONTRIBUTORY NEGLIGENCE.**(A) Persons Injured in General.**

§ 65 (Va.) The doctrine of contributory negligence implies the existence of negligence.—*Powhatan Lime Co. v. Affleck's Adm'r*, 79 S. E. 1054.

(B) Children and Others Under Disability.

§ 85 (Ga.) The diligence required of a child of tender years is not measured by the ordinary care required of an adult; but "due care" in such child is such care as the child's mental and physical capacity fits it for exercising under the particular circumstances.—*Elk Cotton Mills v. Grant*, 79 S. E. 836.

(D) Comparative Negligence.

§ 98 (Va.) Where it appears that the negligence of a servant has contributed as an efficient cause to the injury, the court will not undertake to balance the negligence of the respective parties.—*Powhatan Lime Co. v. Affleck's Adm'r*, 79 S. E. 1054.

§ 101 (Ga.) Under Civ. Code 1910, § 2781, providing that no person shall recover against a railroad company for injuries from his own negligence, and that where both are at fault the damages shall be diminished, a person injured from a crossing accident cannot recover, where his negligence is equal to or greater than that of the railroad company.—*Georgia & F. Ry. v. Newton*, 79 S. E. 142.

§ 101 (Ga.) Where an injured employé was not guilty of negligence preventing a recovery, but was guilty of some negligence, the doctrine of diminution of damages may be invoked.—*Elk Cotton Mills v. Grant*, 79 S. E. 836.

The words "contributory negligence," while generally employed to express negligence which will preclude a recovery, in this state are commonly used to express negligence which will merely diminish a recovery, under the doctrine of comparative negligence.—*Id.*

§ 101 (Ga.App.) A railroad company is not liable for injuries caused by the running of its trains, if it can show that plaintiff was equally at fault.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

§ 101 (Ga.App.) In a railroad employé's action under the federal Employers' Liability Act for injuries, plaintiff need not show that he was free from fault; his own fault, if any, going merely in reduction of damages.—*Charleston & W. C. R. Co. v. Brown*, 79 S. E. 932.

IV. ACTIONS.**(B) Evidence.**

§ 121 (Va.) Negligence will not be presumed in an action to recover damages for personal injuries; but the burden is upon the plaintiff to prove it by a preponderance of the evidence.—*Steele's Adm'r v. Colonial Coal & Coke Co.*, 79 S. E. 348.

(C) Trial, Judgment, and Review.

§ 136 (Ga.App.) Where plaintiff's injuries were the result of pure casualty, a nonsuit was properly granted.—*Glanton v. City of Rome*, 79 S. E. 225.

§ 136 (Ga.App.) Where there is evidence of mutual negligence on the part of an automobile driver and of the railroad company, the comparison of the negligence is a question for the jury.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

§ 141 (Ga.) An instruction that, if plaintiff by ordinary care could have avoided the consequences to himself of defendant's negligence, there could be no recovery, was in effect the language of Civ. Code 1910, § 4426, and was therefore not objectionable as limiting plaintiff's negligence which would bar recovery to that succeeding the negligence of defendant.—*Collum v. Georgia Ry. & Electric Co.*, 79 S. E. 475.

§ 141 (Ga.App.) In an action for injuries received on a railroad track, where there was evidence of negligence of both parties, it was error to refuse a requested charge that, if the negligence of the plaintiff exceeded or equaled that of the defendant, he could not recover.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See Criminal Law, §§ 942, 945; Homicide, § 319; New Trial, §§ 108, 168.

NEW TRIAL.

See Appeal and Error, §§ 110, 222, 270, 299, 302, 502, 933, 977, 979, 1005, 1178, 1195; Criminal Law, §§ 909-955, 1063, 1105, 1129, 1156; Eminent Domain, § 224; Homicide, § 319.

L NATURE AND SCOPE OF REMEDY.

§ 11 (Ga.App.) While a trial judge has less discretion in granting a new trial after a second verdict for the same party, he is not relieved in such case from exercising his discretion.—*Savannah Electric Co. v. Lackens*, 79 S. E. 53.

II. GROUNDS.**(A) Errors and Irregularities in General.**

§ 18 (Ga.) The overruling of a demurrer to a pleading and of objections to an amendment to a plea can only be taken advantage of by exception, and are not ground for new trial.—*Hurt v. Barnes*, 79 S. E. 775.

§ 27 (Ga.App.) A motion for new trial on general grounds is properly refused, where plaintiff's undisputed testimony requires the judgment rendered in its favor.—*Wright v. Bank of Southwestern Georgia*, 79 S. E. 184.

(B) Misconduct of Parties, Counsel, or Witnesses.

§ 29 (Ga.App.) Where counsel for plaintiff remarked in the presence of the jury, while claimant was testifying, that if she were let alone she would impeach herself, and counsel for claimant moved for a mistrial, and the court refused either to award a mistrial or to rebuke counsel, it was ground for a new trial.—*Smith v. D. Rothschild & Co.*, 79 S. E. 88.

(C) Rulings and Instructions at Trial.

§ 39 (Ga.App.) Where the answer presented the defense that the note sued on was without consideration and that plaintiff with knowledge of this fact conspired with the payee to collect same from defendant, the maker, an instruction that the only defense raised was one of non est factum held ground for new trial where the error affected the whole trial.—Daniel v. Browder-Manget Co., 79 S. E. 237.

§ 39 (Ga. App.) In an action by a wife to recover for personal injuries, in which the court instructed the jury as to the measure of damages for diminished capacity to discharge plaintiff's ordinary daily duties, a new trial will be granted, where it is impossible to determine what damages, if any, the jury allowed for diminution of plaintiff's capacity to discharge her household duties; such services belonging to her husband.—Berrien County v. Allen, 79 S. E. 1129.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 55 (S.C.) Misconduct of jury, not such as to be clearly prejudicial and not brought to the attention of the trial judge until after verdict, though known during the trial to defendants' counsel, did not require the granting of a new trial.—Huggins v. Atlantic Coast Line R. Co., 79 S. E. 406.

(E) Verdict or Findings Contrary to Law or Evidence.

§ 68 (Ga.) In a joint action by two plaintiffs against a railroad company, a verdict for plaintiffs will be set aside, where joint ownership as to much of the property alleged to have been destroyed was not proved.—Louisville & N. R. Co. v. Henderson, 79 S. E. 556.

§ 68 (Ga.App.) Where plaintiff establishes her case, and there is no evidence whatever to sustain the defense relied upon, a verdict for defendant should be set aside and a new trial granted.—Wardlaw v. Frederick, 79 S. E. 523.

§ 68 (Ga. App.) Where a mortgage *fi. fa.* did not follow the mortgage, and the levy did not follow the *fi. fa.*, it appearing that the mortgagor had two farms in the militia district in which the mortgaged crops were located, and there was no parol evidence identifying the property described in the levy with that which had been mortgaged, a new trial should have been granted.—Clark v. Georgia Fertilizer Works, 79 S. E. 1134.

§ 69 (Ga.App.) Though the testimony for the losing party would have warranted a different verdict, the court did not err in refusing a new trial; the credibility of witnesses being for the jury.—Brown v. Hawkins, 79 S. E. 76.

§ 70 (Ga.App.) In an action on an insurance policy, where the only issues were the value of the property sold and the amount of the loss, and whether the delay in payment was due to bad faith, and verdict on these issues was supported by the evidence, a motion for new trial was properly overruled.—Providence-Washington Ins. Co. v. Spence, 79 S. E. 77.

§ 70 (W.Va.) A new trial should not be granted for insufficiency of the evidence, though the evidence is contradictory, where it does not appear that the verdict is plainly unwarranted by the evidence, when considered most favorably in its support.—Wilson v. Johnson, 79 S. E. 734.

§ 71 (Ga.App.) Where the evidence, though conflicting, warranted a verdict for the defendant, there was no error in refusing plaintiff's motion for a new trial.—Jarrard v. Hawes, 79 S. E. 373.

§ 79 (Ga.) That a judgment does not follow or is not authorized by the verdict is not a good ground for a motion for new trial.—Potts v. City of Atlanta, 79 S. E. 110.

§ 81 (Ga.App.) Where, in an action on the lien of a sawmill proprietor, it appears that

the property was surrendered to the debtor, and the evidence does not show that the lien was recorded, a verdict in favor of the lien should be set aside on motion for a new trial on the ground that the lien was lost, though this point was not raised by motion at the trial.—Richardson v. Mallory, 79 S. E. 362.

(G) Surprise, Accident, Inadvertence, or Mistake.

§ 91 (N.C.) Under Revisal 1905, § 513, the verdict of a jury may be set aside for mistake or excusable neglect, if rendered subsequent to the passage of Laws 1893, c. 81.—Mann v. Hall, 79 S. E. 437.

(H) Newly Discovered Evidence.

§ 108 (Ga.App.) Where, in an action for injuries to a railroad employé's wife while riding on a free pass issued under authority of the Hepburn Act, there was proof of an actual marriage of plaintiff and the employé, a new trial was properly denied, where the newly discovered evidence relied on furnished merely proof of a presumptive marriage between one of them and a third person.—Charleston & W. C. Ry. Co. v. Thompson, 79 S. E. 242.

§ 108 (N. C.) A new trial for newly discovered evidence will only be granted on appeal where it is very probable that substantial justice has not been done by reason of the unavoidable failure to produce the evidence at the trial, and where it is also probable that on a new trial a different result will be reached and right prevail.—Warrick v. Taylor, 79 S. E. 286.

§ 108 (S.C.) Where affidavits on an application for a new trial for newly discovered evidence presented an issue of fact, were conflicting, and did not show that such would probably change the result, there was no abuse of discretion in denying the motion.—Miller v. Atlantic Coast Line R. Co., 79 S. E. 645.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 114 (Ga.) A motion for new trial, filed with the judge who heard the case after he had severed his connection with the court and while another judge who received the verdict was presiding, should have been dismissed for want of jurisdiction to entertain same.—Pendergrass v. Duke, 79 S. E. 129.

§ 117 (Ga.App.) A motion for a new trial, which was not filed during the term at which the rule nisi was granted, should be dismissed.—W. H. Cooper & Sons v. Bell, 79 S. E. 380.

§ 124 (Ga.) A motion for a new trial, which complains that the judge instructed on the impeachment of witnesses, but fails to state, at least in substance, the instruction given, presents nothing for determination.—Brock v. Brock, 79 S. E. 478.

§ 124 (Ga.) A motion for a new trial complaining of the admission of certain documents in evidence, without setting out such documents, but referring to them in general terms as "fully set out in the brief of evidence accompanying this motion," held insufficient.—Ford v. Blackshear Mfg. Co., 79 S. E. 576.

§ 132 (Ga.) A brief of evidence is an essential part of a valid motion for new trial.—Pendergrass v. Duke, 79 S. E. 129.

§ 132 (Ga.App.) A ground of motion for new trial which complains of the admission of documentary evidence cannot be considered, unless the evidence is set forth or attached thereto as an exhibit.—Franklin v. Fields & Chance, 79 S. E. 366.

§ 153 (S.C.) Affidavits showing misconduct of jurors as a ground for new trial need not be served on opposing counsel four days before hearing.—Huggins v. Atlantic Coast Line R. Co., 79 S. E. 406.

§ 154 (Ga.App.) Where a rule nisi was granted on a motion for a new trial, and ordered

served, and the motion set for the next regular term, it was proper to dismiss the motion, where the rule nisi had not been served at the calling of the motion.—Tyler & Tomlinson v. Arnett, 79 S. E. 482.

§ 155 (Ga.) While the judge of a superior court may, under Civ. Code 1910, § 4852, determine a motion for new trial in vacation, without an order passed in term time, when upon the application of either party the judge has fixed a time for hearing and 10 days' notice has been given, such power can be exercised only where a valid motion for a new trial is pending.—Pendergrass v. Duke, 79 S. E. 129.

§ 156 (Ga.App.) Where a party moving for a new trial failed to serve the rule nisi as ordered by the court, and showed no reason on the call of the motion why the service had not been made, the court properly refused to grant a continuance to permit a service of the rule.—Tyler & Tomlinson v. Arnett, 79 S. E. 482.

§ 161 (Va.) Where, in ejectment in two counts, one for recovery of 1,000 acres and the other of an included tract of 79 acres, which was the tract actually in dispute, verdict was rendered generally for defendant, *held*, that the court, instead of granting a new trial, properly required defendant to enter a release of that portion of the 1,000-acre tract outside of the tract in dispute.—Honaker v. Shrader, 79 S. E. 391.

§ 163 (Ga.) The orders made on a motion for a new trial *held* not to show that the trial judge failed to exercise his discretion in passing on the motion.—Macon, D. & S. R. Co. v. Anchors, 79 S. E. 153.

§ 163 (Ga.App.) An order overruling a motion for new trial and reciting that the trial judge did not feel justified in granting a new trial, as two juries had found in favor of the plaintiff, did not show a refusal of the judge to exercise his discretion.—Savannah Electric Co. v. Lackens, 79 S. E. 53.

§ 168 (N.C.) Where defendant moves for a new trial on the ground of newly discovered evidence after the case is argued in the Supreme Court, the application should be carefully scrutinized, and the burden is upon the defendant to rebut the presumption that the verdict is correct and that there has been a lack of diligence.—Johnson v. Seaboard Air Line Ry. Co., 79 S. E. 690.

Requisites of an affidavit in the Supreme Court for a new trial upon the ground of newly discovered evidence stated.—*Id.*

NOLLE PROSEQUI.

See Criminal Law, § 178.

NON OBSTANTE VEREDICTO.

See Judgment, § 199.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, §§ 425, 651, 833, 930, 1043, 1066; Banks and Banking, § 154; Bills and Notes, §§ 330, 337, 367, 471, 485, 534; Certiorari, § 54; Constitutional Law, §§ 308, 309; Corporations, §§ 90, 487; Costs, § 41; Counties, § 139; Execution, § 129; Garnishment, § 158; Holidays; Insurance, § 378; Justices of the Peace, § 203; Logs and Logging, § 3; Mechanics' Liens, §§ 118, 132; Municipal Corporations, § 790; Negligence, § 33; Nuisance, § 42; Pleading, § 85; Principal and Surety, § 199; Sales, § 176; Taxation, §§ 707, 788; Telegraphs and Telephones, §§ 33, 37, 38, 54; Time, § 9; Vendor and Purchaser, § 223; Wills, § 269.

§ 13 (Ga.App.) In order to bind defendant for attorney's fees, the petition need not state how the notice of intention to bring suit was served, if service be alleged.—Cook v. Hightower & Co., 79 S. E. 165.

NOVATION.

§ 1 (Ga.App.) Under the express provisions of Civ. Code 1910, § 3543, a change in the terms of a contract is called a "novation."—Little Rock Furniture Co. v. Jones & Co., 79 S. E. 375.

NUISANCE.

See Action, § 7; Courts, § 163; Easements, § 61; Injunction, § 77; Municipal Corporations, §§ 623, 667, 697; Waters and Water Courses, § 126.

I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 3 (Ga.) Under Civ. Code 1910, § 4457, a "nuisance" is "anything that worketh hurt, inconvenience, or damage to another."—Williams v. Southern Ry. Co., 79 S. E. 850.

§ 6 (N.C.) A continued violation of a valid ordinance constitutes a nuisance.—Knight v. Foster, 79 S. E. 614.

§ 10 (Ga.) The action authorized by Civ. Code 1910, § 4458, to be brought against the alienee of the person creating a continuing nuisance, is for damages resulting from its maintenance, and not from its creation.—Williams v. Southern Ry. Co., 79 S. E. 850.

(B) Acquisition of Rights by Prescription.

§ 11 (Ga.) Prescription cannot run in favor of the maintenance of a railroad embankment constituting a continuing nuisance.—Williams v. Southern Ry. Co., 79 S. E. 850.

(C) Abatement and Injunction.

§ 18 (Ga.App.) A private nuisance may be abated by the summary proceeding provided for in Civ. Code 1910, § 5329 et seq.—Adair v. Spellman Seminary, 79 S. E. 589.

(D) Actions for Damages.

§ 42 (Ga.) An action for damages for the maintenance of a nuisance, when brought against the alienee of the person creating it to recover pursuant to Civ. Code 1910, § 4458, can be maintained against such person only after he has been notified to abate the nuisance.—Williams v. Southern Ry. Co., 79 S. E. 850.

§ 54 (Ga.) In an action against the alienee under Civ. Code 1910, § 4458, for damages from a continuing nuisance maintained by the alienee of the person creating the nuisance, it is error to charge the law applicable to an action for damages from the creation of the nuisance.—Williams v. Southern Ry. Co., 79 S. E. 850.

II. PUBLIC NUISANCES.

(B) Rights and Remedies of Private Persons.

§ 72 (Ga.App.) An individual cannot sue to abate a public nuisance, unless he shows special damage in which the public does not participate.—Adair v. Spellman Seminary, 79 S. E. 589.

§ 72 (W.Va.) An individual may sue to enjoin a public nuisance only when his rights are affected in a special manner different from the public in general.—Davis v. Spragg, 79 S. E. 852.

For a public nuisance to be enjoined at the suit of an individual, plaintiff must not only be specially damaged but his injury must be serious and affect the substance and value of his property.—*Id.*

§ 75 (W.Va.) That plaintiff maintains a similar nuisance constitutes no defense to a suit to abate a public nuisance.—*Davis v. Spragg*, 79 S. E. 652.

OATH.

See Criminal Law, § 178.

OBJECTIONS.

See Appeal and Error, §§ 170, 205-222; Criminal Law, §§ 695½, 847; Depositions, § 107; Jury, § 110; New Trial, § 81; Pleading, § 409; Trial, §§ 83, 85.

OBLIGATION OF CONTRACTS.

See Constitutional Law, § 128.

OBSTRUCTING JUSTICE.

§ 3 (Ga.App.) Neither threats alone, unaccompanied by any fear or apparent intention to execute them, nor the doing of an act which impedes or defeats the execution of the process with which the officer is armed, but without resisting him, is sufficient to constitute the offense of forcibly resisting an officer in violation of Pen. Code 1910, § 311.—*Raines v. State*, 79 S. E. 860.

§ 16 (Ga.App.) Evidence in a prosecution for forcibly resisting an officer, in violation of Pen. Code 1910, § 311, held insufficient to sustain a conviction.—*Raines v. State*, 79 S. E. 860.

OFFICERS.

See Banks and Banking, §§ 61, 112; Corporations, §§ 284-331, 399-432; Justices of the Peace; Municipal Corporations, §§ 63, 142, 184, 185, 591; Obstructing Justice; Physicians and Surgeons; Receivers; States, §§ 34, 40, 165; Statutes, § 219.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(C) Eligibility and Qualification.

§ 30 (S.C.) Act Feb. 17, 1912 (27 St. at Large, p. 738), conferring certain powers and duties on the sinking fund commission, which is composed of public officers, held not to violate Const. art. 2, § 2, forbidding any person holding two offices at the same time.—*State v. Blease*, 79 S. E. 247.

OPEN AND CLOSE.

See Execution, § 195; Trial, § 25.

OPENING.

See Judgment, §§ 136-167, 358-386.

OPINION EVIDENCE.

See Criminal Law, §§ 448, 493; Evidence, §§ 471-558.

OPINIONS.

See Courts, §§ 89-107; Criminal Law, §§ 655, 656, 762, 918.

OPTIONS.

See Contracts, § 340; Vendor and Purchaser, § 18.

ORDERS.

See Appeal and Error, §§ 80, 110; Injunction, § 157; New Trial, § 163; Pleading, § 85.

ORDINANCES.

See Municipal Corporations, §§ 120, 592; Nuisance, § 6.

ORIGINAL ENTRY.

See Evidence, §§ 354, 355.

PARENT AND CHILD.

See Bastards, §§ 3, 17; Divorce, § 289; Evidence, §§ 287, 294; Guardian and Ward; Infants; Master and Servant, § 230.

§ 5 (Ga.App.) Under the express provisions of Civ. Code 1910, § 3021, where a father abandons his family he loses parental control over his minor children, and loses the right to their services and the proceeds of their labor.—*Newton v. Cooper*, 79 S. E. 356.

A mother, having the care and custody of a minor child after abandonment by the father, is entitled to the child's services and proceeds of his labor.—*Id.*

§ 6 (Ga.App.) In a parent's action against the employer of his minor son, without his consent, to recover the value of the son's services, defendant may set off the value of necessities furnished the minor during employment.—*Newton v. Cooper*, 79 S. E. 356.

PAROL EVIDENCE.

See Criminal Law, § 400; Evidence, §§ 390-461.

PARTIES.

See Appeal and Error, §§ 327, 962; Banks and Banking, § 154; Cancellation of Instruments, § 35; Carriers, § 76; Costs, § 96; Counties, § 139; Criminal Law, §§ 59, 67; Equity, § 114; Evidence, § 222; Execution, § 155; Executors and Administrators, §§ 473, 474; Insane Persons; Mortgages, § 427; Partition, §§ 46, 48; Principal and Surety, § 152; Trusts, § 366.

III. NEW PARTIES AND CHANGE OF PARTIES.

§ 47 (Ga.) Interveners take the case as they find it.—*Atlanta & C. Ry. Co. v. Carolina Portland Cement Co.*, 79 S. E. 555.

§ 51 (N.C.) It is within the discretion of the court whether the defendant shall be allowed to bring in a proper party defendant.—*Spruill v. Bank of Plymouth*, 79 S. E. 262.

PARTITION.

See Appeal and Error, §§ 69, 871, 1073; Equity, §§ 181, 196; Estoppel, § 35; Evidence, § 222; Judgment, § 382; Tenancy in Common, § 15.

II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

§ 14 (Ga.) The rule that, in partitioning property among tenants in common, there should be a complete partitioning does not affect the rights of a devisee entitled to possession to have his share delivered to him, though there may be other devisees not then entitled to possession.—*Wright v. Hill*, 79 S. E. 546.

(B) Proceedings and Relief.

§ 44 (Ga.) A suit in partition was not premature as to those plaintiffs who were of age and sui juris, though there were other plaintiffs who were minors and not then entitled to recover.—*Wright v. Hill*, 79 S. E. 546.

§ 46 (Ga.) All the parties in interest should have been made parties to a suit in partition.—*Wright v. Hill*, 79 S. E. 546.

§ 48 (N.C.) Under Revisal 1905, §§ 76, 410, 414, a party claiming to be a tenant in common of land which plaintiffs desired sold for partition may properly be brought in as a party defendant.—*McKeel v. Holloman*, 79 S. E. 445.

§ 53 (W.Va.) Where land which is the subject of a suit in partition contains valuable deposits of oil and gas in imminent danger of loss by drainage, and the parties interested are unable to agree upon some plan for development, the court may appoint a receiver to pro-

duce the oil and gas as a measure of preservation.—Ohio Fuel Oil Co. v. Burdett, 79 S. E. 667.

§ 55 (Ga.) It is not essential that a petition for partition specify the interest of each legatee having an interest in the land.—Wright v. Hill, 79 S. E. 546.

§ 63 (N.C.) Where defendant, who claimed to be the owner of one-third interest in land which plaintiffs desired partitioned, set up his claim in derogation of plaintiffs' title to one-third of the property, he has the burden of proof.—McKeel v. Holloman, 79 S. E. 445.

In partition of land of which defendant claimed to be a tenant in common of one-third, a will under which defendant claimed is properly rejected, where there was no sufficient identification of the land described in the will.—Id.

§ 64 (Ga.) Where the petition in partition was good as against the demurrer filed, it was error to dismiss the entire case, though certain parts of the petition should have been stricken.—Wright v. Hill, 79 S. E. 546.

That an allegation of the petition that plaintiffs were tenants in common with executors and entitled to partition on that basis should have been stricken did not require dismissal of the entire cause.—Id.

§ 78 (N.C.) On a partition of land, the party making betterments is entitled to have the part improved by him allotted in his share, in which case he recovers nothing for the betterments.—Daniel v. Dixon, 79 S. E. 425.

§ 83 (W. Va.) In partition, the court may determine title between conflicting claimants of an undivided interest in the land.—Wright v. Pittman, 79 S. E. 1091.

§ 113 (W. Va.) The owner of an oil and gas lease, holding under conflicting claimants and not colluding with either, may appeal on jurisdictional matters from a decree in partition settling the title.—Wright v. Pittman, 79 S. E. 1091.

§ 114 (Ga.) Where tenants in common applied for partition against cotenants, who made no resistance, and the property being indivisible, was sold, the applicants were not entitled to an allowance of fees for their attorneys from the fund; the word "expenses," as used in Civ. Code 1910, §§ 5365, 5366, authorizing the deduction of expenses from the fund, not covering attorney's fees.—Neal v. Neal, 79 S. E. 849.

PARTNERSHIP.

See Justices of the Peace, § 194; Set-Off and Counterclaim, § 44; Trover and Conversion, § 17; Wills, § 6.

I. THE RELATION.

(B) As to Third Persons.

§ 37 (Ga.App.) Where a bank made a loan, represented by two notes executed in the name of the partnership by one member thereof, in reliance upon a statement of each of the alleged partners, that they were members of the firm, the partnership was estopped to deny its existence and membership in a subsequent action on the notes.—Swygert Bros. v. Bank of Haralson, 79 S. E. 759.

(C) Evidence.

§ 48 (Ga.App.) A partnership may be proved by evidence that each of the partners admitted its existence.—Swygert Bros. v. Bank of Haralson, 79 S. E. 759.

§ 54 (Ga.App.) Where, in an action on a note against a partnership, defendants relied on the defense that the person who executed the note was not a partner, evidence that each of the partners admitted that such person was a partner was sufficient to prove the existence of the

partnership.—Swygert Bros. v. Bank of Haralson, 79 S. E. 759.

Evidence in an action on a note against a partnership as maker thereof held to sustain a finding that the partnership existed as alleged.—Id.

Only slight evidence is necessary to bind parties as partners in their relation to creditors.—Id.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 146 (Ga.App.) Under Civ. Code 1910, §§ 3172, 3180, one member of a partnership can bind it by signing its name to a note under seal in the course of partnership business, though not authorized by an instrument under seal.—Swygert Bros. v. Bank of Haralson, 79 S. E. 759.

(D) Actions by or Against Firms or Partners.

§ 199 (Ga.App.) Where partnership goods are sold by one partner, the partnership may recover the purchase price in its own name, though the purchaser did not know of the partnership.—F. T. Hardy & Co. v. Jones Bros., 79 S. E. 246.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(B) Rights, Powers, and Liabilities after Dissolution.

§ 279 (S.C.) Where a partnership, composed of three individuals, which had contracted a debt was dissolved prior to suit upon the debt, and it was agreed that two of the partners should assume the debts of the partnership, that agreement did not affect the rights of the creditor to hold the retiring partner.—Strickland v. Strickland, 79 S. E. 520.

(C) Distribution and Settlement Between Partners and Their Representatives.

§ 303 (W. Va.) Where one partner furnished the entire capital and the other his services and a building for the business, the profits and losses to be shared equally, and the property purchased with the capital was destroyed by fire and the business discontinued, the partner furnishing no capital was chargeable with half the loss of stock, though in addition he lost his services and building.—Gore v. Vines, 79 S. E. 820.

(D) Actions for Dissolution and Accounting.

§ 320 (Ga.App.) An action for a partnership accounting must be brought in the superior court of the county of defendant's residence.—Cox v. Manning, 79 S. E. 484.

§ 329 (W. Va.) Where a written contract either relates to a previously existing partnership business, transactions of the firm prior to the date of the contract, as well as those subsequent thereto, are properly cognizable in a suit for the settlement of the partnership.—Gore v. Vines, 79 S. E. 820.

§ 344 (W. Va.) A decree on a partnership accounting settling the principles whereby the amount of loss chargeable against one partner was to be ascertained, and providing for a future decree when the amount should be ascertained, was not erroneous on the ground of indefiniteness as to the amount.—Gore v. Vines, 79 S. E. 820.

PASSENGERS.

See Carriers, §§ 247-381.

PAYMENT.

See Banks and Banking, § 154; Bills and Notes, §§ 426, 499; Chattel Mortgages, § 235; Compromise and Settlement; Contracts, § 214; Corporations, § 90; Fraudulent Conveyances, §§ 277, 300; Mechanics' Liens, §§ 115, 210; Principal and Surety, § 108; Taxation, § 319; Telegraphs and Telephones, §§ 33, 38; Trusts, §§ 72, 77; Vendor and Purchaser, § 215.

II. APPLICATION.

§ 38 (Ga.App.) A person, indebted upon a mortgage and an open account, may direct that a payment be applied to the mortgage, rather than to the account.—Benton-Shingler Co. v. Mills, 79 S. E. 755.

V. RECOVERY OF PAYMENTS.

§ 85 (Ga.App.) Where money due a bank was by mistake paid to another, and the circumstances were such that the company receiving could not in equity and good conscience retain it, and that it lost nothing by the payment, and would be in no worse position after the mistakes were corrected than before, the parties paying the money were entitled to recover it.—Pine Belt Lumber Co. v. Morrison & Harvey, 79 S. E. 363.

§ 89 (Ga.App.) Where defendant set up a claim for money which, though due a bank on the debt of an insolvent company, was paid to the plaintiff company by defendant through mistake, evidence explanatory of the transactions between defendants and the insolvent company was admissible to show how the mistake came to be made.—Pine Belt Lumber Co. v. Morrison & Harvey, 79 S. E. 363.

PEDIGREE.

See Evidence, §§ 287, 294, 355.

PENALTIES.

See Appeal and Error, § 1073; Assignments, §§ 28, 120; Carriers, §§ 2, 45; Commerce, §§ 8, 10; Constitutional Law, §§ 126, 247; Telegraphs and Telephones, § 78; Witnesses, § 22.

PENDENCY OF ACTION.

See Abatement and Revival, § 5; *Lis Pendens*.

PERJURY.

See Criminal Law, §§ 90, 1122; Indictment and Information, §§ 3, 125.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 1 (Ga.App.) That a witness has made other knowingly false statements under the same oath does not create new offenses, though the concurrence of other similar false statements may supply ground for a heavier penalty than would otherwise have been imposed.—Black v. State, 79 S. E. 173.

Perjury consists in knowingly, willfully, and falsely testifying to a material matter in a judicial proceeding, and the gist of the offense is the disregard of the oath taken; and the offense is complete if there be one false statement made with intent to conceal the truth.—Id.

§ 10 (Ga.App.) For a witness to be sworn as a witness, so as to render him liable to prosecution for perjury, it is not essential that he stand with the rest of the witnesses, or that he have his hand upon the Bible, or raise his hand; but it is sufficient that a lawful oath be administered to him and he assent thereto.—Cox v. State, 79 S. E. 909.

§ 11 (Ga.App.) The test of materiality is whether the alleged false statement could have influenced the decision as to the question at issue in a proceeding in which the perjury was

alleged to have been committed; if it could have done so, it was material.—Black v. State, 79 S. E. 173.

II. PROSECUTION AND PUNISHMENT.

§ 25 (Ga.App.) An indictment should specifically allege, and the proof should show, wherein the testimony on which the perjury is assigned is material to the issue in the trial in which it was delivered.—Black v. State, 79 S. E. 173.

§ 31 (Ga.App.) The burden is on the state to prove, not merely that the accused took the stand as a witness and submitted to an examination as such, but that he was duly sworn; no presumption that he was sworn arising from the fact that he was a witness.—Cox v. State, 79 S. E. 909.

§ 37 (Ga.App.) An instruction which withhold from the jury the determination of whether the alleged false testimony was material to the issue is erroneous.—Cox v. State, 79 S. E. 909.

An instruction defining perjury *held* erroneous, where it omitted the statement that the false testimony must be material to an issue involved.—Id.

The court should instruct, under Pen. Code 1910, § 259, that a charge of perjury cannot be based upon testimony not delivered in a judicial proceeding, and that, to convict, the testimony of two witnesses, or of one witness supported by corroborating circumstances, is required.—Id.

PERPETUITIES.

§ 6 (Ga.) A provision of a will that a certain bequest should remain undivided until the youngest one of the issue of testator's children mentioned should become of age *held* not in conflict with the rule against perpetuities; a limited effect being given by Civ. Code 1910, § 3878, to those limitations which are not too remote.—Wright v. Hill, 79 S. E. 548.

PERSONAL COVENANTS.

See Covenants, § 31.

PERSONAL INJURIES.

See Agriculture; Appeal and Error, §§ 1002, 1004, 1062, 1178; Carriers, §§ 280-348; Commerce, § 27; Damages, §§ 97, 100, 132, 178, 208, 216; Electricity; Evidence, § 548; Husband and Wife, § 209; Landlord and Tenant, § 167; Limitation of Actions, § 182; Master and Servant, §§ 87-302; Municipal Corporations, §§ 759-822, 852; Negligence; Railroads, §§ 256-400; Street Railroads.

PETITION.

See Criminal Law, § 130; Pleading.

PHYSICAL EXAMINATION.

See Insurance, § 392.

PHYSICIANS AND SURGEONS.

See Appeal and Error, § 1058; Evidence, § 548; Master and Servant, § 92.

§ 3 (W.Va.) Under Code 1906, c. 150, § 9, as amended and re-enacted by Acts 1907, c. 66 (Code Supp. 1909, c. 150), the state board of health has discretion to make reasonable regulations as to licensing medical licentiates of other states with whose licensing authorities reciprocal relations have been established, and to refuse to grant licenses to those who have not complied with such regulations.—Thomas v. State Board of Health, 79 S. E. 725.

A regulation of the state board of health which requires a foreign medical licentiate to reside and practice his profession in his state for one year before application for a license is reasonable.—Id.

A regulation of the state board of health that

a foreign applicant for license to practice medicine shall have practiced one year in the foreign state contemplates that such practice shall have been in compliance with the laws of that state.—Id.

The interpretation given by the state board of health to a regulation adopted by it relative to the licensing of applicants to practice medicine will be followed by the court unless clearly unreasonable and arbitrary.—Id.

PIPE LINES.

See Eminent Domain, §§ 34, 76, 167, 191.

PLEADING.

See Abatement and Revival, § 85; Action, § 50; Appeal and Error, §§ 11, 70, 73, 832, 959, 1039-1041, 1052, 1175, 1178; Appearance, § 17; Assignments, § 131; Assumpsit, Action of, § 19; Attachment, §§ 47, 241; Attorney and Client, § 190; Bankruptcy, § 302; Banks and Banking, § 154; Bills and Notes, §§ 426, 454, 471, 481, 485, 534; Brokers, § 82; Carriers, § 275; Certiorari, §§ 42-70; Chattel Mortgages, § 283; Contracts, § 340; Corporations, § 557; Costs, § 42; Courts, § 189; Covenants, § 114; Damages, § 159; Death, § 47; Deeds, § 166; Dismissal and Nonsuit, § 58; Electricity, § 19; Equity, §§ 148-226; Evidence, §§ 441, 443; Execution, § 425; Executors and Administrators, §§ 221, 444, 449; Fraud, § 41; Fraudulent Conveyances, § 269; Highways; Insurance, § 815; Judgment, §§ 123, 252, 948; Justices of the Peace, §§ 91, 92; Limitation of Actions, § 182; Malicious Prosecution, § 47; Mines and Minerals, § 94; Mortgages, § 458; Municipal Corporations, §§ 544, 845; New Trial, § 18; Notice; Partition, §§ 55, 64; Principal and Surety, § 156; Railroads, §§ 394, 395; Sales, §§ 435, 437; Telegraphs and Telephones, § 78; Time, § 10; Trial, §§ 25, 251, 252; Trover and Conversion, § 32; Warehousemen, § 34.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 64 (Ga.) A petition in a suit by a wife to cancel a deed made by her to her husband as a cloud on her title, because it was a forgery and represented a contract of sale by her of her separate estate to her husband, in violation of Civ. Code 1910, § 3009, was not multifarious.—Echols v. Green, 79 S. E. 557.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§ 85 (N.C.) A defendant is bound to take notice of any order made in the regular term extending the time of pleading, and the law presumes that he has full notice of it, particularly where he himself is an attorney.—Dell School v. Peirce, 79 S. E. 687.

§ 93 (Ga.App.) Under Civ. Code 1910, § 5649, authorizing inconsistent pleas, plea of failure of consideration and plea of rescission may be pleaded in an action for goods sold.—Kerr Glass Mfg. Co. v. Americus Grocery Co., 79 S. E. 381.

§ 95 (S.C.) Under Code Civ. Proc. 1912, §§ 220-222, 224, 227, where an action on a note formerly held by a savings bank all of whose assets were taken over by a trust company, which then changed its name, was brought in the name of the savings bank, plaintiff should have been permitted to amend in this respect.—Citizens' Savings Bank v. Ebird, 79 S. E. 637.

(F) Affidavit of Defense or of Merits.

§ 155 (W.Va.) A verification of a plea when in the form prescribed by Code 1906, c. 125, § 42, was insufficient to constitute the affidavit

of defense provided for by section 46, where, when read with the pleading, it did not constitute a substantial denial of liability in whole or in part.—Woods v. Teter, 79 S. E. 658.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 165 (W.Va.) A replication is unnecessary, where the answer admits the allegations of the bill.—Wright v. Pittman, 79 S. E. 1091.

V. DEMURRER OR EXCEPTION.

§ 199 (Ga.App.) A demurrer by defendant held too late, when not filed at the appearance term.—Avery & Co. v. Pope, 79 S. E. 946.

§ 199 (W.Va.) The defendant, in an action at law in which the office judgment has become final, but is not entered, may demur to the declaration.—Wilson v. Shrader, 79 S. E. 1083.

§ 204 (Ga.App.) A demurrer to an entire answer for irrelevancy and insufficiency, which does not specify any particular defects, is properly overruled if some of the paragraphs thereof, in the light of the allegations in all, set up a sufficient defense.—Wardlaw v. Frederick, 79 S. E. 523.

§ 204 (W.Va.) A general demurrer to a declaration containing more than one count is properly overruled where one of the counts is good, though the others are bad.—Selvey v. Grafton Coal & Coke Co., 79 S. E. 656.

§ 208 (Ga.App.) Where a demurrer for irrelevancy attacks a paragraph as a whole, without specifying the irrelevant matter, the demurrant cannot complain that the entire paragraph, which contained both relevant and irrelevant matter, was not stricken.—Wardlaw v. Frederick, 79 S. E. 523.

§ 214 (Ga.) While a demurrer admits facts well pleaded, where the petition alleged that a second note was collateral to the first, but the copies of the notes attached showed that this allegation was incorrect, the demurrer admitted the fact shown by the notes, rather than the interpretation alleged by the pleader.—Strickland v. Lowry Nat. Bank, 79 S. E. 539.

§ 216 (Ga.App.) A demurrer, which was insufficient, in that it failed to specifically point out the defect in the petition, was properly overruled, though the petition may have been demurrable.—Atlantic Coast Line R. Co. v. Whitney, 79 S. E. 181.

§ 218 (N.C.) Where a complaint was dismissed on demurrer, it was improper to award a judgment adjudicating title to the land in controversy, ordering a writ of possession and assessing damages.—Cavanaugh v. Jarman, 79 S. E. 673.

§ 221 (Ga.App.) Where a demurrer to a petition is improperly overruled, further proceedings at the trial are nugatory.—Martin v. Cox, 79 S. E. 39.

§ 225 (Ga.App.) Where a demurrer to a plea is sustained with leave to amend, and subsequently an amendment is filed without objection, the original and amended plea should be considered together in determining whether a defense is set forth.—Daniel v. Browder-Manget Co., 79 S. E. 237.

Where defendant unsuccessfully excepts to an order requiring him to amend his answer, he does not thereby waive his right to amend.—Id.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 237 (Ga.App.) Either party, by proper amendment, may conform his pleadings to the evidence which has been introduced.—Hyer v. C. E. Holmes & Co., 79 S. E. 58.

Pleadings may be amended after the close of the evidence and argument, provided the amendment is supported by the evidence, and does not

necessitate the introduction of new parties or a new cause of action.—Id.

§ 243 (Ga.App.) In a bailor's action for the loss of two freight cars, it was not error to permit plaintiff to strike from his petition an allegation which was made merely by way of inducement, and was not essential to his case.—Atlantic Coast Line R. Co. v. Bunn, 79 S. E. 947.

§ 248 (Ga.App.) An amendment to the petition in an action to recover a statutory penalty for failure to deliver a telegram did not set forth a new cause of action, where it merely corrected a mistake as to the name of the place where the telegram was received, and it appeared that the same telegram was referred to in both the original and amended petitions.—Western Union Telegraph Co. v. Calhoun, 79 S. E. 371.

§ 268 (W.Va.) Where the verification of a special plea in the form prescribed by Code 1906, c. 125, § 42, when considered together with the plea, was wholly inadequate to constitute the affidavit of defense prescribed by section 46, the court properly refused, after an adjournment of term, to permit it to be amended to conform to the requirements of such affidavit.—Woods v. Teter, 79 S. E. 658.

VIII. PROFERT, OYER, AND EXHIBITS.

§ 308 (Ga.App.) Where, in a suit on a note against a retiring partner, he filed an amended answer alleging a transfer of his interest to plaintiff and another, who agreed to pay all the firm's indebtedness, including the note, and that all of the firm's papers were delivered to plaintiff, it was not demurrable for failure to attach an itemized statement of the indebtedness of the firm, together with the contract by which plaintiff assumed the firm debts.—Hyer v. C. E. Holmes & Co., 79 S. E. 58.

X. FILING, SERVICE, AND WITHDRAWAL.

§ 336 (S.C.) Under Code Civ. Proc. 1912, § 448, authorizing service by mail, and section 450, making section 448 inapplicable to service of "process," a complaint may be served by mail, as "process" is a writ, summons, or order issued in a judicial proceeding to acquire jurisdiction of a person or his property, to expedite the cause or enforce the judgment.—Royal Exchange Assurance of London v. Bennettsville & C. R. Co., 79 S. E. 104.

XI. MOTIONS.

§ 343 (N.C.) Where, in a partition proceeding, no exception was taken by plaintiff to an order of the clerk setting aside a judgment in his favor and allowing defendant to file an answer raising an issue of fraud, plaintiff was not entitled to a judgment on the whole record.—Turner v. Davis, 79 S. E. 257.

§ 360 (Ga.App.) A judgment striking a defense to the foreclosure of a mortgage, because filed without leave and after filing of the original affidavit of illegality, does not preclude defendant from amending at a subsequent term the affidavit of illegality, setting up the defense that he sought to raise in the amendment stricken.—Benton-Shingler Co. v. Mills, 79 S. E. 755.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 409 (Ga.App.) A plea, bad in substance, may be ignored or the defect taken advantage of by motion to strike, or by objection to the evidence, or by a request to instruct to disregard the plea, or in any other proper way, even though it has been amended without objection.—Daniel v. Browder-Manget Co., 79 S. E. 237.

A plaintiff may object at any time in any proper manner to a plea which is bad in substance, unless he is estopped from challenging

its sufficiency by a judgment which he himself invoked.—Id.

§ 417 (Ga.App.) Where defendant amends his plea to meet a ruling sustaining a demurrer, he thereby waives his right to except to the order requiring the amendment.—Daniel v. Browder-Manget Co., 79 S. E. 237.

PLEAS.

See Criminal Law, §§ 274-282.

PLEDGES.

§ 34 (Ga.) A pledgor cannot recover his pledge of his pledgee's assignee without paying or tendering the amount of the debt secured, unless the facts excuse a tender.—Payne v. Power, 79 S. E. 771.

A pledgor's offer to tender the amount of the debt secured held not equivalent to a tender so as to entitle him to recover his pledge.—Id.

POISONS.

See Criminal Law, § 1171.

§ 2 (Ga.App.) Pen. Code 1910, § 459, and Civ. Code 1910, § 1651, regulating the furnishing or sale of narcotic drugs, was intended not only to prevent traffic in such drugs, but also to lessen the evils consequent upon their habitual use.—Silver v. State, 79 S. E. 919.

§ 4 (Ga.App.) It is a penal offense under Pen. Code 1910, § 459, to give, furnish, or sell any of the narcotic drugs mentioned in Acts 1907, p. 121 (Civ. Code 1910, § 1651), except upon the conditions prescribed therein.—Silver v. State, 79 S. E. 919.

POLICE.

See Municipal Corporations, §§ 184, 185.

POLICE POWER.

See Constitutional Law, §§ 238, 275, 276; Municipal Corporations, §§ 591, 604.

POSSESSION.

See Adverse Possession; Husband and Wife. § 201; Possessory Warrant.

POSSESSORY WARRANT.

§ 2 (Ga.App.) A judgment awarding the property in dispute to defendant was proper, where the undisputed testimony showed that plaintiff had voluntarily parted with its possession.—Lotz v. Walker, 79 S. E. 169.

A possessory warrant is not proper means for the recovery of personal property, unless the possession of the property was acquired by fraud or violence and without the consent of the complaining party.—Id.

§ 2 (Ga.App.) Where personal property has been left by the owner with an agent to be kept until called for, and the agent refuses to deliver it on demand, a possessory warrant will lie, though the possession was not acquired violently or fraudulently.—Grantham v. Lance, 79 S. E. 481.

§ 3 (Ga.App.) Where defendant in a possessory warrant to recover a deed had not been in peaceable possession in his own right for four years, and the evidence tended to show that plaintiff in the warrant had possessed the right to demand the deed for less than two years, a dismissal of the warrant was unauthorized; no presumption arising that defendant's possession was lawful.—Grantham v. Lance, 79 S. E. 481.

POWERS.

See Wills, §§ 600, 601, 689, 693.

II. CONSTRUCTION AND EXECUTION.

§ 32 (S. C.) Where a gift of property in trust gave the beneficiary a power of appointment

by "her last will and testament authenticated in due form of law," such power cannot be executed except by will.—*Huggins v. Price*, 79 S. E. 798.

§ 33 (Ga.) Where a donee of a power to apportion property and appoint from a class certain persons to hold the apportionment made by the donee, under the conditions imposed by the donor's will creating the power, executes a will devising the specific property in parcels to appointees selected from the proper class, such will is an act indicative of the donee's intention to execute the power.—*Grayson v. Germania Bank*, 79 S. E. 124.

§ 34 (Ga.) Where testator made specific devises to his children and issue of deceased children, with certain conditions, and devised certain property to his wife for life, with power to devise to such of testator's children or issue of deceased children as she might desire, upon the conditions prescribed in his will, a will by the wife, in which she devised the property without condition to two children and two grandchildren of testator, was a good execution of the power.—*Grayson v. Germania Bank*, 79 S. E. 124.

§ 38 (Ga.) Where the quantity of interest to be taken by an appointee is expressly limited by the instrument creating the power, and the donee is only authorized to appoint the property over which the estate is to ride, an appointment by the donee of an interest exceeding that intended to be given to the appointee is tantamount to an exercise of the power of appointment to the extent of the power.—*Grayson v. Germania Bank*, 79 S. E. 124.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRECEDENTS.

See Courts, §§ 89, 97.

PREJUDICE.

See Appeal and Error, §§ 1031-1078.

PRELIMINARY INJUNCTION.

See Injunction, §§ 132-157.

PREMIUMS.

See Insurance, §§ 137, 184-198, 349.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions; Nuisance, § 11.

PRESUMPTIONS.

See Appeal and Error, §§ 901-935; Criminal Law, §§ 308-325, 561, 1144; Evidence, §§ 63, 75.

PRINCIPAL AND AGENT.

See Attorney and Client; Bills and Notes, §§ 103, 426; Brokers; Corporations, §§ 284-331, 399-432; Factors; Frauds, Statute of, § 95; Husband and Wife, § 25; Insurance, § 378; Intoxicating Liquors, §§ 169, 224; Mechanics' Liens, § 71; Money Received; Partnership.

I. THE RELATION.

(A) Creation and Existence.

§ 21 (Ga.App.) While mere hearsay evidence of declarations of agency is inadmissible to establish agency, a person may testify that he acted as another's agent.—*Great Southern Accident & Fidelity Co. v. Guthrie*, 79 S. E. 162.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(A) Execution of Agency.

§ 78 (W.Va.) Evidence of an agent's acquiescence in the principal's statements of the account between them and of his failure to object to same, supplemented by evidence showing the existence of the relationship and course of business between them, held sufficient evidence of the agent's liability, in the absence of opposing evidence, to call for a verdict against him.—*Indiana & Ohio Live Stock Ins. Co. v. Bowman*, 79 S. E. 651.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 92 (N.C.) The acts of an agent within the authority given, either express or implied, as well as those acts within the scope of his apparent authority, are binding upon the principal.—*Latham v. Field*, 79 S. E. 865.

§ 103 (Ga.App.) Where an agent, authorized to sell corporate stock for cash only, took a note for stock sold, and attached the stock to the note, title to the stock did not pass to the purchaser, though he had no knowledge of the terms of the contract between the corporation and the agent.—*Great Southern Accident & Fidelity Co. v. Guthrie*, 79 S. E. 162.

Presumptively an agent can sell only for cash.—*Id.*

§ 103 (Ga.App.) Where an agent takes an order for personal property subject to the approval of his principal, no sale is completed until the principal approves the order, though the agent has accepted part payment of the price, unless such payment has been paid to, and accepted by, the principal with knowledge of the terms of the order.—*City Drug Co. v. American Soda Fountain Co.*, 79 S. E. 376.

§ 116 (Ga.App.) A cotton factor's agent authorized to solicit cotton shipments is presumptively authorized to make the terms under which the cotton shall be shipped, sold, and handled by his principal, and, under Civ. Code 1910, § 3595, this rule is not altered by any secret instructions to the agent by the principal.—*John Flannery Co. v. James*, 79 S. E. 912.

§ 119 (N.C.) Where a written contract for the sale of a piano declared that it contained the entire contract, and that no agent was authorized to alter it, defendant, claiming a parol agreement for a credit to be allowed for recommendation, made by the selling agent, held bound to prove the agent's authority to waive the provisions of the contract.—*Cable Piano Co. v. Strickland*, 79 S. E. 506.

§ 119 (S.C.) A principal who would escape liability for the acts of his agent done within the apparent scope of the agency on the ground that the agent's authority was limited has the burden of proving the limitation and notice thereof to the third party.—*Hiller v. Bank of Columbia*, 79 S. E. 899.

§ 131 (N.C.) A principal is as liable for damages from acts performed through an agent as if he had done them himself.—*Latham v. Field*, 79 S. E. 865.

(B) Undisclosed Agency.

§ 145 (W.Va.) To constitute one a "trader" within Code 1906, c. 100, § 13, providing that, if any person shall transact business as a trader, and fail to disclose the name of his principal, the principal's property shall be liable for the trader's debts, he must be both a buyer and a seller, or a barterer of goods, for profit.—*Cable Co. v. Mathers*, 79 S. E. 1079.

Where the person to whom pianos and organs are consigned by the owner, to be sold on commission, carries no goods for sale on his own account, he is not a trader within Code 1906, c.

100, § 13, providing that, if any person shall transact business as a trader, and fail to disclose the name of his principal, the principal shall be liable for the trader's debts.—Id.

That a consignee of goods to be sold on commission occasionally accepted new musical instruments in part payment for old ones held not to constitute him a "barterer" of goods so as to render the consigned property liable for his debts under Code 1906, c. 100, § 13.—Id.

A principal's property in the hands of his agent, who is not himself a trader, for sale on commission, is not liable for the agent's debts.—Id.

(F) Actions.

§ 184 (Ga.App.) Where money paid to an agent ought in equity to be returned, the owner of the money may sue either the agent, or the principal, or both, for money had and received.—Great Southern Accident & Fidelity Co. v. Guthrie, 79 S. E. 162.

Where an agent, authorized to sell corporate stock only for cash, without authority employed another agent, who made the sale, collected the proceeds, deducted a portion for his services, and remitted the balance to the first agent, who paid none of it to the corporation, the purchaser of the stock, upon the first agent's refusal to deliver the stock, was entitled to recover from him the amount he received, but not the sum retained by the second agent.—Id.

§ 193 (N.C.) In an action for breach of a contract for the sale of cotton, made through a third person, evidence on the question of the defendant's liability as principal held sufficient to go to the jury.—Latham v. Field, 79 S. E. 865.

PRINCIPAL AND SURETY.

See Appeal and Error, §§ 327, 914, 1089; Appearance, §§ 9, 25; Constitutional Law, § 306; Corporations, § 484; Costs, § 238; Evidence, §§ 165, 423; Guaranty; Indemnity; Recognizances; Taxation, § 545.

III. DISCHARGE OF SURETY.

§ 97 (Ga.App.) Under the express provisions of Civ. Code 1910, § 3543, a change in the terms of a contract without the consent of the surety discharges him, though the change inures to the benefit of both the principal and surety.—Little Rock Furniture Co. v. Jones & Co., 79 S. E. 375.

§ 100 (Ga.App.) That a building contract provided for changes in the structure to be erected did not authorize a change as to the method and amount of the payments without consent of the sureties on the contractor's bond.—Blackburn v. Morel, 79 S. E. 492.

§ 105 (Ga.App.) Where a new note is accepted by the payee or indorsee of a note in renewal of a note previously given, without the consent of a surety thereon, this amounts to a novation and discharges the surety.—E. Matthews & Son v. Richards, 79 S. E. 227.

§ 108 (Ga.App.) Mere indulgence or extension of time of payment of a note, granted to the maker without consideration, will not discharge a surety or indorser.—E. Matthews & Son v. Richards, 79 S. E. 227.

§ 114 (Ga.App.) Where a cropper, the principal on a note, delivered cotton to his landlord, the surety on the note, to sell and apply the proceeds in payment thereof, and where the payee induced the surety to apply the proceeds on the cropper's individual note by misrepresenting to him that he was in law bound on such note also, the surety was not released thereby, especially where he made no offer before suit to restore the status quo by returning the note paid.—Jones Bros. v. Watson, 79 S. E. 239.

§ 117 (Ga.App.) Where the owner of a building under construction made payments to the contractor in excess of the amount authorized by the contract, and failed to require affidavits provided for therein, the sureties on the con-

tractor's bond, as their liability could not be extended, were discharged, regardless of how the change in the contract affected them.—Blackburn v. Morel, 79 S. E. 492.

IV. REMEDIES OF CREDITORS.

§ 152 (W.Va.) A suit by a bank to enforce the obligation on its cashier's bond should be brought jointly against the surviving obligors and the personal representatives of the deceased obligors.—Clark v. Nickell, 79 S. E. 1020.

§ 156 (Ga.App.) In an action against the sureties on a bond, the court properly refused to strike a plea that defendants did not sign the bond as sued on, but that it had been changed after they signed it, so as to make it appear that the principal signed, not for himself, but as agent and next friend for two minors; such plea being in effect a denial of the contract sued on, and not being governed by the general rules governing the alteration of instruments, so that allegation of fraudulent alteration was not necessary.—Hobbs v. Taylor, 79 S. E. 356.

V. RIGHTS AND REMEDIES OF SURETY.

(B) As to Principal.

§ 177 (Ga.App.) The contract of a surety or accommodation indorser is executory until payment by the surety is actually made.—Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 79 S. E. 45.

§ 183 (Va.) A surety company cannot hold the estate of the principal debtor liable for loss sustained by a subsequent contractor who contracted to complete the building after the first contractor abandoned it, where the second contractor's loss under his contract was voluntarily paid by the surety company.—Tatterson v. Fidelity & Deposit Co. of Maryland, 79 S. E. 334.

(C) As to Co-Surety.

§ 199 (W.Va.) Evidence on a surety's motion under Code 1906, c. 101, § 5, for a judgment of contribution, held to support a judgment in his favor.—Selvey's Ex'rs v. Armstrong's Adm'r, 79 S. E. 1019.

Notice of a surety's motion, under Code 1906, c. 101, § 5, for a judgment of contribution against a cosurety, was sufficient where it described the note by naming the parties and recited payment of the judgment and costs, though it did not state the day or amount of the note.—Id.

On a surety's motion under Code 1906, c. 101, § 5, for a judgment of contribution, the judgment obtained against the sureties was properly admitted in evidence.—Id.

PRIORITIES.

See Chattel Mortgages, § 138.

PRISONS.

See Criminal Law, § 90.

PRIVATE NUISANCE.

See Nuisance, §§ 3-54.

PRIVILEGED COMMUNICATIONS.

See Witnesses, § 203.

PROCESS.

See Appeal and Error, §§ 914, 1074; Appearance; Arrest; Constitutional Law, § 309; Dismissal and Nonsuit, § 58; Divorce, § 157; Execution; Garnishment, § 191; Insurance, § 626; Judgment, § 668; Justices of the Peace, § 128; Possessory Warrant; Prohibition; Time, § 5.

II. SERVICE.**(A) Personal Service in General.**

§ 64 (Ga.App.) Where an officer having a summons for a husband and wife drove up to the front of their residence and told the husband that he had a paper to serve on him and his wife and handed same to him, there was not a sufficient service on the wife, where she testified that she did not hear the conversation, though she was ten feet from the husband; it further appearing that but one copy of the writ was handed to the husband.—*Ambrose v. Barber*, 79 S. E. 1135.

§ 67 (Ga.) The acknowledgment of service, entered after the appearance term, *held* not an acknowledgment that the petition and process had been legally served on defendant the requisite time before the appearance term.—*Bell v. Verdel*, 79 S. E. 849.

(D) Privileges and Exemptions.

§ 126 (N.C.) Service of process upon one attending court as a witness is not void but voidable and hence must be attacked by motion to set aside, the defendant appearing specially for the purpose of a motion; his remedy, in case the motion is overruled, being to except, answer, and appeal from the final judgment.—*Dell School v. Peirce*, 79 S. E. 687.

(E) Return and Proof of Service.

§ 148 (Ga.) It is not error to exclude testimony of an attorney that he directed service of process in another action to be made upon a corporation defendant in the pending suit, where the entry showed it to have been made upon an individual.—*Hodges v. Stuart Lumber Co.*, 79 S. E. 462.

§ 149 (Ga.App.) On the trial of a traverse to a return of personal service, proof of service by leaving a copy at the residence of defendant will not avail the plaintiff.—*Ambrose v. Barber*, 79 S. E. 1135.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 163 (Ga.App.) It was not error to permit process to be amended and thereafter order service to be perfected, returnable to a later term of the court; there being no time limit when amendments to writs shall be made.—*Atlantic Coast Line R. Co. v. Whitney*, 79 S. E. 181.

§ 164 (Ga.) The refusal of the court to permit one who, as sheriff, made service upon the defendant, a corporation, in a prior action, to amend his entry of service, which showed service upon an individual, was not erroneous, where it did not appear that he was still sheriff.—*Hodges v. Stuart Lumber Co.*, 79 S. E. 462.

PROHIBITION.**I. NATURE AND GROUNDS.**

§ 10 (Va.) Code 1904, § 437a, as amended by Acts 1910, c. 39, provides an exclusive remedy for the correction of an erroneous assessment of mineral lands, so that the circuit court had no jurisdiction of an application therefor by the state auditor of public accounts under Code 1904, § 573, and it would be restrained by a writ of prohibition.—*Grief v. Kegley*, 79 S. E. 1062.

§ 10 (W.Va.) Under Code 1906, c. 110, § 1, authorizing the writ of prohibition, when the inferior court "exceeds its legitimate powers," prohibition lies to prevent a trial court from entertaining a plea to an indictment which challenges the legality or sufficiency of the evidence on which it was found.—*Noll v. Dailey*, 79 S. E. 668.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

See Constitutional Law, §§ 251-309.

§ 9 (Ga.) Evidence that plaintiff was offered a certain sum for his alleged interest in an estate *held* incompetent to prove the fact of such interest.—*Hurt v. Barnes*, 79 S. E. 775.

PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 738-764; Trial, §§ 191-194.

PROVISOS.

See Statutes, § 207.

PROVOCATION.

See Homicide, § 295.

PROXIMATE CAUSE.

See Railroads, §§ 337, 389.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 260-544.

PUBLIC LANDS.

See War, § 29.

III. DISPOSAL OF LANDS OF THE STATES.

§ 186 (W. Va.) A general entry of land afterwards carried into survey and grant, and relied on as proof of an exception from another grant of land susceptible of inclusion by the description of the entry, but lying outside the lines of the entry and patent founded, may be construed as calling only for the land surveyed and granted.—*William James' Sons Co. v. Crouch*, 79 S. E. 815.

§ 186 (W. Va.) A decree of dismissal in a suit for the sale of lands as forfeited for the school fund, which was based on a report of the commissioner of school lands pursuant to the latter provision of Code 1906, c. 105, § 6, and actually dismissed lands from the cause, *held* not a mere retraxit, which could not be made over objection of a claimant of leave to redeem, but an adjudication, though it recited that it was entered on motion and by consent.—*State v. Reed*, 79 S. E. 939.

Where a new county is formed from the territory of a county in which a suit for the sale of forfeited school lands has been instituted, the commissioner of school lands of the new county may make the report of the suit which is contemplated by the latter provision of Code 1906, c. 105, § 6, providing for such report.—*Id.*

A hearing of the matters raised by the report of the commissioner, pursuant to Code 1906, c. 105, § 6, will not be delayed to enable a formal party to the cause, claiming the right to redeem, to contest same, where the matters are the same as those already presented, and as to which he has had ample time to present his case.—*Id.*

Where it appears by the report that certain forfeited lands involved in the suit have been granted by the state to another, and that there has been no subsequent forfeiture, the suit may properly be dismissed as to such lands.—*Id.*

PUBLIC NUISANCE.

See Nuisance, §§ 72, 75.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain, § 34.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, § 190.

PUNISHMENT.

See Criminal Law, §§ 13, 27, 1205-1208; Intoxicating Liquors, § 242.

PUNITIVE DAMAGES.

See Damages, §§ 91, 208.

QUANTUM MERUIT.

See Assumpsit, Action of.

QUARANTINE.

See Health, § 16.

QUASHING.

See Execution, §§ 167-177; Indictment and Information, § 137.

QUESTIONS OF LAW AND FACT.

See Trial, §§ 136-145.

QUIETING TITLE.

See Appeal and Error, § 1041; Evidence, §§ 314, 324.

I. RIGHT OF ACTION AND DEFENSES.

§ 7 (Ga.) A court of equity will cause to be delivered up and canceled a forged deed, which casts a cloud on the title of the true owner.—Echols v. Green, 79 S. E. 557.

§ 15 (S.C.) Where defendant in a suit to quiet title claimed under a deed to the common source, defendant could not take advantage of any defect in the execution of such deed.—Bethea v. Allen, 79 S. E. 639.

RAILROADS.

See Appeal and Error, §§ 1001, 1066; Carriers; Commerce, § 27; Covenants, §§ 119-135; Death, §§ 31, 75; Evidence, §§ 413, 441, 471; Executors and Administrators, §§ 122, 129; Master and Servant, §§ 114, 129, 150, 228, 246, 264, 270, 274, 278, 289; Negligence, § 141; Nuisance, § 11; Street Railroads; Trial, §§ 253, 255, 261, 296; Waters and Water Courses, § 126; Witnesses, § 369.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 68 (W.Va.) A railroad company's possession of a strip of land which it fenced and cared for without objection for a long period of time, and upon a part of which it maintained its tracks, held to constitute a practical construction of a deed which granted it such strip for a right of way without specifying the width, and to fix such width as coextensive with such possession, although the possession and acquisition could not have commenced with the date of the deed or the construction of the road.—Ashbaugh v. Chesapeake & O. Ry. Co., 79 S. E. 741.

The construction of a side track within an area to which a railroad company had acquired a right by possession and use without objection under a deed granting a strip of land for a right of way without fixing its width held not an enjoyment of the easement granted by the deed and defined by the conduct of the parties.—Id.

§ 72 (Ga.App.) Where a railroad company pursuant to a consolidation takes over the property of another company, which property is subject to a covenant running with the land, requiring the building of a side track and warehouse, and where it proceeds to operate and manage

same, it may be held liable in a suit for breach of the covenant, though the property is not formally transferred to it until after the commencement of the suit.—Reidsville & S. E. R. Co. v. Baxter, 79 S. E. 187.

A railroad company's contract to locate a station at a given point is not void per se, but is enforceable against the company, unless performance will render it impossible for the company to discharge its duties to the public.—Id.

The damages consequent upon the breach of a railroad company's covenant to construct a side track and erect a warehouse to be used as a depot, in consideration of a grant of a right of way, are not necessarily speculative, though resting upon the opinion of witnesses.—Id.

That a railroad company which, in consideration of the grant of a right of way, has covenanted to construct a side track and erect a warehouse at a certain point is unable for want of room to comply with its covenant, after laying its track in the center of the right of way according to custom, will not excuse a breach of such covenant, since the company could comply with the covenant by condemning additional land.—Id.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 94 (N.C.) A railroad, though operating under legislative franchise, is subject to all reasonable police regulations, and the acceptance of its charter is upon the implied condition that it will comply with all reasonable regulations of a town regarding the use of its streets.—State v. Atlantic & N. C. R. Co., 79 S. E. 447.

§ 95 (N.C.) An ordinance requiring railroads on a certain street to fill the ditches beside the tracks and maintain the right of way on a reasonable grade with the street is valid where, although the ditches are necessary for drainage, they can be covered or tiled at moderate expense.—State v. Atlantic & N. C. R. Co., 79 S. E. 447.

§ 103 (Ga.) Civ. Code 1910, § 2699, requires cattle guards for the protection of landowners whose lands are traversed by the railroad, and not for the protection of those whose lands merely abut upon the right of way.—Louisville & N. R. Co. v. Butler, 79 S. E. 776.

X. OPERATION.**(O) Companies and Persons Liable for Injuries.**

§ 258 (N.C.) Purchasers of a railroad from receivers are liable on equitable principles for injuries caused by the negligence of the receivers while operating the road.—Lassiter v. Norfolk Southern R. Co., 79 S. E. 264.

§ 260 (Va.) Where one coal company allows another to use its railroad yards, it owes no duty to a licensee on an engine of the other company to promulgate rules for the movement of engines in the yards.—Steele's Adm'r v. Colonial Coal & Coke Co., 79 S. E. 346.

(D) Injuries to Licensees or Trespassers in General.

§ 276 (Va.) The rule that one who takes passage on a freight train assumes the risk of such jerking and jarring as are incident to the operation of such trains applies more strongly to a licensee than to a passenger, for whose safety the carrier is held to the exercise of extraordinary care.—Steele's Adm'r v. Colonial Coal & Coke Co., 79 S. E. 346.

§ 282 (Va.) In an action for the death of a coal miner who was killed by being knocked from the platform of an engine, where he was riding for his own convenience, by the impact of an engine of the defendant company with a car coupled to the engine on which he was riding, evidence held insufficient to show any actionable negligence on the part of the employees of the defendant company.—Steele's

Adm'r v. Colonial Coal & Coke Co., 79 S. E. 346.

In an action for the death of one who was killed while riding upon an engine of one coal company in the yards of the defendant company, evidence *held* insufficient to show any proximate causal connection between the failure of the defendant company to promulgate rules for the movement of engines in its yards and the injury.—*Id.*

(F) *Accidents at Crossings.*

§ 301 (N.C.) Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross, but the traveler must yield the right of way to the railroad in the ordinary course of the latter's business.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

A railroad company and a traveler on a highway approaching a crossing are charged with a mutual duty of keeping a careful lookout for danger, and the degree of vigilance is in proportion to the known danger.—*Id.*

A greater degree of vigilance is required of a traveler approaching a railroad crossing than is required of employees of the company who are engaged in the performance of their duties.—*Id.*

§ 312 (N.C.) While a train has the right of way at a crossing, it is the duty of the engineer to give signals and exercise vigilance in approaching such crossings.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

The act of a railroad company in making a flying switch across a public highway in a populous town or village is gross and criminal negligence.—*Id.*

§ 317 (Ga.) Where a person riding on a two-horse wagon driven by another is, through no negligence of his own, injured at a crossing by a train running at a speed in excess of that prescribed by ordinance, he may recover against the railroad company for such injury.—*Georgia & F. Ry. v. Newton*, 79 S. E. 142.

§ 324 (N.C.) If a traveler fails to exercise the degree of care required of him when approaching a railroad crossing, it is such negligence as will bar his recovery, if it was the proximate cause of his injury.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

Where a traveler is deceived by appearances produced by the negligence of the railroad company in such a way and to such an extent that a man of ordinary prudence would not anticipate danger, the company cannot escape liability by imputing the blame to him.—*Id.*

§ 325 (Va.) A railway mail clerk in the discharge of his duties, while he is required to exercise ordinary care in using a defective door of the mail car, and cannot recover if he fails to do so, does not assume the risk of the defect, even though he knew of it and did not report it.—*Virginian Ry. Co. v. Bell*, 79 S. E. 396.

§ 326 (N.C.) If a traveler's view is obstructed or his hearing an approaching train is prevented, especially if through the fault of the railroad company, and the company's servants fail to warn him of the approach of a train, and he attempts to cross the track, having used his faculties as best he could under the circumstances, negligence will not be imputed to him.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

§ 327 (N.C.) Before attempting to cross the track, a traveler must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

The duty of a traveler to look and listen when approaching a railroad crossing is not always an absolute one, but may be qualified by attendant circumstances.—*Id.*

§ 334 (N.C.) A traveler who is without fault, or if his fault is excused by some act of the

company, or the company has the last clear chance to avoid the accident, when suddenly confronted by a peril, may adopt such means of extrication as are apparently necessary, and is held only to such measure of care as a man of ordinary prudence would exercise in the same circumstances.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

§ 337 (N.C.) The act of a railroad company in making a flying switch across a public highway, where no warning was given of the approach of the rear portion of the train and it was concealed behind cars upon a siding, *held* to have been the proximate cause of injuries to a boy attempting to cross the track.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

§ 347 (N.C.) Evidence of measurements of the width of certain cars, not shown to have been of the same width as those upon a siding at the time of an accident, *held* inadmissible to show that cars could not have been at the place claimed by plaintiff without being struck by a train on another track.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

§ 350 (N.C.) In an action for injuries to a 12 year old boy, who was injured, at a railroad crossing over a frequented street, by the rear portion of a train engaged in making a flying switch, and which was concealed by cars upon a siding, evidence *held* sufficient to take to the jury the question of the boy's exercise of due care.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

(G) *Injuries to Persons on or near Tracks.*

§ 358 (Va.) While a railroad company is entitled to a clear track and is not ordinarily liable for injuries to persons thereon, yet if it knows that persons are in the habit of using its track for a footpath it is bound to exercise reasonable care to prevent injury to such persons.—*Nesbit v. Webb*, 79 S. E. 330.

§ 359 (Ga.App.) The only duty a railroad company owes to the driver of an automobile who crosses the track elsewhere than at a public crossing is to refrain from wanton injury and to use ordinary care to prevent injury.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

§ 362 (N.C.) Under Laws 1909, c. 446, requiring railroad locomotives to carry an electric headlight at night, the failure to do so is unlawful, and constitutes negligence per se.—*Shepherd v. North Carolina E. Co.*, 79 S. E. 968.

§ 369 (Ga.App.) The failure to comply with the statutory requirements as to signals and checking the train on approaching a highway crossing does not constitute negligence, for which recovery may be had by a person not upon or approaching a public crossing.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

§ 387 (Ga.App.) A railroad company is not liable for injuries caused by the running of a railroad train, if the person injured could have avoided the consequences of the company's negligence.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

§ 389 (Ga.App.) Failure to give the statutory signals required upon approaching a public crossing is not the proximate cause of an injury to a person not at the crossing, and who was aware of the approach of the train.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

A railroad company is not liable for injuries caused by an unavoidable accident.—*Id.*

§ 394 (Ga.App.) Where the petition in an action for injuries on a track alleges that defendant's agents knew of a custom to use a portion of the track as a passway, and that the place where the accident occurred was so used with permission of defendant's officers, it need not allege the names of such agents and officers.

—Atlantic Coast Line R. Co. v. Whitney, 79 S. E. 181.

§ 395 (Ga.App.) Where a railroad company defends on the ground that plaintiff was at fault equally with, or more, than itself, or that plaintiff could by the exercise of ordinary care have avoided the consequences of the negligence, or that the injury was due to unavoidable accident, it was entitled to recover on proof of any one of such defenses.—Central of Georgia Ry. Co. v. McKey, 79 S. E. 378.

§ 396 (Ga.App.) Where it appears that an injury has been caused by the running of a railroad train, the burden is upon the company to prove that it exercised all ordinary and reasonable care.—Central of Georgia Ry. Co. v. McKey, 79 S. E. 378.

§ 400 (Ga.App.) It is for the jury to determine whether it is want of ordinary care for a licensee to step on a railroad track without looking for the approach of a train.—Southern Ry. Co. v. Lofton, 79 S. E. 37.

The question of defendant's negligence was for the jury, where the petition alleged that plaintiff's decedent, while a licensee on a track, was struck by a train running at an unlawful speed without signals, and when the engineer, if he had kept a proper lookout, could have stopped the train before reaching the point where decedent was struck.—Id.

§ 400 (Ga.App.) Where it was undisputed that the driver of an automobile saw a train approaching at some distance, the court should instruct that the failure to ring the bell and blow the whistle was not negligence for which the plaintiff could recover.—Central of Georgia Ry. Co. v. McKey, 79 S. E. 378.

§ 400 (Ga.App.) Where, in an action against a railroad company for the death of plaintiff's minor son, plaintiff produces evidence sufficient to raise the statutory presumption of negligence, and defendant fails to rebut the presumption by evidence of probative weight, it is error to direct a verdict for defendant, under Civ. Code 1910, § 5928.—Eubanks v. Central of Georgia Ry. Co., 79 S. E. 488.

§ 400 (N.C.) In action for death of person struck and killed by a freight train while crossing track some distance from a highway crossing blocked by a train, evidence as to defendant's negligence *held* to make a question for the jury.—Shepherd v. North Carolina R. Co., 79 S. E. 968.

(H) Injuries to Animals on or near Tracks.

§ 419 (Ga.App.) Damages are not recoverable for the negligent killing of a dog by a train, there being no evidence that it was caused by the wanton or malicious act of the agents of the railroad.—Western & A. R. Co. v. Swanson, 79 S. E. 77.

§ 419 (N.C.) A railroad company was negligent in failing to sound the alarm whistle when turkeys were on the track which were seen, or should have been seen, by the engineer in time to sound the whistle.—Lewis v. Norfolk Southern R. Co., 79 S. E. 283.

§ 441 (Ga.App.) The statutory presumption of negligence, arising on proof that cattle were killed by a locomotive of defendant, not having been rebutted by the evidence, a verdict based on such presumption was authorized by law.—Georgia & F. Ry. Co. v. Norman, 79 S. E. 86.

§ 441 (Ga.App.) The presumption of negligence which arises from the killing of live stock by a railroad company extends only to the acts of negligence alleged in plaintiff's pleadings.—South Georgia Ry. Co. v. Atkins, 79 S. E. 226.

§ 446 (N.C.) Evidence, in an action against a railroad company for running over and killing turkeys, *held* sufficient to take to the jury the question whether defendant's failure to sound the alarm whistle was the proximate cause of the injury.—Lewis v. Norfolk Southern R. Co., 79 S. E. 283.

§ 446 (W.Va.) In an action to recover for injuries to plaintiff's horse on defendant's track, demurrer to evidence *held* rightly sustained.—Bower v. Virginian Ry. Co., 79 S. E. 727.

(I) Fires.

§ 454 (W.Va.) To relieve from liability for fire caused by sparks from a locomotive, it is not essential that the locomotive be equipped with the best and most approved spark arrester, but only that it have an approved and reasonably safe one.—Mills v. Norfolk & W. Ry. Co., 79 S. E. 1090.

§ 480 (W.Va.) The presumption of negligence arising from proof that the fire was started by sparks from a locomotive can only be repelled by proof that the locomotive was equipped and operated in a reasonably safe way, and not by proof alone that it was equipped with a proper spark arrester.—Mills v. Norfolk & W. Ry. Co., 79 S. E. 1090.

§ 485 (W.Va.) In an action for damages from fire started by sparks from a locomotive, it was error to instruct that the presumption of negligence which arises from proof that the fire so started may be repelled by proof that the locomotive was equipped with an approved spark arrester.—Mills v. Norfolk & W. Ry. Co., 79 S. E. 1090.

RAPE.

See Criminal Law, § 762.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 12 (Ga.App.) Sexual intercourse with a woman incapable of consenting is rape, though she makes no resistance, but the mere fact that a woman is weak-minded does not disable her from giving consent.—Morrow v. State, 79 S. E. 63.

Under Pen. Code 1910, § 34, a female under 10 years of age cannot consent to sexual intercourse, and, under section 33, incapacity to consent is presumed between the ages of 10 and 14, but, after the age 14 she is presumptively able to consent.—Id.

The test of capacity to consent to sexual intercourse after the age of 14 is mental capacity to understand the sexual act and give intelligent assent.—Id.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

§ 43 (Ga.App.) In a prosecution for assault with intent to rape a female who was more than 14 years old, evidence of her want of physical development was competent only to illustrate her mental capacity.—Morrow v. State, 79 S. E. 63.

§ 53 (Ga.App.) Evidence *held* insufficient to show that the female made such resistance as indicated that the sexual intercourse attempted by defendant was against her will; and hence the offense at most was an attempt to commit fornication.—Morrow v. State, 79 S. E. 63.

Evidence, in a prosecution for assault with intent to rape a female over 14 years old, *held* insufficient to show mental incapacity to consent to the sexual act.—Id.

RATE.

See Carriers, §§ 32, 36; Telegraphs and Telephones, §§ 28, 33.

RATIFICATION.

See Banks and Banking, § 154; Bills and Notes, § 123.

REAL ACTIONS.

See Ejectment; Partition; Quieting Title.

REBATES.

See Insurance, § 184.

RECEIPTS.

See Corporations, § 90.

RECEIVERS.

See Appeal and Error, § 1043; Corporations, §§ 90, 556-559; Courts, § 489; Divorce, § 206; Mortgages, § 468; Partition, § 53; Railroads, § 258; Warehousemen, § 84.

III. TITLE TO AND POSSESSION OF PROPERTY.

§ 71 (N.C.) A receiver's possession is that of the court, taken for the purpose of securing the thing in controversy, so that it may be subject to such disposition as the court may finally direct.—Gobbie v. Orrell, 79 S. E. 957.

§ 77 (Ga.) Where a receiver was a mere bailee as to property in his possession, equity would restore possession to the intervener, who proved a title superior, to all others, except a conditional seller, who had the legal title until the balance of the price was paid by intervener.—Penton v. Hall, 79 S. E. 465.

RECEIVING STOLEN GOODS.

§ 3 (Ga.App.) Where, in a prosecution for receiving stolen goods, there was no evidence that defendant knew the goods received by him were stolen, a verdict of guilty was unauthorized, though defendant admitted receiving the goods.—Stewart v. State, 79 S. E. 225.

RECEPTION OF EVIDENCE.

See Criminal Law, §§ 665-683; Trial, §§ 48-89.

RECITALS.

See Taxation, § 788.

RECOGNIZANCES.

See Appeal and Error, § 914; Appearance, § 9; Bail, § 76.

§ 1 (N.C.) A recognizance is a debt of record acknowledged before a court of competent jurisdiction, binding accused to appear and answer either a specified charge or to such matters as may be objected, to abide the judgment of the court, and not to depart without leave of court.—State v. White, 79 S. E. 297.

RECORDS.

See Appeal and Error, §§ 499-690, 1052; Bailment, § 18; Criminal Law, §§ 400, 1092-1122; Divorce, § 184; Elections; Logs and Logging, § 28; Vendor and Purchaser, §§ 233, 235; Wills, §§ 53, 246, 261.

§ 10 (Ga.App.) The filing for record of an instrument executed by an agent on behalf of a corporation under its corporate seal, when such instrument is recordable, constitutes notice to third persons, from the time of filing for record, of the presumptive power of the agent to execute it, though it is so defectively recorded by the clerk as to indicate that it was not an instrument under seal.—Blakely Artesian Ice Co. v. Clarke, 79 S. E. 526.

REFERENCE.

See Appeal and Error, § 1022.

III. REPORT AND FINDINGS.

§ 99 (Ga.) The action was equitable in character, the evidence was sufficient to authorize the finding of the auditor in favor of the plaintiff, and the ruling of the presiding judge in

overruling the exceptions thereto was not error.—Coward v. Singletary, 79 S. E. 196.

§ 100 (S.C.) An exception to a referee's report, alleging error in allowing plaintiff a certain sum, on the ground that so much was not due, was too general and insufficient to raise the question whether a particular note should have been allowed in the amount found to be due plaintiff.—Simpson v. Cox, 79 S. E. 102.

§ 101 (Ga.) Where the issues of fact in equity were found for plaintiff by a jury on a former trial, and by the auditor on remand, and where the auditor's finding was approved by the judge, a motion for re-reference was properly overruled.—Coward v. Singletary, 79 S. E. 196.

§ 101 (S.C.) The granting of a motion to recommit to a referee to take further proof is a matter for the trial court's discretion.—Farmers' Bank & Trust Co. v. Southern Granite Co., 79 S. E. 985.

REFORMATION OF INSTRUMENTS.**I. RIGHT OF ACTION AND DEFENSES.**

§ 19 (N.C.) Where there has been a mutual mistake in the execution of a contract or a mistake of one of the parties brought about by the fraud of the other, equity will grant reformation but not for misapprehension of one of the parties as to any facts.—Wilson v. Scarborough, 79 S. E. 811.

II. PROCEEDINGS AND RELIEF.

§ 45 (N.C.) Where relief is sought on the ground of mistake or mistake by one party and fraud of the other, the evidence must be clear and convincing and evidence dehors the deed and inconsistent with it must be shown.—Lamm v. Lamm, 79 S. E. 290.

In suit by the children of a deceased husband against the widow by a second marriage for relief against a deed executed to defendant by a third person, the consideration for which was paid by decedent, on the ground that the deed was made to her as a result of her fraud and undue influence, plaintiffs held required to establish the issue only by the greater weight of the evidence.—Id.

§ 45 (N.C.) In an action where it was sought to reform a timber deed on the ground of mistake, evidence held insufficient to show any mutual mistake.—Dameron v. Rowland Lumber Co., 79 S. E. 607.

REGISTRATION.

See Elections; Records.

REHEARING.

See Appeal and Error, § 833; New Trial.

RELEASE.

See Bankruptcy, § 426; Bills and Notes, § 93; Chattel Mortgages, § 138; Liens; Principal and Surety, §§ 97-117.

RELEVANCY.

See Evidence, §§ 121-142.

REMAINDERS.

See Curtesy, § 9; Deeds, §§ 132, 133; Infants, § 31; Wills, §§ 614, 634.

§ 16 (N.C.) Where land was limited to plaintiff for life, remainder to the heirs of his body, with a remainder over on death without issue, it may, under Revisal 1905, § 1590, be sold for reinvestment in a proceeding in which the contingent remaindermen are parties and any heirs of plaintiff's body now in esse, as well as those who may be born, are represented by a guardian ad litem.—O'Hagan v. Johnson, 79 S. E. 450.

RENT.

See Landlord and Tenant, §§ 112, 196-270, 308.

REPAIRS.

See Landlord and Tenant, §§ 150, 167; Municipal Corporations, § 759.

REPEAL.

See Statutes, § 159.

REPLEVIN.

See Attachment, §§ 192, 339.

REPLICATION.

See Equity, § 208; Pleading, § 165.

REPLY.

See Equity, § 208; Pleading, § 165.

REPORT.

See Drains, § 14; Reference, § 100.

REPRESENTATIONS.

See Fraud; Insurance, §§ 253-299.

REPUTATION.

See Disorderly House, § 17.

REQUESTS.

See Criminal Law, §§ 824-829; Trial, §§ 255-267.

RESCISSION.

See Vendor and Purchaser, §§ 95, 120.

RESERVATIONS.

See Deeds, § 138.

RES GESTÆ.

See Evidence, §§ 121, 122.

RES JUDICATA.

See Judgment, §§ 585-743, 948, 956.

RESULTING TRUSTS.

See Trusts, §§ 72, 77.

RETROSPECTIVE LAWS.

See Constitutional Law, § 203.

REVENUE.

See Taxation.

REVERSAL.

See Appeal and Error, §§ 1188, 1170-1180; Courts, §§ 89, 90.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1184-1179.

REVOCATION.

See Executors and Administrators, § 35; Wills, § 194.

RIGHT OF WAY.

See Easements, § 44; Railroads, §§ 68, 72.

RISK.

Assumption of, see Master and Servant, §§ 204, 206; Negligence, § 1.

ROADS.

See Highways.

RULE IN SHELLEY'S CASE.

See Deeds, § 128; Estates.

SABBATH.

See Sunday.

SAFE PLACE TO WORK.

See Master and Servant, §§ 107-129.

SALES.

See Agriculture, § 7; Bills and Notes, §§ 330-367; Chattel Mortgages, §§ 6, 285; Constitutional Law, § 278; Criminal Law, § 88; Customs and Usages, § 10; Evidence, §§ 142, 178; Execution, §§ 219-258; Executors and Administrators, § 402; Frauds, Statute of, § 95; Gaming, §§ 12, 49; Husband and Wife, §§ 185, 187, 198; Intoxicating Liquors, § 132; Judgment, § 785; Judicial Sales; Logs and Logging; Mines and Minerals, § 55; Partnership, § 199; Pleading, § 93; Principal and Agent, §§ 103, 193; Trial, §§ 252, 295, 350; Vendor and Purchaser; Warehousemen, §§ 22, 34.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 1 (W.Va.) A contract for the sale of drug store fixtures *held* sufficiently definite in the description of the fixtures.—Bernard Gloekler Co. v. Carr, 79 S. E. 732.

§ 23 (W.Va.) An acceptance of an offer to buy store fixtures *held* a binding contract not revocable by the buyer, though it provided that complete plans, specifications, and details were to be submitted and approved by him.—Bernard Gloekler Co. v. Carr, 79 S. E. 732.

IV. PERFORMANCE OF CONTRACT.
(C) *Delivery and Acceptance of Goods.*

§ 161 (Ga.App.) The execution of a bill of lading is not essential to a valid shipment contract, or necessary to constitute such delivery to a common carrier as will be equivalent to delivery to the consignee.—City of Bainbridge v. Smith, 79 S. E. 1130.

§ 176 (Ga.) In an action for the price of cross-ties delivered under a contract calling for an inspection at delivery, an instruction that if the buyer had an opportunity to inspect them, and then discovered that they were not up to specifications, it was his duty to notify the seller of that fact, was proper.—Ellard v. Smith, 79 S. E. 459.

§ 177 (W.Va.) A buyer's refusal to take drug store fixtures in conformity with the contract under which he had bought them was a breach thereof.—Bernard Gloekler Co. v. Carr, 79 S. E. 732.

V. OPERATION AND EFFECT.**(A) Transfer of Title as Between Parties.**

§ 202 (Ga.App.) Where personal property is sold for cash, title does not pass until the purchase money is paid.—Bowen v. De Loach, 79 S. E. 371.

Where an absolute sale was made for cash, but the seller received only a small part of the purchase money, his failure to return the same did not operate to pass to the purchaser a title which he could transfer to a third person, but merely gave the purchaser a right to complete the sale and obtain title by payment of the balance due.—Id.

VI. WARRANTIES.

§ 272 (N.C.) A sale of goods by a manufacturer for resale imports an implied warranty that

the goods are merchantable.—*Dr. Shoop Family Medicine Co. v. Davenport*, 79 S. E. 602.

§ 273 (Ga.App.) Where an article is ordered by a name importing no particular quality, and proves unsuited to the use intended, and for which the seller represented it to be suitable, the buyer is not bound for the purchase price, unless at the time of the purchase he knew the real quality of the article.—*Kerr Glass Mfg. Co. v. Americus Grocery Co.*, 79 S. E. 381.

§ 284 (N.C.) A buyer may return goods, if they are unsalable and worthless, for breach of an implied warranty of merchantability.—*Dr. Shoop Family Medicine Co. v. Davenport*, 79 S. E. 602.

§ 287 (N.C.) Where a seller accepted a return of a part of goods sold for alleged breach of warranty of merchantability, it could not recover a balance of the contract price.—*Dr. Shoop Family Medicine Co. v. Davenport*, 79 S. E. 602.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

§ 347 (Ga.App.) In a seller's action for the price of a shipment of goods, evidence that the goods had actually been delivered to the defendant buyer by the carrier at destination authorized a judgment for plaintiff, regardless of whether a valid agreement was made to release defendant and look alone to the carrier for the value of the goods.—*Rogers-McRorie Co. v. Robeson Cutlery Co.*, 79 S. E. 374.

§ 358 (Va.) In an action on certain notes given for part of the price of a sawmill outfit, a letter written by plaintiffs to defendants held to show on its face that it related to the matter in controversy and was therefore relevant and admissible.—*Davis v. Cole Bros.*, 79 S. E. 1033.

Whether defendants did not send plaintiffs a note purporting to have been executed by defendants' grandfather as collateral security and whether plaintiffs had not returned the same stating that the maker had repudiated the signature and pronounced the note forged were proper subjects of inquiry.—*Id.*

A question asked one of the plaintiffs as to his knowledge concerning whether defendant D. sold to his codefendants any timber held admissible.—*Id.*

§ 363 (Ga.App.) Where the contract sued on was unambiguous, and defendant admitted that he had not complied with its terms, which authorized him to return unsold goods, and where the evidence showed no excuse for such non-compliance, the court properly directed a verdict for plaintiff for the amount sued for.—*Joseph Dry Goods Co. v. Home Pattern Co.*, 79 S. E. 356.

§ 363 (Ga.App.) Where, in an action on a note for the price of a gin outfit, under a contract obligating plaintiff to superintend putting it in place, defendant relied on failure of the machine to work satisfactorily, and the evidence showed that such failure was due to the misplacement of two pulleys, but did not show whether such misplacement was the fault of plaintiff or of defendant, it was error to direct a verdict for plaintiff.—*McDuffie v. Lummus Cotton Gin Co.*, 79 S. E. 493.

§ 364 (Ga.App.) A charge that the buyer may rescind for fraud where he moves with "reasonable promptness," and that restitution of the goods is unnecessary where they are worthless, is in substantial accord with Civ. Code 1910, § 4306.—*Kerr Glass Mfg. Co. v. Americus Grocery Co.*, 79 S. E. 381.

(F) Actions for Damages.

§ 370 (Ga.App.) Where goods are sold for future delivery and prior to the time for delivery the purchaser notifies the seller that he will not take and pay for the goods, the seller may treat

the contract as rescinded and sue for damages sustained up to the time of the repudiation of the contract.—*American Mfg. Co. v. Champion Mfg. Co.*, 79 S. E. 485.

§ 381 (N.C.) Where, in a seller's action for the breach of a contract of sale, the defense was that the contract was procured by fraudulent representations of plaintiff's agent, the burden was on defendant to prove that they were induced to contract by such representations, that in consequence thereof they declined to perform, that they were calculated to deceive and did deceive, and that defendants lost something thereby.—*White Sewing Machine Co. v. I. W. Bullock & Co.*, 79 S. E. 1107.

VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

§ 392 (Ga.App.) Where a buyer of goods to be manufactured repudiates the contract, and the seller fails or refuses to manufacture the goods for delivery at the time fixed in the contract, the seller's only remedy is an action for damages for breach of the contract, and he cannot sue for the price or for the contract price less the cost of manufacture.—*American Mfg. Co. v. Champion Mfg. Co.*, 79 S. E. 485.

Where a buyer of goods to be manufactured repudiates the contract before time for delivery, the seller in order to recover the price, or the price less the cost of manufacture, must manufacture and have available for delivery the entire quantity of the articles contracted for.—*Id.*

§ 398 (Ga.) In an action for the price of cross-ties of specific dimensions, an instruction that, if the ties were reasonably within the specifications, it was the duty of the buyer to accept them, and that he was liable for the whole contract price, held erroneous.—*Ellard v. Smith*, 79 S. E. 459.

(D) Actions and Counterclaims for Breach of Warranty.

§ 428 (Ga.App.) In an action for the price of trees sold, the defendant could set off his damages from being compelled to pay notes in the hands of innocent purchasers, given by defendant for trees previously bought, but not as warranted, though the notes were paid after discovery of the breach.—*Gillespie v. Bacon Pecan Co.*, 79 S. E. 212.

§ 435 (Ga.App.) Where the answer in an action for trees sold set up damages from being compelled to pay notes in the hands of an innocent purchaser before maturity, given to plaintiff for trees previously purchased and not as warranted, but failed to state when the notes were given, or to whom they were transferred, or to state facts from which it could be determined whether the holder was an innocent purchaser, such answer was demurrable.—*Gillespie v. Bacon Pecan Co.*, 79 S. E. 212.

§ 437 (Ga.App.) Where the defendant in an action for breach of a contract of warranty of an automobile admitted the "execution" of the contract, this was an admission of the doing of all acts necessary to carry its purpose into effect, and plaintiff was only required to prove breach and damages.—*Hall v. Studebaker Corporation of America*, 79 S. E. 750.

§ 445 (Ga.App.) In an action for breach of a contract of warranty of an automobile, held, that it was error to grant a nonsuit.—*Hall v. Studebaker Corporation of America*, 79 S. E. 750.

IX. CONDITIONAL SALES.

§ 467 (Ga.App.) Where a note given for the price of a horse reserves to the seller title to the property until paid for, loss by death without fault of the buyer will fall on the seller, in the absence of a stipulation to the contrary, given under Civ. Code, 1910, § 4123.—*McKinney v. Battle Bros.*, 79 S. E. 92.

In a contract of sale with reservation of title,

a stipulation that the seller does not insure the health, life, or work of the horse, but, "in case of loss or damage to said property, the same shall be the loss of the buyers," includes loss by death.—Id.

§ 472 (Ga.) Where plaintiff sold certain mules for cash and for notes, reserving title in the mules until the notes were paid, and the purchaser took the notes for execution before a notary, receiving at the same time the mules, and returned the notes officially attested the next day to the seller, who recorded them within 30 days, as provided by Civ. Code 1910, §§ 3318, 3319, 3257, and after delivery of the mules and pending execution of the notes the purchaser sold them to defendant, the latter acquired no title as against plaintiff.—*Rowe v. Spencer*, 79 S. E. 144.

§ 472 (Ga.App.) Under Civ. Code 1910, § 3318, 3319, a written contract of conditional sale, duly attested and recorded within 30 days from the date of delivery of the property, becomes effective against third persons from such date, though the date of the execution of the contract does not appear therein.—*Alexander v. Patterson*, 79 S. E. 482.

§ 484 (Ga.App.) Where accused purchased personality on credit, and a third person paid the vendor, who executed a bill of sale to him as security for the debt, a subsequent sale of the property by the debtor without the consent of such person is not a violation of Pen. Code 1910, § 722, forbidding the sale of property conditionally purchased.—*Shirley v. State*, 79 S. E. 752.

SATISFACTION.

See Accord and Satisfaction; Payment.

SCHOOLS AND SCHOOL DISTRICTS.

See Constitutional Law, § 63; Statutes, §§ 76, 219.

II. PUBLIC SCHOOLS.

(A) Establishment, School Lands and Funds, and Regulation in General.

§ 19 (N.C.) Under Revisal 1905, § 4116, as amended by Pub. Laws 1913, c. 149, and section 4124, graded school district under control of graded school commissioners held entitled to share in the fund for building schoolhouses reserved by the county board of education from the county school fund.—*Board of Graded School Com'rs of City of Winston v. Board of Education of Forsyth County*, 79 S. E. 886.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 41 (S.C.) Act Feb. 19, 1913 (28 St. at Large, p. 355), amending Act Jan. 5, 1895 (21 St. at Large, p. 921), by enlarging the Anderson school district, does not violate Const. art. 11, § 5, requiring a new district embracing the territory of an old district to bear its just proportion of any tax for the liquidation of the bonds of the old district.—*Burris v. Brock*, 79 S. E. 193.

(E) District Debt, Securities, and Taxation.

§ 97 (S.C.) Act Feb. 19, 1913 (28 St. at Large, p. 355), amending Act Jan. 5, 1895 (21 St. at Large, p. 921), by enlarging the Anderson school district, and authorizing the trustees thereof to hold an election on the question of issuing bonds, without a petition of a majority of freeholders, does not violate Const. art. 2, § 13, making such petition a condition precedent to the holding of such election in incorporated cities.—*Burris v. Brock*, 79 S. E. 193.

There is no provision in the Constitution requiring a petition of freeholders as a condition precedent to an election on the question of issuing bonds of a school district.—Id.

Act Feb. 19, 1913 (28 St. at Large, p. 355),

authorizing the trustees of Anderson school district to hold an election on the question of issuing bonds and not requiring a petition of freeholders as a condition precedent, is inconsistent with and impliedly repeals Civ. Code 1912, § 1743, requiring such a petition.—Id.

No law, constitutional or statutory, requires more than one voting place for an election such as is provided by Act Feb. 19, 1913 (28 St. at Large, p. 355), authorizing the trustees of a school district to hold an election on the question of issuing bonds.—Id.

§ 103 (Ga.) Where a school district tax collection had been held pursuant to Civ. Code 1910, § 1535, which was enacted pursuant to Const., art. 8, § 4 (Civ. Code 1910, § 6579), and the requisite two-thirds vote obtained, the ordinary should declare the result, and thereafter a tax will be levied as provided for by Civ. Code 1910, § 1537.—*Connally v. Morrison*, 79 S. E. 119.

Where the law for levying a school tax for supplementing the funds in a school district has been put into effect by an election in a district, as provided for by Civ. Code 1910, § 1535, it will continue until changed by law.—Id.

Where the law for levying a school tax for supplementing the funds in a school district has been put in effect as provided by Civ. Code 1910, § 1535, a subsequent election under section 1536, at which 60 votes favor local taxation and 84 opposed it, did not repeal the law in so far as it related to that district, and an application to enjoin the tax levy was properly refused.—Id.

SCIENCE.

See Evidence, § 363.

SCIRE FACIAS.

See Injunction, § 27.

SEALS.

See Habeas Corpus, § 85.

SECONDARY EVIDENCE.

See Criminal Law, § 400; Evidence, §§ 157-187.

SEIZURE.

See Execution, § 129.

SELF-DEFENSE.

See Homicide, §§ 118, 300.

SELF-SERVING DECLARATIONS.

See Evidence, § 271.

SENTENCE.

See Criminal Law, § 1205.

SEPARATE ESTATE.

See Husband and Wife, §§ 129-201.

SERVANTS.

See Master and Servant.

SERVICE.

See Pleading, § 336; Process.

SET-OFF AND COUNTERCLAIM.

See Appeal and Error, § 1050; Banks and Banking, § 154; Chattel Mortgages, § 172; Courts, § 188; Landlord and Tenant, § 270; Parent and Child, § 6; Sales, 423.

II. SUBJECT-MATTER.

§ 33 (Ga.App.) Under the express provisions of Civ. Code 1910, § 5521, the statutory right of set-off is restricted to demands or claims of a similar nature, and a claim arising ex con-

tractu cannot be set off against one arising ex delicto.—*McArthur v. Wilson*, 79 S. E. 374.

A debt claimed by defendant against plaintiff cannot be set up as a defense in trover to recover possession of personal property.—*Id.*

§ 44 (Ga.App.) In an action by a partnership for the price of partnership property sold by one partner, defendant could not plead as a defense a set-off based on a contract made with one partner solely in his individual capacity.—*F. T. Hardy & Co. v. Jones Bros.*, 79 S. E. 246.

SETTING ASIDE.

See Judgment, §§ 138-167; Wills, § 355.

SETTLEMENT.

See Accord and Satisfaction; Compromise and Settlement; Partnership, §§ 303-344; Payment.

SEVERANCE.

See Criminal Law, § 622; Tenancy in Common, § 8.

SEWAGE.

See Eminent Domain, § 2.

SEWERS.

See Drains; Municipal Corporations, §§ 839, 845.

SHADE TREES.

See Municipal Corporations, §§ 663, 678, 680, 681.

SHELLEY'S CASE.

See Deeds, § 128; Estates.

SHERIFFS AND CONSTABLES.

See Criminal Law, §§ 850, 929; Evidence, § 178; Execution, §§ 2, 207, 210, 219, 221; False Imprisonment, § 7; Taxation, § 746.

SIDE TRACKS.

See Railroads, § 68.

SIGNALS.

See Railroads, §§ 312, 337, 369, 389, 419, 446.

SIGNATURES.

See Habeas Corpus, § 85; Husband and Wife, § 187; Principal and Surety, § 156; Wills, §§ 120, 123.

SOCIETIES.

See Intoxicating Liquors, § 146.

SPECIAL LAWS.

See Statutes, §§ 76, 90.

SPECIAL STATUTES.

See Statutes, § 246.

SPECIFIC PERFORMANCE.

See Trial, §§ 252, 373.

II. CONTRACTS ENFORCEABLE.

§ 28 (N.C.) A stipulation in an agreement to convey land in consideration of marriage, that plaintiff should be good and kind to defendant's daughter, *held* not to render the agreement indefinite, uncertain, or unenforceable.—*Winslow v. White*, 79 S. E. 258.

§ 44 (Ga.) Under Civ. Code 1910, § 4634, specific performance of a parol contract as to land will not be decreed on account of partial payment, unless such partial payment is ac-

companied with possession of the land by the party making it, or there be possession of the land with valuable improvements.—*Hall v. Edwards*, 79 S. E. 852.

§ 53 (Va.) Specific performance of a contract for the sale of realty will not be denied on the ground that the agent whom plaintiff had engaged to sell the property had wrongfully acted as agent for both parties, where the agent merely transmitted complainant's offer to defendant.—*Croghan v. Worthington Hardware Co.*, 79 S. E. 1039.

§ 59 (N.C.) A stipulation in an agreement to convey land in consideration of marriage, that plaintiff should be good and kind to defendant's daughter, *held* not to constitute a condition precedent covering the entire period of married life, preventing enforcement, but was only a condition subsequent.—*Winslow v. White*, 79 S. E. 258.

§ 65 (Va.) Where no fraud or imposition was practiced on a vendor of land and the contract was fairly entered into, the purchaser is entitled to specific performance.—*Croghan v. Worthington Hardware Co.*, 79 S. E. 1039.

§ 73 (Ga.) Specific performance of a contract for personal services which are material and mechanical in character will not ordinarily be enforced; the rule stated in Civ. Code 1910, § 4633, that specific performance will be decreed whenever the damages recoverable at law will not be adequate, not being without exception.—*Greer v. Pope*, 79 S. E. 846.

The specific performance of contracts for personal services involving the exercise of skill, judgment, and discretion, continuous in their character, and running for 99 years, will not be enforced.—*Id.*

IV. PROCEEDINGS AND RELIEF.

§ 121 (Ga.) To entitle a plaintiff to specific performance of a parol contract for the sale of land, the contract must be established to a reasonable certainty.—*Coffey v. Cobb*, 79 S. E. 568.

Evidence, in an action for specific performance, *held* insufficient to show that payments were made as alleged, or that valuable improvements were erected with reference to the alleged contract.—*Id.*

§ 121 (Va.) Evidence, in specific performance of an agreement to sell complainant a tract containing an orchard, *held* to show that the option to purchase contemplated that complainant pay the costs of labor performed on the orchard while the option was in force, and that he never offered to pay such costs and had no intention of doing so.—*Triplett v. Gudebrod*, 79 S. E. 1045.

§ 123 (Ga.) Where, in an action on a covenant in a 99-year lease of a portion of a telephone system, which bound the lessees to furnish free service to the lessors, there was evidence that the lessees had sold the entire system and placed it beyond their power to carry out the covenant, and that those purchasing from them refused to do so, the question whether the lessees were liable in damages in lieu of specific performance was for the jury.—*Greer v. Pope*, 79 S. E. 846.

§ 128 (Va.) Where complainant was not entitled to specific performance, and could obtain adequate relief at law, equity would not retain jurisdiction to award the value of complainant's improvements, less the rental value of the land.—*Branham v. Artrip*, 79 S. E. 390.

Code 1904, § 2760, authorizing allowance for improvements in ejectment and in cases in which there is a decree or judgment against a defendant for land, *held* inapplicable to a suit for specific performance, where the complainant seeking to take advantage of the section was unsuccessful.—*Id.*

SPEED.

See Railroads, § 317.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

STATES.

See Commerce, §§ 3, 8; Costs, § 96; Courts, § 489; Public Lands.

II. GOVERNMENT AND OFFICERS.

§ 34 (W.Va.) A summons for a witness before a joint legislative committee, ordered by the unanimous action of such committee and signed by the chairman of the committee from either house, pursuant to Code 1906, c. 12, § 7, is not invalid, though such chairman be also the chairman selected by the joint committee.—Sullivan v. Hill, 79 S. E. 670.

§ 40 (W.Va.) Where a witness summoned before a joint legislative committee refuses to testify as to a subject within the range of legitimate legislative inquiry, his obedience may be enforced by attachment, fine, or imprisonment, as provided by Code 1906, c. 12, § 7.—Sullivan v. Hill, 79 S. E. 670.

Code 1906, c. 12, § 7, authorizing either house of the Legislature or a committee thereof to enforce obedience to its process, *held* constitutional.—Id.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 87 (Va.) As to property held by public corporations for public purposes the power of the Legislature is supreme, but, while it may prohibit such corporations from accepting property as trustee under a private grant, yet when the trust has once been accepted it cannot divert it to purposes other than that of the trust.—General Board of State Hospitals for the Insane v. Robertson, 79 S. E. 1064.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

§ 115 (S.C.) The refunding of a valid existing debt does not increase the debt of the state, and hence does not require submission to the voters under Const., art. 10, § 11.—State v. Blease, 79 S. E. 247.

Act Feb. 10, 1912 (27 St. at Large, p. 922), repealing as to two certain bonds Act Feb. 25, 1896 (22 St. at Large, p. 183), limiting the time for refunding bonds, *held* not to increase the indebtedness of the state contrary to Const. art. 10, § 11.—Id.

§ 144 (S.C.) The liability of a state upon negotiable paper issued by competent authority is the same as that which attaches to private individuals under like circumstances.—State v. Blease, 79 S. E. 247.

Holders of negotiable paper issued by the state, in the absence of allegations to the contrary, are presumed to be innocent purchasers for value before maturity, and without notice of any objection to its validity.—Id.

When authority to issue negotiable paper in the name of the state exists, neither irregularities nor frauds on the part of the officers or agents of the state intrusted with the exercise of such authority will affect it in the hands of innocent purchasers for value before maturity and without notice.—Id.

The state is estopped to deny recitals on the face of negotiable paper in the hands of innocent purchasers for value before maturity and without notice.—Id.

§ 158 (S.C.) Provision of section 15 of the joint resolution of March 22, 1878 (16 St. at Large, p. 672), ratifying and validating bonds and certificates of stock issued after the expiration of the terms of office of the officers executing them, *held* valid.—State v. Blease, 79 S. E. 247.

§ 164 (S.C.) Refunding of bonds and stocks of the state *held* not to be enjoined on the ground of irregularities in their issuance, where it was not alleged that the holders were not innocent purchasers, that the securities did not rest upon valid debts of the state, or that they were fraudulent or void in their inception.—State v. Blease, 79 S. E. 247.

§ 165 (S.C.) Where the action of the state treasurer and treasurer of the sinking fund commission in publishing a notice to holders of state bonds to present them for payment was authorized by the commission, it was unnecessary that a subsequent attempted ratification thereof was valid.—State v. Blease, 79 S. E. 247.

Sinking fund commission in carrying out the provisions of Act Feb. 17, 1912 (27 St. at Large, p. 738), relative to issuing bonds and stocks and redeeming others *held* not subject to the control of the court as to matters within its discretion.—Id.

Resolution of sinking fund commission pursuant to Act Feb. 17, 1912 (27 St. at Large, p. 738), adopted at a meeting at which it was claimed there was no quorum present, *held* to involve matters still subject to its orders, and hence to have been ratified by the commission's subsequent refusal to revoke it.—Id.

Act Feb. 17, 1912 (27 St. at Large, p. 738), relative to refunding bonds and stocks issued under Acts Dec. 22, 1892, and Dec. 22, 1893 (21 St. at Large, pp. 24, 420), *held* not to authorize the refunding of outstanding Green Consols, issued under the Act Dec. 22, 1873 (15 St. at Large, p. 518), and subsequent acts.—Id.

Under Act Feb. 17, 1912 (27 St. at Large p. 738), authorizing the redemption of bonds and stocks issued under Act Dec. 22, 1892 (21 St. at Large, p. 24), bonds and stocks issued under Act Dec. 22, 1893 (21 St. at Large, p. 420), amending and supplementing the act of 1892, *held* also redeemable.—Id.

Under Act Dec. 22, 1892 (21 St. at Large, p. 24), bonds and stocks issued thereunder *held* redeemable 20 years from January 1, 1893, the date borne by them, although some were not actually issued until later.—Id.

Under Act Dec. 22, 1892 (21 St. at Large, p. 24), sinking fund commission *held* not required to hold bonds issued thereunder, when called for payment, as assets of the sinking fund, but to cancel them.—Id.

VI. ACTIONS.

§ 191 (Va.) A suit against a state hospital for the insane in its public governmental capacity is a suit against the state which cannot be maintained by an individual unless the state waives its immunity and submits itself to the jurisdiction of the courts.—General Board of State Hospitals for the Insane v. Robertson, 79 S. E. 1064.

A state hospital for the insane which in its private capacity has accepted a testamentary trust stands upon the same footing with respect to it as any other trustee and is suable by a beneficiary.—Id.

STATUTES.

See Appeal and Error, § 170; Courts, § 489; Frauds, Statute of; Limitation of Actions. For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 48 (N.C.) Pub. Loc. Laws 1911, c. 761, amending the General Mechanics' Lien Law, but providing that it shall apply only in certain counties, shall not apply in Union and Stanley counties, and shall not apply where material is furnished by any person, firm, or corporation outside of Union county, *held* contradictory, self-destructive, and void.—Orinoco Supply Co. v. Masonic & Eastern Star Home, 79 S. E. 964.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 76 (S.C.) Const. art. 3, § 34, subd. 11, providing that no special law shall be enacted where a general law could be made to apply, does not render invalid an act enlarging a school district and authorizing the trustees to hold an election on the question of issuing bonds.—*Burris v. Brock*, 79 S. E. 193.

§ 76 (W.Va.) Acts 1907, c. 74 (Code Supp. 1909, c. 42, §§ 18, 20), amending and re-enacting Code 1906, c. 42, §§ 18, 20, and providing for an alternative method of condemning land or easements by pipe line companies, *held* not violative of Const. art. 6, § 39 (Code 1906, p. lxii), prohibiting the passage of a special act where a general law would be proper and applicable.—*Carnegie Natural Gas Co. v. Swiger*, 79 S. E. 3.

§ 90 (S.C.) Act Feb. 19, 1913 (28 St. at Large, p. 355), amending Act Jan. 5, 1895 (21 St. at Large, p. 921), by enlarging the Anderson school district, does not violate Const. art. 3, § 34, subd. 5, prohibiting the incorporating of school districts by special law, as such law does not incorporate a district but only amends a previous statute of incorporation.—*Burris v. Brock*, 79 S. E. 193.

III. SUBJECTS AND TITLES OF ACTS.

§ 107 (S.C.) Act Feb. 19, 1913 (28 St. at Large, p. 355), does not violate Const. art. 3, § 17, requiring that every act shall relate to but one subject and that to be expressed in the title.—*Burris v. Brock*, 79 S. E. 193.

§ 112 (W.Va.) Acts 1907, c. 74 (Code Supp. 1909, c. 42, §§ 18, 20), amending and re-enacting Code 1906, c. 42, §§ 18, 20, and providing for an alternative method of condemning land or easements by pipe line companies, *held* not violative of Const. art. 6, § 30 (Code 1906, p. lx), providing that no act shall embrace more than one subject, which shall be expressed in its title.—*Carnegie Natural Gas Co. v. Swiger*, 79 S. E. 3.

§ 119 (S.C.) Provision of Act Feb. 17, 1912 (27 St. at Large, p. 738), for issuance of bonds and stocks for the purpose of calling in and paying other bonds and stocks, *held* germane to the subject expressed in the title, and not to violate Const. art. 3, § 17.—*State v. Blease*, 79 S. E. 247.

Act Feb. 17, 1912 (27 St. at Large p. 738), so far as it authorizes the redemption thereunder of bonds and stocks known as Brown Consols, in addition to those known as Redemption Brown Consols, *held* to violate Const. art. 3, § 17, as relating to a subject not expressed in its title.—*Id.*

Provision of section 15 of the joint resolution of March 22, 1878 (16 St. at Large, p. 672), validating certain bonds and stocks issued after the expiration of the terms of office of the officers executing them, *held* germane to the title, and not to violate Const. 1868, art. 2, § 20, requiring the subject of acts to be expressed in their title.—*Id.*

Provisions of Act Dec. 24, 1879 (17 St. at Large, p. 110), amending and extending the provisions of Act Dec. 20, 1878 (16 St. at Large, p. 704), for refunding obligations issued after January 1, 1866, *held* not to relate to a subject not expressed in the title, contrary to Const. 1868, art. 2, § 20.—*Id.*

§ 126 (S.C.) While Const. art. 3, § 17, providing that every act shall relate to but one subject, which shall be expressed in its title, is very liberally construed, yet, when the title of an act specifically limits its object, the court

must limit the operation of the act to the subject so expressed in the title.—*State v. Blease*, 79 S. E. 247.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 159 (N.C.) Where two statutes are in conflict and cannot reasonably be reconciled, the later one repeals the one of earlier date to the extent of the repugnance.—*Board of Com'rs of Vance County v. Town of Henderson*, 79 S. E. 442.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 181 (N.C.) If a statute is ambiguous so as to be fairly susceptible of more than one interpretation, then the courts may exercise the power of construing its language so as to give effect to the intention of the Legislature, but such intention is to be ascertained by reasonable construction of the act and not founded on mere arbitrary conjecture.—*Board of Com'rs of Vance County v. Town of Henderson*, 79 S. E. 442.

§ 185 (N.C.) The Legislature is presumed to know the existing law including the judicial construction given to existing statutes, and to legislate with reference thereto.—*Raeferd Lumber Co. v. Rockfish Trading Co.*, 79 S. E. 627.

§ 190 (N.C.) Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts should not hesitate to give it a literal interpretation merely because they may question the wisdom or expediency of the enactment.—*Board of Com'rs of Vance County v. Town of Henderson*, 79 S. E. 442.

§ 190 (N.C.) It is only when the terms of a statute give rise to ambiguity, or the grammatical construction is doubtful, that courts can exercise the power of controlling the language to give effect to what they suppose to have been the real intention of the Legislature.—*Whitford v. North State Life Ins. Co.*, 79 S. E. 501.

§ 207 (N.C.) Where the proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature.—*Orinoco Supply Co. v. Masonic & Eastern Star Home*, 79 S. E. 964.

§ 219 (N.C.) It being by statute the duty of the State Superintendent of Public Instruction to construe the school law, his construction thereof, though not binding on the courts, is entitled to high consideration.—*Board of Graded School Com'rs of City of Winston v. Board of Education of Forsyth County*, 79 S. E. 886.

§ 225 (N.C.) Statutes which relate to the same subject should be construed together.—*Powell v. Strickland*, 79 S. E. 872.

(B) Particular Classes of Statutes.

§ 241 (S.C.) In a criminal prosecution there should be a strict construction of the law in favor of the defendant, but it should not be one which would thwart the clear intention of the lawmakers as gathered from a reasonable interpretation of the statute.—*City of Anderson v. Fant*, 79 S. E. 641.

In a criminal prosecution under a statute it must appear not only that the accused is within the letter of the law but that he is within its spirit.—*Id.*

§ 246 (N.C.) A special statute, entirely local in its nature in abrogation of the general law of the state, should be strictly construed.—*Orinoco Supply Co. v. Masonic & Eastern Star Home*, 79 S. E. 964.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Amend. 14 3

STATUTES AT LARGE.

1887, Feb. 4, ch. 104, 24 316

Stat. 379 316

1887, Feb. 4, ch. 104, § 20, 24 Stat. 386. Amended

by Act 1906, June 29, ch.

3591, § 7, 34 Stat. 593. 310

1887, Feb. 4, ch. 104, § 22, 24 Stat. 387 316

1887, March 3, ch. 373, § 3, 24 Stat. 554 264

1898, July 1, ch. 541, § 11d, 30 Stat. 549 470

1898, July 1, ch. 541, § 17a, 30 Stat. 550. Amended by Act 1903,

Feb. 5, ch. 487, § 5, 32 Stat. 798 576

1898, July 1, ch. 541, § 60b, 30 Stat. 562 470

1898, July 1, ch. 541, § 60b, 30 Stat. 562. Amended by Act 1903,

Feb. 5, ch. 487, § 13, 32 Stat. 799 470

1903, Feb. 5, ch. 487, § 5, 32 Stat. 798 576

1903, Feb. 5, ch. 487, § 13, 32 Stat. 799 470

1906, June 29, ch. 3591, 34 Stat. 584 242

1906, June 29, ch. 3591, § 7, 34 Stat. 593 310

1906, June 29, ch. 3591, § 7, para. 11, 12, 34 Stat. 593 700

1908, April 22, ch. 149, 35 Stat. 65 970

1908, April 22, ch. 149, § 1, 35 Stat. 65 970

1908, April 22, ch. 149, § 6, 35 Stat. 66 414

1908, April 22, ch. 149, § 9 added by Act 1910, April 5, ch. 143, § 2, 36 Stat. 291 970

1910, April 5, ch. 143, § 2, 36 Stat. 291 970

1913, March 3, ch. 117, 37 Stat. 732 676

COMPILED STATUTES
1901.

Page 582 264

Page 3154 316

Page 3169 310

Page 3170 316

Page 3426 470

Page 3428 576

Page 3445 470

COMPILED STATUTES
SUPP. 1911.

Page 1288 242

Page 1307 310, 700

Page 1322 414, 558, 710, 932, 970

Page 1324 414

Page 1325 970

Page 1496 576

Page 1508 470

GEORGIA.

CONSTITUTION.

Art. 1, § 1, par. 3 1125

Art. 1, § 1, par. 5 1128

Art. 8, § 4 119

Art. 11, § 1, par. 2 1116

Art. 13, § 1, par. 1 1116

CIVIL CODE 1895.

§ 4774 456

CIVIL CODE 1910.

§ 152 915

258 222

§ 445, 447, 448 195

722 752

933 747

1187 1125

§ 1535-1537 119

1651 908, 908

1652 908

1771 et seq. 476

1774 754

2251 536

2268 170

2471 210

§ 2563, 2564 487

2675 142

2699 776

§ 2712, 2714 364

2717-2719 369

2752 162

2781 142, 475

2812 370

2815 et seq. 170

§ 2971, 2980 115

3009 557

3021 356

3067 761

3144 836

§ 3172, 3180 759

3222, subsec. 7 376

3257 144, 755

3286 980

3301 783

§ 3318, 3319 144, 482

3345-3347 540

3349 213

3352 236, 465

3353 236

§ 3354, 3356 362

3358 383

3364, subsec. 2 81

3442 1128

3469 947

3479 77

3501 235

3543 375

3596 912

3653 196, 359, 753

3655 753

3657 196

§ 3660, 3678 546

3718 196

3729 167

3739 572, 852

3780 572

3931 772

§ 3935-3938 903

4010 780

4029 561

4123 92

4144 230

4182 853

4212 466

4252 180, 539

4254 211

§ 4273, 4276 540

4279 227

4296 236

4305 381

§ 4355, 4357 568

4362, 4368 470

4419 570

4426 475

4439 922

§ 4457, 4458 850

4490 86

§ 4521 557

4633 846

4634 852

4738 530

4739 496

4742 530

4765 167

4852 129

§ 4853, 4854 472

4863 909

4998 530

5014 496

§ 5055, 5056 946

5113 360

5154 840

5169 88

5190 586

5192 752

§ 5196, 5200 179

5228 110, 841

§ 5282, 5283 781

5287 1130

5289 781

5329 et seq. 589

5331 576

5346 456

§ 5365, 5366 849

5385 854

5385 et seq. 842

5389 842, 854

5417 772

5477 1120

5515 454

5521 167, 374

5527 122

5579 462

5649 381

5680 215

5730 468

5732 475

5749 468

5769 41

5794 38

5828 227

5858 373, 473

5858, subsecs. 1, 4 572

5861 1124

5867 572

5910 459

5926 488

5969 532

5973 et seq. 849

6037 539

6062 582

6084 142

6093 755

6138 240, 584, 841

6160 377

6167 363, 495, 583

§ 6185, 6186 840

6204 246

6207 136

6264 768

6359 1125

6361 1128

6510 589

6524 530

6540 122

6579 119

6584 160

PENAL CODE 1910.

§ 33, 34 63

40 114

45 71

65 764

67 919

§ 70, 71, 73 30

81 71

163 176

175 861

204 170

245 764

259 909

311	860
389	177
416	357
442	927
448	768
450	908, 919
539	369
715	182, 524, 906, 1134
§ 716, 719	524
823	29
954	71
971	79
982	746
995	29
1010	232
1036	181
1037	223
1043	367
1058	228, 861, 909

ACTS.

1866, p. 138	373
1883, p. 443, § 77	158
1889, p. 85	373
1899, p. 78	213
1899, p. 90	540
1903, p. 579	241
1906, p. 1014	158
1907, p. 121	908, 919
1908, p. 909	158
1910, p. 86	221
1910, p. 134	94
1911, p. 74	543
1911, p. 81	29
1911, p. 172	476
1911, p. 1097 et seq.	553

NORTH CAROLINA.

CONSTITUTION 1776.

Declaration of Rights, § 25 431

CONSTITUTION 1868.

Art. 1, §§ 12, 13	284
Art. 4, § 8	293, 690
Art. 7, § 7	615
Art. 10, § 8	625

CODE.

§ 447. Amended by Laws	
1891, ch. 541	1102

REVISAL 1905.

76	445
380, subsec. 2	677
§ 410, 414	445
453	687
513	437
535	596
§ 641, 642	512
652	425
860	602
980	896
1578	301
1590	450
§ 1628-1630	872
1631	497, 883
1636	872
1643	507
§ 1689-1691	450
2001	1107
§ 2019-2021	964
2019-2021. Amended by Pub. Loc. Laws 1911, ch. 761	964
§ 2028. Amended by Laws	
1909, ch. 32	627
2178	680
2208	498
2494	257
3123	291
3152	615
3291	284

3333	869
3534	888
3615	284
4116. Amended by Laws	
1913, ch. 149	886
4124	886
4508	442
4775	681
4808	806

REVISAL 1908.

625	1102
1636	501
2634a	421
3731	629
4773a	299

PRIVATE LAWS.

1907, ch. 1, §§ 28, 32, 34	629
----------------------------	-----

PUBLIC LOCAL LAWS.

1911, ch. 472	284
1911, ch. 761	964

LAWS.

1777 (2d Sess.) chs. 1, 17	431
1779 (2d Sess.) ch. 2	431
1891, ch. 541	1102
1893, ch. 81	437
1907, ch. 24, § 3	676
1909, ch. 32	627
1909, ch. 442	266, 430
1909, ch. 442, § 9	427
1909, ch. 442, § 11	266
1909, ch. 442, §§ 16, 17	427
1909, ch. 446	968
1911, ch. 62, §§ 15, 21	442
1911, ch. 133	888
1913, ch. 44	619, 888
1913, ch. 44, § 5	619
1913, ch. 149	886

SOUTH CAROLINA.

CONSTITUTION 1868.

Art. 2, § 20	247
Art. 12, § 1	521

CONSTITUTION 1895.

Art. 2, § 2	247
Art. 2, § 13	193
Art. 3, § 17	193, 247
Art. 3, § 34, subsecs. 5, 11	193
Art. 5, §§ 2, 6, 12	785
Art. 9, §§ 2, 8	521
Art. 10, § 11	247
Art. 11, § 5	193

CIVIL CODE 1912.

§ 957	309
1743	193
2572	310
2573	700
§ 2669-2671, 2700	405
3023	635
3330	309
3605	791
3812	521

CODE OF CIVIL PROCEDURE 1912.

11d, subsec. 2	645
180	104
§ 220-222, 224, 227	637
312	634
384	520
§ 445, 448, 456	104

CRIMINAL CODE 1912.

§ 220	108
§ 794, 825	641

LAWS.

1873, p. 518	247
1878, p. 672	247
1878, p. 672, § 15	247
1878, p. 704. Amended by Laws 1879, p. 110	247
1879, p. 110	247
1892, p. 24	247
1892, p. 24. Amended by Laws 1893, p. 420	247
1893, p. 420	247
1895, p. 921. Amended by Laws 1913, p. 355	193
1896, p. 183. Repealed by Laws 1912, p. 922	247
1910, p. 717	310
1912, p. 702	312
1912, pp. 738, 922	247
1913, p. 355	193

VIRGINIA.

CODE 1904.

Page 2195, § 8, Sched- ule C	1074
Page 2195, § 8, Schedule C, subsecs. 3, 4	1074
§ 437a. Amended by Laws	
1910, ch. 39	1062
§ 567, 568, 573	1062
§ 838, 843, 844	393
§ 1697, 1702	1064
2259	1040
2419	337
2760	390
2791	1059
§ 2840, 2841a	1029
2962	1059
§ 3236, 3241	1049
3454	322, 329
3455	322
3466	388
3988	324

LAWS.

1901-02, ch. 307	324
1906, ch. 48	1064
1908, ch. 195	1064
1910, ch. 39	1062

WEST VIRGINIA.

CONSTITUTION.

Art. 3, §§ 9, 10	3
Art. 6, §§ 30, 39	3

CODE 1906.

Pages, l, li, lx, lxii	3
Ch. 12, § 7	670
Ch. 13, § 14	738
Ch. 13, § 17, subsec. 15	656
Ch. 15L	1016
Ch. 42, §§ 18, 20. Amend- ed by Laws 1907, ch. 74	3
Ch. 47, § 28	660
Ch. 50, § 168	1079
Ch. 50, § 202	738
Ch. 53, § 53	350
Ch. 62d	647
Ch. 64, § 13	1016
Ch. 66, § 3	1024
Ch. 75	10
Ch. 75, §§ 3, 5	10
Ch. 77, §§ 25, 26	815
Ch. 79, § 7	656, 1083
Ch. 99, § 7	662
Ch. 100, § 13	1079
Ch. 101, § 5	1019
Ch. 104, § 18	728
Ch. 105, § 6	939
Ch. 106	723
Ch. 110, § 1	668
Ch. 125, § 35	824
Ch. 125, §§ 42, 46	653

Ch. 125, § 53.....1081	CODE SUPPLEMENT 1909.	LAWS.
Ch. 139, §§ 10, 11..... 728	Ch. 42, §§ 18, 20..... 3	1907, ch. 38, §§ 4, 5..... 720
Ch. 150, § 9. Amended by	Ch. 131, §§ 9aIV, 9aV.... 720	1907, ch. 66..... 725
Laws 1907, ch. 66..... 725	Ch. 150 725	1907, ch. 74..... 3
Ch. 160, § 4..... 834		1911, ch. 12, § 2.....1005

STIPULATIONS.

See Evidence, § 445.

STOCK.

See Corporations, § 90.

STOCKHOLDERS.

See Corporations, §§ 180-265.

STREET RAILROADS.

See Appeal and Error, § 1068; Carriers, §§ 292, 315, 317, 318; Evidence, § 271.

II. REGULATION AND OPERATION.

§ 87 (N.C.) Where plaintiff drove his horse, which showed signs of fright, close to an approaching street car, he cannot recover for injuries occasioned by the fright of the horse; the company being under no obligation to stop its car, which was being operated with only the usual noise.—Barnes v. North Carolina Public Service Co., 79 S. E. 881.

§ 98 (Ga.) Under Civ. Code 1910, § 2781, plaintiff could not recover against a street railroad company for injuries sustained which were caused by his own negligence, whether his negligence was prior or subsequent to the negligence of the railroad company.—Collum v. Georgia Ry. & Electric Co., 79 S. E. 475.

§ 113 (Ga.App.) In an action for the death from being struck by a street car run at an excessive speed, it was error to admit evidence that other motormen had run cars at excessive speed at the same place and on one occasion had nearly run over some children.—Rome Ry. & Light Co. v. Lansdell, 79 S. E. 1131.

§ 117 (Ga.) In an action to recover for death of plaintiff's husband by being struck by a street car, the questions of defendant's negligence and of the diligence of plaintiff's husband in avoiding the consequence thereof by ordinary care were for the jury.—Howard v. Savannah Electric Co., 79 S. E. 112.

Where a petition alleged that plaintiff's husband looked in the direction from which a car was coming before attempting to cross the tracks, but that, owing to the unlawful speed at which the car was running, it struck him, and this allegation was denied by the answer, and the evidence did not show that deceased saw the car or heard the gong before being struck, it was error to direct a verdict for defendant.—Id.

In an action for injuries to a pedestrian, struck by a street car, whether he exercised ordinary care, or to what extent he contributed to his injury by his neglect, were questions for the jury.—Id.

§ 118 (Ga.) An instruction that the precise thing that every man is bound to do before stepping on a railroad track, including those of street railroads, is that which every prudent man would do under like circumstances, and if every prudent man would look and listen, so must every one else, or take the consequences so far as they may have been avoided by that means, was proper.—Collum v. Georgia Ry. & Electric Co., 79 S. E. 475.

An instruction held not objectionable for failure to require that plaintiff's negligence must have been subsequent to that of defendant.—Id.

STREETS.

See Easements, § 17; Eminent Domain, §§ 101, 203; Municipal Corporations, §§ 225, 544, 655-697, 759-822.

STRIKING OUT.

See Pleading, § 360.

SUBCONTRACTORS.

See Mechanics' Liens, §§ 100-115.

SUBMISSION OF CONTROVERSY.

§ 7 (N.C.) Recovery against an express company for money lost from a valise in its hands for transportation could not be sustained, where the agreed facts on which the case was submitted contained no finding that the money was taken while the valise was in defendant's care or control.—Sedbury v. Southern Express Co., 79 S. E. 286.

SUBSCRIPTIONS.

See Corporations, §§ 90, 228.

SUICIDE.

See Appeal and Error, § 380; Evidence, §§ 122, 271, 272, 317; Insurance, §§ 646, 665; Witnesses, § 191.

SUIT.

See Action.

SUMMONS.

See Process.

SUNDAY.

See Time, § 10.

§ 11 (Ga.App.) Under Pen. Code 1910, § 416, making it a crime for one to pursue one's ordinary calling on Sunday except for necessity or for charity, a Sunday contract whereby a person keeping automobiles for hire hired an automobile for use on Sunday was void, and hence he could not recover for the hire of the automobile.—Jones v. Belle Isle, 79 S. E. 357.

§ 15 (Ga.App.) Where defendant hired an automobile on Sunday for use on that day and the contract was void under Pen. Code 1910, § 416, and where he used the car as intended, his subsequent promise, made on a secular day without a new consideration, to pay for the hire did not render the contract enforceable.—Jones v. Belle Isle, 79 S. E. 357.

SUPPORT.

See Bastards, § 17; Deeds, § 19; Husband and Wife, §§ 302, 313.

SUPPRESSION.

See Theaters and Shows, § 1.

SURETYSHIP.

See Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, §§ 89, 126.

SURPRISE.

See Continuance, § 46.

SUSPENDED SENTENCE.

See Criminal Law, §§ 982, 989, 1001, 1134.

TAXATION.

See Adverse Possession, § 79; Drains, § 13; Equity, § 148; Licenses; Prohibition; Schools and School Districts, §§ 41, 103.

V. LEVY AND ASSESSMENT.

(B) Assessors and Proceedings for Assessment.

§ 319 (Va.) One whose property is liable to assessment for taxes may not evade payment for errors, omissions, or irregularities in the assessment thereof which do not prejudice his rights.—*Bridgewater Mfg. Co. v. Funkhouser*, 79 S. E. 1074.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

§ 378 (Va.) Under Code 1904, p. 2195, § 8, schedule C, providing for the taxation of the capital of corporations, etc., capital employed in the business of a miller or other manufacturer is subject to taxation.—*Bridgewater Mfg. Co. v. Funkhouser*, 79 S. E. 1074.

The word "capital," as used in Code 1904, p. 2195, § 8, schedule C, subsecs. 3, 4, providing for the taxation of the capital of corporations, *held* to mean money and other property adventured in the business, whether owned by the company or borrowed, and not the original amount paid in by the shareholders on their purchase of stock.—*Id.*

(G) Review, Correction, or Setting Aside of Assessment.

§ 466 (Va.) Code 1904, § 437a, as amended by Acts 1910, c. 39, providing for separate assessment of mineral lands and for a correction by the State Corporation Commission, *held* to furnish the exclusive procedure for the correction of such assessments, and hence that under Code 1904, §§ 567, 568, 573, providing for the review of assessments generally and for application therefor by the auditor of public accounts, the auditor could not apply for a correction of a mineral land assessment.—*Grief v. Kegley*, 79 S. E. 1062.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(A) Collectors and Proceedings for Collection in General.

§ 545 (Ga.) Civ. Code 1910, § 1187, authorizing the Comptroller General to issue execution against tax collectors and their sureties on their bonds, *held* invalid.—*Gaulden v. Wright*, 79 S. E. 1125.

§ 569 (Ga.) It is error not to enjoin the enforcement of an execution under Civ. Code 1910, § 1187, where the unconstitutionality of the law was urged as a basis for the injunction.—*Gaulden v. Wright*, 79 S. E. 1125.

X. REDEMPTION FROM TAX SALE.

§ 707 (N.C.) A tax deed on sale of land for taxes for the year 1897 *held* void where no affidavit was filed showing service of notice on the owner of the land and persons in possession.—*McNair v. Boyd*, 79 S. E. 966.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 730 (N.C.) Under the statute providing for the sale of land for nonpayment of taxes of 1897, the county could not become an absolute purchaser, but could only foreclose the certificate of purchase or deed.—*McNair v. Boyd*, 79 S. E. 966.

§ 742 (N.C.) Under the statute providing for the sale of land for nonpayment of taxes of 1897, the county could not become an absolute purchaser, but could only foreclose the certifi-

cate of purchase or deed, and the county's assignee acquired no better right.—*McNair v. Boyd*, 79 S. E. 966.

(B) Tax Deeds.

§ 746 (N.C.) A tax deed could be executed by a sheriff after his term expired to convey land which he sold for taxes during his term.—*McNair v. Boyd*, 79 S. E. 966.

§ 788 (N.C.) The rule that the recitals in tax deed are evidence, either conclusive or presumptive, does not apply when the tax deed itself is attacked for noncompliance with conditions precedent with reference to notice.—*McNair v. Boyd*, 79 S. E. 966.

(C) Actions to Confirm or Try Title.

§ 805 (N.C.) The statute of limitations cannot avail a defendant, in an action to cancel a tax deed as a cloud on title of plaintiffs who were in possession.—*McNair v. Boyd*, 79 S. E. 966.

TAX DEEDS.

See Taxation, §§ 707, 746, 788.

TAX TITLES.

See Taxation, §§ 730-805.

TELEGRAPHS AND TELEPHONES.

See Specific Performance, § 123; Trial, § 241.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 16 (Ga.) A covenant in a 99-year lease of a portion of a telephone system, which bound the lessees, their heirs and assigns, to give free service to the lessors over all their lines, *held* not binding upon a purchaser from the lessees.—*Greer v. Pope*, 79 S. E. 846.

Evidence, in an action on a covenant for free service which was contained in a 99-year lease of a portion of a telephone system, *held* to authorize submission to the jury whether a corporation formed by the covenantors assumed or became bound by the covenant.—*Id.*

II. REGULATION AND OPERATION.

§ 28 (N.C.) Telegraph and telephone companies hold their charters subject to the obligation to render service at uniform and reasonable rates without discrimination, and may not make or continue a contract which renders them unable to perform those duties.—*Woodley v. Carolina Telephone & Telegraph Co.*, 79 S. E. 598.

A telephone company cannot, by waiver or the provisions of its contract, put itself in a position which will prevent a proper performance of its statutory duties and the providing of service at reasonable rates without discrimination.—*Id.*

§ 33 (N.C.) Telegraph and telephone companies may make such just and reasonable rules and regulations as are required for the conduct of their business, including a rule requiring the payment of established rates monthly in advance.—*Woodley v. Carolina Telephone & Telegraph Co.*, 79 S. E. 598.

The granting of a preliminary injunction to restrain the severing of telephone connection with a subscriber, who alone refused to obey company's rule requiring payment in advance, *held* to be erroneous.—*Id.*

Where a telephone subscriber struck out from the form of contract the provision requiring payment in advance, such erasure left the matter undetermined, and subject to future regulation by the company.—*Id.*

An oral agreement that a telephone subscriber should pay at the end of the month instead of in advance, which was indefinite as to time,

would be determinable at the will of either party upon the giving of reasonable notice.—Id.

Where a written contract for telephone service provided that it should continue for one year, and thereafter until terminated by the company at its option, the company could terminate an oral agreement, supplementary of the written subscription, and which permitted the subscriber to pay at the end of each month instead of in advance.—Id.

An ordinance permitting a telephone company to require its subscribers to give a bond to secure the payment of the first year's rental was manifestly intended to secure the cost of installing the service, and does not prevent the company from requiring its subscribers to pay their rentals monthly in advance.—Id.

Where a telephone company temporarily permitted its subscribers to pay at the end of the month instead of in advance, as their contracts required, it did not thereby waive its right to require the payment in advance.—Id.

Where a telephone subscriber made a tender for a few days' service in advance, while at the same time insisting that he had a right to pay at the end of the month, the tender was not sufficient to prevent the removal of the telephone by the company.—Id.

§ 37 (N.C.) When a telegram is received by an agent of a telegraph company after office hours, it is his duty to make reasonable efforts to deliver it, and if he cannot do so he must endeavor to notify the sender of its non-delivery.—Griswold v. Western Union Telegraph Co., 79 S. E. 273.

§ 38 (N.C.) A message announcing a death and urging the addressee to come gives the telegraph company notice that it is of great importance and that mental anguish will probably result from delay in transmitting it.—Ellison v. Western Union Telegraph Co., 79 S. E. 277; Harrison v. Same, Id. 281.

Where the agent did not ask for prepayment, the right to prepayment was waived and cannot be urged as a defense to an action for delay in delivery of the message.—Id.

Where the agent received a message and undertook to transmit it, the company cannot defend an action for delay in delivery on the ground that it was received by the agent after regular office hours.—Id.

It is the duty of a telegraph agent, when he finds that he cannot deliver a message, to notify the sender at once so that an attempt may be made to transmit it in some other way.—Id.

It is no defense, to an action for delay in transmitting a message, that the agent was also the agent of the railroad company and was busy with his railroad duties.—Id.

§ 45 (Ga.App.) Failure of a telephone company to exercise ordinary care to promptly furnish a subscriber with telephone connection renders it liable for damages proximately resulting.—Southern Bell Telephone & Telegraph Co. v. Glawson, 79 S. E. 488.

Where a telephone company provides a delicate mechanism of the most approved kind to operate a bell to awaken the night operator, and exercises ordinary care to keep same in order, and the mechanism gets out of order, the company is not liable for damages resulting from the failure of a subscriber to secure telephonic connection.—Id.

§ 54 (Ga.App.) Where a telegram blank provided for written notice of any claim for damages, evidence that within a week after the message was filed the sender presented his claim orally to the operator with whom he filed the message, and the operator, without requiring that the claim should be made in writing, took up the matter of adjustment with the superintendent, showed a waiver of the condition that the claim should be in writing.—Western Union Telegraph Co. v. Fitts, 79 S. E. 156.

Though an agent of a telegraph company is not bound to recognize an oral demand, if he does so, making no objection on the ground that

it is not in writing, it is a waiver of the written demand.—Id.

Where, within 60 days after filing a telegram, the sender presented to the company's agent, with whom the message was filed, an oral claim for damages, and from the action of the company a waiver of a written demand must be implied, it was not restored to its original right to insist on the written claim because, after 60 days, the sender's attorney transmitted a claim in writing, setting forth the specific damages claimed.—Id.

§ 66 (Ga.App.) In an action against a telephone company for damages from negligent failure to give a subscriber telephonic connection, the burden is on plaintiff to prove negligence.—Southern Bell Telephone & Telegraph Co. v. Glawson, 79 S. E. 488.

§ 66 (N.C.) In an action against a telegraph company for mental anguish caused by delay in the delivery of a message notifying the plaintiff of the death of her foster mother, evidence held sufficient to warrant the jury in finding the company negligent, and that plaintiff was thereby prevented from taking an earlier train.—Ellison v. Western Union Telegraph Co., 79 S. E. 277; Harrison v. Same, Id. 281.

After the receipt by a telegraph company of a message for transmission is shown, there is a presumption of negligence from a delay in transmitting it extending from 5:30 p. m. until noon the next day.—Id.

Evidence of an arrangement whereby plaintiff was to be notified if her foster mother's condition became worse held admissible, in an action for delay in delivering a message announcing her death, to show that the plaintiff would have taken an earlier train but for the delay.—Id.

§ 73 (N.C.) In an action for mental suffering caused by delay in the delivery of a message announcing a death, it is proper to submit the question of damages for such suffering to the jury, if there is evidence of actual mental suffering, even though the relationship between the parties was not such that the law would presume mental suffering.—Ellison v. Western Union Telegraph Co., 79 S. E. 277; Harrison v. Same, Id. 281.

Where the evidence is conflicting as to whether a telegraph agent accepted a message unconditionally, that question is for the jury in the trial court.—Id.

§ 78 (Ga.App.) In an action for the statutory penalty for failure to deliver a telegram, as provided by Civ. Code 1910, § 2812, an answer by defendant stating that, for want of sufficient information, he can neither admit nor deny allegations of the petition that the telegram was received by defendant on a certain date at a certain place and that the required tolls were paid to defendant, is an admission of such allegations; these being matters of which the defendant telegraph company is chargeable with knowledge.—Western Union Telegraph Co. v. Calhoun, 79 S. E. 370.

Where, in an action for the statutory penalty prescribed by Civ. Code 1910, § 2812, for failure to deliver a telegram, the undisputed evidence showed defendant's acceptance of the telegram, failure to deliver same, and all other material allegations of the petition, the court properly directed a verdict for plaintiff.—Id.

TENANCY IN COMMON.

See Cancellation of Instruments, § 59; Partition, §§ 14, 48.

I. CREATION AND EXISTENCE.

§ 8 (Va.) If the land is owned by joint tenants, a conveyance by less than all will not effect a severance; but the grantee, if he is a stranger, takes as tenant in common with the others.—Virginia Coal & Iron Co. v. Hylton, 79 S. E. 337.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

§ 15 (N.C.) A tenant in common may oust the others, and a tenant who is excluded from possession or participation in the rents and profits for 20 years loses his right to the land by adverse possession.—*McKeel v. Holloman*, 79 S. E. 445.

§ 15 (Va.) Where a stranger to the title takes a conveyance of the whole estate in a tract from a tenant in common, and enters into exclusive possession, claiming title to the whole, such conveyance and possession is an ouster, on which the grantee may base a claim of adverse possession.—*Virginia Coal & Iron Co. v. Hylton*, 79 S. E. 337.

While the entry and possession of a tenant in common is the entry and possession of all until some notorious act of ouster, yet a tenant in common may enter adversely and claim in severalty, and if he does so the statute of limitations will run in his favor against his cotenants.—*Id.*

Where, after parol partition, a part of the common property was conveyed by warranty deed to one of the cotenants, and he and his successors in interest entered under the deed claiming the fee, and continued in possession, and paid taxes as the fee-simple owners for 30 years or more, they acquired title to the land and subjacent minerals by adverse possession as against cotenants not bound by the partition.—*Id.*

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

§ 44 (Va.) A joint tenant may transfer his undivided share in land.—*Virginia Coal & Iron Co. v. Hylton*, 79 S. E. 337.

The deed of a joint tenant of his interest is not void, but, under Code 1904, § 2419, is effectual to pass the interest conveyed, making the grantee a tenant in common with the grantor's cotenants.—*Id.*

§ 45 (Va.) A joint tenant may not convey any of the property by metes and bounds or the minerals and reserve the surface as against his co-owners.—*Virginia Coal & Iron Co. v. Hylton*, 79 S. E. 337.

§ 49 (W.Va.) While an oil and gas lease executed by one or more of several cotenants is not binding on the others, it is valid between the parties thereto, and binding on the lessor's interest, even while the premises remain undivided.—*Freeman v. Egnor*, 79 S. E. 824.

TENDER.

See Brokers, § 63; Costs, § 42; Interest, § 50; Pledges; Telegraphs and Telephones, § 33; Vendor and Purchaser, § 344.

TESTAMENTARY CAPACITY.

See Wills, §§ 52, 53, 324.

TESTAMENTARY POWERS.

See Powers.

THEATERS AND SHOWS.

See Arrest, § 63.

§ 1 (N.C.) Under Revisal 1908, § 3731, and Priv. Laws 1907, c. 1, §§ 28, 32, 34, relating to the city of Raleigh, the police have authority to prevent or suppress an indecent or immoral show given in a public place, and may suppress the same when given in their presence.—*Brewer v. Wynne*, 79 S. E. 629.

THEFT.

See Embezzlement; Larceny.

THREATS.

See Criminal Law, § 1169; Obstructing Justice, § 3.

TICKETS.

See Carriers, § 253.

TIMBER.

See Logs and Logging.

TIME.

See Assault and Battery, § 95; Bailment, § 18; Bills and Notes, § 141; Carriers, § 105; Contracts, § 214; Criminal Law, §§ 178, 1092; Depositions, §§ 7, 107; Dismissal and Non-suit, § 58; Exceptions, Bill of, §§ 36, 43; Execution, § 221; Logs and Logging, § 3; New Trial, §§ 117, 155; Telegraphs and Telephones, § 54; Trial, §§ 25, 156; Trusts, § 77; Vendor and Purchaser, § 120; Wills, § 53.

§ 5 (W.Va.) A summons issued by a justice on August 24, 1901, returnable September 24, 1901, was not invalid under Code 1906, c. 50, § 202, providing that such summons shall be returnable not less than one month after its date; thereon "month," under Code 1906, c. 13, § 14, meaning a calendar month.—*Bank of Union v. Baird*, 79 S. E. 738.

§ 9 (Ga.) Where notice to plaintiff of the taking of depositions was given on the 19th, and the taking was set for the 23d of the same month, there was no compliance with Civ. Code 1910, § 5910, requiring five days' notice.—*Bank of Lavonia v. Bush*, 79 S. E. 459.

§ 10 (S.C.) Under Code Civ. Proc. 1912, § 180, requiring service of the complaint within 20 days after demand, section 445, providing that in computing time the first day shall be excluded, and the last day, if it fall on Sunday, and section 448, authorizing service by mail, where the last day was Sunday and the complaint was mailed Monday, though not received till next day, an order setting aside the service was improper.—*Royal Exchange Assurance of London v. Bennettsville & C. R. Co.*, 79 S. E. 104.

TITLE.

See Adverse Possession, § 13; Assignments, §§ 3, 76; Courts, § 163; Ejectment, § 9; Estoppel, §§ 35, 38; Evidence, §§ 842, 431; Execution, §§ 194, 253; Logs and Logging, § 3; Partition, § 83; Quieting Title; Sales, § 202; Statutes, §§ 107-126; Vendor and Purchaser, §§ 120, 208.

TORTS.

See Arrest, § 49; Damages, § 91; Death; Equity, §§ 11, 26; False Imprisonment; Fraud; Malicious Prosecution; Municipal Corporations, §§ 723-852; Negligence; Nuisance; Trespass; Trover and Conversion.

§ 1 (Ga.App.) A tort may consist in a violation of a public duty imposed on all persons occupying a particular relation or of a legal duty founded on contract, and if it arises out of the latter it is only dependent on the contract to the extent necessary to raise the duty; the tort consisting in the breach thereof.—*J. B. Carr & Co. v. Southern Ry. Co.*, 79 S. E. 41.

TOWNS.

See Counties; Municipal Corporations.

TRADERS.

See Principal and Agent, § 145.

TRANSFERS.

See Tenancy in Common, § 44.

TREES.

See Eminent Domain, § 69; Municipal Corporations, §§ 663, 678, 680, 681.

TRESPASS.

See Action, § 28; Assault and Battery, § 95; Criminal Law, § 325; Electricity; Executors and Administrators, § 130; Negligence, § 33; Railroads, § 359.

I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

§ 7 (N.C.) The entry by plaintiff, armed with a shotgun, and killing plaintiff's dog, chained to a stake near the porch, in the presence of plaintiff's wife, and under her protest, was not only a trespass, but a forcible trespass.—Beasley v. Byrum, 79 S. E. 270.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 30 (N.C.) Where P. conveyed the timber on certain land in controversy to a planing mill company, which removed it, if trespass was established against the company in removing the timber, P. was also liable therefor.—Locklear v. Paul, 79 S. E. 617.

III. CRIMINAL RESPONSIBILITY.

§ 76 (Ga.App.) To constitute the crime of trespass the act must have been committed willfully and intentionally.—Hayes v. State, 79 S. E. 761.

That a guardian had no authority to rent land of the ward without an order of court, as provided by Civ. Code 1910, § 3067, was immaterial on the question of the criminal responsibility of the tenant as for a trespass.—Id.

§ 84 (Ga.App.) A tenant who in good faith claims possession of land under a bona fide claimant of title and right of possession cannot be convicted of trespass.—Hayes v. State, 79 S. E. 761.

§ 88 (Ga.App.) In a prosecution for trespass, any evidence tending to show that defendant's possession either originated or was continued in good faith is relevant and competent.—Hayes v. State, 79 S. E. 761.

TRIAL

See Adverse Possession, § 115; Agriculture; Appeal and Error, §§ 170-270, 843, 928, 930, 969, 994-1024, 1033, 1062, 1066, 1068, 1178; Assault and Battery, § 95; Bills and Notes, § 537; Burglary, § 47; Carriers, §§ 36, 320, 347, 348; Continuance; Contracts, § 353; Corporations, § 90; Costs; Covenants, § 134, 135; Criminal Law, §§ 622-895, 1152, 1153, 1158-1160, 1166½, 1171-1174; Customs and Usages, § 21; Damages, § 215; Deeds, § 66; Drains, § 14; Eminent Domain, §§ 66, 222, 224; Execution, §§ 194-210, 425; False Imprisonment, § 39; Forgery, § 48; Gaming, § 71; Homicide, §§ 282-310, 340; Husband and Wife, § 209; Insurance, §§ 668-670; Intoxicating Liquors, § 238; Jury; Landlord and Tenant, § 270; Larceny, § 3; Master and Servant, §§ 285-297; Municipal Corporations, § 822; Negligence, § 136, 141; New Trial; Nuisance, § 54; Perjury, § 37; Principal and Agent, § 193; Railroads, §§ 350, 400, 448, 485; Reference; Sales, §§ 176, 363, 364, 398, 445; Specific Performance, § 123; Street Railroads, §§ 117, 118; Telegraphs and Telephones, §§ 16, 73, 78; Venue; Waters and Water Courses, § 126; Wills, § 324.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 25 (Ga.App.) An amended answer which admitted the bailment alleged and the amount of damages, and thus gave plaintiff a prima facie right to recover, held to entitle defendant to open and close, where the amendment was filed

before any evidence was introduced by plaintiff.—Atlantic Coast Line R. Co. v. Bunn, 79 S. E. 947.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 48 (W.Va.) That impeaching evidence was on a collateral matter, and therefore not good as such evidence, did not render its admission error, where it tended to support some of the main issues.—Greer v. Arrington, 79 S. E. 720.

§ 58 (N.C.) Where improper evidence is admitted, the court should withdraw it from the jury.—Cooper v. Seaboard Air Line R. Co., 79 S. E. 418.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 83 (Ga.) An objection merely that testimony was incompetent, without stating the reason for such incompetency, held too general.—Dale v. Christian, 79 S. E. 1127.

§ 85 (Ga.) Where a part of the testimony objected to in bulk was competent and material to the issues, the objection was properly overruled, though another part may have been incompetent.—Macon, D. & S. R. Co. v. Anchors, 79 S. E. 153.

§ 85 (Ga.App.) Where a part of a witness' testimony was clearly admissible, an objection to it in *solido* was properly overruled.—Great Southern Accident & Fidelity Co. v. Guthrie, 79 S. E. 162.

§ 85 (Ga.App.) An objection to a witness' testimony as a whole was properly overruled, where only a part of his testimony was subject to the objection made.—Reidsville & S. E. R. Co. v. Baxter, 79 S. E. 187.

§ 89 (W.Va.) In a suit under the civil damage act it is not error to deny defendant's motion to exclude plaintiff's evidence tending in an appreciable degree to support the declaration.—Greer v. Arrington, 79 S. E. 720.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 123 (N.C.) Where, in an action for alienation of affections, defendant's conduct with plaintiff's wife tended to show improper relations, defendant's failure to testify was a subject of comment by counsel, and might be considered by the jury on the question of improper relations.—Powell v. Strickland, 79 S. E. 872.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 136 (Ga.App.) Whether a known right, on which a party had a right to insist, was waived, is a question of fact for the jury.—Western Union Telegraph Co. v. Fitts, 79 S. E. 156.

§ 139 (Ga.App.) A verdict should not be directed where there is any issue of fact or proved facts which, viewed from any possible legal point of view, will sustain any other finding than that directed.—McDuffie v. Lummus Cotton Gin Co., 79 S. E. 493.

§ 139 (N.C.) A motion for nonsuit will be denied where there is evidence which, if believed by the jury, is sufficient foundation for a verdict for the plaintiff.—Ellison v. Western Union Telegraph Co., 79 S. E. 277; Harrison v. Same, Id. 281.

§ 139 (S.C.) If there is any competent evidence at all tending to sustain the allegations of the complaint, the case should be submitted to the jury, and a nonsuit denied.—Bennett v. Southern Ry.-Carolina Division, 79 S. E. 710.

§ 139 (S.C.) Where there is any evidence in favor of plaintiff, its weight and sufficiency should be left to the jury.—Smith v. Southern Ry. Co., 79 S. E. 1099.

§ 139 (W.Va.) Where a case does not turn on conflicting oral testimony, the court may properly direct a verdict for the party in whose favor the evidence decidedly preponderates.—*Lovett v. West Virginia Central Gas Co.*, 79 S. E. 1007.

§ 141 (N.C.) Where the testimony of plaintiff's witness as to the amount due was not controverted or denied, and there was no attempt to impeach him, a verdict should have been directed for that amount.—*Arey Distilling Co. v. Mutual Aid Banking Co.*, 79 S. E. 287.

§ 141 (N.C.) Where the evidence is uncontradicted, and only one inference can be drawn therefrom, the judge may direct the jury to find a certain verdict if they believe the evidence, but it is very rare that a verdict can be properly directed when the sole question is the possession of land, and much evidence is offered on each side.—*Barfield v. Hill*, 79 S. E. 677.

§ 141 (N.C.) Where, in an action on an accepted order, the uncontradicted evidence showed that the order was accepted conditionally, it was error to submit to the jury a question whether the order was unconditional.—*Craig & Wilson v. Stewart & Jones*, 79 S. E. 1100.

§ 145 (S.C.) In an action for a deposit, in which the bank sought to charge checks, drawn on another account kept by plaintiff, against the deposit sued for, an instruction held erroneous as invading the province of the jury, which withdrew from the jury the issue whether, by the course of dealing, the bank was justified in believing plaintiff's agent was authorized to direct the bank to charge the checks as was done.—*Hiller v. Bank of Columbia*, 79 S. E. 899.

(B) Demurrer to Evidence.

§ 156 (Va.) Where deceased was killed by being thrown from the platform of a dinkey engine, on which he was riding, by the impact of another engine against a car, from which the dinkey had just been uncoupled, but the evidence failed to show whether it was before or after the dinkey was put in motion, it will be assumed on demurrer to the evidence that it was afterwards.—*Steele's Adm'r v. Colonial Coal & Coke Co.*, 79 S. E. 346.

(C) Dismissal or Nonsuit.

§ 165 (Ga.) A motion for nonsuit in an action for land should be denied, where plaintiff's evidence under the most favorable construction makes out a prima facie case.—*Henry v. Roberts*, 79 S. E. 115.

§ 165 (N.C.) Upon motion for a nonsuit the evidence must be taken in the light most favorable to the plaintiff and with all the inferences which may be reasonably drawn therefrom in his favor.—*Lewis v. Norfolk Southern R. Co.*, 79 S. E. 283.

§ 165 (N.C.) In determining a motion for a nonsuit, the evidence, which makes for plaintiff's right to recover, must be taken as true and interpreted in the light most favorable to him.—*Brewer v. Wynne*, 79 S. E. 629.

§ 165 (N.C.) On motion for nonsuit the court will consider only the evidence most favorable to plaintiff and in the most favorable aspect to him.—*Smith v. Cumberland County Agr. Society*, 79 S. E. 632.

§ 165 (N.C.) In ruling upon a defendant's motion for a nonsuit or a directed verdict, the court must adopt the evidence of the plaintiff and reject that of the defendant, except in so far as the latter is in the plaintiff's favor.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

(D) Direction of Verdict.

§ 168 (S.C.) The rules governing nonsuits govern the direction of verdicts.—*Smith v. Southern Ry. Co.*, 79 S. E. 1099.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 191 (Ga.App.) An instruction that plaintiff could not recover if her injuries were not due to certain enumerated acts of the defendant, carrier held not erroneous, as assuming that certain acts stated were negligent, when considered in connection with the entire charge.—*Savannah Electric Co. v. Lackens*, 79 S. E. 53.

§ 191 (N.C.) Where the indorsement of a note by the payee to a bank was expressly denied, it was error for the court to state to the jury that it was proved and not denied that the note went into the hands of the bank before it was due.—*Third Nat. Bank of St. Louis v. Eixum*, 79 S. E. 498.

§ 191 (S.C.) A charge which assumes a disputed question of fact is improper.—*Hiller v. Bank of Columbia*, 79 S. E. 899.

§ 192 (S.C.) Where, in the trial of title to a lot, defendant set up title by adverse possession, a charge that defendant must have had the lot for 10 full years prior to the commencement of the action in May, 1910, was not a charge on the facts, as it simply stated a fact about which there was no controversy.—*McLain v. Allen*, 79 S. E. 1.

§ 192 (S.C.) A charge is not improper as a charge on the facts merely because it does not state hypothetically facts which are admitted.—*Hiller v. Bank of Columbia*, 79 S. E. 899.

§ 193 (S.C.) The trial judge may charge the law applicable to any facts proven, and a statement of what facts are admitted or not contested is not a charge on the facts.—*Mullaly v. Smyth*, 79 S. E. 634.

§ 194 (Ga.) Where defendant denied that a diamond alleged to have been stolen belonged to plaintiff, but claimed that he received it from R., whom he did not produce, an instruction that it should be presumed that R., if present, would not have supported such claim, was objectionable, as charging that the defendant's testimony was weaker than that of R., had he testified in the case.—*Brothers v. Horne*, 79 S. E. 468.

(B) Necessity and Subject-Matter.

§ 203 (Ga.App.) Where the only defense to a suit upon a note was accord and satisfaction, it was error to charge the jury that the defendant could not recover unless he proved payment of the note, and to omit to instruct as to the defense.—*Elrod v. M. C. Kiser & Co.*, 79 S. E. 375.

§ 203 (N.C.) Under Revisal 1905, § 535, it was error, in an action for the value of a hog, where there was much evidence to ownership and value, and defendant relied on estoppel, to only charge the jury to take the case and settle it as between man and man.—*Blake v. Smith*, 79 S. E. 626.

(C) Form, Requisites, and Sufficiency.

§ 228 (Ga.App.) In an action to recover for injuries to plaintiff's storehouse by change of grade, it was not error in the instructions to refer to the lot as "the property."—*City of Americus v. Phillips*, 79 S. E. 56.

§ 228 (Ga.App.) An instruction that the damages recoverable for mental pain and suffering is left to the "enlightened consciences of intelligent jurors" held not erroneous in the use of the word "intelligent" instead of "impartial."—*City of Rome v. Ford*, 79 S. E. 243.

§ 234 (Ga.App.) A trial judge in declaring that the party having the burden of proof has discharged it so that the burden of evidence is shifted to his opponent may properly consider the question as to which party has control of the more precise and conclusive knowledge as

to the particular facts.—*Hyer v. C. E. Holmes & Co.*, 79 S. E. 58.

§ 235 (N.C.) Where the evidence was conflicting, instruction to find for plaintiff, if the jury believed the evidence, *held* improper.—*Henry v. Heggie*, 79 S. E. 982.

§ 236 (Ga.) An instruction, after charging the language of Civ. Code 1910, § 5732, for determining the credibility of witnesses, that the jury should reconcile all the testimony, if possible, and, if not, give the greater weight to that witness or those witnesses whose testimony seems to be most reasonable and credible, *held* sufficient.—*Collum v. Georgia Ry. & Electric Co.*, 79 S. E. 475.

§ 236 (Ga.App.) An instruction that the jury could believe the witnesses having the best opportunity of knowing the facts and the least inducement to swear falsely, without qualifying the instruction by the addition of the words "if the witnesses are of equal credibility," is erroneous.—*Richter v. Cathy*, 79 S. E. 179.

§ 240 (Ga.) A request to instruct should not be argumentative, though based upon a discussion in the opinion of a court of last resort.—*Flemister v. Central Georgia Power Co.*, 79 S. E. 148.

§ 241 (S.C.) In an action for mental anguish caused by the failure to deliver promptly a telegram announcing the death of plaintiff's father, it is not error for the court, in charging the jury, to read Civ. Code 1912, § 3330, allowing a recovery in such cases.—*Gossett v. Western Union Telegraph Co.*, 79 S. E. 309.

§ 242 (S.C.) Where the jury were charged that plaintiff could not recover if guilty of negligence in any one or more of the particulars specified in the answer, containing nine specifications of contributory negligence, an instruction that the burden was on defendants to establish every material allegation of the defense of contributory negligence was not misleading.—*Huggins v. Atlantic Coast Line R. Co.*, 79 S. E. 406.

§ 243 (Va.) Where two instructions on the issue of a servant's contributory negligence were irreconcilable, the judgment will be reversed.—*Powhatan Lime Co. v. Affleck's Adm'r*, 79 S. E. 1054.

(D) Applicability to Pleadings and Evidence.

§ 251 (Ga.App.) In an action for injuries to an automobile driver at a railroad crossing, negligence of the defendant in maintenance of the crossing should be confined by the instructions to the specific act of negligence alleged in the petition.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

§ 251 (Va.) In an action for injuries to a railway mail clerk, instructions requested by the defendant, basing plaintiff's right of recovery upon negligence in suddenly checking the train, *held* to have been properly refused, where two counts of the declaration did not rely upon that ground of negligence.—*Virginian Ry. Co. v. Bell*, 79 S. E. 396.

§ 252 (Ga.) Where, in an action on a note, there was no evidence of failure of consideration or of notice to plaintiff at the time it took the note of fraud practiced on the maker by the agents of the payee inducing the execution thereof, it was error to charge on fraud and failure of consideration.—*Bank of Lavonia v. Bush*, 79 S. E. 459.

§ 252 (Ga.) Where, in trover to recover a stolen diamond, one of the defendants claimed that the diamond introduced in evidence did not belong to plaintiff, but that he had received it from R., and it did not appear that R. was in the county or could by reasonable diligence have been obtained as a witness, it was error to charge that under Civ. Code 1910, § 5749, it should be presumed that R., if produced, would not have supported such claim.—*Brothers v. Horne*, 79 S. E. 468.

§ 252 (Ga.) Where, in an action for specific performance, plaintiff based her right to recover upon a parol gift, possession under the gift, substantial improvements, and a contract of sale, but there was no evidence as to gift, possession, and improvements, the court in its charge should have confined the jury to the question of a contract of sale.—*Coffey v. Cobb*, 79 S. E. 568.

§ 252 (Ga.App.) Failure of the court in a personal injury case to instruct on elements of damages pleaded but not proven was not error.—*City of Rome v. Ford*, 79 S. E. 243.

§ 252 (N.C.) Where a contract for the sale of timber authorized plaintiff to suspend cutting on a decline of the market price so as to render cutting unprofitable, an instruction on the issue whether plaintiff suspended cutting in violation of the agreement, failing to include his right to suspend, was erroneous.—*Wilson v. Scarboro*, 79 S. E. 811.

§ 252 (N.C.) Where, in an action on an accepted order, the evidence conclusively showed a conditional and not an absolute promise to pay the order, it was error to instruct that plaintiffs would be entitled to recover if defendants "promised to pay it and accepted it."—*Craig & Wilson v. Stewart & Jones*, 79 S. E. 1100.

§ 252 (Va.) Where an engineer fell into a ditch dug by a contractor on the railroad company's premises and was injured, an instruction that, if the engineer had no right on the premises, then the contractor owed him no duty except not to willfully injure him was properly refused as abstract.—*Nesbit v. Webb*, 79 S. E. 330.

§ 252 (Va.) A requested instruction, in an action against a county on a contract for the improvement of a highway, that plaintiff is entitled to recover if the work was performed according to the specifications, "as directed by the engineer," was properly modified by striking out the words quoted, where the contract provided that the work should be done in accordance with the specifications, and to the satisfaction of the county and engineer.—*Luck Const. Co. v. Russell County*, 79 S. E. 393.

§ 252 (Va.) A requested instruction which is not supported by the evidence is properly refused.—*Virginian Ry. Co. v. Bell*, 79 S. E. 396.

§ 252 (W.Va.) In a suit under the civil damage act, it was error to submit instructions on the question of injury to plaintiff's person, where there was no evidence of such injury.—*Greer v. Arrington*, 79 S. E. 720.

§ 253 (Ga.) Under Civ. Code 1910, § 6084, relative to requests to charge, it was error, in an action for injuries from a crossing accident, to refuse an instruction properly stating the law of contributory negligence, where there was evidence that the accident resulted from the mutual negligence of defendant and plaintiff.—*Georgia & F. Ry. v. Newton*, 79 S. E. 142.

§ 253 (N.C.) An instruction in garnishment *held* erroneous for ignoring certain evidence.—*Cannon-Torrence Co. v. Marlott*, 79 S. E. 1109.

§ 253 (S.C.) In a depositor's action for a balance, an instruction that the bank must prove that the checks charged to the account were signed by the depositor herself *held* improper as ignoring the issue whether the depositor's agent had authority, real or apparent, to direct that they be so charged, though irregularly signed.—*Hiller v. Bank of Columbia*, 79 S. E. 899.

§ 253 (Va.) An instruction, in an action against a county for balance due on a road construction contract, that if the facts therein stated are true the county is estopped from denying that certain work was not according to contract which disregards evidence that the plaintiff induced the action claimed to constitute an estoppel by fraud, was properly refused.—*Luck Const. Co. v. Russell County*, 79 S. E. 393.

(E) Requests or Prayers.

§ 255 (Ga.) In an action for malicious arrest, failure to instruct on advice of counsel *held* not error, in the absence of a request therefor.—*Hurt v. Barnes*, 79 S. E. 775.

§ 255 (Ga.App.) In an action under the federal Employers' Liability Act, failure to instruct that there is no presumption of negligence against a railroad company in such cases is not error in the absence of a request for such an instruction.—*Charleston & W. C. R. Co. v. Brown*, 79 S. E. 932.

§ 256 (Ga.) Where the instructions given fairly presented the issues, failure to give fuller instructions was not error, in the absence of a request therefor.—*West v. Locklear*, 79 S. E. 855.

§ 256 (Ga.) Where the instructions given in a personal injury case do not state the defense as fully as desired, the defendant should request additional instructions.—*Alabama Great Southern R. Co. v. Brown*, 79 S. E. 1113.

§ 256 (Ga.App.) In the absence of a request for an instruction as to the burden of proof on a particular point or issue, an instruction as to the burden of proof in the case as a whole is sufficient.—*Cook v. Hightower & Co.*, 79 S. E. 165.

§ 256 (Ga.App.) Where the instructions fairly presented the law, a party desiring more specific instructions upon particular features of the case should have made appropriate requests therefor.—*Rochelle Gin & Cotton Co. v. Fisher*, 79 S. E. 584.

§ 256 (Ga.App.) Where the instructions substantially covered the issues, defendant could not complain of failure to give more specific instructions, in the absence of a request therefor.—*Moultrie Compress Co. v. Byrom Cotton Co.*, 79 S. E. 589.

§ 256 (N.C.) Where the court has given a proper instruction on a particular subject, if a party desires more specific instructions he must ask for them.—*Monds v. Town of Dunn*, 79 S. E. 303.

§ 256 (S.C.) Where the charge as a whole is free from error, the defendant should present requests to charge, if it desires more specific instructions.—*Gossett v. Western Union Telegraph Co.*, 79 S. E. 309.

§ 256 (S.C.) Where a charge is desired on a special phase of the case, it must be brought to the attention of the court by request to charge, and, in the absence of appropriate request, the giving of a mere general charge is not error.—*Hiller v. Bank of Columbia*, 79 S. E. 890.

§ 259 (Ga.) Failure to charge relative to certain admissions relied on by plaintiff to establish a resulting trust *held* not error in the absence of an appropriate written request therefor.—*Banks v. Bradwell*, 79 S. E. 572.

§ 259 (Ga.App.) In the absence of written requests for specific instructions, the court was not required to give the meaning of the word "consent," as necessarily free and not obtained by fraud, as defined in Civ. Code 1910, § 4490, and use it in an instruction given.—*City of Americus v. Phillips*, 79 S. E. 36.

§ 260 (Va.) It is not error to refuse one of defendant's requests to charge where the jury was liberally instructed on every phase of defendant's theory of the case.—*Nesbit v. Webb*, 79 S. E. 330.

§ 260 (Va.) Instructions, that the persons who were required to perform certain duties under a contract were the engineers within its meaning, were unnecessary, and the court did not err in refusing them, where the jury were instructed that if they believed that certain persons, whom the evidence showed were the ones who performed such duties, were appointed to perform them, that they were the engineers.

—*Luck Const. Co. v. Russell County*, 79 S. E. 393.

§ 261 (Ga.) In an action for injuries from a crossing accident, an instruction on the effect of plaintiff's negligence, which was confusing in the use of the word "diligence" for "negligence," was properly refused.—*Georgia & F. Ry. v. Newton*, 79 S. E. 142.

§ 267 (Va.) In an action for injuries to a railway mail clerk, where there is evidence of contributory negligence, the court should modify an erroneous instruction on that issue tendered by the defendant, or should give another instruction in lieu thereof.—*Virginian Ry. Co. v. Bell*, 79 S. E. 396.

§ 267 (W.Va.) Where an instruction, though good as an abstract proposition, may tend to mislead when applied to a concrete case, it is not error for the court to so modify its language as to make it cover the case presented.—*Greer v. Arrington*, 79 S. E. 720.

(G) Construction and Operation.

§ 295 (Ga.App.) Excerpts from instructions should be considered in connection with the entire charge to determine their sufficiency.—*Lyon v. Cedartown Lumber Co.*, 79 S. E. 236.

§ 295 (Ga.App.) In an action for goods sold, general instructions on fraud, without limiting their application to the fraud pleaded, were not error, where, from the instructions as a whole, the jury must have understood that they must determine from the evidence whether defendant was defrauded as alleged.—*Kerr Glass Mfg. Co. v. Americus Grocery Co.*, 79 S. E. 381.

§ 295 (N.C.) The charge as a whole is to be considered, and where every position available to appellant was correctly referred to the jury, that portions of the instructions standing by themselves might be open to criticism is not reversible error.—*Bird v. Bell Lumber Co.*, 79 S. E. 448.

§ 295 (S.C.) Where the charge as a whole instructed that plaintiff must make out his case by the greater weight of the evidence, the fact that the charge in some places also required that he prove his case by a clear preponderance of the evidence did not render it erroneous, as requiring too high a degree of proof.—*Mullaly v. Smyth*, 79 S. E. 634.

§ 295 (S.C.) Statement in charge that proof of injury to a servant by defective machinery was prima facie evidence of negligence on the part of the master *held* not error in view of the remainder of the charge.—*Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

The charge in an action for the wrongful death of a servant *held* not objectionable as one on the facts when considered as a whole.—*Id.*

§ 296 (Ga.) In an instruction in an action by plaintiff to recover for the death of her husband, an omission to charge that to recover it must appear that his death was caused by negligence of defendant, and that such negligence was the proximate cause of the injury, was not cause for new trial, where the court had previously instructed that plaintiff could not recover if decedent was killed by his own carelessness, or if by ordinary care he could have avoided the negligence of defendant.—*Macon, D. & S. R. Co. v. Anchors*, 79 S. E. 153.

§ 296 (Ga.App.) A charge on contributory negligence, which in itself is insufficient, is not erroneous, where the court in another part of the charge instructed fully on the law of contributory negligence.—*Central of Georgia Ry. Co. v. McKey*, 79 S. E. 378.

§ 296 (N.C.) In an action for breach of contract, an instruction that the jury must be convinced that the contract was made as alleged by plaintiff before they could find for plaintiff was sufficient, in connection with another instruction distinctly placing the burden of proof upon the plaintiff.—*Holt v. Wellons*, 79 S. E. 450.

§ 296 (N.C.) In an action on an accepted order, an instruction, erroneous because not addressed to any particular issue, was harmless, where the jury, in the light of the other instructions, could not have been misled thereby.—*Craig & Wilson v. Stewart & Jones*, 79 S. E. 1100.

Where two instructions, one good and the other bad, are so blended and applied to a single issue as not to be separable, and it is impossible to determine under which instruction the jury answered the issues, the case will be reversed on appeal.—*Id.*

§ 296 (Va.) In an action for injuries received by a railway mail clerk, instructions permitting recovery without showing a sudden checking of the train, as alleged in the declaration, *held* not to be misleading in view of an instruction given at defendant's request, requiring such fact to be proved.—*Virginian Ry. Co. v. Bell*, 79 S. E. 396.

IX. VERDICT.

(A) General Verdict.

§ 330 (N.C.) Where, notwithstanding there was no evidence of fraud in the alleged omission of a certain stipulation from a contract, the court submitted that question to the jury, a finding that the provision was omitted by fraud or mistake was unsustainable.—*Wilson v. Scarborough*, 79 S. E. 811.

§ 343 (S.C.) The verdict must be construed as resolving all inferences in favor of the successful party.—*Aldrich v. Southern Ry. Co.*, 79 S. E. 316.

(B) Special Interrogatories and Findings.

§ 350 (Ga.App.) Where, in an action for goods sold, the only defense relied on was that the goods were worthless, and fraud, though pleaded, was not an essential part of the defense, it was not error to refuse to instruct the jury to specify whether the verdict was based upon defendant's plea of rescission or plea of failure of consideration.—*Kerr Glass Mfg. Co. v. Americus Grocery Co.*, 79 S. E. 381.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§ 373 (S.C.) Under Code Civ. Proc. 1912, § 312, where special issues are submitted to a jury in a suit for specific performance, an instruction that the court is not bound by the jury's findings, is not error.—*Mullaly v. Smyth*, 79 S. E. 634.

§ 374 (S.C.) The court has the right in all equity cases to submit both legal and equitable issues raised by the pleadings to the jury, and need not require them to return a general verdict.—*McLain v. Allen*, 79 S. E. 1.

TROVER AND CONVERSION.

See Bailment, § 18; Corporations, § 432; Courts, § 189; Evidence, § 596; Gifts, § 48; Trial, § 252.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 1 (Ga.App.) Trover lies only where there has been a conversion.—*Jeems v. Lewis*, 79 S. E. 235.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 13 (Ga.App.) Trover will not lie to recover possession of a deed executed to defendant, or a nonnegotiable note and certificates of deposit payable to defendant, on the ground that the writings were improperly taken in defendant's name, when they should have been taken in that of plaintiff; plaintiff's remedy being in equity.—*Gaskins v. Gaskins*, 79 S. E. 483.

§ 16 (Ga.App.) Where the evidence showed that defendant, a member of a firm succeeded

by plaintiffs, which formerly owned the horse sued for, had exchanged it for another horse, which the partnership accepted, and that when plaintiffs came into possession of the assets the firm had parted with the title to the horse, the evidence demanded a verdict for defendant.—*Fisher v. Beach, Hinson & Co.*, 79 S. E. 84.

§ 17 (Ga.App.) A person who holds property as security for a debt may maintain trover for its recovery from one who wrongfully withholds possession thereof.—*Gearreld v. Woodruff*, 79 S. E. 355.

§ 17 (Ga.App.) Trover will not lie where the title to the property sought to be recovered rests in a partnership, and plaintiff's interest therein cannot be determined until a full partnership accounting has been had.—*Cox v. Manning*, 79 S. E. 484.

§ 23 (Ga.App.) Where a husband makes a gift of a chattel to his wife in conformity with Civ. Code 1910, § 4144, prescribing the essentials of a gift, and afterwards regains possession, he cannot, in trover by the wife to recover the chattel, set up title in a third person at the time the gift was made.—*Hartz v. Hartz*, 79 S. E. 230.

§ 23 (Ga.App.) There can be no conversion of a chattel so long as the party in possession has a right to retain it against the person claiming the right to recover it.—*Jeems v. Lewis*, 79 S. E. 235.

§ 25 (Ga.) Where two persons conspire to steal personal property, and one of them commits the larceny, while the other is present aiding and abetting, both are liable in trover, though the aider and abettor never acquire any part of the stolen goods.—*Brothers v. Horne*, 79 S. E. 468.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 32 (Ga.App.) The description of machinery in a petition in trover as situated in a certain town along a certain right of way, being that formerly used by defendant and described in an instrument identified by stating the parties, date, and place and date of record, is sufficient.—*Blakely Artesian Ice Co. v. Clarke*, 79 S. E. 526.

(C) Evidence.

§ 35 (Ga.App.) The burden is on the plaintiff in trover to prove not only title but also right of possession where he has by contract surrendered possession to another.—*Birmingham Fertilizer Co. v. Dozier*, 79 S. E. 927.

§ 40 (Ga.) Where, in trover to recover a stolen diamond, there was no evidence that one of the defendants was ever in possession thereof, and no proof connecting him with its alleged theft, the evidence was insufficient to sustain a verdict against him.—*Brothers v. Horne*, 79 S. E. 468.

§ 40 (Ga.App.) Evidence in trover to recover certain promissory notes *held* to sustain a verdict for defendant.—*Birmingham Fertilizer Co. v. Dozier*, 79 S. E. 927.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Carriers, § 76; Constitutional Law, §§ 63, 278; Corporations, §§ 265, 479; Costs, § 196; Estoppel, § 98; Evidence, §§ 236, 256, 271; Insane Persons; Wills, §§ 597, 740.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§§ 17, 18 (N.C.) The statute of frauds requiring that a sale of land must be evidenced by a memorandum signed by the party to be charged has no application to a declaration of trust as to land.—*Anderson v. Harrington*, 79 S. E. 426.

§ 21 (Ga.) It is no objection to the validity of trust created by a deed that the cestuis que trust cannot be definitely known until the death of the trustee, but is sufficient that they come into being during the trustee's life and are distinguished at her death.—*Heyward-Williams Co. v. McCall*, 79 S. E. 133.

§ 35 (N.C.) It is not necessary that a trustee be declared in any particular mode, and where money was loaned a purchaser of land to pay the purchase price, and a deed taken in the vendor's name under an oral agreement that when the loan should be repaid each would have a half interest in the land, a trust was hereby created in favor of the purchaser.—*Anderson v. Harrington*, 79 S. E. 426.

(B) Resulting Trusts.

§ 72 (Ga.) Under Civ. Code 1910, §§ 3739, 3780, where a trust would be implied from the payment of the purchase money by another, it will be implied where the recipient uses such money for other purposes, and substitutes his own money to pay for the land.—*Banks v. Bradwell*, 9 S. E. 572.

§ 77 (Ga.) Under Civ. Code 1910, § 3739, relative to implied trusts, a resulting trust is not created by the payment of the price, unless the payment is made either before or at the time of purchase.—*Hall v. Edwards*, 79 S. E. 852.

II. CONSTRUCTION AND OPERATION.

(A) In General.

§ 124 (Ga.) In a deed conveying land to F., trustee for her children," the words quoted, though usually construed to refer to only such persons as are in life, referred to such as might be thereafter born, where other language in the deed indicated that such was the maker's intention.—*Heyward-Williams Co. v. McCall*, 79 S. E. 133.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

§ 366 (N.C.) Plaintiff *held* not entitled to establish a parol trust in his own favor against the grantee in his deed, and his wife and children alleged to be the other beneficiaries of the trust, in a suit to which they were not made parties.—*Cavanaugh v. Jarman*, 79 S. E. 673.

ULTRA VIRES.

See Corporations, §§ 385, 388; Municipal Corporations, §§ 680, 681.

UNAVOIDABLE ACCIDENT.

See Carriers, § 292.

UNDISCLOSED AGENCY.

See Principal and Agent, § 145.

UNDUE INFLUENCE.

See Deeds, §§ 196, 211.

UNITED STATES.

See Commerce, § 3.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

§ 98 (Ga.) Under Civ. Code 1910, § 3442, providing that a conveyance to secure a debt infected with usury is void, the grantor may have a homestead set apart in the property sought to be conveyed, which will not be subject to a judgment on the debt, though the usury be eliminated when the judgment is taken.—*McConnell v. Gregory*, 79 S. E. 1128.

(C) Rights and Remedies of Third Persons.

§ 127 (S.C.) That the bank at which plaintiff discounted defendant's note charged usurious interest on a subsequent renewal note is no defense where, having paid a second renewal note as indorsee, plaintiff brought action to foreclose a mortgage given as security, though usury, added to the face of the second renewal note from which plaintiff received benefit, was not recoverable.—*Simpson v. Cox*; 79 S. E. 102.

VACATION.

See Judgment, §§ 358-386.

VAGRANCY.

§ 1 (Ga.App.) A married woman, whose husband is not shown to be able to support her, cannot be convicted of vagrancy on proof that she is able to work and does not work, though she and her husband may be living apart.—*Brown v. State*, 79 S. E. 1133.

VENDOR AND PURCHASER.

See Appeal and Error, § 150; Constitutional Law, § 278; Deeds, § 117; Evidence, § 142; Homestead, §§ 120, 131; Husband and Wife, §§ 185-198; Lis Pendens; Mechanics' Liens, § 279; Railroads, § 258; Remainders; Sales; Specific Performance; Trusts, §§ 17, 18, 72.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 13 (N.C.) Marriage is a valuable consideration for a contract for the sale of land.—*Winslow v. White*, 79 S. E. 258.

An agreement by defendant that, if plaintiff would marry his daughter and be good and kind to her, he would give him a strip of land *held* to constitute an agreement in consideration of marriage to convey such land.—*Id.*

§ 18 (Va.) An option to purchase land can be accepted only on the terms contained therein.—*Triplett v. Gudebrod*, 79 S. E. 1045.

§ 22 (N.C.) Agreement to convey land *held* to sufficiently describe the land.—*Winslow v. White*, 79 S. E. 258.

§ 39 (Ga.) A contract for the sale of land is not invalid because it secures to the vendor a right to repurchase.—*Cowart v. Singletary*, 79 S. E. 196.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 51 (N.C.) In determining the meaning of a stipulation in an agreement to convey land in consideration of marriage, *held*, that the language used, the relationship and purpose of the donor, and the attendant circumstances were all proper for consideration.—*Winslow v. White*, 79 S. E. 258.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

§ 95 (Ga.) Acceptance of purchase money by a vendor precluded her from claiming a forfeiture under a provision of the sale contract authorizing a forfeiture on nonpayment of any installment of the price.—*Cowart v. Singletary*, 79 S. E. 196.

(C) Rescission by Purchaser.

§ 120 (Va.) Where a deed provided that at the end of five years grantor should ascertain whether the grantee was satisfied, and, if not, should return the price, and receive a reconveyance, a statement by grantee when ap-

proached at the time set, that "I am about of the same opinion that I was when the transaction was had; get your money ready," meant that grantee was dissatisfied, and intended to reconvey.—*Burner v. Burner*, 79 S. E. 1060.

Such provision entitled grantor to a reconveyance upon paying such amount to grantee, provided the latter declared he was not satisfied.—*Id.*

The grantor was entitled to a reasonable time before the expiration of such five years to raise the money to himself perform, and seven days before the expiration of such period was a reasonable time for ascertaining grantee's wishes.—*Id.*

Where grantee stated that he was dissatisfied when questioned seven days before the end of the five years, when grantor began to raise the money for a reconveyance, grantee could not afterwards change his mind and refuse to reconvey on the ground that grantor did not wait until the exact expiration of the five-year period.—*Id.*

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 129 (N.C.) In view of Revisal 1905, § 1578, converting estates tail into fee-simple estates, a purchaser could not refuse to perform a contract for the purchase of land the chain of title to which contained a deed to the grantee and her bodily heirs.—*Harrington v. Grimes*, 79 S. E. 301.

V. RIGHTS AND LIABILITIES OF PARTIES.

(A) As to Each Other.

§ 197 (N.C.) An agreement to purchase property subject to the incumbrances thereon did not constitute an assumption of such incumbrances so as to make the purchaser personally liable to the vendor for an amount paid by the vendor to satisfy an incumbrance.—*Henry v. Heggie*, 79 S. E. 982.

A covenant in a deed to assume all incumbrances on the property as a part of the consideration, with special reference to particular mortgages, which were excepted from the warranty, constituted an assumption of the mortgage debt by the grantee and an indemnity against its payment by the grantor.—*Id.*

§ 208 (Ga.) The vendor's title stands as a security for unpaid purchase-money notes, and the vendor cannot, without the consent of the purchaser, separate the title into fractional undivided interests by transferring the notes to different persons, or thus empower a transferee to obtain a judgment, file a deed, and sell an undivided interest, as provided by Civ. Code 1910, § 6037, or obtain a general judgment against the purchaser, with a special lien upon the undivided interest; such a transaction not being authorized by section 6037, which provides for the filing of a quitclaim deed and the sale of property under a purchase-money judgment.—*Strickland v. Lowry Nat. Bank*, 79 S. E. 539.

(B) As to Third Persons in General.

§ 214 (Ga.) Under Civ. Code 1910, § 3657, defining a fee-simple estate, and section 3718, providing that a condition repugnant to the estate granted is void, a stipulation of a bond for title that the bond should not be transferred, if construed as an absolute restriction upon any alienation of the land, is void.—*Cowart v. Singletary*, 79 S. E. 196.

Where the holder of a bond for title conveyed land by a warranty deed, such conveyance did not constitute a transfer of the bond within the meaning of a stipulation prohibiting such a transfer.—*Id.*

Where C. conveyed land to S. on his agreement to pay a balance due from C. to H. on the price, and where subsequently H. conveyed the land to G., and where there was evidence that H. knew of the conveyance to S., and

accepted payments from S., and that G. knew such facts, *held*, that a provision of the bond for title received by C. from H., that the bond should not be transferable, did not preclude S. from enforcing his equitable rights in the land.—*Id.*

§ 215 (Ga.) A provision in a bond for title restricting the purchaser's right to alienate the land until the last payment of the purchase money shall fall due is enforceable only for the benefit of the vendor, and not enforceable after such purchase money has been paid in full.—*Cowart v. Singletary*, 79 S. E. 196.

(C) Bona Fide Purchasers.

§ 228 (N.C.) A purchaser having notice of an opposing claim is thereby placed upon inquiry and charged with notice of every fact which a proper inquiry would have discovered.—*Rae-ford Lumber Co. v. Rockfish Trading Co.*, 79 S. E. 627.

§ 233 (N.C.) A deed is not valid as against a junior deed to a purchaser for a valuable consideration which is first registered.—*Thompson v. Thomas*, 79 S. E. 896.

§ 235 (N.C.) Under Revisal 1905, § 980, providing that no conveyance of land shall be valid as against creditors or purchasers for a valuable consideration but from the registration thereof, registration is not required as against a subsequent deed, made without a valuable consideration.—*Thompson v. Thomas*, 79 S. E. 896.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

§ 334 (Ga.App.) Where land is sold at a stipulated price per acre, and plaintiff pays an excess over the stipulated price, not because of fraud of defendant, or any negligence of plaintiff, but simply through a mistake made by the surveyor, whom both selected to ascertain the exact acreage, plaintiff is entitled to recover the excess so paid.—*Mobley v. Harrell*, 79 S. E. 372.

(B) Actions for Breach of Contract.

§ 343 (S.C.) Where a vendor of land, upon being informed that there was a deficiency, insisted that land underneath the nonnavigable stream upon which the tract bordered should be surveyed and included, there was no waiver on his part of the right to have such land included, though he was not present at the survey.—*Southern Power Co. v. Cassels*, 79 S. E. 453.

§ 344 (Ga.) It is ordinarily a condition precedent to a purchaser's right to sue for damages for breach of a contract of sale for cash that he tender the cash or such tender be waived.—*Smith v. Tatum*, 79 S. E. 775.

A proposition to the owner of land that he send a conveyance to a city in another state, and receive payment, or that the purchaser would send a check to a bank to be delivered upon delivery of the conveyance, *held* not to constitute such a tender of performance of a contract to sell for cash as entitled plaintiff to sue for breach of contract.—*Id.*

§ 349 (S.C.) In an action for an alleged deficiency discovered on the subsequent survey, defendant may under a general denial show that the survey was only partial.—*Southern Power Co. v. Cassels*, 79 S. E. 453.

VENUE.

See Bills and Notes, § 454; Constitutional Law, §§ 206, 249, 305; Criminal Law, §§ 130, 1023; Injunction, § 111; Insurance, § 618; Partnership, § 320.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 22 (Ga.App.) Where the court has jurisdiction of the person of one defendant when a suit is filed, the mere fact that such defendant is

discharged in bankruptcy will not prevent the court from proceeding to judgment against another defendant, jurisdiction over whom is dependent, not upon the liability of the bankrupt, but upon jurisdiction over him.—*Daniel v. Browder-Manget Co.*, 79 S. E. 237.

VERDICT.

See Appeal and Error, §§ 973, 977, 979, 994-1024; Criminal Law, §§ 877, 878; New Trial, §§ 68-81; Trial, §§ 330-350.

VERIFICATION.

See Chattel Mortgages, § 271; Pleading, § 155.

VICE PRINCIPALS.

See Master and Servant, § 187.

VIEWERS.

See Drains, § 14.

WAGES.

See Master and Servant, §§ 69-83.

WAIVER.

See Abatement and Revival, § 85; Appeal and Error, §§ 1071, 1078; Appearance, §§ 9-25; Bailment, § 18; Bankruptcy, § 363; Bills and Notes, § 301; Contempt, § 66; Criminal Law, §§ 847, 895, 1178; Eminent Domain, §§ 79, 80; Estoppel; Evidence, § 445; Homestead, §§ 169, 172; Insurance, §§ 377, 392; Jury, § 110; Landlord and Tenant, § 112; Mechanics Liens, § 210; Pleading, § 409; Telegraphs and Telephones, §§ 28, 33, 54; Trial, § 136; Vendor and Purchaser, §§ 343, 344.

WAR.

§ 29 (N.C.) Under section 25 of the Declaration of Rights of 1776, the Confiscation Acts (Laws 1777 [2d Sess.] c. 17, and Laws 1779 [2d Sess.] c. 2), and the Entry Act (Laws 1777 [2d Sess.] c. 1), lands to which one of the lords proprietors of Carolina had title *held* to have been held by him as a quasi sovereign and not as an individual, to have passed to the state by right of conquest, and to have been subject to entry and grant.—*Weston v. John L. Roper Lumber Co.*, 79 S. E. 431.

WAREHOUSEMEN.

See Customs and Usages, § 15.

§ 22 (Ga.) Where there is an express contract or a custom requiring a warehouseman to insure the goods intrusted to him, he is liable for loss sustained by reason of his failure to insure.—*Farmers' Ginners & Mfg. Co. v. Thrasher*, 79 S. E. 474.

A warehouseman holds the proceeds of insurance upon the stored goods, which have been destroyed by fire, for the benefit of the insured customers.—*Id.*

The proceeds of the sale of goods, damaged in a warehouse fire so that they could not be identified, are held by the warehouseman for the benefit of all the owners of the goods, whether their goods were insured or not.—*Id.*

A warehouseman, who fails to insure the goods for as much as he should, is liable to the customers severally to the extent of the deficiency of the insurance.—*Id.*

§ 22 (Ga.App.) A warehouseman, agreeing to insure cotton stored with it, subsequently destroyed by fire, is liable for the full value, though it acted in good faith in compromising with the insurers on policies covering cotton, and has been guilty of no negligence, and though it has failed to insure the particular

cotton.—*Rochelle Gin & Cotton Co. v. Fisher*, 79 S. E. 584.

§ 34 (Ga.) Where a petition against a warehouseman for an accounting of the proceeds of insurance and the sale of goods showed that the duty to insure covered a period of only 30 days, and did not allege the several dates on which the goods were stored, it was subject to a special demurrer on that ground.—*Farmers' Ginners & Mfg. Co. v. Thrasher*, 79 S. E. 474.

Where a suit for an accounting by a warehouseman for goods destroyed by fire was not founded upon the warehouse receipts, the petition was not demurrable for failing to set forth the form or substance of the receipts.—*Id.*

A petition in an action against a warehouse corporation, based on an alleged parol contract to insure the goods is not subject to special demurrer on the ground that it failed to allege the name of the agent who made the contract.—*Id.*

A petition against a warehouse corporation for an accounting of the proceeds of insurance and sales of goods destroyed or damaged by fire, which does not allege a breach of the duty as to the fund, or that the company had suspended business, or was insolvent, or that there was danger of loss of property, did not allege grounds for the appointment of a receiver or the granting of an injunction.—*Id.*

WARNING.

See Master and Servant, § 155; Railroads, §§ 312, 337, 369, 389, 419, 446.

WARRANT.

See Possessory Warrant.

WARRANTY.

See Sales, §§ 272-287.

WATERS AND WATER COURSES.

See Eminent Domain, § 98; Evidence, § 543; Mines and Minerals, § 81; Municipal Corporations, §§ 839, 845.

V. SURFACE WATERS.

§ 89 (S.C.) An owner of land abutting on a nonnavigable stream owns to the middle of the bed of the stream, and, on conveyance of his land as including a given number of acres, the submerged land should be included.—*Southern Power Co. v. Cassels*, 79 S. E. 453.

§ 126 (Ga.) An action for damages to farm lands by water ponded thereon by a railroad embankment, so as to render it unfit for cultivation, *held* to be an action for damages resulting from the maintenance of a continuing nuisance.—*Williams v. Southern Ry. Co.*, 79 S. E. 850.

In an action for damages from the maintenance of an embankment constituting a continuing nuisance, against the alienee of the railroad company creating it, it was error to instruct that if there had been any overflow within four years and plaintiff was injured from the "increased overflow," defendant would be liable for the consequential damages; the damages in such case not being restricted to those caused by "increased overflow."—*Id.*

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 190 (Ga.) A contract between a city and a property owner reciting a grant to the city of the right to use a spring as a source of water supply in consideration of the city's furnishing the necessary plumbing to convey water to the owner's residence was not invalid for want of consideration.—*Hall v. City of Calhoun*, 79 S. E. 533.

Where a contract authorized a city to use a

spring that fed a fish pond on the land of a private owner for municipal water supply, the city acquired the right to a reasonable use of the water, notwithstanding it might operate to the detriment of the fish pond.—Id.

Where a city, in consideration of the right to use a spring on the land of a private owner as a source of municipal water supply, granted the right to the landowner to use water from the city's mains free of charge, such right was not assignable.—Id.

WAYS.

See Easements, § 17.

WEAPONS.

§ 3 (Ga.App.) Act Aug. 12, 1910 (Acts 1910, p. 134), prohibiting any person from carrying a pistol without a license, should receive a reasonable construction in accordance with the purpose of the Legislature.—Casper v. State, 79 S. E. 94.

§ 13 (Ga.App.) One who finds a pistol on the public road, and carries it to his home for safe-keeping until it is called for by its owner, is not guilty of violation of the act prohibiting the carrying of pistols without a license.—Casper v. State, 79 S. E. 94.

WHISTLES.

See Railroads, §§ 419, 446.

WILLS.

See Dower, § 20; Executors and Administrators; Perpetuities; Powers; Witnesses, § 92.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

§ 6 (N.C.) A partner cannot bequeath or devise his undivided interest in any specific article belonging to the firm, since each has a joint interest in the whole but not a separate interest in any particular part of the partnership property.—Spencer v. Spencer, 79 S. E. 291.

II. TESTAMENTARY CAPACITY.

§ 52 (N.C.) Where it is shown that a will was properly executed, the law presumes that the testator had the power to make it, and the burden is on the caveators to show lack of mental capacity, and, if the jury are not satisfied that the testator lacked mental capacity, they must find such capacity in accordance with such presumption.—In re Cherry's Will, 79 S. E. 288.

§ 53 (N.C.) A record of proceedings involving the testator's sanity, made some time after the execution of the will, was not in such reasonable proximity in point of time to the fact in issue as to have any tendency to establish the same.—In re Smith's Will, 79 S. E. 977.

III. CONTRACTS TO DEVISE OR BEQUEATH.

§ 58 (W.Va.) An oral contract to make a will, if certain and definite, and upon sufficient consideration, if equitable, is as valid and enforceable against the estate of a decedent as any other valid contract.—Davidson v. Davidson, 79 S. E. 998.

Contracts of this character are viewed by courts with suspicion, are not favored, and to be enforceable must be upon sufficient consideration, be equitable, definite, and certain, and clearly proven.—Id.

§ 59 (W.Va.) A parol contract between an unmarried woman and a man of large property, after the birth of her child, of which he was the father, that he would provide for her and her child by will as if he were married to her, is supported by a sufficient consideration, and enforceable against his estate.—Davidson v. Davidson, 79 S. E. 998.

IV. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

§ 99 (N.C.) A letter written by testator immediately after he had executed his will and just before his departure for a European trip, in which he stated: "If I die I want you to have your part of the five thousand insurance I took out for Spencer Bros. I have written to Bro. George to see that you get it"—was not a codicil because not made *animo testandi*.—Spencer v. Spencer, 79 S. E. 291.

(C) Execution.

§ 120 (N.C.) A testator need not expressly ask the witnesses to sign their names as witnesses thereto, if the will is executed under such circumstances as to indicate that he intended the paper writing that he signed to take effect as his will.—In re Cherry's Will, 79 S. E. 288.

§ 123 (N.C.) While testator must sign a will in the presence of two witnesses, who must in his presence sign their names as attesting witnesses, it is not necessary that he must see the paper at the instant that the witnesses sign if they are in such a position that he could see them sign, if he so desired.—In re Cherry's Will, 79 S. E. 288.

(G) Revocation and Revival.

§ 194 (Va.) Where testatrix gave house and lot to be sold and equally divided between two great-nephews, *held*, that the gift was revoked by the sale of the house and lot by the testatrix in her lifetime, whether treated as a devise of the house and lot, or a bequest of the proceeds.—May v. Sherrard's Legatees, 79 S. E. 1026.

Where testatrix disposed of house and lot given to two grandnephews, the fact that she stated in a codicil that she had disposed of it and reinvested the proceeds in other real estate *held* not to prevent a revocation.—Id.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(D) Probate or Record of Foreign Wills.

§ 246 (W.Va.) Admission to record by the clerk of a county court of West Virginia of a copy of a will probated in another state amounts, under Code 1906, c. 77, § 26, to a probate thereof, which cannot be collaterally drawn in question, or set aside otherwise than as prescribed by Code 1906, c. 77, § 25.—William James' Sons Co. v. Crouch, 79 S. E. 815.

(E) Jurisdiction, Limitations, and Laches.

§ 261 (N.C.) While there is no statute of limitations affecting the right of parties under a will, yet when a will has been regularly proven in common form, the right to caveat may be lost by lapse of time.—In re Dupree's Will, 79 S. E. 611.

Where a will was duly admitted to probate and recorded in December, 1887, and testator's daughter, who married while a minor prior to her father's death, with knowledge of all the facts, did not file a sufficient caveat until March 6, 1911, her right was barred by laches, notwithstanding her coverture and the fact of the continued residence of her brother, to whom all testator's land was devised, in another state after he had sold the land in 1889.—Id.

(F) Parties and Process or Notice.

§ 269 (N.C.) Revisal 1905, § 3123, providing that a devisee applying for probate of a will, in case the executor does not, must give notice, applies to the probate of a codicil.—Spencer v. Spencer, 79 S. E. 291.

(H) Evidence.

§ 292 (N.C.) On the trial of a caveat filed to a will offered for probate, evidence that the propounders were claiming under the alleged will property which was given thereby to the

caveators was properly excluded.—In re Cherry's Will, 79 S. E. 288.

On the trial of a caveat filed to an alleged will offered for probate, evidence that one of the caveators had paid a physician for attending deceased, and had also paid for a monument for deceased, was properly excluded.—Id.

§ 293 (Ga.) That a will was signed in the presence of the subscribing witnesses may be shown by other competent testimony, where they testify that they cannot remember, and even where one or more denies that the testator signed in their presence.—Brock v. Brock, 79 S. E. 473.

§ 302 (W.Va.) Evidence, on the trial of an issue *devisavit vel non*, held insufficient to sustain a verdict against the validity of the will.—Carpenter v. Hayhurst, 79 S. E. 819.

(I) Hearing or Trial.

§ 324 (Ga.) Where, on the probate of a will, there was abundant uncontradicted evidence to show testator's testamentary capacity, it was not error to instruct that the question whether testator was of sound mind and memory was not in issue.—Brock v. Brock, 79 S. E. 473.

(J) Judgment or Decree.

§ 355 (N.C.) Where a judgment in a will contest invalidating the will was set aside for fraud, the caveat filed against the will remained in full force and effect until the issue raised thereby was tried and a valid judgment rendered.—Holt v. Ziglar, 79 S. E. 805.

(M) Operation and Effect.

§ 424 (N.C.) The probate of a will before the clerk in common form is conclusive evidence of its validity, until it is vacated or declared void by a competent tribunal.—Holt v. Ziglar, 79 S. E. 805.

VI. CONSTRUCTION.

(A) General Rules.

§ 461 (Va.) Where testatrix, after giving stock certificate to two grandnephews, stated that she had another certificate, and that, "I wish to go to," held, that the provision as to this last certificate was so indefinite that it passed under the residuary clause.—May v. Sherrard's Legatees, 79 S. E. 1026.

Where a testator's intention is manifest, one word may be substituted for another, but this cannot be done unless the testator's intention is clear or manifest.—Id.

§ 487 (Ga.) Parol evidence of testator's expressed intention is inadmissible to vary the terms of an unambiguous will.—Hanvy v. Moore, 79 S. E. 772.

(B) Designation of Devisees, and Legatees and Their Respective Shares.

§ 506 (Ga.) A will providing that the residue of testator's estate be distributed equally among his legal heirs, construed in the light of Civ. Code 1910, § 3931, relative to the wife's dower, and held that the widow was not included in the phrase "legal heirs," and did not share in the residue.—Hanvy v. Moore, 79 S. E. 772.

(C) Survivorship, Representation, and Substitution.

§ 543 (Ga.) Under a will bequeathing to testator's wife one year's support and certain property during her life or widowhood, and thereafter to his five heirs, naming them, and providing that if a certain two of such heirs should die after testator and before his wife, their shares should revert to the general estate, to be divided among testator's heirs, the wife took an estate for life or widowhood in the land devised and also one-fifth of the fee in the remainder.—Hanvy v. Moore, 79 S. E. 772.

(D) Description of Property.

§ 564 (Va.) In a will providing that the testator's wife shall support herself and the unmarried daughters out of the income from the real estate, the wife is entitled only to a sufficient amount to support them in their station in life, and the balance is to be retained and divided when the property is divided.—Ross v. Ross, 79 S. E. 343.

§ 565 (Va.) Where a testator bequeathed money separately to his wife, to whom he also gave all his personal property, that fact held not sufficient to indicate that the testator did not use the term "personal property" in its technical sense, in view of his knowledge of that sense and of the other clauses of the will.—Ross v. Ross, 79 S. E. 343.

(E) Nature of Estates and Interests Created.

§ 597 (N.C.) Will construed, and held to vest in testator's widow the fee in all his property without trust or other limitation.—Fellows v. Durfee, 79 S. E. 621.

§ 600 (N.C.) A devise generally of real estate, with a power of disposition, passes the fee without restriction, but a devise for life with power of disposition creates only a life estate with the power annexed; the test whether the fee or merely a life estate passes is whether the testator expressly limits the devise to the first taker to a life estate by specific language.—Griffin v. Commander, 79 S. E. 499.

§ 601 (N.C.) A devise generally of real estate, "with power to give and devise the same after her (the devisee's) death, to our beloved children and grandchildren," not expressly restricting the devisee's estate to a life estate, passes the fee without restriction, and the words quoted are to be regarded as mere surplusage as the right to devise is incident to the fee.—Griffin v. Commander, 79 S. E. 499.

§ 614 (Ga.) An item of a will construed in accordance with Civ. Code 1910, § 3630, and held to create a life estate in each of testator's children respectively, with a contingent remainder over as to such share to the children of each child, and with an executory devise in case any child of testator should die without issue.—Wright v. Hill, 79 S. E. 546.

(F) Vested or Contingent Estates and Interests.

§ 634 (Ga.) Where a will created a life estate in each of testator's children respectively, with a contingent remainder over as to such share as to children of each child, and with an executory devise in case any child of testator should die without issue, and where a son of testator survived him and died leaving lawful children, they took vested interests in their father's share.—Wright v. Hill, 79 S. E. 546.

(H) Estates in Trust and Powers.

§ 689 (Ga.) A will held to confer upon testator's widow absolute power to sell, not merely a life estate, but the fee to any part of the estate, when necessary for her support, and to exclude his children from any part of the property so sold, leaving that part of his estate which might remain at her death to be divided among the children, though in one item it provided that she should take charge of all the property "without any appraisal and use it as she needs for her comfort and support."—Stark v. Chambers, 79 S. E. 535.

§ 693 (Ga.) Where a testator made specific devises to his children and issue of deceased children, with certain conditions, and devised certain property to his wife for life, with power to devise it to such of testator's children and issue of deceased children as she might desire, upon the same conditions as the devises were made to them in testator's will, the power of the wife

extended only to the nomination of certain persons from a class, and the apportionment of property among her appointees, who would take under the donor's will, subject to the conditions imposed upon each appointee.—*Grayson v. Germania Bank*, 79 S. E. 124.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 733 (Va.) A holographic will, bequeathing \$3,000 in cash and all the testator's personal property to his wife, *held* to give her the cash immediately upon his death, and entitle her to the balance of the personal property at the settlement of the estate.—*Ross v. Ross*, 79 S. E. 343.

§ 740 (S.C.) Where property was conveyed in trust for a woman and her heirs, with power to her of appointment by will, and she, after selling part of it, and giving one child the proceeds thereof, divided the remainder among the other children, the other children, after accepting the benefits of the will, cannot attack the conveyance.—*Huggins v. Price*, 79 S. E. 798.

(B) Specific, Demonstrative, and General Devisees and Bequests.

§ 750 (Va.) As a general rule, a legacy will not be construed as specific unless it appears clearly to have been so intended, and whether or not it is specific depends wholly upon the language of the will.—*May v. Sherrard's Legatees*, 79 S. E. 1026.

§ 751 (Va.) Where testatrix gave house and lot to be sold and equally divided between two great-nephews, *held*, that the gift was specific.—*May v. Sherrard's Legatees*, 79 S. E. 1026.

(C) Advancements, Ademption, Satisfaction, and Lapse.

§ 767 (Va.) Where testatrix disposed of house and lot given to two grandnephews, the fact that she stated in a codicil that she had disposed of it and reinvested the proceeds in other real estate *held* not to prevent ademption.—*May v. Sherrard's Legatees*, 79 S. E. 1026.

(D) Election.

§ 781 (W.Va.) A devisee cannot take under one provision of a will and deny the validity of another provision.—*Wiley v. Ball*, 79 S. E. 659.

WITNESSES.

See Criminal Law, §§ 594, 603, 656, 665, 785, 918, 1153; Depositions, § 64; Evidence; Municipal Corporations, §§ 640, 642; Perjury; Process, § 126; States, §§ 34, 40; Trial, § 236; Wills, §§ 120, 123, 293.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

§ 5 (N.C.) Practicing attorney *held* not excused from obeying a subpoena to appear as a witness under Revisal 1905, § 1643, because cases in which he appeared were ready for trial in another court.—*In re Pierce*, 79 S. E. 507.

§ 22 (N.C.) To render a witness liable for the penalty prescribed by Revisal 1905, § 1643, for a failure to attend when summoned, it is not necessary the failure should be willful.—*In re Pierce*, 79 S. E. 507.

Intentional failure of witness to attend court as such, although under an erroneous belief as to his rights, *held* willful if Revisal 1905, § 1643, prescribing the penalty for such failure, requires it to be willful.—*Id.*

II. COMPETENCY.

(A) Capacity and Qualifications in General.

§ 37 (Ga.) That a witness, testifying as to a conversation overheard by him, had heard only

a part of such conversation did not render him incompetent to testify to the part which he had heard.—*Lynn v. State*, 79 S. E. 29.

§ 37 (N.C.) In action on account for groceries, witness who testified that he presented an account to the debtor *held* properly permitted to testify that it was for groceries, though he had not sold any of the goods to the debtor.—*Scott v. Reynolds*, 79 S. E. 960.

§ 37 (N.C.) Questions asked witnesses were properly excluded, where it appeared that the witnesses did not have the requisite knowledge of the facts to answer them.—*In re Smith's Will*, 79 S. E. 977.

§ 58 (N.C.) Under Revisal 1905, § 1636, making a husband and wife of any party competent to testify except to give evidence "for or against each other" in criminal action or action brought because of adultery or of criminal conversation construed with sections 1628, 1629, 1630, *held*, that a husband could testify, in an action for alienation of affections, as to the adultery of his wife with defendant.—*Powell v. Strickland*, 79 S. E. 872.

§ 60 (Ga.) The common-law disqualification of a party to testify as a witness on the ground of interest has been expressly preserved by Civ. Code 1910, § 5861, in cases arising from adultery.—*Anderson v. Anderson*, 79 S. E. 1124.

Where a wife sues her husband for divorce for cruelty and intoxication, she is a competent witness in her own behalf.—*Id.*

Where, to a suit of a wife for divorce, the husband files a cross-libel, the wife is incompetent, under Civil Code, § 5861, to testify as to the charge of adultery, made in the cross-libel.—*Id.*

(B) Parties and Persons Interested in Event.

§ 92 (Ga.) That a person was the propounder of a will, and was also named as executrix and as a legatee, did not disqualify her from testifying to the signing of the will by testator in the presence of the subscribing witnesses, under Civ. Code 1910, § 5858.—*Brock v. Brock*, 79 S. E. 473.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 126 (Ga.App.) The provisions of Civ. Code 1910, § 5858, concerning the testimony of transactions with deceased persons, as adopted in 1889 (Acts 1889, p. 85), supersede the decisions of the Supreme Court rendered prior to 1889, construing the act of 1866 (Acts 1866, p. 139), and permit no exceptions to the rule.—*Jarrard v. Hawes*, 79 S. E. 373.

§ 128 (N.C.) Revisal 1905, § 1631, prohibiting a party in interest against the executor or administrator of a decedent as to a conversation or transaction with decedent, has no application to criminal cases, so as to prevent the state introducing evidence of a conversation between defendant and one whom he is charged with murdering.—*State v. Shelton*, 79 S. E. 883.

§ 149 (N.C.) In an action by a widow and heirs to recover land, involving delivery of a deed to decedent, Revisal 1905, § 1631, *held* not to require exclusion of widow's testimony that she saw decedent place the deed in his trunk; it not being against the personal representative of the deceased or any one claiming under him.—*Carroll v. Smith*, 79 S. E. 497.

§ 159 (N.C.) In an action by a widow and heirs to recover land involving delivery of a deed to decedent, Revisal 1905, § 1631, *held* not to exclude the widow's testimony that she saw decedent place the deed in a trunk; it not involving a communication or transaction with him.—*Carroll v. Smith*, 79 S. E. 497.

(D) Confidential Relations and Privileged Communications.

§ 191 (N.C.) Written directions by a husband just before his death to his wife, with reference to business matters, not intended to come into her hands until after his death, *held* admissible to prove suicide, and not a confidential communication under Revisal 1906, § 1636; the word "communicate" meaning to convey, to make known, as to communicate information.—*Whitford v. North State Life Ins. Co.*, 79 S. E. 501.

§ 203 (W.Va.) Knowledge acquired by a witness under direction of a prosecuting attorney to use in the trial of indictments against legislators for bribery is not privileged, even on an examination before a joint legislative committee.—*Sullivan v. Hill*, 79 S. E. 670.

III. EXAMINATION.**(A) Taking Testimony in General.**

§ 226 (N.C.) The mode of the examination of witnesses is within the sound discretion of the trial court.—*State v. Cobb*, 79 S. E. 419.

§ 240 (N.C.) The trial court may in its discretion exclude leading questions.—*McKeel v. Holloman*, 79 S. E. 445.

§ 245 (N.C.) Questions which were fully covered by previous answers of the witness were properly excluded.—*In re Smith's Will*, 79 S. E. 977.

§ 246 (Ga.App.) In a prosecution for a violation of the prohibition law it was error for the court to ask a witness whether he did not tell an officer that he had purchased intoxicating liquor at defendant's place, and why he had been used as a witness if he knew no more about the case than he had testified to, where the state had already examined such witness, and elicited nothing tending to incriminate defendant.—*Murphy v. State*, 79 S. E. 228.

§ 255 (Ga.App.) Testimony of a witness, based upon a memorandum made by himself or under his supervision and from which he had refreshed his recollection, *held* properly admitted, where the witness knew the memorandum was correct at the time it was made.—*Rogers-McRorie Co. v. Robeson Cutlery Co.*, 79 S. E. 374.

§ 262 (N.C.) Permitting or refusing the recalling of witnesses for further examination on matters already gone into rests in the discretion of the trial court.—*State v. Fogleman*, 79 S. E. 879.

(B) Cross-Examination and Re-Examination.

§ 268 (Va.) In an action on certain notes given for the price of a sawmill, a question asked on cross-examination of one of the original parties to the transaction as to the amount of money he had to pay for the mill on the day it was advertised to be sold, where he got it, and what he did with it, *held* proper.—*Davis v. Cole Bros.*, 79 S. E. 1033.

§ 274 (Ga.) Where, on a trial for murder, defendant put his character in issue, and a witness for defendant failed to qualify as a character witness on his direct examination, it was error, on cross-examination, to allow the state to introduce evidence of specific acts of defendant, tending to show that he was a man of violent character.—*Lynn v. State*, 79 S. E. 29.

§ 287 (S.C.) Where the part of a conversation testified to by a witness on cross-examination was not brought by any questions asked of the witness, and such conversation had previously been excluded, questions on redirect examination calling for the rest of the conversation were properly ruled out.—*McLain v. Allen*, 79 S. E. 1.

(C) Privilege of Witness.

§ 297 (S.C.) One liable to a prosecution for a criminal offense cannot be compelled to tes-

tify merely because the prosecuting officer may agree not to prosecute him.—*City of Anderson v. Fant*, 79 S. E. 641.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.**(A) In General.**

§ 311 (Ga.App.) That the prosecutor has remained in the courtroom and heard the other testimony, after sequestration of the witnesses has been requested by defendant, may be considered by the jury in passing upon the credibility of the prosecutor's testimony.—*Hudgins v. State*, 79 S. E. 367.

§ 330 (Va.) In an action on notes, a question asked one of the original parties to the transaction whether he had not given one of the plaintiffs as collateral a note of witness' grandfather and whether the latter had not afterwards claimed it to be a forgery *held* admissible to lay a foundation for attacking the witness' credibility.—*Davis v. Cole Bros.*, 79 S. E. 1033.

(B) Character and Conduct of Witness.

§ 355 (Ga.) A witness, who stated that he did not know the general character of accused, and that all he knew was personal, *held* not qualified to testify as a character witness.—*Lynn v. State*, 79 S. E. 29.

(C) Interest and Bias of Witness.

§ 367 (Ga.) Where an attorney testified for defendant in attachment, evidence was admissible to show that he represented other creditors of defendant, who might profit by his testimony.—*Dale v. Christian*, 79 S. E. 1127.

§ 369 (N.C.) In a personal injury action against a railroad company, it is proper for the plaintiff to show, by cross-examination of a witness for the defendant, that the company furnished the witness transportation to come to the trial, as a circumstance from which bias may be inferred.—*Johnson v. Seaboard Air Line Ry. Co.*, 79 S. E. 690.

WORDS AND PHRASES.

"Abandonment."—*State v. Smith* (N. C.) 79 S. E. 979.

"Absolute estate."—*Cowart v. Singletary* (Ga.) 79 S. E. 196.

"Accessory before the fact."—*Snell v. State* (Ga. App.) 79 S. E. 71.

"Adverse possession."—*Barfield v. Hill* (N. C.) 79 S. E. 677.

"As."—*Clark v. Nickell* (W. Va.) 79 S. E. 1020.

"Assumpsit."—*Wilson v. Shrader* (W. Va.) 79 S. E. 1083.

"Bank."—*Dunn v. State* (Ga. App.) 79 S. E. 170.

"Barterer."—*Cable Co. v. Mathers* (W. Va.) 79 S. E. 1079.

"Benefit of counsel."—*Reliford v. State* (Ga.) 79 S. E. 1128.

"Bill of sale."—*Owens v. Bridges* (Ga. App.) 79 S. E. 225.

"Burden of evidence."—*Hyer v. C. E. Holmes & Co.* (Ga. App.) 79 S. E. 58.

"Burden of proof."—*Hyer v. C. E. Holmes & Co.* (Ga. App.) 79 S. E. 58.

"Capital."—*Bridgewater Mfg. Co. v. Funkhouser* (Va.) 79 S. E. 1074.

"Cases respecting title to land."—*Adair v. Spellman Seminary* (Ga. App.) 79 S. E. 589.

"Charter."—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.* (Ga. App.) 79 S. E. 45.

"Chartered bank."—*Dunn v. State* (Ga. App.) 79 S. E. 170.

"Chattel mortgage."—*Owens v. Bridges* (Ga. App.) 79 S. E. 225.

"Choses in action."—*Wilson v. Shrader* (W. Va.) 79 S. E. 1083.

- "Civil officers."—*Phillips v. City of Jefferson* (Ga. App.) 79 S. E. 222.
- "Codicil."—*Spencer v. Spencer* (N. C.) 79 S. E. 291.
- "Communicate."—*Whitford v. North State Life Ins. Co. (N. C.)* 79 S. E. 501.
- "Communication."—*Whitford v. North State Life Ins. Co. (N. C.)* 79 S. E. 501.
- "Connection."—*State v. Patterson* (S. C.) 79 S. E. 309.
- "Conspiracy."—*Lynn v. State* (Ga.) 79 S. E. 29.
- "Contingent fee."—*Modlin v. Smith* (Ga. App.) 79 S. E. 82.
- "Contributory negligence."—*Elk Cotton Mills v. Grant* (Ga.) 79 S. E. 836.
- "Conversion."—*Brothers v. Horne* (Ga.) 79 S. E. 468.
- "Corn liquor."—*Mullins v. Commonwealth* (Va.) 79 S. E. 324.
- "Covenant running with the land."—*Reidsville & S. E. R. Co. v. Baxter* (Ga. App.) 79 S. E. 187.
- "Crime."—*Cosper v. State* (Ga. App.) 79 S. E. 94.
- "Date of issue."—*State v. Blease* (S. C.) 79 S. E. 247.
- "Delivery."—*Leftwich v. Early* (Va.) 79 S. E. 384.
- "Due."—*Avery & Co. v. Pope* (Ga. App.) 79 S. E. 946.
- "Due care."—*Elk Cotton Mills v. Grant* (Ga.) 79 S. E. 836.
- "Due process."—*Carnegie Natural Gas Co. v. Swiger* (W. Va.) 79 S. E. 3.
- "Due process of law."—*Jefferson Fire Ins. Co. of Philadelphia v. Brackin* (Ga.) 79 S. E. 487.
- "Exception."—*Marion County Lumber Co. v. Hodges* (S. C.) 79 S. E. 1096.
- "Executed."—*House v. Universal Crusher Corporation* (Va.) 79 S. E. 1049.
- "Execution."—*Hall v. Studebaker Corporation of America* (Ga. App.) 79 S. E. 750.
- "Expenses."—*Neal v. Neal* (Ga.) 79 S. E. 849.
- "Ex post facto."—*State v. Vaughn* (S. C.) 79 S. E. 312.
- "False imprisonment."—*Butler v. Tattnall Bank* (Ga.) 79 S. E. 456.
- "Fee-simple estate."—*Cowart v. Singletary* (Ga.) 79 S. E. 196.
- "Felony."—*State v. Hyman* (N. C.) 79 S. E. 284.
- "Final order."—*Salem Loan & Trust Co. v. Kelsey* (Va.) 79 S. E. 329.
- "Fixture."—*Basnight v. Small* (N. C.) 79 S. E. 269.
- "General election."—*Moore v. Smith* (Ga.) 79 S. E. 1116.
- "General reputation."—*Guy v. Lanark Fuel Co.* (W. Va.) 79 S. E. 941.
- "Gift."—*Hartz v. Hartz* (Ga. App.) 79 S. E. 230.
- "Guardian de facto."—*Starke v. Storm's Ex'r* (Va.) 79 S. E. 1057.
- "Guardian de son tort."—*Starke v. Storm's Ex'r* (Va.) 79 S. E. 1057.
- "Hereditary disease."—*South Atlantic Life Ins. Co. v. Hurt's Adm'r* (Va.) 79 S. E. 401.
- "In trust."—*Hillis v. E. T. Comer & Co.* (Ga. App.) 79 S. E. 930.
- "Judgment."—*J. G. & G. W. Durden v. Aycock Bros.* (Ga. App.) 79 S. E. 213; *Sedbury v. Southern Express Co.* (N. C.) 79 S. E. 286.
- "Land."—*Selvey v. Grafton Coal & Coke Co.* (W. Va.) 79 S. E. 656.
- "Larceny."—*Pittman v. State* (Ga. App.) 79 S. E. 915; *State v. Ruffin* (N. C.) 79 S. E. 417.
- "Larceny from the person."—*Hanson v. State* (Ga. App.) 79 S. E. 176.
- "Legal heirs."—*Hanvy v. Moore* (Ga.) 79 S. E. 772.
- "Legal malice."—*Smith v. State* (Ga.) 79 S. E. 1127.
- "Legal representative."—*In re Brown's Estate* (S. C.) 79 S. E. 791.
- "Levy."—*Russell v. State* (Ga. App.) 79 S. E. 495.
- "Licensee."—*Kiser v. Colonial Coal & Coke Co.* (Va.) 79 S. E. 348.
- "Liquor."—*Mullins v. Commonwealth* (Va.) 79 S. E. 324.
- "Living together."—*Wright v. Bank of Southwestern Georgia* (Ga. App.) 79 S. E. 184.
- "Malicious prosecution."—*Mimbs v. Battle* (Ga. App.) 79 S. E. 922.
- "Month."—*Bank of Union v. Baird* (W. Va.) 79 S. E. 733.
- "Multifariousness."—*Dennis v. Justus* (Va.) 79 S. E. 1077.
- "Negotiable."—*Pomeroy Nat. Bank v. Huntington Nat. Bank* (W. Va.) 79 S. E. 662.
- "Novation."—*Little Rock Furniture Co. v. Jones & Co.* (Ga. App.) 79 S. E. 375.
- "Nuisance."—*Williams v. Southern Ry. Co.* (Ga.) 79 S. E. 850.
- "Oath."—*Cox v. State* (Ga. App.) 79 S. E. 909.
- "Obstruct."—*Lamon v. Gold* (W. Va.) 79 S. E. 723.
- "Onus probandi."—*Hyer v. C. E. Holmes & Co.* (Ga. App.) 79 S. E. 58.
- "Ordinary care."—*Parker v. G. O. Loving & Co.* (Ga. App.) 79 S. E. 77.
- "Pass."—*Smith v. State* (Ga. App.) 79 S. E. 764.
- "Perform labor."—*Collins v. Board of Trustees of Davis & Elkins College* (W. Va.) 79 S. E. 10.
- "Perjury."—*Black v. State* (Ga. App.) 79 S. E. 173.
- "Personal covenant."—*Reidsville & S. E. R. Co. v. Baxter* (Ga. App.) 79 S. E. 187.
- "Persons performing labor or furnishing material."—*Collins v. Board of Trustees of Davis & Elkins College* (W. Va.) 79 S. E. 10.
- "Presumption of innocence."—*Butts v. State* (Ga. App.) 79 S. E. 87.
- "Prima facie."—*State v. Wilkerson* (N. C.) 79 S. E. 883.
- "Principal in the second degree."—*Pope v. State* (Ga. App.) 79 S. E. 909.
- "Process."—*Royal Exchange Assurance of London v. Bennettsville & C. R. Co.* (S. C.) 79 S. E. 104.
- "Procure, counsel, and command."—*Snell v. State* (Ga. App.) 79 S. E. 71.
- "Public nuisance."—*Davis v. Spragg* (W. Va.) 79 S. E. 652.
- "Publish."—*Smith v. State* (Ga. App.) 79 S. E. 764.
- "Rape."—*Morrow v. State* (Ga. App.) 79 S. E. 63.
- "Reasonable doubt."—*Butts v. State* (Ga. App.) 79 S. E. 87.
- "Recognizance."—*State v. White* (N. C.) 79 S. E. 297.
- "Rental value."—*Martin v. Clegg* (N. C.) 79 S. E. 1105.
- "Repair."—*Knight v. Foster* (N. C.) 79 S. E. 614.
- "Reservation."—*Marion County Lumber Co. v. Hodges* (S. C.) 79 S. E. 1096.
- "Sidewalk."—*City of Raleigh v. Durfey* (N. C.) 79 S. E. 434.
- "Submitted."—*Fortson v. State* (Ga. App.) 79 S. E. 746.
- "Suit."—*Lamon v. Gold* (W. Va.) 79 S. E. 723.
- "Surviving children."—*Bradshaw v. Stansberry* (N. C.) 79 S. E. 302.
- "Taking of private property."—*Parriah v. Town of Yorkville* (S. C.) 79 S. E. 635.
- "Tenant at sufferance."—*Stanley v. Stembbridge* (Ga.) 79 S. E. 842.
- "Tender."—*Smith v. State* (Ga. App.) 79 S. E. 764.
- "The sitting of the court."—*Watson v. American Nat. Bank* (Ga. App.) 79 S. E. 586.
- "Tort."—*J. B. Carr & Co. v. Southern Ry. Co.* (Ga. App.) 79 S. E. 41.
- "Trader."—*Cable Co. v. Mathers* (W. Va.) 79 S. E. 1079.
- "True owner."—*Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co.* (Ga.) 79 S. E. 465.
- "Ultra vires act."—*Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.* (Ga. App.) 79 S. E. 45.

"Utter."—Smith v. State (Ga. App.) 79 S. E. 764.

"Waiver."—City of Americus v. Phillips (Ga. App.) 79 S. E. 36; State v. Vaughn (S. C.) 79 S. E. 312.

"Whisky."—Mullins v. Commonwealth (Va.) 79 S. E. 324.

"Willful."—In re Pierce (N. C.) 79 S. E. 507.

WORK AND LABOR.

See Constitutional Law, §§ 238, 275, 276; Contracts, § 10.

WRITING.

See Evidence, § 272.

WRITS.

See Attachment; Certiorari; Execution; Garnishment; Habeas Corpus; Injunction; Mandamus; Possessory Warrant; Process; Prohibition.

Of error, see Appeal and Error; Contempt, § 66; Exceptions, Bill of, § 43.

For cases in Dec. Dig. & Am. Dig. Key No. Series & Indexes see same topic and section (§) NUMBER

★

TABLES OF SOUTHEASTERN CASES

IN

STATE REPORTS

VOL. 12, GEORGIA APPEALS REPORTS

Ga. A. Rep.	S.E. Rep.	Ga. A. Rep.	S.E. Rep.	Ga. A. Rep.	S.E. Rep.	Ga. A. Rep.	S.E. Rep.	Ga. A. Rep.	S.E. Rep.	Ga. A. Rep.	S.E. Rep.	Ga. A. Rep.	S.E. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	76	649	126	76	1034	233	77	2	380	77	189	511	77
8	76	644	127	76	1036	237	77	15	380	77	206	512	77
10	76	645	133	76	1070	240	76	1077	361	77	206	514	77
11	76	645	137	76	996	241	76	1077	362	77	184	519	77
13	76	647	137	76	1057	241	77	3	363	77	188	522	77
14	76	594	140	76	1054	246	77	1	364	77	183	526	77
17	76	794	141	76	1040	248	77	102	364	77	372	529	77
19	76	753	141	76	1051	250	77	100	367	77	106	530	77
19	76	770	145	76	994	251	76	1086	369	77	193	533	77
22	76	751	147	76	1055	251	77	184	378	77	203	536	77
23	76	782	148	76	1039	252	77	101	380	77	209	536	77
28	76	786	149	76	1040	252	77	104	390	77	370	537	77
40	76	753	152	76	1035	253	76	278	391	77	192	539	77
41	76	773	153	76	1062	253	77	102	392	77	316	540	77
49	76	796	154	76	1041	256	77	100	399	78	347	550	77
50	76	793	154	76	1059	258	77	207	409	77	368	550	77
51	76	792	155	76	991	259	77	104	411	77	659	561	77
53	76	751	157	76	996	260	77	101	422	77	369	562	77
53	76	753	157	76	1059	260	77	107	425	76	103	563	77
54	76	754	158	76	1042	261	76	1083	426	76	991	567	77
54	76	771	158	76	1054	268	77	102	427	77	371	567	77
58	76	761	159	76	992	268	77	106	429	76	1082	561	77
61	76	754	163	76	1044	269	77	175	429	77	213	562	77
62	76	760	168	76	1056	272	77	100	430	78	206	562	77
65	76	766	169	76	1032	273	76	279	436	77	366	563	77
68	76	768	174	76	1029	273	77	102	441	78	258	564	77
73	76	758	180	76	1034	275	77	105	447	78	197	564	77
74	76	755	180	76	1063	275	77	181	456	78	260	565	77
74	76	759	186	76	1067	279	77	109	463	77	312	566	77
76	76	757	186	76	1077	286	77	172	472	77	320	571	77
79	76	754	191	76	1073	291	77	108	475	77	664	572	77
79	76	755	201	76	1072	292	77	106	479	77	591	573	77
80	76	752	201	76	1077	293	77	109	479	77	653	574	77
81	76	756	203	76	1063	294	77	176	480	77	651	574	77
84	76	784	203	76	1066	305	77	6	480	77	652	575	77
84	76	785	206	77	12	305	77	108	481	77	649	576	77
86	76	753	209	77	13	308	77	106	482	77	651	576	77
86	76	779	213	77	6	312	77	218	483	77	585	583	77
91	76	762	213	77	15	315	77	186	483	77	653	584	77
97	76	777	214	76	1082	318	77	208	486	77	585	585	77
102	76	752	215	77	6	319	77	197	488	77	589	588	77
102	76	756	216	76	1081	326	77	204	488	77	591	594	77
104	76	765	216	78	1082	327	77	207	492	77	651	601	77
106	76	1060	217	77	9	329	77	200	492	77	878	608	77
108	76	996	220	78	1078	336	77	189	493	77	587	608	77
111	76	1047	220	78	1083	337	77	189	494	77	672	614	77
111	76	1059	221	78	1078	342	77	214	496	77	650	614	77
117	76	1056	221	77	8	350	77	183	497	77	650	615	77
119	76	992	222	77	7	350	77	206	498	77	667	615	77
119	76	1053	225	77	11	353	77	191	505	77	588	632	77
120	76	997	227	78	1091	355	77	184	507	77	666	632	77
121	76	1049	228	76	1079	358	77	208	508	77	591	634	77
124	76	1042	232	77	9	359	77	187	508	77	652	634	77

VOL. 12, GEORGIA APPEALS REPORTS

	Page		Page
Aaron v. State (76 S. E. 753).....	40	Ashburn Auto Co. v. Black (78 S. E. 470).....	754
Adams v. State (78 S. E. 473).....	808	Atlanta Telephone & Telegraph Co. v. Cheshire (78 S. E. 53).....	652
Adamson v. McEwen (77 S. E. 591).....	508	Atlantic Coast Line R. Co. v. Canty (77 S. E. 659).....	411
Akridge v. City of Atlanta (77 S. E. 101).....	252	Atlantic Coast Line R. Co. v. Hill (77 S. E. 316).....	392
Albany Mill Supply Co. v. United Roofing & Mfg. Co. (77 S. E. 829).....	537	Atlantic Coast Line R. Co. v. McElmurray Bros. (77 S. E. 2).....	233
Alligood v. Daniel & King (76 S. E. 1083).....	220	Atlantic Coast Line R. Co. v. McRee (76 S. E. 1057).....	137
American Law Book Co. v. Brunswick Croastie & Cresosoting Co. (77 S. E. 104).....	259		
Anderson v. Anderson (78 S. E. 271).....	706		
Anglin v. State (76 S. E. 992).....	159		

12 GA. APP.—Continued.

	Page	Page	Page
Atlantic Coast Line R. Co. v. Thomas (77 S. E. 13).....	209	Cooper v. State (77 S. E. 878).....	561
Atlantic Coast Line R. Co. v. Walthour (77 S. E. 15).....	213	Copeland v. McClelland (78 S. E. 479).....	785
Augusta-Aiken Ry. & Electric Corp. v. Sibt (76 S. E. 1044).....	163	Crawford v. Manning (76 S. E. 771).....	54
Augusta Ry. & Electric Co. v. Beagles (78 S. E. 949).....	849	Crawley v. Watt-Holmes Hardware Co. (77 S. E. 106).....	367
Austin v. Berlin Supply Co. (78 S. E. 723).....	798	Darlington v. Belt (77 S. E. 653).....	522
Avery v. State (77 S. E. 892).....	562	Davenport v. State (76 S. E. 756).....	102
Bailey v. State (77 S. E. 652).....	529	Davenport v. State (77 S. E. 830).....	565
Baker v. State (77 S. E. 884).....	553	Davis v. D. G. Blount & Co. (77 S. E. 189).....	326
Bankers' Health & Life Ins. Co. v. Givvins (77 S. E. 203).....	378	Davis & Co. v. Preston (76 S. E. 766).....	65
Barfield v. Tremere (78 S. E. 729).....	774	Dean v. Bateman (77 S. E. 102).....	253
Barrett v. State (77 S. E. 652).....	508	De Freese v. City of Atlanta (76 S. E. 1077).....	201
Barron v. State (77 S. E. 214).....	342	Denton Bros. v. Hannah (77 S. E. 672).....	494
Bateman v. Warfield (77 S. E. 104).....	259	De Vaughn's Son v. Ohio Pottery & Glass Co. (76 S. E. 793).....	50
Beasley v. State (77 S. E. 100).....	256	Dixon v. State (76 S. E. 794).....	17
Bekakas v. Mayor and Council of Macon (76 S. E. 1063).....	203	Douglas v. Moore (78 S. E. 429).....	755
Bell v. Swainsboro Fertilizer Co. (76 S. E. 756).....	81	Douglas v. Wilson (78 S. E. 50).....	665
Belmas v. State (77 S. E. 188).....	363	Dozier v. Central of Georgia R. Co. (78 S. E. 469).....	753
Besheres v. State (78 S. E. 483).....	805	Dozier v. State (78 S. E. 203).....	722
Binion v. Central of Georgia R. Co. (78 S. E. 132).....	663	Dubberly v. Kicklighter (77 S. E. 914).....	584
Blocker v. State (76 S. E. 784).....	81	Easterling v. State (78 S. E. 140).....	690
Bloodworth v. Mayor, etc., of Milledgeville (77 S. E. 1131).....	650	Edwards v. Roberts (76 S. E. 1054).....	140
Bodiford v. State (78 S. E. 201).....	726	Elliott v. Tifton Mill & Gin Co. (77 S. E. 667).....	498
Bolton v. State (77 S. E. 208).....	358	Elsbery v. State (76 S. E. 779).....	86
Bowles v. State (76 S. E. 594).....	14	Empire Life Ins. Co. v. Einstein (77 S. E. 209).....	350
Bridges v. Southern Bell Telephone & Telegraph Co. (76 S. E. 996).....	108	Evans v. Southern R. Co. (77 S. E. 197).....	319
Bright v. Central of Georgia R. Co. (77 S. E. 372).....	364	Fanning v. Mayor and Council of Washington (77 S. E. 1).....	246
Brooke v. Lewis (77 S. E. 101).....	260	Farley v. State (77 S. E. 1131).....	643
Brooks v. Floyd (77 S. E. 877).....	530	Farmer v. Phillips (78 S. E. 353).....	732
Brooks v. State (76 S. E. 765).....	104	Farmers' Oil & Guano Co. v. Louisville Cotton Oil Co. (76 S. E. 751).....	22
Brooks v. State (78 S. E. 143).....	693	Federal Rubber Co. v. King (76 S. E. 1083).....	261
Browder v. State (77 S. E. 914).....	637	Felker v. Stark (78 S. E. 202).....	695
Brown v. Smith & Kelly Co. (76 S. E. 1082).....	214	Fincher v. Redman (76 S. E. 1077).....	241
Brown v. State (77 S. E. 922).....	642	Fincher & Womble v. Hanson (77 S. E. 1068).....	608
Brown v. State (78 S. E. 352).....	722	First Nat. Bank of Senoia v. Jones (76 S. E. 1042).....	158
Brown & Haley v. Browning (76 S. E. 1054).....	158	Fitzgerald Trust Co. v. Burkhart (77 S. E. 7).....	222
Brunswick-Oglethorpe Club v. State (76 S. E. 1034).....	180	Fletcher v. State (78 S. E. 478).....	809
Butler v. State (77 S. E. 1130).....	642	Flint v. State (76 S. E. 1032).....	169
Cain v. Armenia Lodge No. 1930, G. U. O. O. F. in America (77 S. E. 184).....	251	Flood v. State (78 S. E. 268).....	702
Canal-Louisiana Bank & Trust Co. v. Savannah Ice Co. (79 S. E. 45).....	818	F. M. Stubbs & Co. v. Philip Carey Co. (77 S. E. 6).....	215
Cannon v. State (77 S. E. 920).....	637	Ford v. State (76 S. E. 1079).....	228
Cargill v. State (77 S. E. 832).....	574	Fortune v. Braswell (78 S. E. 201).....	702
Carr & Co. v. Southern R. Co. (79 S. E. 41).....	830	Fourth Nat. Bank of Fayetteville v. Consolidated Steamboat Co. (76 S. E. 1057).....	864
Carter v. Atkinson (77 S. E. 370).....	390	Franklin v. State (77 S. E. 653).....	483
Carter v. State (78 S. E. 205).....	430	Freeman v. City of Atlanta (77 S. E. 891).....	564
Case Threshing Mach. Co. v. Donaldson (76 S. E. 1049).....	121	Fryer v. State (77 S. E. 830).....	533
Central Georgia Power Co. v. State (77 S. E. 107).....	260	Gainesville v. Henderson (76 S. E. 1034).....	126
Central of Georgia R. Co. v. Borland (78 S. E. 352).....	729	Gaskins v. State (76 S. E. 777).....	97
Central of Georgia R. Co. v. Dozier (78 S. E. 469).....	753	Gates v. State (78 S. E. 270).....	706
Central of Georgia R. Co. v. Garrison (77 S. E. 193).....	369	Gaynor v. Travelers' Ins. Co. (77 S. E. 1072).....	601
Chandler v. Schofield (78 S. E. 49).....	681	Georgia Burial Corp. v. Herrin, 76 S. E. 753).....	53
Charleston & W. C. R. Co. v. McElmurray Bros. (78 S. E. 258).....	441	Georgia Excelsior Co. v. Hartfelder-Garbutt Co. (78 S. E. 611).....	797
Citizens' Bank of Iron City v. Ware (77 S. E. 589).....	512	Georgia, F. & A. R. Co. v. Anderson (76 S. E. 1056).....	117
Citizens' Bank of Vidalia v. Greene (76 S. E. 795).....	49	Georgia, F. & A. R. Co. v. Parsons (76 S. E. 1063).....	180
City of Rome v. Harris (78 S. E. 475).....	756	Georgia, F. & A. R. Co. v. Walton (76 S. E. 1060).....	106
Climax v. Jeter (76 S. E. 904).....	145	Georgia Iron & Coal Co. v. Rogers, Brown & Co. (77 S. E. 213).....	429
Coker v. State (76 S. E. 103, 991).....	425	Georgia Life Ins. Co. v. McCranie (78 S. E. 1115).....	855
Coleman v. Kea (78 S. E. 429).....	798	Georgia Northern R. Co. v. Hardwick (77 S. E. 102).....	268
Collins v. City of Dalton (76 S. E. 1053).....	119	Georgia R. R. v. Hunter (77 S. E. 176).....	294
Collins v. State (77 S. E. 1079).....	635	Georgia Ry. & Electric Co. v. Crosby (78 S. E. 612).....	750
Columbus R. Co. v. Waller (78 S. E. 52).....	674	Georgian Co. v. Shulman (77 S. E. 585).....	482
Cook v. State (76 S. E. 1078).....	220		

12 GA. APP.—Continued.		Page			Page
Bittens v. Whelchel (76 S. E. 1051).....	141		Jones v. State (76 S. E. 1070).....	133	
Bisson v. Moore (77 S. E. 108).....	291		Jones v. State (77 S. E. 892).....	564	
Bordon v. State (78 S. E. 204).....	710		Jones v. State (78 S. E. 474).....	813	
Bray v. State (77 S. E. 916).....	634		Joyner v. State (77 S. E. 9).....	217	
Bregory & Bro. v. Hendricks (77 S. E. 585).....	486				
Bridfin v. State (77 S. E. 1080).....	615		Kelly v. Butler, Stevens & Co. (78 S. E. 471).....	794	
Brynton v. State (77 S. E. 830).....	562		Kemp v. State (76 S. E. 752).....	80	
Budden v. Cherokee Sawmill Co. (76 S. E. 997).....	120		Killebrew v. State (78 S. E. 205).....	725	
Baines v. Patrick (77 S. E. 591).....	438		King v. State (77 S. E. 651).....	482	
Baley v. Emerson Lumber Co. (77 S. E. 100).....	250		King v. State (78 S. E. 483).....	764	
Ball v. C. J. Roehr & Co. (78 S. E. 481).....	803		Kinsey v. State (77 S. E. 369).....	422	
Ball v. Mooring (76 S. E. 759).....	74		Kirby v. Johnson County Sav. Bank (76 S. E. 996).....	157	
Ball v. State (77 S. E. 893).....	571		Kirkpatrick v. State (77 S. E. 104).....	252	
Ball v. Treadaway (77 S. E. 878).....	492		Knight v. State (76 S. E. 1047).....	111	
Baliburton v. Harshfield Bros. (78 S. E. 49).....	652		Knowles v. Farmers' Bank of Jenkinsburg (76 S. E. 1059).....	157	
Barper v. State (77 S. E. 915).....	651				
Barrison v. State (77 S. E. 830).....	552		Lane v. Brinson (78 S. E. 725).....	760	
Bartford Fire Ins. Co. v. Wimbish (78 S. E. 265).....	712		Law v. Leroux (77 S. E. 651).....	492	
Bathaway v. City of Atlanta (77 S. E. 916).....	648		Lewis v. Harris (77 S. E. 108).....	305	
Bawthorne v. State (78 S. E. 473).....	811		Lewis v. Ocean S. S. Co. (76 S. E. 1073).....	191	
Baywood v. Kitchens (78 S. E. 614).....	783		Linam v. Anderson (78 S. E. 424).....	735	
Baywood v. State (76 S. E. 1077).....	240		Little v. Lary (78 S. E. 470).....	754	
Beagwood v. State (77 S. E. 886).....	566		Long v. Ivey (76 S. E. 1055).....	147	
Benry v. State (76 S. E. 1078).....	221		Long v. Mendel (78 S. E. 471).....	779	
Benson v. State (77 S. E. 916).....	632		Louisville & N. R. Co. v. Burns (77 S. E. 913).....	576	
Beriot v. Connerat (76 S. E. 1066).....	203		Low v. Foster (77 S. E. 878).....	575	
Bewell v. Brown Bros. (76 S. E. 1086).....	251		Lowther v. City of Waycross (78 S. E. 141).....	727	
Bewitt v. State (76 S. E. 1054).....	168		Lumpkin v. City of Atlanta (76 S. E. 1059).....	111	
Bevwood v. State (77 S. E. 1130).....	643		Luthersville Banking Co. v. Hopkins (77 S. E. 589).....	488	
Bicks & Son v. S. G. Mozley & Co. (78 S. E. 133).....	661				
Bigh Co. v. Georgia Ry. & Power Co. (77 S. E. 588).....	505		McConnell v. Prince (76 S. E. 754).....	54	
Binkle v. Smith (77 S. E. 650).....	496		McCranie v. Webb (77 S. E. 175).....	269	
Blogan v. State (76 S. E. 1081).....	227		McCrary v. Henry (76 S. E. 1082).....	429	
Bolleman v. Georgia Southern & F. R. Co. (78 S. E. 428).....	755		McCrary v. State (77 S. E. 1080).....	615	
Bolliday v. Coleman (78 S. E. 482).....	779		McDaniel v. Akridge (76 S. E. 755).....	79	
Bolmes v. State (77 S. E. 187).....	359		McDonald v. State (77 S. E. 655).....	526	
Bome Fertilizer & Chemical Co. v. Dickerson (76 S. E. 1040).....	149		McElheney v. Jasper Trading Co. (78 S. E. 727).....	490	
Bornsby v. Jensen (78 S. E. 267).....	696		McIntosh v. Patton (77 S. E. 6).....	305	
Borsley v. Woodley (78 S. E. 260).....	456		McIntyre Bros. & Co. v. South Atlantic S. S. Line (78 S. E. 347).....	399	
Borton v. Smith (77 S. E. 9).....	232		McLean v. Jackson (76 S. E. 792).....	51	
Boward v. Tucker (77 S. E. 191).....	353		McLendon v. State (78 S. E. 130).....	691	
Budson v. State (77 S. E. 828).....	535		McMillan v. Wilcox (78 S. E. 270).....	721	
Bunter, Pearce & Battey v. Lawton-Anderson Co. (76 S. E. 782).....	23		Maril v. Boswell (76 S. E. 773).....	41	
Byer v. C. E. Holmes & Co. (79 S. E. 58).....	837		Mashburn v. Harrell (77 S. E. 207).....	327	
			Massee & Felton Lumber Co. v. Georgia & F. Ry. (77 S. E. 366).....	436	
International Silver Co. v. F. G. Hull & Co. (78 S. E. 610).....	812		Massee & Felton Lumber Co. v. Ivey (77 S. E. 1130).....	583	
Backson v. State (77 S. E. 371).....	427		Mathews v. Fields (77 S. E. 11).....	225	
Backson v. State (77 S. E. 651).....	480		Mathis v. Harrell (77 S. E. 650).....	497	
Backson v. State (78 S. E. 53).....	693		Maxwell Bros. v. Liverpool & London & Globe Ins. Co. (76 S. E. 1036).....	127	
Bacobs v. Atlanta Skirt Mfg. Co. (77 S. E. 100).....	272		Maynard & Co. v. Maynard (77 S. E. 109).....	279	
B. Carr & Co. v. Southern R. Co. (79 S. E. 41).....	830		Mayor and Council of Gainesville v. Henderson (76 S. E. 1034).....	126	
B. C. Quillian & Bros. v. Oliver (76 S. E. 754).....	79		Medders v. Cox (77 S. E. 106).....	283	
B. E. De Vaughn's Son v. Ohio Pottery & Glass Co. (76 S. E. 793).....	50		Miller v. State (77 S. E. 653).....	479	
Beffords v. State (78 S. E. 474).....	813		Miller v. State (77 S. E. 891).....	550	
Benks v. State (77 S. E. 184).....	362		Mitchell v. State (77 S. E. 889).....	557	
Beter v. Hornsby (77 S. E. 917).....	649		Monk v. National Bank of Tifton (76 S. E. 278).....	253	
B. H. Hicks & Son v. S. G. Mozley & Co. (78 S. E. 133).....	661		Moon v. State (77 S. E. 1088).....	614	
B. I. Case Threshing Mach. Co. v. Donalson (76 S. E. 1049).....	121		Moon v. Wright (78 S. E. 141).....	659	
B. M. High Co. v. Georgia Ry. & Power Co. (77 S. E. 588).....	505		Moore v. State (77 S. E. 1132).....	576	
B. O. Gregory & Bro. v. Hendricks (77 S. E. 585).....	486		Morgan v. Nashville Grain Co. (77 S. E. 913).....	574	
Bohnson v. Cothern (77 S. E. 207).....	258		Morris v. State (78 S. E. 477).....	810	
Bohnson v. Thompson (76 S. E. 751).....	53		Moss v. Myers (76 S. E. 768).....	68	
Bohnson v. State (77 S. E. 587).....	493		Munn v. State (77 S. E. 591).....	479	
Bohnston v. Pinkston (77 S. E. 1075).....	585		Murdock v. Adamson (77 S. E. 181).....	275	
Bolner v. W. W. Stovall & Bro. (76 S. E. 753).....	19				
Bones v. District Grand Lodge No. 18, G. U. O. O. F. (76 S. E. 279).....	273		Napier v. Dasher (76 S. E. 1062).....	153	
			Nobles v. State (77 S. E. 184).....	355	
			Norman v. Rehberg (78 S. E. 256).....	693	
			Nunez Gin & Warehouse Co. v. Moore (76 S. E. 758).....	73	
			Oglesby v. State (78 S. E. 134).....	684	

12 GA. APP.—Continued.	Page	Page
Oliver v. Webb (76 S. E. 1081).....	216	Southern R. Co. v. Barber (77 S. E. 172).....
Oppenheim v. State (77 S. E. 652).....	480	Southern R. Co. v. Myrick (77 S. E. 30).....
Paschal v. State (77 S. E. 109).....	293	Spiers v. Hubbard (78 S. E. 136).....
Perry v. State (77 S. E. 879).....	573	Springfield Metallic Casket Co. v. Dunn (76 S. E. 644).....
Phillips v. State (77 S. E. 832).....	563	Standard Fashion Co. v. Newton-Hart Co. (76 S. E. 760).....
Pickering v. Anderson (76 S. E. 754).....	61	Stanley v. Sterling Mut. Life Ins. Co. (77 S. E. 664).....
Pilgrims Health & Life Ins. Co. v. Scott (78 S. E. 469).....	749	Starr v. State (77 S. E. 205).....
Platt v. State (77 S. E. 831).....	536	Story v. State (77 S. E. 914).....
Plumer v. Continental Casualty Co. (77 S. E. 917).....	594	Strickland v. Miller (78 S. E. 48).....
Postal Telegraph-Cable Co. v. Mayor and Council of Cordele (77 S. E. 192).....	391	Strickland v. State (77 S. E. 1070).....
Postell v. Avery & Co. (77 S. E. 666).....	507	Strong v. City of Atlanta (77 S. E. 921).....
Potter v. State (77 S. E. 186).....	315	Stubbs v. Fourth Nat. Bank of Macon (77 S. E. 893).....
Powell & Kendall v. Lawson (77 S. E. 183).....	350	Stubbs & Co. v. Philip Carey Co. (77 S. E. 6).....
Progress Club v. State (76 S. E. 1029).....	174	Sutton v. Hurley (77 S. E. 218).....
Pyles v. State (78 S. E. 144).....	667	Taylor v. American Nat. Bank (78 S. E. 186).....
Quillian & Bros. v. Oliver (76 S. E. 754).....	79	Taylor v. State (77 S. E. 1132).....
Randall v. Bell (77 S. E. 1132).....	614	Taylor v. Town of Omega (78 S. E. 14).....
Randall v. Daniel (77 S. E. 832).....	550	Thompson v. State (76 S. E. 1072).....
Rea v. McGahee (77 S. E. 204).....	326	Thrasher v. Cobb Real Estate Co. (78 S. E. 254).....
Reese v. Colquitt Nat. Bank (77 S. E. 320).....	472	Tolbert v. State (78 S. E. 131).....
Reese v. State (77 S. E. 922).....	647	Toller v. Hewitt (77 S. E. 650).....
Register v. State (76 S. E. 649).....	1	Toole v. Geer (77 S. E. 363).....
Register v. State (78 S. E. 142).....	688	Town of Climax v. Jeter (76 S. E. 94).....
Roberson v. State (76 S. E. 752).....	102	Travelers' Ins. Co. v. Gaynor (77 S. E. 1072).....
Robinson v. State (78 S. E. 53).....	683	Tremere v. Barfield (78 S. E. 729).....
Robson & Evans v. Weatherly Lumber Co. (78 S. E. 610).....	781	Truitt v. Ansley (77 S. E. 200).....
Rome v. Harris (78 S. E. 475).....	756	Underwood Typewriter Co. v. Veal (76 S. E. 645).....
Roper v. City of Atlanta (76 S. E. 645).....	10	Virginia-Carolina Chemical Co. v. Bond (78 S. E. 51).....
Rothschild v. State (78 S. E. 201).....	728	Walker v. Royster Guano Co. (78 S. E. 478).....
Rountree & Leak v. Craigmiles (77 S. E. 15).....	237	Walker v. State (76 S. E. 762).....
Rowland v. Bell (76 S. E. 995).....	137	Walton v. Georgia, F. & A. R. Co. (76 S. E. 1060).....
Rucker v. State (77 S. E. 1129).....	632	Walton v. State (77 S. E. 891).....
Rucker v. State (77 S. E. 1132).....	634	Ward v. City of Jackson (77 S. E. 649).....
Russell v. State (77 S. E. 829).....	557	Wardlaw v. State (77 S. E. 205).....
Ryals v. Commissioners of Tattnall County (77 S. E. 8).....	221	Warren v. State (78 S. E. 202).....
Ryon v. State (78 S. E. 477).....	813	Warren Brick Co. v. Lagarde Lime & Stone Co. (76 S. E. 761).....
Sapp Bros. v. Mathis (77 S. E. 102).....	273	Waters v. Hurst (77 S. E. 102).....
Savannah Electric Co. v. Johnson (76 S. E. 1059).....	154	Watson v. Whitehead (78 S. E. 50).....
Savannah Electric Co. v. Lackens (79 S. E. 53).....	765	Watts v. State (77 S. E. 206).....
Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co. (79 S. E. 45).....	818	Webb v. McCranie (77 S. E. 175).....
Schumer v. Register (78 S. E. 731).....	443	Webb v. State (77 S. E. 670).....
Scott & Co. v. Atlanta Wood & Iron Novelty Works (76 S. E. 1082).....	216	Western & A. R. Co. v. Poston (76 S. E. 1042).....
Seaboard Air-Line Ry. v. Peebles (77 S. E. 12).....	206	Wheeler v. Board of Public Education (Americus) (76 S. E. 1035).....
Seaboard Air-Line Ry. v. Rosenbusch (76 S. E. 1041).....	154	White v. Brown (77 S. E. 105).....
Segar v. State (78 S. E. 51).....	685	White v. Claxton (76 S. E. 1040).....
Sellers v. State (78 S. E. 196).....	687	Whitton v. Entekin (76 S. E. 1077).....
Shaw v. State (77 S. E. 913).....	608	Wikle v. Avery (76 S. E. 1033).....
Sheffield v. Causey (77 S. E. 1077).....	588	Wiley v. Rome Ins. Co. (76 S. E. 105).....
Simpson v. State (77 S. E. 105).....	292	Williams v. Herrington (76 S. E. 150).....
Sims v. State (77 S. E. 188).....	363	Williams v. State (76 S. E. 785).....
Sims v. State (77 S. E. 891).....	551	Williams v. State (77 S. E. 189).....
Singleton v. State (77 S. E. 888).....	572	Williams v. State (77 S. E. 183).....
Smith v. City of Atlanta (78 S. E. 423).....	805	Wilson v. McDougald Bros. & Co. (76 S. E. 755).....
Smith v. City of Atlanta (78 S. E. 472).....	816	Wilson Bros. v. Verner (77 S. E. 640).....
Smith v. J. M. Walkeen Millinery Co. (76 S. E. 992).....	119	Wimberly v. State (77 S. E. 879).....
Smith v. Knowles (78 S. E. 264).....	715	W. M. Scott & Co. v. Atlanta Wood & Iron Novelty Works (76 S. E. 1082).....
Smith v. Smith & Kelly Co. (76 S. E. 770).....	19	Wood v. Southern Trust Co. (76 S. E. 99).....
Smith v. State (76 S. E. 647).....	13	Wood v. State (78 S. E. 140).....
Smith v. State (77 S. E. 651).....	482	Wrenn v. State (78 S. E. 202).....
Smith v. State (78 S. E. 134).....	607	Wright v. State (77 S. E. 657).....
South Georgia Grocery Co. v. Wade-Chambers Grocery Co. (77 S. E. 6).....	213	Wright v. Watters (77 S. E. 106).....
Southern Bell Telephone & Telegraph Co. v. Davis (76 S. E. 786).....	28	W. T. Maynard & Co. v. Maynard (77 S. E. 109).....
Southern Bell Telephone & Telegraph Co. v. Shamos (77 S. E. 312).....	463	Young v. State (76 S. E. 753).....
Southern Exp. Co. v. Cowan (77 S. E. 208).....	318	Young v. State (77 S. E. 189).....
Southern Exp. Co. v. Fant Fish Co. (78 S. E. 197).....	447	

VOL. 71, WEST VIRGINIA REPORTS

W. Va. Rep.	S. E. Rep.	W. Va. Rep.	S. E. Rep.	W. Va. Rep.	S. E. Rep.	W. Va. Rep.	S. E. Rep.	W. Va. Rep.	S. E. Rep.	W. Va. Rep.	S. E. Rep.	W. Va. Rep.	S. E. Rep.	W. Va. Rep.	S. E. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	75	558	106	76	142	199	76	424	296	76	561	287	76	814	507
21	75	197	114	76	129	199	79	350	300	76	669	393	76	807	514
35	75	151	119	76	183	206	76	243	303	76	657	402	76	797	516
38	75	149	131	76	837	210	76	443	316	76	670	417	76	845	519
43	75	313	139	76	167	217	76	346	320	76	673	423	76	851	567
52	76	127	144	75	113	220	76	342	325	76	654	427	76	813	625
55	75	894	148	76	177	221	76	428	330	76	653	431	76	848	627
57	76	122	155	76	170	246	76	448	334	76	664	436	76	850	629
61	76	126	161	76	172	250	76	441	345	76	662	438	76	961	639
63	76	131	173	76	169	254	76	457	350	77	284	453	76	843	649
72	76	968	175	76	182	262	76	454	350	80	367	458	76	878	651
76	76	841	177	76	180	269	76	438	363	76	673	470	76	970	656
82	76	124	180	76	446	273	76	453	364	76	804	477	76	893	659
87	76	140	184	76	420	277	76	450	371	76	811	481	76	889	664
93	76	138	192	76	426	285	76	461	375	76	834	490	76	960	672
98	76	137	195	76	344	292	76	440	383	76	795	494	76	883	674
100	76	134													

VOL. 71, WEST VIRGINIA REPORTS

	Page		Page
Bank of Union v. Loeb (76 S. E. 883)....	494	Dixon-Pocahontas Fuel Co. v. Myers Grain Co. (77 S. E. 362).....	715
Bartholow v. Hoge (76 S. E. 813).....	427	Dowler v. Citizens' Gas & Oil Co. (76 S. E. 845).....	417
Batley, In re (Ex parte Jones, 77 S. E. 1029)	567	Farmers' Nat. Bank of Claysville v. Howard (76 S. E. 122).....	57
Batten v. Hope Natural Gas Co. (76 S. E. 889)	481	Freeman v. Freeman (76 S. E. 657).....	303
Birch River Boom & Lumber Co. v. Glendon Boom & Lumber Co. (76 S. E. 167)...	139	Frum v. Prickett (76 S. E. 453).....	273
Birch River Boom & Lumber Co. v. Glendon Boom & Lumber Co. (76 S. E. 972)...	507	Galizian v. Henry (76 S. E. 440).....	292
Blake v. Hollandsworth (76 S. E. 814)....	387	Gay v. Householder (76 S. E. 450).....	277
Bluefield Produce & Commission Co. v. City of Bluefield (77 S. E. 277).....	696	Gordon v. Elmore (76 S. E. 344).....	195
Boswell, In re (Ex parte Jones, 77 S. E. 1029)	567	Greenbrier Valley Bank v. Bair (77 S. E. 274)	684
Boyles v. Wheeling Traction Co. (76 S. E. 673)	320	Guthrie v. Huntington Chair Co. (76 S. E. 795)	383
Buffalo Coal & Coke Co. v. Vance (76 S. E. 177)	148	Hains v. Parkersburg, M. & I. R. Co. (76 S. E. 843).....	453
Buffington v. Lyons (76 S. E. 129).....	114	Hall v. South Penn Oil Co. (76 S. E. 124)	82
Burkheimer v. Blake (76 S. E. 170).....	155	Hayhurst v. Hayhurst (77 S. E. 361).....	735
Burns v. Waldron (76 S. E. 894).....	514	Hedrick v. Summers County Court (77 S. E. 359)	732
Caroway v. Cochran (77 S. E. 278).....	698	Hennen v. Deveny (77 S. E. 142).....	629
Cheesebrow v. Town of Point Pleasant (76 S. E. 424; 79 S. E. 350).....	199	Henrie v. Henrie (76 S. E. 837).....	131
City of St. Mary's v. Hope Natural Gas Co. (76 S. E. 841).....	76	Herold v. McQueen (75 S. E. 313).....	43
Clayton v. Clayton (77 S. E. 137).....	656	Hertzog v. Riley (77 S. E. 138).....	651
Custer v. Hall (76 S. E. 183).....	119	Higgs v. Cunningham (77 S. E. 273).....	674
Daniels v. McLaughlin (77 S. E. 71)....	625	Hinton Foundry, Machine & Plumbing Co. v. Farley (76 S. E. 169).....	173
Dickinson v. Stuart Colliery Co. (76 S. E. 654).....	325	Hoffman v. Beltzhoover (76 S. E. 968)...	72
Digman v. West (76 S. E. 561).....	296	Holley v. Lincoln County Land Ass'n (77 S. E. 271).....	728

71 W. VA.—Continued.		Page	
Honaker v. New River & Pocahontas Con- sol. Coal Co. (76 S. E. 180).....	177	Point Mountain Coal & Lumber Co. v. Holly Lumber Co. (75 S. E. 197).....	2
Horner v. Gas Co. (76 S. E. 662).....	345	Post v. Board of Education of Clarksburg School Dist. (76 S. E. 127).....	2
Hudson v. Iguano Land & Mining Co. (76 S. E. 797).....	402	Ritter v. Couch (76 S. E. 428).....	2
Hull v. Geary (76 S. E. 960).....	490	Robinson v. City & E. G. R. Co. (76 S. E. 851).....	2
Hurley v. Hurley (76 S. E. 438).....	269	Roller v. Murray (76 S. E. 172).....	2
Jackson v. Cook (76 S. E. 443).....	210	Runnion v. Morrison (76 S. E. 457).....	2
James Sons Co. v. Farley (76 S. E. 169)...	173	St. Mary's v. Hope Natural Gas Co. (76 S. E. 841).....	2
Johnston v. City of Huntington (76 S. E. 142).....	106	Shock v. Gowing (76 S. E. 441).....	2
Jones, In re (77 S. E. 1029).....	567	Shore v. Powell (76 S. E. 126).....	2
Kanawha Cent. R. Co. v. Broun (77 S. E. 360).....	738	Simpson v. Mann (76 S. E. 895).....	2
Kanawha Oil & Gas Co. v. Wenner (76 S. E. 893).....	477	Smith v. Davis (76 S. E. 670).....	2
Kendall v. Dunn (76 S. E. 454).....	262	Smith v. Peterson (76 S. E. 804).....	2
Kidwell v. Chesapeake & O. R. Co. (77 S. E. 285).....	664	Smith v. United Lumber Co. (77 S. E. 307) Smith v. White (78 S. E. 378).....	2
Lilly Lumber Co. v. Farley (76 S. E. 169).....	173	South Penn Oil Co. v. Haight (78 S. E. 759).....	2
Lohr v. Wolfe (77 S. E. 71).....	627	South Penn Oil Co. v. Snodgrass (76 S. E. 961).....	2
Lyons v. Fairmont Real Estate Co. (77 S. E. 525).....	754	Stampfle v. Bush (77 S. E. 233).....	2
McClagherty v. Rumburg (76 S. E. 137)...	98	State v. Fraley (76 S. E. 134).....	2
McGinnis v. Caldwell (76 S. E. 834).....	375	State v. Highland (76 S. E. 140).....	2
Mahaffey v. J. L. Rumbarger Lumber Co. (76 S. E. 182).....	175	State v. Moore (76 S. E. 461).....	2
Marshall v. Porter (76 S. E. 653).....	330	State v. Southern Coal & Transportation Co. (76 S. E. 970).....	2
Martin v. County Court (75 S. E. 894)...	55	State v. Sutter (76 S. E. 811).....	2
May v. Davis Coal & Coke Co. (76 S. E. 342).....	220	State v. Tygarts Valley Brewing Co. (76 S. E. 149).....	2
Mays v. Brown (77 S. E. 243).....	519	State v. Waldron (75 S. E. 558).....	2
Mellon & Sons v. Grafton Gas & Electric Light Co. (77 S. E. 141).....	649	State v. Weir (76 S. E. 138).....	2
Melton v. Chesapeake & O. R. Co. (78 S. E. 369).....	701	State ex rel. Mays v. Brown (77 S. E. 243) State ex rel. Nance v. Brown (77 S. E. 243).....	2
Michaelson v. City of Charleston (75 S. E. 151).....	35	State ex rel. Post v. Board of Education Clarksburg School Dist. (76 S. E. 127) Steele v. Moore (76 S. E. 850).....	2
Moore v. Patchin (76 S. E. 426).....	192	Stewart v. Ballot Com'rs (76 S. E. 448)...	2
Moore, Keppel & Co. v. Ward (76 S. E. 807) Morris v. Ballot Com'rs (76 S. E. 446)...	393 180	Tucker v. Farmers' Mut. Fire Ass'n (77 S. E. 279).....	2
Nance v. Brown (77 S. E. 243).....	519	United States Coal & Oil Co. v. Harri- son (76 S. E. 346).....	2
Neeley v. Town of Cameron (75 S. E. 113) Neil v. Flynn Lumber Co. (77 S. E. 324) Neill v. McClung (76 S. E. 878).....	144 708 458	Virginia Supply Co. v. Calfee (76 S. E. 64) Warth v. Jackson County Court (76 S. E. 420).....	2
New Cumberland Savings & Trust Co. v. Ballentyne (77 S. E. 282).....	672	Washington Nat. Building & Loan Ass'n v. Buckley (76 S. E. 673).....	2
Odell v. Pardee & Curtin Lumber Co. (76 S. E. 343).....	206	West Virginia Nat. Bank v. Spencer (76 S. E. 269).....	2
Pardee & Curtin Lumber Co. v. Odell (76 S. E. 343).....	206	William James Sons Co. v. Farley (76 S. E. 169).....	2
Paulsen, In re (Ex parte Jones, 77 S. E. 1029).....	567	Williamsport Hardwood Lumber Co. v. Re- timore & O. R. Co. (77 S. E. 333).....	2
Peirpoint v. Peirpoint (76 S. E. 848).....	431	Woodall v. Darst (77 S. E. 264; 80 S. E. 367).....	2
Peterson v. Paint Creek Collieries Co. (76 S. E. 664).....	334	Woofter v. Matz (76 S. E. 131).....	2

